HOW MUCH WILL THAT SUBSTANDARD BUILDING DEMOLITION *REALLY* COST YOU?

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I. INTRODUCTION

Saying we Texans cherish our property rights is an understatement. Texas is one of a minority of states that regards the use of deadly force to protect property as a justified homicide.[1] Our state is also home to a strong movement whose members regard any property regulation as a governmental infringement upon their liberty. Despite this climate, Texas cities must still fulfill their duty to protect the public health, safety and welfare, such as abating substandard dilapidated or deteriorated buildings. Due to these competing interests, attorneys advising cities about abating substandard buildings need to carefully educate the city's staff and officials regarding statutory and constitutional limitations to reduce the likelihood of lengthy and costly litigation. As with many areas of municipal law: "An ounce of prevention is worth a pound of cure."

This paper is intended to be a resource for city attorneys who advise cities about substandard building abatement procedures, traps and pitfalls. The paper is organized as follows: Section II discusses the statutory authority for a city to abate substandard buildings, statutory notice and hearing requirements, relief allowed a city, and judicial review of a city's decision; Section III of this paper addresses potential causes of action against a city - such as State and federal takings claims, due process claims, equal protection claims, trespass and fourth amendment issues, and negligence - affirmative defenses, the effect of bankruptcy on the substandard building abatement process, and other litigation issues. Section III also discusses affirmative defenses, including public nuisance, issue and claim preclusion, consent and avoiding claims of personal property. In addition, Section III addresses how to proceed with a substandard demolition despite a bankruptcy stay. Section IV summarizes practical tips for cities and city attorneys; and the Appendix contains numerous forms, including a sample substandard building abatement checklist, sample administrative warrants, a sample notice, sample repair or demolish orders, and a sample lien.

II. SUBSTANDARD BUILDING ABATEMENT PROCEDURES

All property is held subject to valid exercise by the government of the police power to protect the public, because each property owner has an implied obligation to use his property in a way so as not to be injurious or detrimental to the community at large.[2] In furtherance of this principle, the Texas legislature has authorized cities to enact ordinances that provide for the abatement of substandard buildings.[3]

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[1] TEX. PENAL CODE ANN. § 9.42 (Vernon 2008).

[2] LJD Properties, Inc. v. City of Greenville, 753 S.W.2d 204, 207 (Tex. App.—Dallas 1988, writ denied).

[3] TEX. LOC. GOV'T CODE ANN. §§ 54.032(1), (3), 54.036(1), 214.001(a) (Vernon 2008).

A. Chapters 54 & 214: What is the Difference?

Two enabling statutes, located in Chapters 54 and 214 of the Local Government Code, provide specific authority concerning substandard buildings. Both statutes contain requirements a city must follow to abate substandard buildings. Chapter 54 provides for general enforcement authority and procedures for enforcing health and safety ordinances dealing with fire safety, building construction, zoning, planning, and dangerous structures through either: (1) a quasi-judicial building and standards commission; (2) an administrative hearing before an appointed hearing officer with appeal to the municipal court; or (3) a civil action.[4] Chapter 214 is very similar to subchapter C of chapter 54 but provides a city with specific authority regarding substandard buildings and additional authority to secure substandard buildings.[5] Chapter 214 also allows a hearing to be held before a municipal court.[6] Many of the statutory procedural requirements are identical; however, a city should be sure to follow the procedures for the chapter under which their substandard building ordinance was enacted.

B. Substandard Building Ordinance

To abate a substandard building, chapters 54 and 214 require a city to enact a substandard building ordinance that: (1) establishes minimum standards for the use and occupancy of all buildings; (2) provides for a public hearing; and (3) provides for proper notice of hearings and issued orders to the building owner and other interested parties, namely lienholders and mortgagees.[7] The statutes also require a city to hold a public hearing at which interested parties are given an opportunity to participate.[8] A property owner and other interested parties also have a statutory right to seek judicial review of a city's decision.[9]

To be subject to demolition, a building that is dilapidated, substandard or unfit for human habitation must also be a threat to public health, safety and welfare. Regardless of its structural condition, an unsecured vacant building that can be used by uninvited persons, vagrants, or children is also subject to abatement. In addition, a boarded up or secured building is subject to abatement if it is inadequately secured or constitutes a danger to the public.[10] Under chapters 54

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[4] ALAN BOJORQUEZ. TEXAS MUNICIPAL LAW AND PROCEDURE MANUAL § 23.01 (5th ed. 2010).

[5] *Id.*

[6] *Id.*

[7] TEX. LOC. GOV'T CODE ANN. §§ 54.035, 214.001(b)-(g) (Vernon 2008).

[8] *Id.* § 214.001(e).

[9] *Id.* §§ 54.039, 214.0012.

[10] *Id.* §§ 54.018, 54.036, 214.001(a).

and 214, a city is authorized to abate a substandard, vacant, or dangerous building by requiring a property owner to:

- vacate and secure a building;
- relocate the occupants of a building; or
- repair, remove or demolish a building.[11]

When ordering a building demolished, a city bears the burden of proof to establish that repairs cannot be made to the building without substantial reconstruction.[12]

C. Importance of Notice

Providing proper notice to the building owner and interested persons is a critical step to avoiding a successful challenge because, "[t]he essential elements of due process of law are notice and [an] opportunity to defend."[13] In addition to requiring that notice of a hearing be provided to a building owner and other interested parties, Texas law sets forth specific requirements regarding timelines for providing notice.[14] Both subchapter C of chapter 54 and chapter 214 require that notice be sent to the building owner regarding the hearing, each set forth different timelines and methods of delivery, as well as what must be contained in the notice.[15] Both chapters, however, provide that if a notice sent to a property owner, lienholder, or mortgagee is returned as "refused" or "unclaimed," the notice remains valid and is considered to be delivered.[16]

1. Chapter 54 Notice of Hearing

Under chapter 54, notice must be sent on or before the tenth day before the date fixed for a hearing. The notice must contain the date, time, and place of the hearing. In addition, chapter 54 requires that notice be delivered via all three of the following methods: (1) personal delivery or by certified mail; (2) posting a copy of the notice on the front door of each structure; and (3) by publishing the notice in a newspaper of general circulation at least once before the date of the hearing.[17] A city is also authorized, but not required, to file notice of the hearing via a notice of

[11] TEX. LOC. GOV'T CODE ANN. §§ 54.018, 54.036, 214.001(a).

[12] Gonzales v. City of Lancaster, 675 S.W.2d 293, 296 (Tex. App.—Dallas 1984, no writ).

[13] Simon v. Craft, 182 U.S. 427, 436, 21 S. Ct. 836, 839 (1901).

[14] TEX. LOC. GOV'T CODE ANN. §§ 54.035(a)-(c); 214.001(b)-(g).

[15] *See id.*

[16] *Id.* §§ 54.035(f); 214.001(r).

[17] *Id.* § 54.035(a)-(b).

lis pendens with the county clerk. The notice must contain the name and address of the owner of the building, a legal description of the affected property, and a description of the proceeding. Filing such a notice protect the city by binding subsequent owners of the property.[18]

2. Chapter 214 Notice of Hearing

Chapter 214 does not set forth specific timelines for when to send notice but merely states that notice provided pursuant to a city substandard building ordinance must be "proper."[19] Notice, however, must inform the owner that he must submit proof of the scope of any work that may be required to comply with the minimum building requirements and the time it will take to reasonably perform the work.[20] Notice given for a consolidated hearing authorizes, but does not require, a city to file notice of the hearing in the county clerk's office. If a city does so, the notice must contain the name and address of the owner of the affected property, a legal description of the affected property, and a description of the hearing.[21] Filing such a notice will help protect the city by binding subsequent owners of the property.[22] Although not specifically required by the statute, notice should also give the building owner a description of the violations of the standards and cite the specific provisions of city's substandard building abatement ordinance or applicable uniform code that are being violated. The notice must also inform the owner and interested parties that if they intend to seek longer than ninety days to comply with the minimum building requirements, he must submit a detailed plan and work schedule at the hearing.[23]

3. Determining Who is Entitled to Notice

While chapter 214 allows a city to define proper notice, a city should carefully and thoroughly review public records when providing notice prior to a hearing. In *City of Waco v. Roddey*, the Waco Court of Appeals held that the property owner was entitled to notice by personal service or certified mail.[24] Even though the building was listed in the name of the plaintiff's father, who was deceased, the Court concluded that the plaintiff was entitled to notice because his name, address, and telephone number were known to the city by a notation in an account file of the city's utility records and probate proceedings of the estate of the plaintiff's

[18] *Id.* § 54.035(c).

[19] *Id.* § 214.001(b)(2).

[20] *Id.* § 214.001(c).

[21] *Id.* § 214.001(e).

[22] *Id.* § 214.001(e).

[23] *See id.* § 214.001(j).

[24] 613 S.W.2d 360, 365 (Tex. Civ. App.—Waco 1981, writ dism'd).

mother. The court also concluded that the city could have easily obtained the plaintiff's address where a city inspector spoke to a neighbor that gave the inspector plaintiff's name and indicated that she knew where he lived. In affirming an award of damages, the court concluded that notice by publication was insufficient where a person's name and address are known or can be easily obtained by the city.[25]

A city may avoid holding a separate hearing for a lienholder or mortgagee by making a "diligent effort to discover each mortgagee and lienholder before conducting the public hearing" and providing these additional interested parties with notice of and an opportunity to comment at the hearing.[26] Currently, both chapters 54 and 214 list those public records a city should consult to determine property owners, lienholders, or mortgagees of a property.[27] That is, in attempting to locate a property owner, lienholder, or mortgagee, a city fulfills the statutory diligence requirement by searching the (1) county real property records; (2) appraisal district records; (3) secretary of state records; (4) assumed name records; (5) municipal tax records; and (6) municipal utility records.[28]

D. Public Hearing Requirement

Under Subchapter C of Chapter 54 of the Texas Local Government Code, a city may establish a separate building and standards commission to hear and determine cases involving violations of substandard building abatement ordinances.[29] Under this chapter, a city must designate an official to represent the city's interests and present evidence to the commission. These commissions are quasi-judicial in that the commission must adopt rules that allow for the presentation of evidence and testimony; the chairman of the commission may administer oaths and compel witness attendance; and the commission may order the repair or demolition of a substandard building.[30]

Under chapter 214, after a public hearing where a building is found to violate the minimum building standards set out in the ordinance, the municipality may order the building be vacated, secured, repaired, removed, or demolished or the occupants be relocated by the owner within a "reasonable time."[31] A city cannot provide the owner longer than thirty days unless the

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[25] *Id.*

[26] *Id.* §§ 54.035(e), 214.001(e).

[27] TEX. LOC. GOV'T CODE ANN. §§ 54.035(e)(1)-(6), 214.001(q) (Vernon 2008).

[28] *Id.* §§ 54.035(e), 214.001(q).

[29] *Id.* §§ 54.031-.033.

[30] *Id.* § 54.044(b)(2).

[31] *Id.* § 214.001(d).

city establishes specific time schedules for the work and requires the owner or interested party to secure the property from unauthorized entry for the duration of the work period.[32] A city may allow an owner or interested party more than ninety days to complete the ordered action if the owner or interested party provides the city with a work schedule at the public hearing and submits to regular progress reports.[33] To qualify for the extended work period, the building owner or interested party must demonstrate that the scope and complexity of the work requires additional time.[34]

1. Notice of Order Under Chapters 54 and 214

Following a public hearing where a city finds that a building violates the city's minimum building standards, the city may order the property owner to vacate, secure, repair, remove or demolish the building or to relocate the occupants.[35] The city's written order must be delivered in person or mailed by first class mail, certified, return receipt requested to the property owner and all interested persons.[36] The final order must also be filed in the office of the municipal clerk.[37] In addition, a copy of the order must be published one time in a newspaper of general circulation in the city within 10 calendar days of the date of delivery or mailing of the order. The publication must include the street address, the date of the hearing, a brief statement regarding the order, and instructions on where a complete copy of the order may be obtained.[38] Unlike chapter 54, a notice of order issued pursuant to chapter 214 must include "a statement that the municipality will vacate, secure, remove or demolish the building or relocate the occupants of the building if the ordered action is not taken within a reasonable time."[39] If neither the building owner nor any other interested party seeks judicial review, the city's decision is final and binding.[40]

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[32] *Id.* § 214.001(i).

[33] *Id.* § 214.001(k).

[34] *Id.* § 214.001(l).

[35] *Id.* §§ 54.036, 214.001(d).

[36] *Id.* §§ 54.039(a), 214.001(d), 214.001(f).

[37] *Id.* §§ 54.039(a), 214.001(f)(1).

[38] *Id.* §§ 54.039(a), 214.001(f)(2).

[39] *See id.* §§ 54.039(a), 214.001(d)(3).

[40] *Id.* §§ 54.041, 214.0012(a).

2. Notifying Interested Parties

If the owner fails to take the ordered action within the allotted time, the municipality must make a diligent effort to locate all persons with an interest in the property, including any mortgagees and lienholders, and give each notice of the order.[41] This notice must be sent by certified mail, return receipt requested or by using signature confirmation by the U.S. Post Office.[42] Each notice must contain a reasonable description or identification of the property. In addition, the notice must provide a description of the current violations, and a statement regarding the potential consequences should the building owner fail to take the ordered action within a reasonable time.[43]

3. Consolidated Hearing Procedure

Instead of waiting until after the public hearing has been held to contact mortgagees and lienholders, a city is authorized to contact all interested parties before the hearing and allow them an opportunity to comment at the public hearing.[44] Under this alternative process for notification of interested parties, a city must file a notice of hearing in the county clerk's office in the county where the building is located. This notice must contain the name and address of the owner if known, a description of the property and the hearing. This filing is binding on subsequent interest holders, and protects the integrity of the process should the property sell during the condemnation process.[45] The city must specify that should the property owner fail to take the ordered action, the interested party must take the ordered action within thirty days. In the event that the building owner does not take the ordered action, a city that opts to follow these procedures is not required to furnish any additional notice to a mortgagee or lienholder other than a copy of the order.[46]

E. Relief

Under chapter 54, civil penalties may be assessed against the property owner for failure to repair, remove, or demolish the building. The amount of fines may not exceed $1,000 per day per violation unless the property is a homestead, in which case the penalty is limited to $10 per

[41] *Id.* §§ 214.001(d).

[42] *Id.* §§ 214.001(d).

[43] *Id.* §§ 214.001(d)(1)-(3).

[44] *Id.* § 214.001(e).

[45] *Id.* § 214.001(e).

[46] *Id.* § 214.001(e).

day per violation.[47] A fine imposed pursuant to chapter 54 may not exceed $500 for violation if provided by ordinance. Violation of an ordinance governing fire safety, zoning, public health, or sanitation may be fined up to $2,000 if provided by ordinance.[48] To enforce a civil penalty imposed under chapter 54, the city clerk must file a certified copy of the order establishing the amount and duration of the penalty with the district clerk of the county in which the city is located.[49]

Under chapter 214, if the owner and any interested party fail to take the ordered action, the city may vacate, secure, repair, remove, or demolish the building or relocate the occupants of the building at its own expense.[50] A city may repair the building, but only if it is a residential building with ten or fewer dwelling units.[51] In addition, any repairs must meet, but cannot exceed, the minimum housing standards.[52] A municipality may recover repair or demolition costs unless the property is a homestead protected by the Texas Constitution.[53] To recoup the costs incurred, the city must file a lien on the property on which the building is located with the county clerk. If proper notice has been given to the building owner and interested parties, the lien constitutes a "preferred lien subordinate only to tax liens."[54]

F. Judicial Review

1. Procedures and Timeline for Review

As indicated, judicial review of a city's determination that a building is substandard is provided under Texas law.[55] Any aggrieved owner, lienholder, or mortgagee may file a verified petition for writ of certiorari in district court setting forth the grounds for the order or decision's illegality.[56] The petition must be filed within thirty calendar days of the order being mailed or served upon the owner, lienholder, or mortgagee.[57] The court may reverse or affirm, in whole or

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[47] *Id.* § 54.0015(j).

[48] *Id.* § 54.001.

[49] *Id.* § 54.037(b).

[50] *Id.* § 214.001(m).

[51] *Id.* 214.0015(c).

[52] *Id.* 214.0015(c).

[53] *Id.* § 214.001(n).

[54] *Id.* § 214.001(n), (o).

[55] *Id.* §§ 54.039, 214.0012.

[56] *Id.* §§ 54.039(a), 214.0012(a).

[57] *Id.* §§ 54.039(a), 214.0012(a).

in part, or modify the order that is subject to review.[58] A court's review of a city's order appealed by writ of certiorari is conducted under the substantial evidence rule.[59]

Once a notice of the order has been provided, a city attorney should be wary of sending additional correspondence to the property owner because doing so may re-start the clock during which the property owner can seek judicial review. In *Bates v. City of Beaumont*, the court of appeals affirmed denial of the city's motion to dismiss for lack of jurisdiction even though the property owner filed suit in October 2006—nearly five months after the city mailed notice of its "raze or repair" order regarding his building.[60] The property was once used as a car wash but by the spring of 2006, it had become deteriorated with mold and mildew damage. The property was brought to the City's attention after it received numerous complaints due to its use by drug users and prostitutes.

In April 2006, after providing proper notice and a hearing, the city determined that the building was substandard and dangerous. The city's notice of the order informed the property owner that the city would demolish the structure "without further notice" if he failed to substantially complete a "work program." The court reasoned that even though the property owner received notice of the order, his efforts to repair the building, which consisted of repairing a leak and securing the building with plywood, were the equivalent of enrolling in a "work program" and a subsequent letter sent by the city in September informing the property owner of the city's intent to proceed with the demolition constituted the city's "final decision."[61] Thus, the subsequent letter re-started the thirty day period during which the property owner sought an appeal to the district court.

2. Pure Substantial Evidence Review

In *Perkins v. City of San Antonio*, the San Antonio Court of Appeals discussed the appropriate standard of review of an agency's demolition order.[62] Under the substantial evidence rule, a court reviews a city's demolition order based on "pure substantial evidence."[63] Under a pure substantial evidence review, the court can only consider "the factual record made before the administrative body in determining whether substantial evidence supports the Board's order."[64]

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[58] *Id.* §§ 54.039(f), 214.0012(f).

[59] *Id.* §§ 54.039(f), 214.0012(f).

[60] 241 S.W.3d 924, 929 (Tex. App. – Beaumont 2007, no pet.).

[61] *Id.*

[62] Perkins v. City of San Antonio, 293 S.W.3d 650 (Tex. App. – San Antonio 2009, no pet.) (clarifying the appropriate standard of review).

[63] *Perkins*, 293 S.W.3d at 653.

[64] *Id.* at 654.

The court, however, noted that a reviewing court should not allow "an arbitrary action of an administrative agency" to stand and indicated that a trial court would not be precluded from hearing a claim that a city failed to provide due process.[65]

3. Proceedings are not Stayed

The municipal proceedings are not stayed while a petition is pending before the district court.[66] While an owner or other interest holder cannot recover costs and legal fees from the municipality in such an action, a city is permitted to recover attorney's fees and costs.[67]

III. LITIGATION

A. Potential Causes of Action

1. State and Federal Takings Claims

a. Claims under Article 1, Section 17 of Texas Constitution

The right to be free from uncompensated governmental taking of property is a longstanding right. The original Magna Carta stated that goods could not be taken without reasonable compensation.[68] The Texas Constitution similarly states that no "person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . ."[69] When the government takes or damages private property without first paying for it, Texas law provides that the property owner may seek damages through a claim for inverse condemnation.[70] There are three primary factual elements of an inverse condemnation claim: (1) the government must have intentionally performed certain acts; (2) that result in a taking or damaging of property; (3) for public use.[71] In the context of a demolition, it is almost certain that the first two elements of a claimant's case will be present. First, a demolition of a building pursuant to a substandard building order is an intentional act. Second, demolishing a building usually diminishes the value of the property. Regardless of the value of the real

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[65] *Id.*

[66] TEX. LOC. GOV'T CODE ANN. §§ 54.039(e), 214.0012(e) (Vernon 2008).

[67] *Id.* §§ 54.039(g), 214.0012(g)-(h).

[68] MAGNA CARTA, § 8 (1215).

[69] TEX. CONST. art. I, § 17.

[70] *See, e.g.*, Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 554 (Tex. 2004); Westgate, Ltd. v. State, 843 S.W.2d 448, 452 (Tex. 1992).

[71] *E.g.*, State v. Hale, 136 Tex. 29,146 S.W.2d 731, 736 (1941).

property, it is certain that the demolished structures constitute a "taking" and certainly have been "damaged" or "destroyed."[72]

An argument can be made that the "public use" element would not be satisfied in the context of substandard buildings when the property is damaged or destroyed; the buildings or other substandard structures on real property are not used by the government for any public purpose. Rather, the property is destroyed and the debris discarded. This position, however, does not appear to have much support under a broad definition of "public use" from straight condemnation cases or more analogous case law. For example, in *Steele v. City of Houston*, law enforcement officers purposefully burned down a residence to force several escaped convicts from the building.[73] After deciding that these facts were actionable under Article 1, Section 17, the Texas Supreme Court noted "[t]hat the destruction was done for the public use is or can be established by proof that the City ordered the destruction of the property because of real or supposed public emergency to apprehend armed and dangerous men who had taken refuge in the house."[74] More recently, in a substandard building case where the property owner sued for inverse condemnation after several of his apartment buildings were demolished, the City argued it did not take the apartment buildings for a "public use." The court held, however, that general matters of public health and public safety were included within the definition of "public use."[75] Thus, it is unlikely that a city can defend against a state takings claim by merely asserting that the demolition of a substandard building was not done for a public purpose.

When an inverse condemnation claim under Article 1, Section 17 of the Texas Constitution is asserted due to the demolition of a substandard building, the question of whether compensation is owed is less likely to depend on whether a property owner can prove the elements of a takings claim. Rather, the focus will be on whether the city can establish one of the following affirmative defenses: consent, nuisance, collateral estoppel or res judicata.[76]

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[72] These three terms are often used interchangeably in opinions concerning inverse condemnation claims. *E.g.*, City of Dallas v. Jennings, 142 S.W.3d 310, 313 & n.2 (Tex. 2004) (noting that the term "takings claim" has come to encompass all claims for taking, damaging, and destruction of property under Article I, Section 17 of Texas Constitution). But there is a distinction. The Texas Supreme Court has held that although "[t]he taking, the damaging, or the destruction of property are often treated, more or less, as synonyms," the terms are different and have different historical origins. Steele v. City of Houston, 603 S.W.2d 786, 789. The term "taking" is more properly used to describe the transfer of a property right from a property owner to the government. *Id.* Thus, the precise term for the context of a substandard building demolition would be a "damage" or "destruction" of property, not a "taking."

[73] 603 S.W.3d at 788.

[74] *Id.* at 792.

[75] Patel v. City of Everman, 179 S.W.3d 1, 9 (Tex. App.—Tyler 2004, pets. denied) ("*Patel I*") (citing City of Houston v. Crabb, 905 S.W.2d 669 (Tex. App.—Houston [14th Dist.] 1995, no writ)).

[76] *See infra* Part III.B.

b. Ripeness of Federal Takings Claims

As a practical matter, federal takings claims against state and local governments are rare because they almost never become ripe. *Williamson County Regional Planning Commission v. Hamilton Bank*, is the seminal case that established a ripeness doctrine applicable to state and local land use decisions.[77] In this case, the Court held that for a takings claim to be "ripe" for review: (1) the relevant governmental unit must reach a final decision as to the subject property; and (2) the plaintiff must seek compensation through whatever adequate procedures the state provides.[78] Under the second prong of the *Williamson County* ripeness standard—the "state court exhaustion"[79] requirement—an individual must be denied "just compensation" under an adequate state law remedy before pursuing a federal takings claim.[80] A claim for inverse condemnation under Article 1, Section 17 of the Texas Constitution has been held to be such an "adequate state law remedy."[81] Even though the *Williamson County* doctrine was originally established in the context of state and local land use litigation, the application of the requirement to exhaust state remedies has been expanded to numerous different circumstances, including constitutional takings claims in the context of a building demolition.[82] As a result, any takings claim under the Fifth and Fourteenth Amendments to the U.S. Constitution for a building demolition is not ripe until a Texas constitutional claim is pursued and denied.[83]

Although the exhaustion of state court remedies is necessary to pursue a federal takings claim, it is not a sufficient condition. For example, if compensation is provided to a property owner as a result of an inverse condemnation claim under state law, then compensation was not denied under the federal constitution, and the federal claim never ripens.[84] But if the property owner is denied compensation under state law, is he automatically entitled to re-litigate the issues in federal court or do res judicata principles prohibit federal review? At least one Texas court has suggested that the property owner can avoid res judicata and issue preclusion by

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[77] 473 U.S. 172, 105 S. Ct. 3108 (1985).

[78] *Williamson County*, 473 U.S. at 194-95.

[79] Perhaps the more proper name to be applied to this element could be the "state law exhaustion" requirement. This is because as long as there is an independent basis for federal court jurisdiction other than federal question jurisdiction over the claims which are first required to be pursued under state law—such as diversity jurisdiction or federal claims to which the *Williamson County* ripeness test do not apply—a federal takings claim can be ripened by bringing it under state law simultaneous to the federal takings claim, even in federal court. *See, e.g.*, Vulcan Materials Co. v. City of Tehuacana, 238 F.3d 382, 385-86 (5th Cir. 2001).

[80] *Williamson County*, 473 U.S. at 195-96.

[81] *E.g.*, Samaad v. City of Dallas, 940 F.2d 925, 935-36 (5th Cir. 1991).

[82] John Corp. v. City of Houston, 214 F.3d 573, 581 (5th Cir. 2000).

[83] *Williamson County*, 473 U.S. at 195-96.

[84] Town of Flower Mound v. Stafford Estates, L.P., 135 S.W.3d 620, 645-46 (Tex. 2004).

making an express reservation of their federal claims in state court.[85] Accordingly, many attorneys who represent property owners will put an express reservation of federal claims in their state court petition while alleging a claim for inverse condemnation under state law.

It is possible, however, that this reservation of federal claims is inconsequential. In *San Remo Hotel, L.P. v. City & County of San Francisco*, the United States Supreme Court considered a case where property owners argued that ordinary res judicata and other preclusion principles should not apply where a plaintiff is first required to litigate a state takings claim in state court in order to ripen a federal takings claim.[86] In this case, the plaintiffs expressly stated they intended to reserve the federal takings claim for later resolution in federal court.[87] The state takings claims in state court were eventually dismissed, and this decision was eventually affirmed by the California Supreme Court.[88] In affirming the substantive actions of the government, the state supreme court noted that its interpretations of the state takings clause were essentially congruent with the interpretation of the federal counterpart.[89]

On appeal after a federal takings claims was asserted in federal court, the United States Supreme Court stated that "[b]ecause California courts had interpreted the relevant substantive state takings law coextensively with federal law, petitioners' federal claims constituted the same claims that had already been resolved in state court."[90] Thus, where the issues litigated under state law are functionally equivalent to those to be litigated under federal law, the Supreme Court held the federal full faith and credit requires a federal court to give preclusive effect to the issues litigated in state court.[91] Furthermore, the preclusive effect must be given even when presence in the state court forum is involuntary because of the *Williamson County* ripeness doctrine.[92] Since that opinion, the Texas Supreme Court has applied *San Remo Hotel* to similarly hold that a reservation of a federal takings claim is ineffective.[93] The Fifth Circuit has gone even further and held that failure to follow prerequisite administrative and other procedural remedies under

[85] Guetersloh v. State, 930 S.W.2d 284, 289-90 (Tex. App.—Austin 1996, writ denied), *cert. denied*, 522 U.S. 1110, 118 S.Ct. 1040 (1998).

[86] 545 U.S. 323, 125 S. Ct. 2491 (2005).

[87] *Id.* at 331.

[88] *Id.* at 332.

[89] *Id.* at 332-33.

[90] *Id.* at 335.

[91] *Id.* at 346-47.

[92] *Id.*

[93] Hallco Texas, Inc. v. McMullen County, 221 S.W.3d 50, 62 (Tex. 2006)

state law to allow the "adequate state court procedures" to be considered by a state court renders any federal takings claim permanently unripe.[94]

2. Procedural Due Process

Both the Texas and the federal constitutions contain a right to procedural due process where an individual is facing a deprivation of, among other things, property.[95] As recognized by the Texas Supreme Court, "[t]he ultimate test of due process of law in an administrative hearing is the presence or absence of rudiments of fair play long known to our law."[96] A procedural due process claim undergoes a two-part analysis: (1) a determination of whether a liberty or property interest is at stake; and if so, (2) a determination of what process is due.[97] In deciding what procedures are specifically required–or, "what process is due,"–a flexible standard is used.[98] The standard depends on the practical requirements of the circumstances and balances three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of the interest due to the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including function involved, and fiscal and administrative burdens that additional or substitute procedural requirements would entail.[99] However, "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances."[100]

In demolishing a substandard building, which is a deprivation of property, the "rudiments of fair play" require a city to provide certain essential elements—proper notice, a hearing, and a neutral decision-maker.[101] Thus, when a property owner alleges a procedural due process claim, they must establish they were not given adequate notice, an opportunity to be heard, or that the decision maker was not impartial. While these minimum procedural due process requirements for a substandard building proceeding are likely satisfied by strictly complying with the notice

[94] Liberty Mut. Ins. Co. v. Brown, 380 F.3d 793, 799 (5th Cir. 2004).

[95] TEX. CONST. art. I, § 19 (stating that "no citizen of this State shall be deprived of life, liberty, property . . . except by the due course of the law of the land."); U.S. CONST. amends. V, XIV.

[96] State v. Crank, 666 S.W.2d 91, 94 (Tex. 1984), *cert. denied, sub nom*. Crank v. Texas State Board of Dental Examiners, 469 U.S. 833 (1984).

[97] Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 929 (Tex. 1995); Tarrant Appraisal Dist. v. Gateway Center Assoc., Ltd., 34 S.W.3d 712, 715 (Tex. App.–Fort Worth 2000, no pet.).

[98] Bell v. Tex. Workers Comp. Comm'n, 102 S.W.3d 299, 304 (Tex. App.–Austin 2003, no pet.).

[99] Mathews v. Eldridge, 424 U.S. 319, 334-35, 96 S. Ct. 893, 903 (1976); Perry v. Del Rio, 67 S.W.3d 85, 92 (Tex. 2001).

[100] *Mathews*, 424 U.S. at 348.

[101] Nash v. City of Lubbock, 888 S.W.2d 557 (Tex. App. – Amarillo, 1994) (interpreting the statutory predecessor to Chapter 214 of the Texas Local Government Code).

and hearing procedures set forth in the enabling acts, a city may consider requiring additional due process protections in the city's ordinance.[102]

a. Adequate Notice

Under both the Texas and federal constitutions, a city must provide notice that informs the building owner and interested parties of the action so that these parties can take advantage of any opportunity to be heard and present any objections before taking an action which will affect a property interest.[103] Notice must be delivered and set forth in such a manner as to actually inform the interested party and convey the information necessary to protect one's property.[104] The purpose of these elements is to protect against "arbitrary encroachment" and "to minimize substantively unfair or mistaken deprivations of property."[105] At a minimum, a city must ensure that code enforcement officers and city employees are complying with statutory and municipal notice and hearing requirements to defend against a procedural due process challenge. For instance, a city should be sure to adhere to the chapter 214 requirement that a statement be included that "the owner . . . will be required to submit at the hearing proof of the scope of any work that may be required to comply with the ordinance and the time it will take to reasonably perform the work."[106] In addition, a city should consider including language in a hearing notice that accomplishes the following:

- informs the property owner regarding the specific provisions of the specific uniform or international building codes that are being violated;

- informs the property owner that if they would like to request more than thirty days or repair the property, they have the burden to establish that the work cannot be reasonably be performed within thirty days;[107]

- informs the property owner the city cannot allow more than ninety days to perform any repair or demolition work unless they submit a detailed plan and time schedule for the work at the hearing and establish that the work cannot reasonably be performed in ninety days;[108]

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[102] *Nash*, 888 S.W.2d at 561-62.

[103] Mullane v. Central Hanover Tr. Co. 339 U.S. 306, 314 (1950).

[104] *Id.* at 314-15.

[105] United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993).

[106] TEX. LOC. GOV'T CODE ANN. § 214.001(c) (Vernon 2008).

[107] *Id.* § 214.001(h)(2).

[108] *Id.* § 214.001(j)(1)-(2).

- clearly indicates that a hearing is essentially a trial at which the property owner may introduce evidence and question witnesses;

- informs the property owner that they may hire an attorney to represent their interests at the hearing; and

- indicates that while a property owner has the ability appeal the city's decision to the district court, review is limited on appeal under the substantial evidence rule and new evidence may not be introduced.

b. Hearing Procedures

Chapter 54 authorizes a city to appoint a building and standards commission to hear cases concerning violations of a building standard ordinance.[109] Chapter 214, however, does not specify what type of body or official hears or conducts public hearings under section 214.001.[110] Some city ordinances create a separate building appeals board, hearings board, or some other tribunal. Other cities assign substandard building cases as an additional subject-matter that can be brought before an existing municipal board, such as the zoning board of adjustment. Still other cities authorize the city council or a municipal court to preside over these matters.

A common complaint about substandard building procedures is that the "city" is approving its own decision because there is no distinction between city staff and a quasi-judicial administrative board. This complaint tends to carry more weight when the city council presides over a substandard building proceeding. Thus, a prudent practice would be to implement an independent, appointed, quasi-judicial board to hold public hearings and make decisions about substandard buildings.

Regardless of the administrative body or official that hears these matters, however, a city board should avoid the practice of discussing substandard building issues in any informal "pre-meetings" prior to the time of day for the public hearing to discuss any matter related to a building. Doing so may affect both a property owner's right to be heard (if the notice gives the actual meeting time, not the "pre-meeting") and can be used to argue that the property owner was denied its right to an impartial decision maker because the board considered and discussed evidence with city staff in an *ex parte* setting. A city attorney should also caution board or council members from making statements indicating that a member has already reached a decision prior to voting on the matter after hearing city and the property owner's evidence. In

[109] *Id.* § 54.033.

[110] *Id.* § 214.001(a)(1), (d) (only providing that a "municipality" conducts public hearing and may order a building be vacated, secured, repaired, removed, or demolished).

this respect, it is critical to ensure that the official or board that conducts public hearings has adequate training concerning their role as an administrative quasi-judicial body.

As for formal procedural rules, there is certainly no absolute requirement that the rules of evidence be strictly adhered to during a public hearing to consider whether a building is substandard. At the very least, it is advisable for an administrative body or official to: (1) swear witnesses; (2) allow the property owner an adequate opportunity to present evidence; (3) allow the property owner an adequate time to examine the evidence presented by the city; and (4) allow the property owner to question all witnesses and city staff members presenting against the property.

3. Substantive Due Process

A government action cannot be set aside on substantive due process grounds unless the determination "ha[d] no foundation in reason and [was] a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."[111] That is, "[w]hether or not [a] building is a nuisance is to be established by legal and competent evidence, in the same manner as any other fact."[112] In pursuing a remedy, furthermore, "[t]he abatement must be limited to the necessity of the case, and no wanton or unnecessary injury to the property or rights of individuals must be permitted."[113]

Thus, a city's determination that a building is substandard will survive a substantive due process challenge if a rational relationship exists between the board's decision and a government purpose – namely, to safeguard the public welfare.[114] This analysis does not focus on whether a court would agree with the city's decision, but on whether the city rationally believed that demolishing the building furthers a legitimate government objective.[115] That is, if it is at least fairly debatable that the decision was rationally related to legitimate government interests, the city's decision must be upheld.[116]

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[111] Nectow v. City of Cambridge, 277 U.S. 183, 187-88, 48 S. Ct. 447, 448 (1928); *see also* Pennell v. City of San Jose, 485 U.S. 1, 11, 108 S. Ct. 849 (1988); Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239, 243-44 (1st Cir. 1990); Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1577 (11th Cir. 1989); Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 938 (Tex. 1998).

[112] Crossman v. City of Galveston, 247 S.W. 810, 815 (Tex. 1923).

[113] *Id.*

[114] FM Properties Operating Co. v. City of Austin, 93 F.3d 167, 174 (5th Cir. 1996); Stansberry v. Holmes, 613 F.2d 1285, 1289 (5th Cir.), *cert. denied*, 449 U.S. 886 (1980); *Mayhew*, 964 S.W.2d at 938.

[115] Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-88, 75 S. Ct. 461, 465 (1955).

[116] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464, 101 S. Ct. 715 (1981); *FM Properties*, 93 F.3d at 175; *Mayhew*, 964 S.W.2d at 938.

To withstand a substantive due process challenge to a substandard building order, the city must document and put evidence into the administrative record regarding the conditions showing that a building is substandard and a public nuisance. A city substandard building board or official should receive a substandard inspection report that not only indicates whether a structure is dilapidated, deteriorated, decayed, hazardous, or a danger to the public but it should also indicate on what bases the board should reach these decisions. The report should accurately reflect the conditions of the structure in detail, including whether the structure lacks adequate lighting, sanitation facilities, flooring supports, exits; or has rodent infestation, faulty electric wiring, buckled walls or ceilings.[117] At the hearing, the report should be supported by the testimony of the code enforcement officer that conducted the inspection, pictures or video documenting the conditions of the structure and other evidence indicating that the structure threatens public welfare.

4. Equal Protection

Under a traditional Equal Protection claim, a person must show that they are being discriminated against because of membership as part of a protected class. The United States Supreme Court has also recognized an equal protection claim for a "class of one."[118] That is, a person who does not belong to a protected class may still assert a claim under the Equal Protection Clause if a government actor treats him irrationally and differently. The individual being "mistreated" by the government belongs to a "class of one" and the government violates the Equal Protection Clause when it treats the individual differently from other similarly situated individuals. Thus, under a "class of one" equal protection claim, a building owner must prove that he has been treated differently than other similarly situated building owners and the city had no rational basis for such different treatment. This is likely a difficult case to make unless the facts are particularly egregious. Since conditions at every building or property are probably going to be different, it should be relatively easy to make out some rational basis or reason to allow, for example, one property owner to repair, while forcing the other property owner to demolish. In this context, it is important to provide adequate training to the members of the administrative board, council or official that is authorized to make these decisions under a particular city's ordinance. Fair and consistent application of the rules, regardless of the property, is imperative to avoid such an equal protection claim.

5. Trespass and Fourth Amendment Issues

To recover for trespass to real property, a building owner must prove that: (1) the city entered the owner's land and such entry was physical, intentional, and voluntary, and (2) the

[117] See Appendix C for sample Inspection Report.

[118] Village of Willowbrook v. Olech, 528 U.S. 562 (2000).

trespass caused injury to the plaintiff.[119] While this is certainly a potential cause of action when a building is demolished pursuant to a substandard building order, it is a type of intentional tort for which cities clearly retain governmental immunity from suit.[120] Of course, immunity does not extend to city employees who are sued in their individual capacities.[121] Special care should be taken to ensure that when city employees enter property to inspect, repair or carry out a demolition, they do so pursuant to either the consent of the property owner or an administrative search warrant. In some circumstances, substandard conditions can be observed from public areas, but thorough inspection and documentation often requires a city official to enter a building that can not be viewed from the public area.

There is often language in municipal ordinances and uniform codes that purport to give building officials an unqualified right of entry to inspect property. This language, however, absolutely does not except the activity from the warrant requirement of the Fourth Amendment.[122] It is undisputed that entering a structure or viewing parts of property not visible from public areas, whether by entering a door, crossing a fence, or even demolishing a wall, is a "search" in the Fourth Amendment sense. In addition, the demolition of a building or structure is a "seizure" of that property. Thus, the best course of action is to seek authorization for these activities via an administrative search warrant issued by a magistrate.[123]

6. Negligence

The essential elements of a negligence cause of action are: (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately caused by the breach.[124] The damage or destruction of a building or structure pursuant to a substandard building order is an intentional act and thus, and claim for property damage cannot be pled as a negligence claim. While unlikely, negligence is a potential cause of action that may be raised against a city should the demolition of a substandard building accidentally cause property damage to an adjoining building or neighboring property. Consider a hypothetical where a

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[119] Pentagon Enterprises v. Southwestern Bell Telephone Co., 540 S.W.2d 477, 478 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd. n.r.e.).

[120] TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(b) (Vernon 2008); *e.g.*, Harris County v. Cypress Forest Pub. Util. Dist., 50 S.W.3d 551, 553-54 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

[121] The application of official immunity and the scope and operation of Section 101.106 of the Texas Tort Claims Act is not within the scope of this paper.

[122] Michigan v. Tyler, 436 U.S. 499, 504-08, 98 S. Ct. 1943, 1947-49 (1978).

[123] In Texas, search warrants are governed by Chapter 18 of the Code of Criminal Procedure. There is a specific article in that chapter governing warrants for fire, health, and code inspections. TEX. CODE CRIM. PROC. ANN. art. 18.05 (Vernon Supp. 2010). A sample affidavit and search warrant are included in the appendix to this paper.

[124] Morris v. JTM Materials, Inc., 78 S.W.3d 28, 49 (Tex. App.–Fort Worth 2002, no pet. h.).

structure is demolished that shares a party wall with another structure and the adjoining building owner claims structural damage to their building.

Generally, municipalities are immune from suit and liability for tort claims arising from the performance of governmental functions. The demolition of substandard buildings is clearly a governmental function.[125] Under the Texas Tort Claims Act, however, a governmental immunity is waived in three circumstances: (1) when property damage, personal injury or death was caused by an employee's negligent operation or use of a motor-driven vehicle or motor-driven equipment; (2) when personal injury or death is caused by a condition or use of real property; or (3) when personal injury or death is caused by a condition or use of personal tangible property.[126] Should a claim fall within one of these categories, a city will be liable to the plaintiff only if a private person would be liable under Texas law.[127] Thus, governmental immunity is only waived for property damages when the property damage is caused by a city employee's operation or use of a motor-driven vehicle or motor-driven equipment.

As indicated, the Tort Claims Act waives governmental immunity for property damage arising from the operation or use of a motor driven vehicle or equipment if the employee would be personally liable to the claimant under Texas law.[128] Texas courts have defined "operation" as "a doing or performing of some practical work" and "use" as "to put or bring into action or service; to employ for or apply to a given purpose."[129] Merely authorizing the use of a motor-driven vehicle does not waive liability because "[t]he phrase 'arises from' requires a nexus between the injury negligently caused by a government employee and the operation or use of a motor-driven vehicle or piece of equipment."[130] That is, the vehicle or equipment's use must have actually caused the injury.[131] This causation requirement is not met where the vehicle or equipment merely furnishes the condition which makes the injury possible.[132]

While a city need not own the vehicle or equipment for immunity to be waived, the operation or use of vehicle or equipment must be by a government employee, and not by the injured party or some other third party.[133] In the context of a city's accidental property damage

[125] TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(28) (Vernon 2008).

[126] *Id.* § 101.021.

[127] *Id.*

[128] *Id.* § 101.021(a).

[129] *LeLeaux* 835 S.W.2d at 51.

[130] *Id.*

[131] Tex. Natural Res. Conservation Comm'n v. White, 46 S.W.3d 864, 868 (Tex. 2001).

[132] *Id.*

[133] *LeLeaux*, 835 S.W.2d at 51-52.

using motor-driven equipment (i.e., a bulldozer or backhoe) the waiver would clearly apply if a city employee were operating the equipment or specifically directing its use on-site. Application of the waiver becomes a less clear if an independent contractor is used to perform a demolition. But even if the waiver applies there is, of course, a cap on potential damages. The maximum amount of property damages recoverable is $100,000 pursuant to the statutory cap on property damages applicable to cities for a "single occurrence" of property damage.[134] It is settled under Texas law that a plaintiff may not recover damages for mental anguish or emotional distress for negligent damage to property.[135]

B. Affirmative Defenses

1. Public Nuisance

As noted above, the Texas Constitution states that no "person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made."[136] A government may of course "take" through a physical invasion or destruction of the property. When the government takes or damages private property without first paying for it, Texas law provides that the property owner can seek damages by a claim for inverse condemnation. As also noted above, the primary elements of this type of claim will ordinarily not be in dispute. How can a government demolish a building without having to pay compensation?

Simply put, a governmental entity may defend an inverse condemnation claim by showing that the property damaged or destroyed constituted a public nuisance.[137] This is because a governmental entity may abate public nuisances by virtue of its police powers.[138] All property is held subject to valid exercise by the government of the police power to protect the public, because each property owner has an implied obligation to use their property in a way so as not to be injurious to the community at large. As stated by one Texas appellate court:

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[134] TEX. CIV. PRAC. & REM. CODE § 101.023(c) (Vernon 2008).

[135] City of Tyler v. Likes, 962 S.W.2d 489, 497 (Tex. 1997).

[136] TEX. CONST. art. I, § 17.

[137] Patel v. City of Everman, 179 S.W.3d 1, 11 (Tex. App.—Tyler 2004, pets. denied).

[138] *Id.* (citing LJD Props., Inc. v. City of Greenville, 753 S.W.2d 204, 207 (Tex. App.–Dallas 1988, writ denied)). Most language that excepts actions from a compensation requirement simply by virtue of the fact that the action was taken under policy power authority is admittedly antiquated. Certainly, it is well settled that some exercises of regulatory or police power authority can subject a government to inverse condemnation liability, i.e., a regulatory taking. *E.g.*, City of Austin v. Teague, 570 S.W.2d 389, 291 (Tex. 1978). Regardless, it appears to remain the law that if a condition or activity rises to the level of a public nuisance, the police power justification for abating that condition or activity outweighs a property owner's right to just compensation. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029-31, 112 S. Ct. 2886, 2900-01 (1992) (noting exception to compensation requirement even for total, categorical regulatory taking under state "nuisance and property law").

> Although it is fundamental that the government cannot destroy the property of private citizens at will and without justification, the government is given, through these police powers, the ability to abate public nuisances. The police power is a grant of authority from the people to the governmental agents for the protection of the health, the safety, the comfort and the welfare of the public. It is a necessary and salutary power, since without it, society would be at the mercy of individual interest and there would exist neither public order nor security . . . .[139]

Accordingly, a municipality is not required to compensate a landowner for losses resulting from the destruction of a nuisance.[140] Otherwise, government regulation on safety issues would become too costly to be practical, and the public safety would be jeopardized, since almost any exercise of police power infringes on some aspect of personal liberty or property.[141]

In Chapters 54 and 214 of the Texas Local Government Code, the legislature has given Texas cities specific statutory authority to abate a substandard building that constitutes a public nuisance. Section 214.001 provides that a municipality may by ordinance require, among other things, the repair or demolition of a building that is dilapidated, substandard, or "unfit for human habitation *and a hazard to the public health, safety and welfare*."[142] This language embodies the definition of a public nuisance under Texas law. "[W]here a building creates a hazard to health, safety, comfort or welfare, a nuisance exists as a matter of law, which can be abated by the government."[143] While the language of section 214.001(a) suggests that demolition is authorized if a building is either: (1) dilapidated, substandard or unfit for human habitation and a public hazard; (2) unoccupied and unsecured, regardless of its structural condition; or (3) unoccupied and inadequately secured such that it constitutes a danger to the public, a city should not demolish a building unless it is a hazard to the public health, safety and welfare. In addition, the city's demolition order should expressly find that a building is a nuisance.

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[139] LJD Properties, Inc. v. City of Greenville, 753 S.W.2d 204, 207 (Tex. App.–Dallas 1988, writ denied); *accord Lucas*, 505 U.S. at 1029-31, 112 S. Ct. at 2900-01 (noting exception to compensation requirement even for total, categorical regulatory taking under state "nuisance and property law"); Vulcan Mat. Co. v. City of Tehuacana, 369 F.3d 882, 893-94 (5th Cir. 2004) (making *Erie* guess that nuisance exception to compensation requirement applied in context of categorical regulatory taking of limestone mining operation).

[140] City of Texarkana v. Reagan, 112 Tex. 317, 323, 247 S.W. 816, 818 (1923); Woodson Lumber Co. v. City of College Station, 752 S.W.2d 744, 746 (Tex. App.–Houston [1st Dist.] 1988, no writ); Davis v. City of Galveston, 635 S.W.2d 634, 635 (Tex. App.–Waco 1982, no writ) (upholding jury damage award of zero to compensate owner for demolition of nuisance building).

[141] *See, e.g.*, Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 670 (Tex. 2004) (noting that "government could hardly go on" if the government had to compensate for every police power action).

[142] TEX. LOC. GOV'T CODE ANN. § 214.001(a)(1) (Vernon Supp. 2009) (emphasis added). While express language of this nature is not found in chapter 54, a demolition order must be premised on a finding of this nature.

[143] *LJD Properties*, 753 S.W.2d at 207.

2. Res Judicata & Collateral Estoppel

When a property owner does not seek judicial review of the city's demolition order and the order is essentially final, is the city then free to demolish the structure? In this instance, a city should be aware of a potential inverse condemnation claim. In the event an inverse condemnation claim is raised, the primary issue is whether the demolished building was a public nuisance. As noted above, a demolition order should contain the specific finding that defects or conditions exist to the extent that the life, health, property and safety of the public are endangered. If a property owner does not seek judicial review of the city's demolition order, the city's finding that the demolished building is a public nuisance arguably should have a preclusive effect in the context of a de novo inverse condemnation claim. As of now, it is unclear under Texas law whether a court would agree with this position and the outcome may depend on the specific facts of each case.

a. Are Demolition Orders Final?

The law in Texas is clearly settled that when an administrative body acts in a judicial capacity, its decision is conclusive and akin to a court judgment in that it cannot be collaterally attacked in another proceeding.[144] If a court declines to follow this rule within the context of substandard building abatements, an order that is not appealed under sections 214.0012 or 54.039 of the Local Government Code is open to collateral attack because subsequent claims are not barred. In addition, construing the statute in this manner is inconsistent with language in chapters 54 and 214 rendering the decisions final.[145]

A city attorney should be aware of legal authority that supports the position that a city's demolition order does not have any preclusive effect. For instance, in *City of Houston v. Lurie*, the Texas Supreme Court reviewed a Houston ordinance that provided a procedure to abate buildings that were fire hazards.[146] The procedure established by the substandard building abatement ordinance consisted of a hearing before the city council at which the owner of the building had the opportunity to be heard and present witnesses or other evidence.[147] The ordinance also provided that upon a finding that the hazardous condition could not be corrected, the council could declare the building a nuisance and order the owner to demolish the

[144] *E.g.*, Igar v. Brighstar Info. Tech. Group, Inc., 250 S.W.3d 78, 86-87 (Tex. 2007).

[145] TEX. LOC. GOV'T CODE ANN. §§ 54.041 ("If no appeals are taken . . . the decision . . . is . . . final and binding."), 214.0012(a) ("The petition must be filed . . . or such decision shall become final.").

[146] 148 Tex. 391; 224 S.W.2d 871 (1949).

[147] City of Houston v. Lurie, 148 Tex. 391, 393, 224 S.W.2d 871, 873 (1949).

building.[148] Under the ordinance, if the owner did not comply with the order, the city attorney was authorized to file suit to "enforce the order of the City Council."[149]

In *Lurie*, the trial court disregarded the jury's findings that the building could be repaired and, like the Houston City Council, ordered the buildings demolished.[150] Seeking to uphold the trial court's decision before the supreme court, the City of Houston argued that the substantial evidence rule should be applied and that the trial court's judgment should properly be upheld under this standard of review. The supreme court declined to apply the substantial evidence rule reasoning that there was no express statutory authority mandating the application of this standard of review.[151] The supreme court stated that it "would not be justified in applying the substantial evidence rule to this case *when there is nothing in the statutes*, including the home rule enabling act, or in the city's charter or in the city's ordinance, expressing an intention that the suit be tried under that rule."[152]

Arguably, a reviewing court should adhere to the substantial evidence rule if the enabling statutes contain express language to this effect. This principle has been followed in subsequent cases which limit judicial review to the substantial evidence rule when the governing ordinance expressly so provided, or when the legislature has dictated that exclusive jurisdiction is granted to an administrative body, with only limited judicial review.[153] Thus, the precedential value of *Lurie*, if any, remains unclear because the Texas Legislature has subsequently established quasi-judicial municipal bodies and limited judicial review.[154]

i. House Bill 1587 of the 71st Legislative Session

In 1989, House Bill 1587 amended Chapter 54 of the Local Government Code by adding Subchapter C. A bill analysis for "HB" 1587 noted that Chapter 214 of the Local Government Code provides an administrative process while chapter 54 authorizes a home-rule city to seek judicial enforcement of health and safety ordinances.[155] The bill analysis for HB 1587 also notes that:

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[148] *Id.*

[149] *Id.*

[150] *Id.* at 873.

[151] *Id.* at 876.

[152] *Id.* (emphasis added).

[153] *See* Cedar Crest No. 10, Inc. v. City of Dallas, 754 S.W.2d 351, 353 (Tex. App.–Eastland 1988, writ denied), *cert. denied*, 490 U.S. 1081 (1989) (allowing substantial evidence review mandated by ordinance provision); City of Waco v. Roddey, 613 S.W.2d 360, 366 (Tex. Civ. App.–Waco 1981, writ dism'd) (noting that legislature may grant exclusive jurisdiction to administrative building and standards commission).

[154] Act of May 26, 1993, 73d Leg., R.S., ch. 836, § 11, 1993 Tex. Gen. Laws 3292, 3296-97; Act of May 24, 1989, 71st Leg., R.S., ch. 1113, § 1, 1989 Tex. Gen. Laws.

[155] House Comm. on Urban Affairs, Bill Analysis, Tex. H.B. 1587, 71st Leg., R.S. (1989).

> [W]ith both of these processes, the city must prove a violation exists, and the property owners have a right to an administrative hearing or court hearing to prove otherwise. After the administrative hearing is complete, the proceedings must be followed by a hearing in district court. Even with the procedure allowing the city to go directly to district court, the city may not get a preferential setting unless the city includes in a motion to the court facts that demonstrate a delay will unreasonably endanger persons or property. During this time, the property owner is able to remain in the property and the hazard to the community continues.[156]

Thus, the legislative intent behind subchapter C of chapter 54 was to expedite the finality of the proceedings.

ii. House Bill 333 of the 73rd Legislative Session

The legislative history of Section 214.0012 of the Local Government Code also indicates that the Legislature amended chapter 214 to expedite review of decisions regarding substandard buildings. The bill analysis of House Bill 333 recognized that, unlike chapter 54, chapter 214 lacked express provisions for judicial review: "[A] municipality does not have the same quick review process which can extend legal cases indefinitely and not correct dangerous buildings . . . . [This bill] provides for a quick judicial review of administrative hearings officer's rulings by a complaint in District Court within 30 days."[157] A subsequent bill analysis noted that the language of Section 214.0012 "would remove the ability of the district court to . . . collect and hear new evidence" and review by the district court would be "limited to a hearing under the substantial evidence rule (which assumes that an order is valid if supported by evidence at the hearing)."[158] Supporters of "HB" 333 maintained that "[c]ity hearings often lose their meaning when a district court judge can completely re-try the case," therefore, amending chapter 214 was necessary to streamline judicial review by clarifying the standard of judicial review for city administrative determinations.[159]

The legislative history of section 214.0012 and subchapter C of chapter 54 indicates that the 73rd Legislature in 1993 and the 71st Legislature in 1989 intended to expedite the substandard building proceedings by: (1) providing for a thirty day period to appeal to a district court; and (2) providing that the review would be conducted under the substantial evidence rule to prevent the district court from re-trying the case de novo. Arguably, the language added by HB 1587 and HB 313 would be superfluous if a court allowed a property owner to assert a subsequent inverse

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[156] *Id.*

[157] House Comm. on Urban Affairs, Bill Analysis, Tex. H.B. 333, 73d Leg., R.S. (1993).

[158] House Research Org., Daily Floor Report, Bill Analysis, Tex. H.B. 333, 73d Leg., R.S., at 87 (Apr. 19, 1993).

[159] *Id.* at 88-89. The same bill also clarified the judicial review procedures for subchapter C of chapter 54 to limit judicial review to that under the substantial evidence rule and deleting a provision that allow the district court to hear new evidence. House Comm. On Urban Affairs, Bill Analysis, Tex. H.B. 333, 73d Leg., R.S. (1993).

condemnation claim at any time, even up to ten years after the building is demolished,[160] and even after a district court has refused to reverse a city's decision.

Some Texas courts have recognized the principle that a final city order is not subject to collateral attack. For example, in *Nash v. City of Lubbock*, the Amarillo Court of Appeals held that the property owners could not collaterally attack an order of Lubbock Housing Standards Commission because they failed to appeal the order.[161] In *Nash*, the plaintiffs filed suit alleging that the City of Lubbock had deprived them of due process of law by demolishing their buildings.[162] After a series of three public hearings over seven months, the commission entered an order that the structures were substandard in violation of the Lubbock Housing Code, which was enacted pursuant to chapter 214.[163] The City demolished the structures pursuant to the Commission's order and the property owners sued the City almost two years after the order was entered.[164] The applicable Lubbock ordinance had a provision similar to Section 211.0012, which made the Commission's order final if it was not appealed within ten days.[165] The City moved for summary judgment on the grounds that the Commission's order was valid and final because it was not appealed.[166] The court of appeals held that since the property owners did not appeal the Commission's demolition order, they could not collaterally attack its validity in a subsequent suit.[167]

b. A Demolition Order Precludes De Novo Review

Recently, in *Patel v. City of Everman*, the Fort Worth Court of Appeals affirmed a summary judgment based on collateral estoppel where a de novo inverse condemnation claim

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[160] Although there is a split in authority, at least one court has held that a ten-year adverse possession statute of limitations in the context of *all* inverse condemnation claims where a "taking" is alleged, even those concerning demolition of substandard buildings. Patel v. City of Everman, 179 S.W.3d 1, 12-13 (Tex. App.—Tyler 2004, pets. denied). Other inverse condemnation cases where a ten-year statute is applied involved a potential transfer of property rights, not the destruction of buildings. *Brazos River Auth. v. City of Graham*, 163 Tex. 167, 178, 354 S.W.2d 99, 106 (1962) (concerning recurrent flooding which justified the granting of a perpetual easement to be granted to authority); Waddy v. City of Houston, 834 S.W.2d 97, 99 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (concerning city sewer line across property); Woodson Lumber Co. v. City of College Station, 752 S.W.2d 744, 746 (Tex. App.—Houston [1st Dist.] 1988, no writ) (applying 10-year limitation period to claim on land use restriction) Hudson v. Ark. La. Gas Co., 626 S.W.2d 561, 563-64 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.) (concerning gas pipeline across property); *see* Tex. Civ. Prac. & Rem Code Ann. §§ 16.003, 16.026 (Vernon 2008); *but see* Fields v. City of Texas City, 864 S.W.2d 66, 69 (Tex. App.–Houston [14th Dist.] 1993, writ denied) (applying a two-year statute of limitations for demolition of a fire damaged building).

[161] 888 S.W.2d 557, 562 (Tex. App.—Amarillo 1994, no writ).

[162] *Id.* at 559-60.

[163] *Id.* at 560-61 & n.2.

[164] *Id.*

[165] *Id.* at 560.

[166] *Id.*

[167] *Id.* at 562.

was raised due to the demolition of apartment buildings.[168] In this case, the property owner appealed to the district court by writ of certiorari from demolition orders concerning his apartment buildings and sought a temporary injunction to halt the demolition.[169] The property owner then non-suited the direct appeal from the city's demolition orders and pursued relief in federal court.[170] After the federal court action was dismissed, the property owner returned to state court and filed a suit seeking damages for inverse condemnation.[171] The City moved for summary judgment under collateral estoppel based on the final administrative demolition orders. The court of appeals affirmed, stating:

> On April 3, 1998, within thirty days of his receipt of the demolition orders, [the property owner] filed suit, seeking to enjoin the City from demolishing his buildings and seeking judicial review of the Board's decision to do so by writ of certiorari. By doing so, [he] was complying with the applicable standards prescribed by Texas Local Government Code 214.0012. But [the property owner] nonsuited that suit on July 23, 1999. Having nonsuited his direct attack on the ruling of the Board regarding his buildings, and not having otherwise sought judicial review of the Board's order within the thirty-day period prescribed by section 214.0012, [the property owner] is collaterally estopped from now bringing this suit. We hold that the trial court did not err in granting the City's traditional summary judgment under the doctrine of collateral estoppel.[172]

Thus, there is some clear authority supporting proposition that a city's demolition order has a preclusive effect on a de novo inverse condemnation claim.

This is not to say, however, that an inverse condemnation claim is never possible in the context of a substandard building demolition under chapters 54 or 214. If, for example, a building is demolished before a board's order is affirmed on appeal, a property owner could amend the petition to add an inverse condemnation claim to the case appealing the order.[173] If the decision is eventually reversed by the district court, but the building has been demolished by the city, as is expressly permitted under the statute,[174] there would be nothing precluding an

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[168] Patel v. City of Everman, No. 02-07-00303-CV, 2009 WL 885916 (Tex. App.–Fort Worth Apr. 2, 2009, pet. filed) (mem. op., not designated for publication) ("*Patel II*").

[169] *Id.* at *1.

[170] *Id.* at *1-2.

[171] *Id.* at *2.

[172] *Id.* at *7 (internal citations omitted).

[173] Tex. R. Civ. P. 46, 47, 51, 63 (providing for different, alternate claims for relief, joinder of claims and amended pleadings).

[174] TEX. LOC. GOV'T CODE ANN. § 214.0012(e) (Vernon 2008).

inverse condemnation claim from being brought at any time within ten years of the date of demolition.[175] Simply put, the judicial review provisions of chapters 54 and 214 may not absolutely preclude takings claims in the context of substandard buildings. These provisions do, however, make reversal of an administrative order that a building constitutes a public nuisance a prerequisite to sue for compensation for "damaging" a building in a de novo proceeding. The takeaway message here is that a cautious municipality should wait until a demolition order is either affirmed on appeal or until the thirty-day appeal period expires before undertaking a demolition of a building.

c. Preclusive Effect is Not Perpetual

Another recent case, however, suggests that a city that waits too long after a demolition order is issued risks losing the preclusive effect of the administrative nuisance determination. In *City of Dallas v. Stewart*, the City's Urban Rehabilitation Standards Board ("URSB") had, after a public hearing, found that the property owner's house constituted a nuisance and ordered it demolished.[176] The property owner appealed, and the Board affirmed its prior order after a URSB rehearing. The house was demolished and the property owner then appealed the order to the district court, eventually adding due process and takings claims against the City. The district court affirmed the order under the substantial evidence rule, but allowed a jury to hear the takings claim.[177] The jury found in favor of the property owner and the trial court rendered a judgment on the jury's verdict.[178]

The City argued that the URSB nuisance finding and its subsequent affirmation by the district court precluded the property owner's takings claim as a matter of law under res judicata and collateral estoppel principles.[179] The Dallas Court of Appeals first recognized that the takings or inverse condemnation claim could be defended on nuisance grounds and apparently agreed that preclusion principles could be applied to the URSB order.[180] The court of appeals, however, noted that the City had to show the building was a nuisance on the day it was demolished.[181] Noting that the nuisance determination had been made over a year before the

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[175] Again, there is a question about what statute of limitations would apply, but it may be the ten-year statute. *See supra* note 153.

[176] No. 05-07-01244-CV, 2008 WL 5177168, at *1 (Tex. App.—Dallas Dec. 11, 2008, pet. granted) (mem. op., not designated for publication). Oral argument before the Texas Supreme Court in this case occurred on February 16, 2010, and the case is still pending.

[177] *Id.* at *1.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* at *2 (citing City of Houston v. Crabb, 905 S.W.2d 669, 674 (Tex. App.—Houston [14th Dist.] 1995, no writ)).

house was demolished, the court declined to apply res judicata or collateral estoppel principles.[182]

The Dallas Court of Appeals essentially held that the URSB decision did not have preclusive effect as to the property owner's inverse condemnation claim because the nuisance issue decided by the URSB - whether the building was a nuisance as of the date of the hearing - was not the same issue before the trial court - whether the building remained a nuisance on the date of demolition, over a year after the hearing was held.[183] While the court clearly opined that over a year is too long for a city to wait before demolishing a substandard structure, the court declined to provide further guidance as to how long is "too long." The opinion also does not state whether there was any evidence that the condition of the structure had changed or improved since the original Board determination. Without discussion of these matters, the *Stewart* opinion can be regarded as encouraging a city demolish first and ask questions later.

This opinion raises some interesting issues. First, a quick demolition seems inconsistent with the other laws governing substandard buildings. At least with respect to chapter 214, immediate demolition is not allowed. This chapter requires the city to initially allow the property owner to perform the demolition, and only if the order is not completed within a certain time (usually thirty to ninety days), may the demolition be carried out by the municipality.[184] And as noted above, a cautious municipality would likely want to wait to demolish until after the time for an appeal by writ of certiorari to the district court has run (i.e., thirty days from the date the property owner is served with a copy of the administrative decision)[185] and the appeal proceedings are completed and the administrative order is affirmed. But what if the property owner files a bankruptcy petition?[186]

Of course, once a significant period of time elapses, a city can return to the administrative body or decision-maker and obtain an updated order that the structure remains a nuisance. A property owner, however, might argue that this new order restarts the timetable for an appeal to the district court. If this assertion holds, then the risk of a quick demolition after

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[182] *Id.*

[183] Comparing the Dallas Court of Appeals' opinion with the City of Dallas's briefing before the Texas Supreme Court, however, it appears there might be a discrepancy about when the relevant nuisance determination was made relative to the demolition of the structure. The Dallas court's opinion notes that the demolition occurred October 1, 2002, *Stewart*, 2008 WL 5177168, at *1, but Dallas's petition for review appears to assert that the demolition occurred about November 1, 2002. *See* City of Dallas v. Stewart, No. 09-0506, Pet. for Rev. at 2-3 (Tex. Mar. 3, 2009). Dallas also argued that the URSB's original nuisance determination from 2001 was revisited on a motion for rehearing and reaffirmed less than seven weeks before the demolition. *Id.* at 2.

[184] TEX. LOC. GOV'T CODE ANN. § 214.001 (Vernon 2008).

[185] *Id.* §§ 54.039(a), 214.0012(a).

[186] *See infra* Part III.C.

the second nuisance determination may be the same as the risk for the first. Thus, immediate demolition might not be a realistic or even legal option.

A resolution of this conundrum is not found in any Texas cases, although the supreme court may provide some resolution in the *Stewart* case. In the meantime, the Restatement (Second) of Judgments does provide some guidance.[187] The section addressing issue preclusion suggests that this is a question of issue unity and that passage of time sometimes precludes the application of issue preclusion and sometimes it does not. Specifically, comment c to section 27 provides:

> Sometimes, there is a lack of total identity between the matters involved in the two proceedings *because the events in suit took place at different times*. In some such instances, the overlap is so substantial that preclusion is plainly appropriate. . . . . And, *in the absence of a showing of changed circumstances*, a determination that, for example, a person was disabled, or a nonresident of the state, in one year will be conclusive with respect to the next as well. *In other instances the burden of showing changed or different circumstances should be placed on the party against whom the prior judgment is asserted*.[188]

An argument can be made, therefore, that a nuisance determination made by a city official or board retains its preclusive effect unless and until a property owner can show a change in circumstances, such as a change in the conditions of the building, between the date of the administrative determination and the demolition. There are no Texas cases, however, that adopt this reasoning. Regardless of what the law is in Texas or who bears the burden of proving changed circumstances (or absence of changes), a city should be able to demonstrate that building's condition has not substantially changed between the date of the nuisance determination and the date of demolition by exhaustively documenting the determination with pictures, videos, and other evidence - both as of the hearing date and the demolition date.

d. Preclusion of Federal Takings Claims under *Brown* and *San Remo Hotel*

Will an administrative nuisance determination also have preclusive effect against a federal takings claim once compensation is denied by a state court? As noted above, the United States Supreme Court has held that where the state law issues are functionally equivalent to those to be litigated under a federal claim, the federal full faith and credit statute requires a federal court to give preclusive effect to the issues litigated in state court.[189] Although there are no cases

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[187] RESTATEMENT (SECOND) ON JUDGMENTS § 27 (1982).

[188] *Id.* cmt. c (emphasis added).

[189] *See supra* Part III.A.1.b; San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 346-47, 125 S. Ct. 2491 (2005).

precisely on point, a good argument can be made that the nuisance determination under state law that is defensive to a state takings claim is also defensive to and preclusive of a federal takings claim. This is because the U.S. Supreme Court has held that, even in the context of defending against a federal categorical regulatory taking, federal courts will define property interests that are subject to constitutional protection with reference to state nuisance and property law.[190] Thus, to the extent a building or structure is a nuisance under state law, the federal Constitution does not protect a property owner's right to maintain it in that manner. Because the issues under state law and federal law are "functionally equivalent," the nuisance determination would also preclude a federal takings claim.

Moreover, if a property owner fails to appeal and reverse the nuisance determination, or abandons those proceedings, there is authority that any federal claims will be permanently unripe. If it is the case that Texas law requires the administrative nuisance determination to be reversed before a de novo takings claim can be heard, and if those procedures for reversing the determination are ignored, not followed, or abandoned, then the property owner fails to utilize "available state remedies for obtaining compensation," which renders a federal takings claim permanently unripe.[191]

3. Consent

A government can also defend an inverse condemnation claim and avoid having to pay compensation by pleading and proving that the landowner consented to the property's demolition.[192] While it may be difficult to imagine how this affirmative defense can apply in the context of substandard buildings, it has in at least one Texas case. In *Patel I*, the Tyler Court of Appeals partially affirmed a summary judgment based on an agreed order that had been entered into between the City of Everman and Mr. Patel, the property owner, at the conclusion of a prior lawsuit.[193] The agreed order provided that Mr. Patel was obligated to "repair [the] property so it is in compliance with all city codes for the [city]."[194] The order further stated that:

> In the event that each and every unit is not in compliance with the [city's codes] by February 9, 1998, then in that event this Order and any Temporary Injunction shall expire and the [city] shall be permitted to demolish all units and property listed above without further notice and without further Court action.[195]

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[190] Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1029-30, 112 S. Ct. 2886, 2900-01 (1992).

[191] Liberty Mut. Ins. Co. v. Brown, 380 F.3d 793, 798-99 (5th Cir. 2004).

[192] *E.g.*, Rischon Development Corp. v. City of Keller, 242 S.W.3d 161, 167 (Tex. App.—Fort Worth 2007, pet. denied).

[193] Patel v. City of Everman, 179 S.W.3d 1, 9 (Tex. App.—Tyler 2004, pets. denied).

[194] *Id.* at 8.

[195] *Id.*

The court held that this language was not ambiguous and that it obligated Mr. Patel to ensure that the entire property complied with "all city codes" as of the deadline stated in the order.[196] The court next noted that Mr. Patel had conceded that there was at least one minor problem with the properties' plumbing as of the deadline stated in the order. The court held that this conclusively established both his failure to comply with the terms of the agreed order and his consent to the demolition in the agreed order.[197]

Relying on *Patel I*, a city attorney may wish to incorporate language of this nature in any pre-litigation or settlement agreement with a property owner concerning efforts to repair buildings or structures and bring them into compliance with city codes. Doing so may help the city attorney to reconcile the competing interests a city faces concerning substandard building enforcement efforts. That is, on the one hand, city officials and staff should encourage property owners to voluntarily comply with the minimum building standards. But on the other hand, any voluntary repair or improvements to a building or structure subtract from the weight of the evidence that may be needed at a later date to prove the structures amount to a public nuisance. Thus, from the city's perspective, allowing repair must be an all or nothing approach. Regardless of the ultimate enforceability of any "all or nothing" language in a settlement agreement, it certainly provides a city with leverage to help ensure that, repairs are completed once commenced.

4. Personal Property: Waiver or Abandonment

Property owners often leave personal property in a substandard building. Although a determination that the building or structure itself amounts to a nuisance shields the government from having to pay just compensation, it does not appear that the nuisance defense would extend to shield the government from a claim for destruction or damage to personal items, absent a specific finding that the personal property itself constituted a nuisance. There are many options available for a city to guard against exposure to this type of claim. First, a city could clean out the personal property, inventory it, and store it for a certain time until the property owner claims it. Administratively, this is difficult, costly, and would not shield the government from claims if some of the property was lost or stolen.

The easier approach is to give the property owner ample notice of the date of demolition and warn the property owner, in writing and by certified mail, that the city and its employees is not responsible for removing or storing any personal property from the structure or the property before demolition and cleanup. This notice should also expressly state that it is the property owner's sole responsibility to remove any items of personal property from the structure and that

[196] *Id.* at 9.

[197] *Id.* at 11.

any failure to do so will be deemed a waiver of any right, title or interest in the personal property.[198] Although no Texas court has expressly endorsed this as conclusive proof of waiver or abandonment, courts from other jurisdictions essentially disfavored these personal property claims as long as fair notice of the demolition date is given.[199]

C. Bankruptcy Automatic Stay

A city should be aware that a building owner may file a bankruptcy petition in hopes of stalling the substandard building process. Many times, after a demolition order is issued, instead of seeking an appeal of the order in district court by writ of certiorari, a property owner will try to use a bankruptcy proceeding to avoid demolition. Once an individual files for bankruptcy, of course, the bankruptcy code provides an automatic stay of certain actions against the property of the bankruptcy estate.[200] "The purpose of the stay is to give the debtor a 'breathing spell' from his creditors, and also, to protect creditors by preventing a race for the debtor's assets."[201] Among other things, the automatic stay applies to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over the property of the estate."[202] A city that demolishes structures on a property that is part of a bankruptcy estate clearly exercises control over property of the estate.[203]

A city should refrain from demolishing a structure, however, without first seeking relief from the bankruptcy court. While a city can certainly, on its own judgment, conclude that these exceptions apply, that is probably not the best course of action since violation of the automatic stay can expose the violators to damages and sanctions. Thus, the best and most prudent practice for a city is to first seek an order from the bankruptcy court that the proposed action is indeed within an exception to the automatic stay.[204] This part discusses two exceptions that can apply to allow a substandard building process to continue despite a bankruptcy proceeding.

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[198] See Form L for a sample notice letter containing this language.

[199] *E.g.*, City of Kansas City v. Manfield, 926 S.W.2d 51, 54 (Mo. Ct. App. 1996) (holding lessee of property had no interest in condemnation proceeds when it only had interest in personal property of which there was notice and opportunity to remove before demolition).

[200] 11 U.S.C. § 326(a).

[201] *In re* Gandy, 327 B.R. 796, 801 (Bankr. S.D. Tex. 2005) (quoting Browning v. Navarro, 743 F.2d 1069, 1083 (5th Cir. 1984)).

[202] 11 U.S.C. § 326(a)(3).

[203] *See In re* Javens, 107 F.3d 359, 367 (6th Cir. 1997).

[204] *In re* Sutton, 250 B.R. 771, 775-76 (Bankr. S.D. Fla. 2000) (citing *In re* Daugherty, 117 B.R. 515, 517 (Bankr. D. Neb. 1990)). A form motion asserting both the exceptions discussed in this paper is set forth in the appendix. Note, however, that the form of the motion might differ considerably depending on

1. Police Powers Exception

While the automatic stay is broad, it is not unlimited and is subject to a number of policy-based exceptions. One exception to the automatic stay is the police and regulatory authority or "police powers" exception, which is based on the compelling need for the government to continue to protect the public when a debtor files for bankruptcy and to "prevent a debtor from frustrating necessary governmental functions by seeking refuge in bankruptcy court."[205] That is, "a fundamental policy behind the police or regulatory power exception is to prevent the bankruptcy court from becoming a haven for wrongdoers."[206] To determine whether the police powers exception applies to a particular action, two elements must be met: (1) the entity seeking to act under the exception must be a governmental unit; and (2) the proposed action must be seeking to enforce the unit's police and regulatory power.[207] These elements are probably met when a city seeks to demolish or otherwise abate a substandard structure.

2. Liens for Demolition or Repair Costs: Government Assessment Exception

As noted above, a municipality may recover repair or demolition costs unless the property is a homestead protected by the Texas Constitution.[208] The city must file a lien on the property on which the building is located and the lien constitutes a "preferred lien subordinate only to tax liens."[209] Section 362(a)(4) of the bankruptcy code, however, creates an automatic stay of "any act to create, perfect or enforce a lien against the property of the estate."[210] The "police and regulatory power" exception under section 326(b)(4) is only an exception to the stay under subsections (a)(1), (2), (3) and (6), not subsection (a)(4).[211] Even if the "police and regulatory power" exception applies, it would not allow the City to create or perfect any lien concerning the costs incurred in its demolition, repair or cleanup activities.

That authority might be provided by another exception to the automatic stay. Section 362(b)(18) provides an exception to all stays created by subsection (a) for "the creation or perfection of a statutory lien for an ad valorem tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment

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[205] *Gandy*, 327 B.R. at 801-02 (quoting SEC v. Brennan, 230 F.3d 65, 71 (2d Cir. 2000)) (internal quotations omitted).

[206] *In re* Commonwealth Cos., Inc., 913 F.2d 518, 527 (8th Cir. BAP 1990).

[207] *Javens*, 327 B.R. at 802.

[208] TEX. LOC. GOV'T CODE Ann. § 214.001(n) (Vernon 2008).

[209] *Id.* § 214.001(n), (o).

[210] 11 U.S.C. § 362(a)(4).

[211] *Id.* § 362(b)(4).

comes due after the date of the filing of the petition."[212] First, a city is clearly a "governmental unit."[213] Also, it is certain that any costs incurred by a city in pursuing any repair or demolition activity that occurs after the bankruptcy is filed will come due after the filing of the bankruptcy petition. And as noted above, the basis for the lien is statutory and therefore, an argument could be made that the lien is "statutory." The only remaining question is whether the demolition or repair costs are really "special assessment[s]" on real property. Unfortunately, this language is relatively new; this exception was expanded to apply to statutory liens for non-ad valorem special assessments in 2005. As a result, case law discussing and applying the new language of this subsection is scarce. If pursuing a lien for demolition or repair costs is important to a city, a city attorney should be sure to research whether the courts have narrowly or broadly construed the "special assessment" language of this section. Practically, when a bankruptcy is pending, a city should avoid doing anything to file or perfect a lien for demolition or repair costs unless specifically allowed to do so by the bankruptcy court.

IV. SUMMARY & PRACTICE TIPS

A. As Abraham Lincoln Said: "Discourage Litigation"

Discussing the liability exposure of demolishing substandard buildings can make a city attorney queasy. It is easy, therefore, to see the benefit of informally resolving substandard building cases. Even prior to resorting to administrative processes, a city should attempt to meet with the property owner and other interested parties and enter into an agreed method and timeline to abate the substandard conditions or convince the building owner to voluntarily demolish a substandard structure. It is suggested that any agreements that a city enters into with a property owner require the building owner to comply with *all* building codes rather than merely requiring the owner to abate the substandard conditions and also contain language that allows demolition if not all conditions are remedied by a specific date.

Bringing a structure before a city administrative board seeking an order to repair or demolish a structure is often, and should be, an act of last resort. Many times, formal substandard building proceedings are the culmination of months or even years of failed attempts to bring a property into compliance through enforcement efforts like misdemeanor citations, warnings, etc. This is especially true if the substandard structures have absent, non-resident owners who ignore or even scoff at code enforcement efforts. Issuing an administrative demolition order, however, can encourage owners to "get serious" about the condition of their property and diligently make the necessary repairs. In the authors' experience, cities can often negotiate a settlement with property owners, sometimes even during the pendency of the appeal

[212] 11 U.S.C. § 362(b)(18).

[213] 11 U.S.C.§ 101(27) (defining governmental unit to include a "municipality").

to the district court, to bring structures into compliance. If rehabilitation is not economically feasible, a city can often get the property owner to agree to the demolition.

B. Document Everything, Get a Digital Camera & Save the Pictures

A city should exhaustively document the conditions of the building or structure that make it substandard and support a determination that the building amounts to a public nuisance. Documentation of conditions should occur, not only just before any administrative hearing, but also immediately before a subsequent demolition. This documentation helps prove that the building is a public nuisance and also protects the city from a subsequent takings claim by showing that there was no change in circumstances between an administrative nuisance determination and the date of demolition. If a city attorney is concerned that the pictures do not look "that bad," then perhaps a city should reconsider whether demolition is the best course of action. Pictures taken immediately before and during demolition can also help defend against claims that valuable personal property near or inside the structures was taken, damaged or destroyed.

C. Give Property Owners More Process Than What is Due

A city should meticulously follow the applicable notice and other procedures found in either Subchapter C of Chapter 54 or Chapter 214 of the Local Government Code. While a failure to follow those procedures does not necessarily amount to a deprivation of procedural due process, it certainly does not help a city's defense if it ignores these procedures. The hearing notice should provide the property owner with sufficient information concerning the problems with the structure and what evidentiary burdens they will bear at the hearing concerning repair costs, plans and timetables.

It should also be noted that, given the limited substantial evidence review and potential preclusive effect of a city's administrative nuisance determination, the hearing at the city level is, essentially, the only de novo evidentiary hearing a property owner may get. Not only should the property owner and their attorney be fairly informed of this, city staff and certainly the city's administrative decision-makers should understand this concept. The hearing is essentially a trial, and if the property owner may not introduce new evidence on appeal, then certainly the city cannot present new evidence either. All evidence should be introduced before the city's administrative board or hearing official. The body or official that hears these matters should be properly trained concerning their role as essentially "quasi-judges." Understanding this role will assist them to act in an impartial manner and treat property owners how they would want to be treated by a judge in any tribunal.

D. Demolition Should be Last Resort in Only the Worst Cases

While this paper focuses on the dangers and pitfalls of demolition, it should be understood that the relevant statutes authorize other enforcement options including civil penalties, ordering securing, vacation or repair of the property. City officials should understand that demolition is excepted from the requirement of just compensation only when the structure or building amounts to a public nuisance, i.e., a detriment to public health, safety and welfare.

E. An Ounce of Prevention

Sometimes comparatively small steps or actions help to avert a challenge or complaint. For example, getting an administrative search warrant is a relatively easy step to take given the express statutory authority for them in Texas. In the absence of a property owner's consent, getting search warrants for any instance in the process where entering the building or seizing property (e.g., demolition) is concerned. Further, the presence of personal property on or near a building or structure ordered to be demolished is not always a "public nuisance" and as such, not excepted from the requirement of just compensation for damaged or destroyed. By taking the simple step of giving the property owner ample notice of the date and time of demolition and informing the property owner that the city will not be responsible for removing any personal property, the city can more readily defend against a claim on the grounds of abandonment or consent. While city officials may question the necessity of taking these extra steps and delaying the demolition of a substandard building that poses a public safety hazard, a city attorney should caution against taking shortcuts. A seemingly inconsequential step can expose a city to liability and result in years of costly litigation.

APPENDIX

FORM A: SUBSTANDARD BUILDING INSPECTION CHECKLIST

ADDRESS: _____
LEGAL DESCRIPTION OF PROPERTY: Abst:_____ Tract _____
Out of _____ Survey Lot: _____ Block: _____ Subdivision: _____
PROPERTY OWNER: _____
PROPERTY OCCUPANT: _____
LIENHOLDER: _____
INSPECTOR: _____

Affidavit for Search Warrant and Administrative Search Warrant (Forms B1 and C1)	_____
Substandard Building Inspection Report completed. (Form D: Inspection Report).	_____
Research for all lienholders or mortgagees for the property in question requested.	_____
Title Report received.	_____
Commencement of abatement proceedings recommended to the Substandard Buildings Board ("Board").	_____
Date set for public hearing to be held before the Board to determine whether a building complies with the standards set out in Article IX "Substandard Buildings" of Chapter 14 of the City Code. (Must be accomplished at least 2 weeks prior to public hearing to provide sufficient time to notify owners and lienholders).	_____
Notice the Public Hearing (Form E) sent via certified mail to the record owner and all lienholders or mortgagees at least 2 weeks prior to the date set for the public hearing. Copy of Substandard Building Inspection Report attached. (Form B).	_____
Green cards returned.	_____
Notice of Hearing posted (Form E) on all occupied buildings.	_____
Agenda and packet information delivered to the Board.	_____
Copy of the Notice of Hearing (Form E) mailed to the record owner and filed in the Selena County real property records prior to the public hearing.	_____
Date completed and received.	_____
Affidavit for Search Warrant (Pre-Hearing) (Form B2) and Administrative Search Warrant (Pre-Hearing) (Form C2)	_____

At public hearing, if the record owner seeks longer than ninety (90) days to abate the substandard building, the owner or lienholder must be prepared to demonstrate the scope of work required to comply with the minimum standards of Article IX of Chapter 14 of the City Code and the time it will take to perform the work. (See Form G: suggested public meeting format). _____

The Board determines the following at the public hearing: (1) time allowed to comply with the minimum standards of Article IX of Chapter 14 of the City Code; and (2) the contents of the order (i.e., repair, demolish, and/or vacate). The Board Chair and City Secretary sign the orders (See Form H: Substandard Building Motion; Forms L1, L2, L3: Substandard Building Order; and Form K: Order to Vacate). _____

Board Order (Forms I1, I2, or I3) completed and signed by Board Chair and City Secretary. _____

File the Order (Forms I1, I2, or I3) with the City Secretary. The City Secretary must sign, date and seal the Order. _____

Order (Forms I1, I2, or I3) sent via certified mail, return receipt requested, to the record owner and any identified lienholder or mortgagee of the building within ten (10) days after date the Order is signed. _____

Order (Forms I1, I2, or I3) filed in County of Selena deed records. _____

Notice of Order to Repair or Demolish (Form J) published in newspaper of general circulation within ten (10) days after the date the order is issued. _____

If appropriate, Notice to Vacate Building (Form L) posted on all affected buildings and send to the occupant of the building via certified mail, return receipt requested. _____

Repair work or demolition performed by Owner. _____

Building Official's Assessment of incomplete and complete work and Building Official's recommendation performance of work by City, if necessary. (Form F: Owner's Repair Summary). _____

Bill sent to property owner. _____

If city enforcement required:

Utility services notified to disconnect services (if necessary). _____

Gas _____

Electric _____

Cable _____

Affidavit for Search Warrant (Pre-Demolition) (Form B3) and Administrative Search Warrant (Pre-Demolition) (Form C3) _____

Work performed by City:

Demolition: _____

City may demolish if Board finds that buildings are a danger and either infeasible of repair or there is no reasonable expectation that they will be repaired if additional time is given. _____

Date of Demolition: _____

Repair: _____

City may repair to extent necessary if the Board determines the building is likely to endanger person or property and the building is a residential dwelling with 10 or fewer units. _____

Repair completed: _____

Other: _____

Secured: _____

Vacated: _____

Sworn itemized account prepared by building official, and filed with city secretary, of expenses incurred in the repair, demolition or removal of the building. (Form O: Sworn Account). _____

Notice of Lien prepared by building official, and filed with city secretary. (Form P: Notice of Lien). _____

Notice of Lien filed in county deed records of the county where the property is located with a copy of the Order attached. _____

Bill for abatement paid. _____

Once assessment is paid, Release of Lien filed with County of Selena deed records. (Form Q: Release of Lien). _____

FORM B1: AFFIDAVIT FOR SEARCH WARRANT (PRE-HEARING)

THE STATE OF TEXAS §
§
COUNTY OF SELENA §

The undersigned Affiant, being a Code Enforcement Officer for the City of Nautilus, Texas, and being duly sworn on oath makes the following statements and accusations:

1. I am a Code Enforcement Officer for the City of Nautilus, Texas, and have been so employed since 1977. I have personal knowledge of the facts stated herein and they are all true and correct;

2. There is in Nautilus, Selena County, Texas, a building determined to be substandard pursuant to City ordinance and ordered demolished by the Substandard Building Board, which building is described and located as follows:

_____

herein referred to as the "Premises";

3. The Premises are in the charge of and controlled by the following person:

_____

who resides at:

_____;

4. The owner of the Premises was notified on _____ by notice delivered by [check the means of delivery]: ____ [hand delivery] ____ [certified mail, return receipt requested], that the items listed above were in violation of the Nautilus City Code and the owner was advised to abate the violations. A true and correct copy of the notice letter(s) are attached hereto as Exhibit "A" and is incorporated herein by reference;

5. The time period for compliance has expired, and the I have good reason to believe and do believe, that probable cause exists that owner has not abated the condition on the Premises as required and a fire or health hazard or unsafe building condition is present, which violate the building standards set forth in the Nautilus City Code Section(s) 14-354 and 14-355.

WHEREFORE, for these reasons, Affiant asks for the issuance of a warrant that will authorize Affiant to conduct inspection of said Premises for the purpose of proceeding with an administrative hearing.

Signed this _____ day of _____, 20____.

_____
Code Enforcement Official, Affiant

Subscribed and sworn to before me by said Affiant on this the ____ day of _____, 20____ at _____ o'clock ___.m.

_____
Notary Public in and for the State of Texas

_____

FORM B2: AFFIDAVIT FOR SEARCH WARRANT (POST-HEARING)

THE STATE OF TEXAS §
§
COUNTY OF SELENA §

The undersigned Affiant, being the Code Enforcement Officer of the City of Nautilus, Texas, and being duly sworn, on oath makes the following statement and accusations:

1. I am a Code Enforcement Officer for the City of Nautilus, Texas, and have been so employed since 1977 and has personal knowledge of the facts stated herein and they are all true and correct;

2. There is in Nautilus, Selena County, Texas, a building determined to be substandard pursuant to City ordinance and ordered demolished by the Substandard Buildings Board, which building is described and located as follows:

_____

herein referred to as the "Premises";

3. Premises are in the charge of and controlled by the following person:

_____

who resides at:

_____;

4. At said Premises, there is evidence of a violation of a fire, health, or building regulation, statute or Sections 14-324 and 14-325 of the Nautilus City Code, which violation(s) have been determined to render the Premises substandard or dangerous and have resulted in the Substandard Buildings Board to order the Premises repaired or demolished in the interests of the public health and safety. A copy of the order is attached hereto;

5. The time period has expired, and I have good reason to believe that owner has not abated the condition on the Premises as required by the Order;

6. Based upon the reasons set forth above, I have good reason to believe and do believe that probable cause exists to inspect the Premises as necessary and appropriate to complete the above-referenced investigation.

WHEREFORE, for these reasons, I ask for issuance of a warrant that will authorize me to conduct inspections of said Premises for the purpose of determining compliance with the terms of Order No. _____, issued by the Substandard Buildings Board.

_____
Code Enforcement Officer, Affiant

SUBSCRIBED AND SWORN TO before me by said Affiant on this the ____ day of _____, 2010 at _____ o'clock ___.M.

_____
Notary Public in and for the State of Texas

FORM B3: AFFIDAVIT FOR SEARCH WARRANT (PRE-DEMOLITION)

THE STATE OF TEXAS §
§
COUNTY OF SELENA §

The undersigned Affiant, being the Code Enforcement Officer of the City of Nautilus, Texas, and being duly sworn, on oath makes the following statement and accusations:

1. I am a Code Enforcement Officer for the City of Nautilus, Texas, and have been so employed since 1977 and has personal knowledge of the facts stated herein and they are all true and correct;

2. There is in Nautilus, Selena County, Texas, a building determined to be substandard pursuant to City ordinance and ordered demolished by the Substandard Buildings Board, which building is described and located as follows:

_____

herein referred to as the "Premises";

3. Premises are in the charge of and controlled by the following person:

_____

who resides at:

_____;

4. At said Premises, there is evidence of a violation of a fire, health, or building regulation, statute or Sections 14-324 and 14-325 of the Nautilus City Code, which violation(s) have been determined to render the Premises substandard or dangerous and have resulted in the Substandard Building Board to order the Premises demolished in the interests of the public health and safety. A copy of the order is attached hereto;

5. In order to proceed with demolition, it is necessary to have access to the Premises in order to evaluate potential environmental contamination and legally required environmental abatement prior to or as part of demolition, and then conduct any necessary environmental abatement and demolition;

6. Based upon the reasons set forth above, I have good reason to believe and do believe that probable cause exists to inspect the suspect site as necessary and appropriate to complete the above-referenced investigation and proceed with demolition.

WHEREFORE, for these reasons, I ask for issuance of a warrant that will authorize any health officer, fire marshal or code enforcement officer of the City of Selena County, Texas to conduct inspections of said Premises for the purpose of proceeding with demolition for established violations of health and safety codes or ordinances of the City of Nautilus, Texas.

_____
Code Enforcement Officer, Affiant

SUBSCRIBED AND SWORN TO before me by said Affiant on this the ____ day of _____, 2010 at _____ o'clock ___.M.

_____
Notary Public in and for the State of Texas

FORM C1: ADMINISTRATIVE SEARCH WARRANT (PRE-HEARING)

STATE OF TEXAS §
§
COUNTY OF SELENA §

TO: Any health officer, fire marshal, or code enforcement officer of the City of Nautilus, Selena County, Texas:

WHEREAS, _____, Affiant, the building official of the City of Nautilus, Selena County, Texas, and a credible person that has presented a written affidavit to me (which Affidavit was attached to this warrant when it was presented and signed and is by this reference incorporated into this warrant for all purposes);

WHEREAS, I find that the verified facts stated by Affiant in the Affidavit show that there is probable cause that there are existing fire or health hazards, unsafe building conditions, or a violation of a fire, health, or building regulation, state, statute or Sections 14-235 and 14-325 of the Nautilus City code at the premises described and located as follows:

_____, herein referred to as "Premises";

WHEREAS, there is probable cause that evidence at Premises is essential to allow determination whether the Premises is in violation of a fire, health, or building regulation, statue or Section 14-324 and 14-325 of the Nautilus City code, which has been adopted by the City of Nautilus pursuant to City Ordinance No. 01-555;

WHEREAS, the Affidavit presents the necessary evidence establishing the existence of proper grounds for the issuance of this Administrative Search Warrant pursuant to the Texas Code of Criminal Procedure, Article 18.05 and the Nautilus City Code.

NOW, THEREFORE, I do hereby order that any health officer, fire marshal, or code enforcement officer of the City of Nautilus, Texas, execute this Warrant and enter the Premises to there inspect and determine if evidence exists that said Premises are substandard or dangerous in violation of the City Code; that a video and/or photo record of the evidence shall be permitted. Herein fail not, but have execution with your return thereon, showing how you have executed the same.

ISSUED AT _____ o'clock _____. M., on this the _____th day of _____, 20__, to certify which witness my hand this day.

_____
COURT MAGISTRATE

RETURN

THE STATE OF TEXAS §
§
COUNTY OF SELENA §

The undersigned Affidavit, being a Code Enforcement Officer of the City of Nautilus, Texas, and being duly sworn, on oath, certifies that the foregoing Warrant came on hand on the day it was issued and that it was executed on the _____ day of _____, 2010, by making the inspection directed therein.

_____
Affiant

SUBSCRIBED AND SWORN TO before me, authority, by said Affiant on this the _____day of _____, 2010.

_____
Notary Public in and for the State of Texas

Notary's Printed Name: _____

My Commission Expires:

_____

FORM C2: ADMINISTRATIVE SEARCH WARRANT (POST-HEARING)

STATE OF TEXAS §
§
COUNTY OF SELENA §

TO: Any health officer, fire marshal, or code enforcement officer of the City of Nautilus, Selena County, Texas:

WHEREAS, _____, Affiant, the building official of the City of Nautilus, Selena County, Texas, and a credible person that has presented a written affidavit to me (which Affidavit was attached to this warrant when it was presented and signed and is by this reference incorporated into this warrant for all purposes); and

WHEREAS, I find that the verified facts stated by Affiant in the Affidavit show that there is probable cause to believe that there are existing fire or health hazards, unsafe building conditions, or a violation of a fire, health, or building regulation, state, statute or Sections 14-235 and 14-325 of the Nautilus City code at the premises described and located as follows:

_____, herein referred to as "Premises";

WHEREAS, I find that proper notices were sent to the owners of the Premises of a public hearing held as required by law and that such a hearing was held, that notice of an order was given to the owners to repair or demolish the building(s) on the Premises within ____ days; that such time has elapsed and the ordered action was not taken within the allotted time; and

WHEREAS, the Affidavit presents the necessary evidence establishing the existence of proper grounds for the issuance of this Administrative Search Warrant pursuant to the Texas Code of Criminal Procedure, Article 18.05 and the Nautilus City Code and I find that the inspection for compliance with Order No. _____ is reasonable and in the best interest of the public health, safety and welfare.

NOW, THEREFORE, I do hereby order that any health officer, fire marshal, or code enforcement officer of the City of Nautilus, Texas, execute this Warrant and enter the Premises to abate the City Code violation by demolishing the building(s); that a video and/or photo record of the items to be abated shall be permitted and shall be sufficient to constitute and inventory of the items abated; and the City is authorized to dispose of any personal property which shall be deemed abandoned violations and to conduct a survey on the presence of asbestos materials at the Premises and to execute all lawful orders affecting the Premises.

ISSUED AT _____ o'clock _____. M., on this the _____th day of _____, 20__, to certify which witness my hand this day.

_____
COURT MAGISTRATE

RETURN

THE STATE OF TEXAS §
§
COUNTY OF SELENA §

The undersigned Affidavit, being a Code Enforcement Officer of the City of Nautilus, Texas, and being duly sworn, on oath, certifies that the foregoing Warrant came on hand on the day it was issued and that it was executed on the _____ day of _____, 2010, by making the inspection directed therein.

_____
Affiant

SUBSCRIBED AND SWORN TO before me, authority, by said Affiant on this the _____day of _____, 2010.

_____
Notary Public in and for the State of Texas

Notary's Printed Name: _____

My Commission Expires:

_____

FORM C3: ADMINISTRATIVE SEARCH WARRANT (PRE-DEMOLITION)

STATE OF TEXAS §
§
COUNTY OF SELENA §

TO: Any health officer, fire marshal, or code enforcement officer of the City of Nautilus, Selena County, Texas:

WHEREAS, _____, Affiant, the building official of the City of Nautilus, Selena County, Texas, and a credible person that has presented a written affidavit to me (which Affidavit was attached to this warrant when it was presented and signed and is by this reference incorporated into this warrant for all purposes);

WHEREAS, I find that the verified facts stated by Affiant in the Affidavit show that there is probable cause to believe that there are existing fire or health hazards, unsafe building conditions, or a violation of a fire, health, or building regulation, state, statute or Sections 14-235 and 14-325 of the Nautilus City code at the premises described and located as follows:

_____, herein referred to as "Premises";

WHEREAS, I find that proper notices were sent to the owners the property of a public hearing held as required by law and that such a hearing was held, that notice of an order was given to the owners to repair or demolish the building(s) on the Premises within ____ days; that such time has elapsed and the ordered action was not taken within the allotted time;

WHEREAS, the Affidavit presents the necessary evidence establishing the existence of proper grounds for the issuance of this Administrative Search Warrant pursuant to the Texas Code of Criminal Procedure, Article 18.05 and the Nautilus City Code and I find that the inspection for further City Code violations and to evaluate potential environmental contamination, including the presence of asbestos and other hazardous materials, is reasonable and in the best interest of the public health, safety and welfare.

NOW, THEREFORE, I do hereby order that any health officer, fire marshal, code enforcement officer of the City of Nautilus, Texas, execute this Warrant and enter the Premises to abate the City Code violation by demolishing the building(s); that a video and/or photo record of the items to be abated shall be permitted and shall be sufficient to constitute and inventory of the items abated; and the City is authorized to dispose of any personal property which shall be deemed abandoned violations and to conduct a survey on the presence of asbestos materials at the Premises and to execute all lawful orders affecting the Premises.

ISSUED AT _____ o'clock _____. M., on this the _____th day of _____, 20__, to certify which witness my hand this day.

_____
COURT MAGISTRATE

RETURN

THE STATE OF TEXAS §
§
COUNTY OF SELENA §

The undersigned Affidavit, being a Code Enforcement Officer of the City of Nautilus, Texas, and being duly sworn, on oath, certifies that the foregoing Warrant came on hand on the day it was issued and that it was executed on the _____ day of _____, 2010, by making the inspection directed therein.

_____
Affiant

SUBSCRIBED AND SWORN TO before me, authority, by said Affiant on this the _____day of _____, 2010.

_____
Notary Public in and for the State of Texas

Notary's Printed Name: _____

My Commission Expires:

_____

FORM D: BUILDING INSPECTION REPORT

City of Nautilus
2609 Ayers Street
Nautilus, Texas 78555
Telephone (Main): ___-___-____
Fax: ___-___-____

Date: _____

Property Address _____

Abst _____ Tract _____ Out of _____ Survey

Lot _____ Block _____

Sub-Division: _____

Property Owner: _____

Property Occupant: _____

Inspector: _____ Case No.: _____

Substandard Buildings Declared and Minimum Building Standards Contained in Section 14-354 of Article IX of Chapter 14 of the City Code.

The above-referenced building, regardless of the date of its construction, is deemed and hereby is declared to be substandard and a nuisance because it has the conditions or defects hereinafter described:

_____ (1) Is dilapidated, deteriorated, decayed or damaged to the extent that it is unfit for human habitation and a hazard to the public health, safety and welfare in the opinion of the building official.

_____ (2) Regardless of its structural condition, is unoccupied by its owners, lessees or other invitees and is unsecured from unauthorized entry to the extent that it could be entered or used by vagrants or other uninvited persons as a place of harborage or could be entered or used by children.

_____ (3) Is boarded up, fenced or otherwise secured in any manner if:

____ (a) The building constitutes a danger to the public even though secured from entry; or

____ (b) The means used to secure the building are inadequate to prevent unauthorized entry or use of the building in the manner described by Subsection 14-354(a)(2) of Article IX of Chapter 14 of the City Code.

_____ (4) Because of obsolescence, dilapidated condition, deterioration, damage, inadequate exits, lack of sufficient fire-resistive construction, faulty electric wiring, gas connections or heating apparatus, or other cause, is determined by the fire marshal to be a fire hazard.

_____ (5) Is in such a condition as to make a public nuisance known to the common law or in equity jurisprudence.

_____ (6) Any portion of the building remains on a site after the demolition or destruction of the building.

_____ (7) Is abandoned so as to constitute such building or portion thereof an attractive nuisance or hazard to the public.

_____ (8) A building, used or intended to be used for dwelling purposes, because of inadequate maintenance, dilapidation, decay, damage, faulty construction or arrangement, inadequate light, air or sanitation facilities, or otherwise, is determined by the building official to be unsanitary, unfit for human habitation or in such a condition that is likely to cause sickness or disease for reasons including, but not limited to, the following:

_____ (a) Lack of, or improper water closet, lavatory, bathtub or shower in a dwelling unit or lodging house.

_____ (b) Lack of, or improper water closets, lavatories and bathtubs or showers per number of guests in a hotel.

_____ (c) Lack of, or improper kitchen sink in a dwelling unit.

_____ (d) Lack of hot and cold running water to plumbing fixtures in a hotel.

_____ (e) Lack of hot and cold running water to plumbing fixtures in a dwelling unit or lodging house.

_____ (f) Lack of adequate heating facilities.

_____ (g) Lack of, or improper operation of, required ventilating equipment.

_____ (h) Lack of minimum amounts of natural light and ventilation required by this Article or the Building Code, Dangerous Building Code, Electric Code, Fire Code, Housing Code, Mechanical Code,

Plumbing Code, or other ordinance or regulation of the City of Nautilus.

_____ (i) Room and space dimensions less than required by this Article or the Building Code, Dangerous Building Code, Electric Code, Fire Code, Housing Code, Mechanical Code, Plumbing Code, or other ordinance or regulation of the City of Nautilus.

_____ (j) Lack of required electrical lighting.

_____ (k) Dampness of habitable rooms.

_____ (l) Infestation of insects, vermin or rodents.

_____ (m) General dilapidation or improper maintenance.

_____ (n) Lack of connection to required sewage disposal system.

_____ (o) Lack of adequate garbage and rubbish storage and removal facilities.

_____ (9) Contains structural hazards, including but not limited to the following:

_____ (a) Deteriorated or inadequate foundations.

_____ (b) Defective or deteriorated flooring or floor supports.

_____ (c) Flooring or floor supports of insufficient size to carry imposed loads with safety.

_____ (d) Members of walls, partitions or other vertical supports that split, lean, list or buckle due to defective material or deterioration.

_____ (e) Members of walls, partitions or other vertical supports that are of insufficient size to carry imposed loads with safety.

_____ (f) Members of ceilings, roofs, ceiling and roof supports, or other horizontal members that sag, split or buckle due to defective material or deterioration.

_____ (g) Members of ceilings, roofs, ceiling and roof supports, or other horizontal members that are of insufficient size to carry imposed loads with safety.

_____ (h) Fireplaces or chimneys that list, bulge or settle due to defective material or deterioration.

_____ (i) Fireplaces or chimneys that are of insufficient size or strength to carry imposed loads with safety.

_____ (10) Is defined as substandard by any provision of the Building Code, Dangerous Building Code, Electric Code, Fire Code, Plumbing Code, Mechanical Code, Housing Code or other ordinance or regulation of the City of Nautilus, or constructed and still existing in violation of any provision of any of said Codes of the City of Nautilus to the extent that the life, health or safety of the public or any occupant is endangered.

The above-referenced building, for the purposes of Article IX of Chapter 14 of the City Code of the City of Nautilus shall be deemed and hereby is declared to be a dangerous and substandard building, and a nuisance, because, regardless of the date of its construction, it has been found to have the conditions or defects hereinafter described to an extent that endangers the life, limb, health, property, safety or welfare of the public or the occupants thereof:

_____ (1) One or more doors, aisles, passageways, stairways or other means of exit are not of sufficient width or size or is not so arranged as to provide safe and adequate means of exit in case of fire or panic.

_____ (2) The walking surface of one or more aisles, passageways, stairways or other means of exit are so warped, worn, loose, torn or otherwise unsafe as to not provide safe and adequate means of exit in case of fire or panic.

_____ (3) The stress in materials, or members or portion thereof, due to all dead and live loads, is more than one and one half times the working stress or stresses allowed in the Building Code for new buildings of similar structure, purpose or location.

_____ (4) A portion thereof has been damaged by fire, earthquake, wind flood or by any other cause, to such an extent that the structural strength or stability thereof is materially less than it was before such catastrophe and is less than the minimum requirements of the Building Code for new buildings of similar structure, purpose or location.

_____ (5) A portion or member or appurtenance thereof is likely to fail, or to become detached or dislodged, or to collapse and thereby injure persons or damage property.

_____ (6) A portion of a building, or any member, appurtenance or ornamentation on the exterior thereof is not of sufficient strength or stability, or is not so anchored, attached or fastened in place so as to be capable of resisting a wind pressure of one half of that specified in the Building Code for new buildings of similar structure, purpose or location without exceeding the working stresses permitted in the Building Code for such buildings.

_____ (7) A portion thereof has wracked, warped, buckled or settled to such an extent that walls or other structural portions have materially less resistance to winds or earthquakes than is required in the case of similar new construction.

_____ (8) The building, or a portion thereof, because of (a) dilapidation, deterioration or decay; (b) faulty construction; (c) the removal, movement or instability of any portion of the ground necessary for the purpose of supporting such building; (d) the deterioration, decay or inadequacy of its foundation; or (e) any other cause, is likely to partially or completely collapse.

_____ (9) The building, or any portion thereof, is manifestly unsafe for the purpose for which it is being used.

_____ (10) The exterior walls or other vertical structural members list, lean or buckle to such an extent that a plumb line passing through the center of gravity does not fall inside the middle one third of the base.

_____ (11) The building, exclusive of the foundation, shows 33 percent or more damage or deterioration of its supporting member or members, or 50 or more percent damage or deterioration of its non-supporting members, enclosing or outside walls or coverings.

_____ (12) The building has been so damaged by fire, wind, earthquake, flood or other causes, or has become so dilapidated or deteriorated as to become (a) an attractive nuisance to children; or, (b) a harbor for vagrants, criminals or immoral persons.

_____ (13) The building has been constructed, exists or is maintained in violation of any specific requirement or prohibition applicable to such building provided by the building regulations of this jurisdiction, as specified in the Building Code, Dangerous Building Code, Electric Code, Fire Code, Housing Code, Mechanical Code, Plumbing Code, or of any law or ordinance of this state or jurisdiction relating to the condition, location or structure of buildings.

_____ (14) The building which, whether or not erected in accordance with all applicable laws and ordinances, has in any non-supporting part, member or portion less than 50 percent, or in any supporting part, member or portion less than 66 percent of the (a) strength, (b) fire-resisting qualities or characteristics, or (c) weather-resisting qualities or characteristics required by law in the case of a newly constructed building of like area, height and occupancy in the same location.

_____ (15) The building, used or intended to be used for dwelling purposes, because of inadequate maintenance, dilapidation, decay, damage, faulty construction or arrangement, inadequate light, air or sanitation facilities, or otherwise, is determined by the building official to be unsanitary, unfit for human habitation or in such a condition that is likely to cause sickness or disease.

_____ (16) The building or structure, because of obsolescence, dilapidation, deterioration, damage or decay, inadequate exits, lack of sufficient fire-resistive construction, faulty electric wiring, gas connections or heating apparatus, or other cause, is determined by the fire marshal to be a fire hazard.

_____ (17) The building or structure is in such a condition as to constitute a public nuisance known to the common law or in equity jurisprudence.

_____ (18) A portion of the building or structure remains on a site after the demolition or destruction of the building or structure or whenever any building or structure is abandoned for a period in excess of six months so as to constitute such building or structure or a portion thereof an attractive nuisance or hazard to the public.

_____ (19) The building is defined as substandard and dangerous to the life, safety, health or safety of the public or any occupant thereof by any provision of the Building Code, Dangerous Building Code, Fire Code, Plumbing Code, Mechanical Code, Electric Code, Housing Code or other ordinance or regulation of the City of Nautilus, or is defined as a dangerous building by any provision of said Codes of the City of Nautilus, or is constructed and still existing in violation of any provision of any of said Codes of the City of Nautilus to the extent that the life, health or safety of the public or any occupant is endangered.

FORM E: NOTICE OF PUBLIC HEARING

NOTICE OF PUBLIC HEARING TO BE HELD BEFORE THE SUBSTANDARD BUILDINGS BOARD ON _____, 2010 AT _____ P.M. IN THE COUNCIL CHAMBERS LOCATED AT THE CITY HALL, 2609 AYERS STREET, NAUTILUS, SELENA, TEXAS 78555.

NAME AND ADDRESS OF RECORD OWNER:

_____

_____

NAME AND ADDRESS OF ALL LIENHOLDERS, MORTGAGEES OR OTHER PERSONS WITH INTEREST:

_____

_____

_____

ACCORDING TO THE RECORDS OF SELENA COUNTY APPRAISAL DISTRICT, YOU ARE THE OWNER, LIENHOLDER OR MORTGAGEE OF PROPERTY DESCRIBED AS:

_____

_____

_____

_____

_____

According to the real property records of Selena County, you own the real property described in this notice. If you no longer own the property, you must execute an affidavit stating that you no longer own the property and stating the name and last known address of the person who acquired the property from you. The affidavit must be delivered in person or by certified mail, return receipt requested, to this office not later than the 20th day after the date you receive this notice. If you do not send the affidavit, it will be presumed that you own the property described in this notice, even if you do not.

Please be advised that on _____ the Building Official of the City of Nautilus has found and determined that a building located on the above described property is substandard and proceedings shall commence to cause the repair, vacation, relocation of occupants, removal, demolition or securing of the building. Attached please find a copy of the Substandard Building Inspection Report dated _____, describing the conditions found to render the building substandard or dangerous pursuant to the minimum standards for continued use and occupancy set forth in Article IX of Chapter 14 of the Nautilus City Code.

A Public Hearing will be held on the date noted above before the Substandard Buildings Board to determine whether the building/structure located at the above described property complies

with the standards set out in Article IX, Chapter 14 of the Nautilus City Code.

According to law, the owner, lienholder, or mortgagee will be required to submit at the hearing proof of the scope of any work that may be required to comply with the Code, and the time it will take to reasonably perform the work.

If the building is found to be in violation of the standards set forth in Article IX, Chapter 14, of the City Code of Nautilus, the Substandard Buildings Board may order that the building be repaired, vacated, removed or demolished, secured, or the occupants relocated, by the owner, mortgagee or lienholder within thirty days (30 days).

If the Order given to the owner, mortgagee, or lienholder is not complied within the allowed time, the City may vacate, secure, remove or demolish the building or relocate the occupants of the building without further notice. The expenses incurred by the City shall be a personal obligation of the property owner in addition to a priority lien being placed upon the property to secure payment.

If you should have any questions regarding this notice, or you are not the owner, mortgagee, or lienholder please call the office of the Building Official or the Code Enforcement Officer at (____) ____-_____ or write to the Building Official at 2609 Ayers Street, Nautilus, Texas 78555.

Attachment:

Substandard Buildings Inspection Report Case No.: _____

Dated: _____

FORM F: INVENTORY OF NEEDED REPAIRS

City of Nautilus
2609 Ayers Street
Nautilus, Texas 78555
(___) ___-____ Fax (___) ___-____

Property Owner _____
Property Occupant _____
Property Address _____
Abst _____ Tract _____ Survey _____
L- _____ B- _____ Sub-Division _____

❑ **CONSTRUCTION:**

Contractor's Name: _____
Address: _____
Phone No.: _____
Work to be done: _____
_____
_____
_____
_____
_____
Time Required: _____

❑ **PLUMBING:**

Contractor's Name: _____
Address: _____
Phone No.: _____
Work to be done: _____
_____
_____
_____
_____
_____
Time Required: _____

❑ **ELECTRICAL:**

Contractor's Name: _____
Address: _____
Phone No.: _____
Work to be done: _____
_____
_____
_____
_____

_____

Time Required: _____

❑ **HEALTH STANDARDS: [ELIMINATE RODENTS, VERMIN, GARBAGE, ETC.]**

Contractor's Name: _____
Address: _____
Phone No.: _____
Work to be done: _____

_____
_____
_____
_____
_____

Time Required: _____

FORM G: SUGGESTED PUBLIC HEARING FORMAT FOR SUBSTANDARD BUILDINGS BOARD

I want to review our format for public hearings on substandard buildings for the benefit of those in the audience.

Each case will be called in the order as shown on the agenda. At the time a case is called, the public hearing will be opened, and a representative from the city staff will make a presentation to the Board concerning the property in question. They will explain the nature of the violation(s) and provide background information on the case being heard.

At the end of the staff presentation, the property owner or representative will be given an opportunity to make a presentation. Following the owner's presentation, those members of the audience who wish to speak may make presentations to the Board. Those persons making presentations must limit their comments to the facts that affect the matter being heard and not to speculate on unrelated matters.

At the conclusion of the speakers, the owner will be given the opportunity for a brief rebuttal since the property owner has the burden to demonstrate the scope of any work that may be required to bring the structure up to standards and the length of time it will take to reasonably perform the work. The Board will then close its public hearing to discuss and consider the facts presented and vote on the matter.

* * * * * *

Example:

I now open the public hearing on property located at _____. The staff may proceed with its presentation.

* * * * * *

The staff presentation having been completed, I now call the property owner (or representative) to make comments and present whatever evidence that the property owner desires.

* * * * * *

Is there anyone in the audience that wishes to speak on behalf of the property owner's position?

* * * * * *

Is there anyone in the audience who wishes to speak against the property owner's position?

* * * * * *

Comments have now been heard from all wishing to speak. I now call the property owner (or representation) for any rebuttal.

* * * * * *

The property owner's rebuttal having been completed, I now close the public hearing on the property located at _____. Is there any discussion by council members on this item?

* * * * * *

Board votes.

FORM H: MOTION TO REPAIR OR DEMOLISH

I. IF THE PROPERTY OWNER IS TO BE GIVEN AN OPPORTUNITY TO REPAIR:

Based on evidence presented at the hearing, I move that the Substandard Buildings Board find that the following facts exist:

1. That the building located at _____, is substandard and a public nuisance; and:

2. That the conditions set forth in the building official's report exist to the extent that the life, health, property or safety of the public are endangered; and

3. That the owner has presented a plan of repair and schedule of work to be completed; and

4. That ____ days is a reasonable period of time to complete the needed repairs taking into account the owner's interests and the interests of public safety; and

5. That if the building is not repaired within said time period, that there is no reasonable probability that the building will be repaired within a reasonable period of time if additional time is given.

Add, if applicable:

6. That the building is unfit for human habitation, and the life, health, property, and safety of the occupants are endangered, and that the building should be secured until the work can be completed;

Continue:

I further move that the Substandard Buildings Board order:

1. That the building be repaired in conformance with the requirements of Article IX of Chapter 14 of the City Code or demolished and the debris removed within _____ days; and

2. If the building is not repaired or the building is not demolished and the debris removed within said time period to full conformance with Article IX of Chapter 14 of the City Code, the City shall demolish the building at its expense and place a lien on the property to recover its costs; and

Add, if applicable:

3. The building be immediately secured to prevent unauthorized entry until such repairs or demolition is completed.

II. IF BUILDING IS TO BE ORDERED DEMOLISHED WITHOUT OPPORTUNITY TO REPAIR BECAUSE REPAIRS ARE INFEASIBLE:

Based on evidence presented at the hearing, I move that the Substandard Buildings Board find that the following facts exist:

1. That the building located at _____ is substandard and a public nuisance; and

2. That the conditions set forth in the building official's report exist to the extent that the life, health, property, or safety of the public (and, if applicable, that occupants of the building(s) are endangered); and

3. That the building is infeasible of repair;

Add, if applicable:

4. That the building is unfit for human habitation, and the life, health, property, and safety of the occupants are endangered, and that the building should be secured until the work is completed;

Continue:

I further move that the Substandard Buildings Board order:

1. The owner to demolish or remove the building and all debris within 30 days; and

2. If the owner fails to demolish or remove the building within 30 days, the City shall demolish the building at its expense and place a lien on the property to recover its costs.

Add, if applicable:

3. The building be immediately secured to prevent unauthorized entry until such repairs or demolition is completed.

III. IF THE BUILDING IS ORDERED TO BE DEMOLISHED BECAUSE THERE IS NO PROBABILITY THE BUILDINGS WILL BE REPAIRED WITHIN A REASONABLE PERIOD OF TIME.

Based on evidence presented at the hearing, I move that the Substandard Buildings Board find that the following facts exist:

1. That the building located at _____ is substandard and a public nuisance; and

2. That the conditions set forth in the building official's report exist to the extent that the

life, health, property, or safety of the public (and, if applicable, that occupants of the building(s) are endangered); and

3. That the owner has been given a reasonable opportunity in the past to make the necessary repairs, and there is no reasonable probability that the building(s) will be repaired within a reasonable period of time if additional time is given;

Add, if applicable:

4. That the building is unfit for human habitation, and the life, health, property, and safety of the occupants are endangered, and that the building should be secured until the work is completed;

Continue:

I further move that the Substandard Buildings Board order:

1. The owner to demolish or remove the building and all debris within 30 days; and

2. If the owner fails to demolish or remove the building within 30 days, the City shall demolish the building at its expense and place a lien on the property to recover its costs.

Add, if applicable:

3. The building is to be immediately secured to prevent unauthorized entry until such repairs or demolition is completed.

FORM I1:
ORDER OF THE SUBSTANDARD BUILDINGS BOARD
ORDERING REPAIR OF SUBSTANDARD BUILDING

TO: _____, Owner

DATE: _____

WHEREAS, a public hearing was held on _____ before the Substandard Buildings Board of the City of Nautilus ("Board") regarding building(s) on the property located at _____ in Nautilus, Texas; and

WHEREAS, the records of the office of the county clerk indicate that _____ is the record owner of the property; and

WHEREAS, notice of the public hearing was mailed to the property owner, to mortgagees, and to lien holders of record, if any, at least ten (10) days prior to the date of the hearing; and

WHEREAS, the Board finds that the defects or conditions set forth on the Substandard Building Inspection Report, attached hereto as Exhibit "A" and incorporated herein for all purposes, are present in the building(s); and

WHEREAS, the Board finds from evidence presented at the public hearing that the building(s) is/are substandard and in violation of the minimum standards set forth in Section 14-354 of Article IX, Chapter 14 of the Nautilus City Code and that the defects or conditions exist to the extent that the life, health, property and safety of the public are endangered; and

WHEREAS, the Board further finds that the building(s) is/are feasible of repair, that the owner has presented a plan of repair and schedule of work to be completed attached hereto as Exhibit "B" and incorporated herein for all purposes; and further finds that there is a probability that the building(s) will be repaired within a reasonable period of time; and further finds that ____ days is a reasonable period of time to complete the needed repairs taking into account the owner's interests and the interests of public safety; and

WHEREAS, the Board further finds that if the building is not repaired within said time period, that there is no reasonable probability that the building will be repaired within a reasonable period of time if additional time is given.

NOW, THEREFORE, THE SUBSTANDARD BUILDINGS BOARD HEREBY ORDERS THAT:

(1) _____, "owner" of the property located at _____ in Nautilus, Texas 78555, Lot _____, Block _____, _____ Addition, is given _____ days to repair the building(s) on the property to a standard in compliance with Article IX of Chapter 14 of the Nautilus City Code. In the alternative the owner may demolish or remove the building(s).

(2) The work to repair, demolish, or remove the building(s) must be completed within _____ days from the owner's receipt of this order.

(3) If the work to repair, demolish, or remove the building(s) is not completed within the period of time referenced in the preceding paragraph, the City of Nautilus will demolish the building(s) without further notice and charge all expenses incurred by the city to the owner. If the owner does not reimburse the city for its expenses, the city will place a lien upon the property for the amount owed. The costs, together with interest accruing at 10% per annum will be assessed as a charge against the land and will be a personal obligation of the owner.

PASSED AND APPROVED THIS _____ DAY OF _____, 2010.

_____
Board Chair

Attest:

_____
City Secretary

FORM I2:
ORDER OF SUBSTANDARD BUILDINGS BOARD
ORDERING DEMOLITION OF SUBSTANDARD BUILDING
DUE TO INFEASIBILITY OF REPAIR

TO: _____, Owner

DATE: _____

WHEREAS, a public hearing was held on _____ before the Substandard Buildings Board ("Board") of the City of Nautilus regarding building(s) on the property located at _____ in Nautilus, Texas; and

WHEREAS, the records of the office of the county clerk indicate that _____ is the record owner of the property; and

WHEREAS, notice of the public hearing was mailed to the property owner, to mortgagees, and to lien holders of record, if any, at least ten (10) days prior to the date of the hearing; and

WHEREAS, the Board finds that the defects or conditions set forth in the Substandard Building Inspection Report, attached hereto as Exhibit "A" and incorporated herein for all purposes, are present in the building(s); and

WHEREAS, the Board finds from evidence presented at the public hearing that the building(s) is/are substandard and in violation of the minimum standards set forth in Section 14-354 of Article IX, Chapter 14 of the Nautilus City Code, and that the defects or conditions exist to the extent that the life, health, property or safety of the public are endangered; and

WHEREAS, the Board further finds that the building(s) is/are infeasible of repair and there is no probability the building(s) can be repaired within a reasonable period of time.

NOW, THEREFORE, THE SUBSTANDARD BUILDINGS BOARD HEREBY ORDERS THAT:

(1) _____, "owner" of the property located at _____ in Nautilus, Texas, _____, Lot _____, Block _____, _____ Addition, is ordered to demolish and remove the building(s) and all debris located on the property in compliance with Article IX, Chapter 14 of the Nautilus City Code.

(2) The work to demolish and remove the building(s) and all debris must be completed within 30 days from the owner's receipt of this order.

(3) If the work to demolish and remove the building(s) and all debris is not completed within the 30 day period, the City of Nautilus will demolish the building(s) and remove the building(s) and all debris and charge all expenses incurred by the City to the owner. In such event, if the owner does not reimburse the City for its expenses, the City will place a lien upon the property for the amount owed. The costs, together with interest accruing at 10% per annum will be assessed as a charge against the land and will be a personal obligation of the owner.

PASSED AND APPROVED THIS _____ DAY OF _____, 2010.

_____
Board Chair

Attest:

_____
City Secretary

FORM I3:
ORDER OF THE SUBSTANDARD BUILDINGS BOARD
ORDERING DEMOLITION OF SUBSTANDARD BUILDING
DUE TO NO REASONABLE PROBABILITY OF REPAIR

TO: _____, Owner

DATE: _____

WHEREAS, a public hearing was held on _____ before the Substandard Buildings Board of the City of Nautilus ("Board") regarding building(s) on the property located at _____ in Nautilus, Texas; and

WHEREAS, the records of the office of the county clerk indicate that _____ is the record owner of the property; and

WHEREAS, notice of the public hearing was mailed to the property owner, to mortgagees, and to lien holders of record, if any, at least ten (10) days prior to the date of the hearing; and

WHEREAS, the Board finds that the defects or conditions set forth on the Substandard Building Inspection Report, attached hereto as Exhibit "A" and incorporated herein for all purposes, are present in the building(s); and

WHEREAS, the Board finds from evidence presented at the public hearing that the building(s) is/are substandard and in violation of the minimum standards set forth in Section 14-354 of Article IX, Chapter 14 of the Nautilus City Code, and that the defects or conditions exist to the extent that the life, health, property or safety of the public are endangered; and

WHEREAS, the Board further finds that the owner has been given a reasonable opportunity in the past to make the necessary repairs, and there is no reasonable probability that the building(s) will be repaired within a reasonable period of time if additional time is given.

NOW, THEREFORE, THE SUBSTANDARD BUILDINGS BOARD HEREBY ORDERS THAT:

(1) _____, "owner" of the property located at _____ in Nautilus, Texas, 78555, Lot _____, Block _____, _____ Addition, is ordered to demolish and remove the building(s) and all debris located on the property in compliance with Article IX, Chapter 14 of the Nautilus City Code.

(2) The work to demolish and remove the building(s) and all debris must be completed within 30 days from the owner's receipt of this order.

(3) If the work to demolish and remove the building(s) and all debris is not completed within the 30 day period, the City of Nautilus will demolish the building(s) and remove the building(s) and all debris and charge all expenses incurred by the City to the owner. In such event, if the owner does not reimburse the City for its expenses, the City will place a lien upon the property for the amount owed. The costs, together with interest accruing at 10% per annum will be assessed as a charge against the land and will be a personal obligation of the owner.

PASSED AND APPROVED THIS _____ DAY OF _____, 2010.

_____
Board Chair

Attest:

_____
City Secretary

FORM J: NOTICE OF SUBSTANDARD BUILDING BOARD ORDER

On _____ at _____ p.m. a public hearing was held before the Nautilus Substandard Buildings Board, where the following Orders were issued:

The Substandard Buildings Board has determined that the building on the property located at _____, Nautilus, Texas _____, the legal description of which is Lot _____, Block _____, _____ Addition, and which is owned by _____, is substandard, and is to be demolished, repaired, vacated or secured, as specified in said order, within ____ days.

If the work is not commenced or completed within the time specified, the City may perform the required work at its own expense and the cost shall be charged against the land and become a personal obligation of the owner.

A complete copy of each Order may be obtained by contacting the City Secretary's Office of the City of Nautilus, _____, Nautilus, Texas 78555.

Questions may be directed to _____, the Building Official of the City of Nautilus, phone (___) ___-_____.

FORM K: ORDER TO VACATE BUILDING
CITY OF NAUTILUS, TEXAS

STATE OF TEXAS §
§
COUNTY OF SELENA §

WHEREAS, the Substandard Buildings Board of the City of Nautilus, Texas ("Board"), held a public hearing on _____, 2010, to consider the condition of a building located on property at _____, Nautilus, Selena County, Texas; and

WHEREAS, upon evidence presented at the public hearing, the Board found that said building is substandard and a public nuisance; and

WHEREAS, the substandard conditions exist to the extent that said building is unfit for human habitation, and the life, health, property, and safety of the occupants are endangered;

NOW, THEREFORE, THE SUBSTANDARD BUILDINGS BOARD OF THE CITY OF NAUTILUS, TEXAS, ORDERS THAT:

(1) All persons occupying said building shall vacate said building within 10 days from the date of receiving delivery of notice of this Order;

(2) The building official shall post at each entrance to said building a notice to vacate as required by Article IX of Chapter 14 of the Nautilus City Code and Local Government Code Section 214.0011(c); and

(3) No person shall again occupy said building until the unsafe and/or unsanitary conditions have been eliminated and the structure has been brought into compliance with Article IX of Chapter 14 of the Nautilus City Code.

PASSED AND APPROVED THIS _____ DAY OF _____, 2010.

_____
Mayor

Attest:

_____
City Secretary

FORM L: NOTICE TO VACATE

NOTICE TO VACATE THIS BUILDING

Substandard Building

Do Not Enter

Unsafe to Occupy

It is a misdemeanor to occupy this building or to remove or deface this notice.

Pursuant to Local Government Code §§214.001 (d)-(e) and 214.0011(c)-(d), the City Substandard Buildings Board has declared this building located at _____ to be substandard. To obtain a copy of this order, contact the City Clerk at _____.

_____

City Official
City of Nautilus

FORM M: LETTER INFORMING PROPERTY OWNER OF RESPONSIBILITY FOR PERSONAL PROPERTY

[Date]

[Via Certified Mail, Return Receipt Requested
 # _____ and Fax Transmission]
[Address of Building Owner's Attorney]

[Via Certified Mail, Return Receipt Requested
 # _____]
[Address of Building Owner]

Re: [Legal Description]
[Common Description] Nautilus, Texas 78555

Dear Mr. and Mrs. _____,

On June 25, 2010 and again on July 9, 2010 the City of Nautilus Substandard Buildings Board found your property at _____ [Common Description] to be substandard. Furthermore, the U.S. Bankruptcy Court of the Texas Northern District has issued an order clarifying that the City of Nautilus ("City") enforcement actions regarding the above referenced property fall within an exception to the automatic bankruptcy stay. A copy of the signed order is enclosed. As a result, the City is now free to abate the conditions that exist on this property.

The property has not been demolished as of this date. This letter serves as notice, in addition to the notice previously given, that the City intends to move forward with the demolition of the structures located on the property and cleanup of the lot. **The City will be demolishing the structures and cleaning up the property on _____ [Date], as ordered by the Substandard Buildings Board.**

This letter also serves as notice that the City and its employees are not responsible for removing or storing any personal property from the structures on the property prior to demolition and cleanup. **You are hereby put on notice that it is the property owner's responsibility to remove any items of personal property from the structures on the property before October 10, 2010.** Please have your clients take this time to remove all personal property from the structures and/or property before this date. Any failure to remove personal items will be deemed a waiver of any right, title, or interest in these items of personal property.

Once the City has had the property demolished, a statement of expense will be sent to you for payment. A lien will be placed on the property should this statement remain unpaid after thirty (30) days.

A copy of this letter will also be posted at the property. Should you have any questions or concerns, please feel free to contact _____, Code Compliance Officer of the City of Nautilus, at _____.

Sincerely yours,

City Attorney

Enclosure
cc: Senior Building Inspector
Code Compliance Officer

FORM N: MOTION TO DETERMINE APPLICATION OF AUTOMATIC STAY

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
NAUTILUS DIVISION

In Re:	§	
	§	
JOHN DOE,	§	
DEBTOR and	§	
JANE DOE,	§	
JOINT DEBTOR.	§	
	§	**Case No. _____**
	§	
CITY OF NAUTILUS, TEXAS,	§	**(Chapter 13)**
MOVANT,	§	
	§	
v.	§	
	§	
JOHN DOE,	§	
DEBTOR and	§	
JANE DOE,	§	
JOINT DEBTOR.	§	

MOTION TO DETERMINE APPLICATION OF EXCEPTIONS TO AUTOMATIC STAY

The City of Nautilus, Texas files this Motion to Determine Application of Exceptions to Automatic Stay and in support would respectfully show the Court the following:

I.

JURISDICTION

1. This Court has jurisdiction of this contested matter pursuant to Title 28 of the United States Code, Sections 157 and 1334 and Title 11 of the United States Code, Section 362. Movant asserts this contested matter is a core matter under Title 28 of the United States Code, Section 157(b)(2). Although this motion is not a motion for relief from, to terminate, modify or annul the automatic stay, it is akin to a motion of that nature because it is seeking a court order regarding the application and extent of the stay. *See* 28 U.S.C. § 157(b)(2)(G). Thus, this motion is a core proceeding.

BACKGROUND

2. John and Jane Doe (jointly referred to as "Debtor") is the debtor in this bankruptcy proceeding and is also the owner of certain real property described as Lot ___ of Block ___, of _____ in the City of Nautilus, Texas, Selena County, Texas. *See* Exhs. B, ¶ 2; C, ¶ 2. The property is also commonly referred to as_____, Nautilus, Texas 76182 (the "Property"). *Id.* There are two (2) buildings located on the Property, the main structure is a one-story, single-family residence and the accessory structure is a small storage shed. *See* Exhs. B, ¶ 2; C, ¶ 2.

3. The Property has been the subject of dozens of informal and formal complaints for numerous City code violations. *See* Exhs. B, ¶ 3; C ¶ 3. The formal complaints include approximately six (6) complaints for high grass and weeds, fourteen (14) complaints concerning the accumulation of junk, trash and debris, and ten (10) complaints concerning inoperative and/or junked vehicles on the Property. *See* Exhs. B, ¶ 3; C ¶ 3.

4. On March 10, 2010, a “drive by” inspection was conducted by a code compliance officer and on March 11, the same code compliance officer sent a minimum standards notice via regular mail to John and Jane Doe. *See* Exh. C, ¶ 5. A second minimum standards notice was sent on March 26, 2010. *See* Exh. B, ¶ 6.

5. On March 24, 2010, the officer and a senior building inspector conducted an inspection of the structures located on the Property and found numerous violations of the minimum building standards set forth in the Nautilus Code of Ordinances. Those violations include, but are not limited to:

(a) various conditions of inadequate weather-proofing, rotten or broken wood, broken windows;

(b) inadequate sanitation and dangerous plumbing, including a lack of water service at the Property;

(c) numerous fire hazards;

(d) general dilapidation and improper maintenance;

(f) a number of structural hazards, including a deteriorated or inadequate foundation, defective or deteriorated floor supports, sagging roofs and roof supports; and

(g) numerous improper and dangerous electrical conditions.

See Exhs. B, ¶ 4; C, ¶ 6.

6. On March 25, 2009, a title search was conducted by to identify the record owners of_____. *See* Exh. B, ¶ 6.

7. On April 18, 2010, a meeting was held with the Debtor to discuss the substandard

condition of the structure and of the Property.

8. On April 24, 2010, a notice and order was sent to the Debtor and other interested parties by certified mail notifying them of the violations and conditions on the Property. The letter requested that the Debtor begin repairs within fifteen (15) days. *See* Exh. B, ¶ 9. Notice was also published in the newspaper and posted at the Property stating the structures had been declared substandard. The fifteen-day period elapsed and although Mr. and Mrs. Doe did commence with repairs and cleanup of the Property, the structures remain substandard and the Property remains a nuisance. *See* Exhs. B, ¶ 18; C, ¶ 16.

9. On May 18, 2010, a Notice of Hearing was mailed to the Debtor by certified mail, return receipt requested. *See* Exhs. B, ¶ 12; C, ¶ 10. Also on May 18, 2010, a Notice of Hearing was posted on the Property stating that a hearing had been set for June 25, 2010 at 2:00 p.m. and would be held at 9015 Grand Avenue before the Nautilus Substandard Building Board regarding the Property.

10. On June 17, 2010, an Administrative Warrant was obtained by a City code compliance officer to allow a City official to execute the warrant and enter the exterior premises of the Property to inspect and photograph substandard conditions.

11. On June 25, 2010, a public hearing was held before the Substandard Building Board (the "Board") of the City regarding the structures located on the Property. Notice was given to the Debtor regarding the hearing. The Board concluded that based on the evidence presented at the public hearing, the structure violates the minimum standards of the City's Code. *See* Nautilus Municipal Code § 98-462. The Board issued an order dated July 9, 2010 that the structure on the Property be demolished within thirty (30) days of the date of the order. *See* Exh. A-8. The deadline for the Debtor to bring the Property into compliance is August 8, 2010. *See* Exhs. A-8, A-9.

12. That same day, the Board ordered that the structures on the Property be demolished within thirty (30) days of the date of its order. *See* Exhs. A-8, A-9. A copy of the Board's order regarding the repair or demolition of the structure on the Property was mailed by certified mail, return receipt requested. *See* B, ¶ 15; C, ¶ 14.

13. On September 29, 2008, Mr. John Doe and joint debtor, Mrs. Jane Doe (jointly referred to as "Debtor") filed a petition for voluntarily filed a petition for relief under Chapter 13 of the Bankruptcy Code.

SUMMARY OF RELIEF REQUESTED

14. The City asks the Court for an order declaring that the City's actions concerning the substandard structure on Debtor's Property is excepted from the application of the automatic stay by Title 11, United States Code, Sections 362(b)(4) and (b)(18). The City asks for an order that the actions of the City in enforcing its building codes and other property maintenance codes against the Property are exempted from the automatic stay under the enumerated subsections. These actions include:

(a) taking steps necessary to demolish or repair the structures on the Property and to clean up all debris;

(b) removing all junk, trash and debris from the Property;

(c) abating conditions of tall grass and weeds existing on the Property; and

(d) creating or perfecting statutory liens on the Property authorized for the assessment of the costs incurred by the City in performing the above-enumerated tasks.

ARGUMENT

15. This Motion is not a Motion for Relief from the Automatic Stay under Title 11, United States Code, Section 326(d) or Local Bankruptcy Rule 4001.1. The City firmly believes that the automatic stay does not apply to its proposed actions against the Property pursuant to Section 326(b)(4) and (b)(18), and would like an express ruling from the Court stating so. Although the City is technically free to proceed against the Property under the stated exceptions, it would be doing so at its own risk in the event there was ever a ruling that the stated exceptions do not apply thereby possibly exposing the City to sanctions or damages for violating the automatic stay. 11 U.S.C. § 362(k)(1)-(2). The best and most prudent practice is to seek an order that the proposed action is within an exception to the automatic stay. *In re Sutton*, 250 B.R. 771, 775-76 (Bankr. S.D. Fla. 2000) (citing *In re Daugherty*, 117 B.R. 515, 517 (Bankr. D. Neb. 1990)).

A. The City is Enforcing its Police and Regulatory Power under Section 362(b)(4)

16. Texas Local Government Code Section 214.001 provides that a municipality may by ordinance require, among other things, the repair or demolition of a building that is dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety and welfare. Tex. Loc. Gov't Code Ann. § 214.001(a)(1) (Vernon 2008). The structures remain substandard and the Property remains in violation of several City codes. The thirty (30) days stated in the final order lapsed on August 8, 2009. *See* Exh. A-8. The City is now authorized to demolish the buildings on the property at its own expense. Tex. Loc. Gov't Code Ann. § 214.001(m) (Vernon 2008).

17. Section 326(a) of the Bankruptcy Code provides for an automatic stay of certain actions upon the filing of a bankruptcy petition. 11 U.S.C. § 326(a). "The purpose of the stay is to give the debtor a `breathing spell' from his creditors, and also, to protect creditors by preventing a race for the debtor's assets." *In re Gandy*, 327 B.R. 796, 801 (Bankr. S.D. Tex. 2005) (quoting *Browning v. Navarro*, 743 F.2d 1069, 1083 (5th Cir. 1984)). Among other things, the automatic stay applies to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over the property of the estate." 11 U.S.C. § 326(a)(3). Clearly, if the City proceeds to cleanup and demolish the Property, it will be exercising control over property of the estate under section (a)(3). *See In re Javens*, 107 F.3d 359, 367 (6th Cir. 1997).

18. While the automatic stay is broad, it is not unlimited and is subject to a number of policy-based exceptions. One exception to the automatic stay is the police and regulatory authority exception, which is based on the compelling need for the government to continue to protect the public when a debtor files for bankruptcy and to "prevent a debtor from frustrating necessary governmental functions by seeking refuge in bankruptcy court." *Gandy*, 327 B.R. at 801-02 (quoting *SEC v. Brennan*, 230 F.3d 65, 71 (2d Cir. 2000)) (internal quotations omitted). "[A] fundamental policy behind the police or regulatory power exception is to prevent the bankruptcy court from becoming a haven for wrongdoers." *In re Commonwealth Cos.*, Inc., 913 F.2d 518, 527 (8th Cir. BAP 1990).

19. Specifically, Section 326(b)(4) of the Bankruptcy Code provides that the automatic stay does not apply to a stay arising "under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power." 11 U.S.C. § 326(b)(4). To determine whether this exception applies to a particular action, two elements must be met: (1) the entity seeking to act under the exception must be a governmental unit; and (2) the proposed action must be seeking to enforce the unit's police and regulatory power. *Javens*, 327 B.R. at 802.

20. The first element is easily satisfied. The City of Nautilus is a Texas home-rule municipality incorporated pursuant to Article 11, Section 5 of the Texas Constitution, Chapter 9 of the Texas Local Government Code and operating under its charter, adopted on November 3, 1964, as amended.[214] Thus, the City is a "governmental unit" as defined by the Bankruptcy Code. 11 U.S.C.§ 101(27) (defining governmental unit to include a "municipality").

21. On the second element, courts have employed two different tests to answer the question of whether a "governmental unit" is exercising its police and regulatory authority under section 326(b)(4). *Gandy*, 327 B.R. at 802-03. The first test is called the "pecuniary interest" test and inquires into whether the government is pursuing the matter for the public interest rather than its own pecuniary interest. *Id.* at 803. The test distinguishes between legitimate enforcement actions of the government and the government's attempt to collect money damages that do not relate to the government's police and regulatory authority. *Id.* For example, if a government's action is to collect a money judgment that arises from its involvement in a normal commercial transaction for goods or services, or an action for the collection of delinquent taxes, then the government's action is normally stayed by the automatic stay and does not fall under the police and regulatory authority exemption. *Id.* The second test is the "public policy" test. This test requires a court to determine whether the government is proceeding to "effectuate public policy" or to "adjudicate private rights." Only a government proceeding to "effectuate public policy" falls within the exemption to the automatic stay under section 326(b)(4). *Id.* (citing *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986)).

[214] The Court may take judicial notice of the City's charter. E.g., *Demos v. City of Indianapolis*, 302 F.3d 698, 706 (7th Cir. 2002). The text of the City's charter can be found at: http://www.municode.com/resources/gateway.asp?pid=10882&sid=43.

22. The proposed actions of the City concerning the demolition or cleanup of the Property clearly fall within enforcement of the City's police or regulatory authority. More precisely, the actions are to enforce the City's building codes and minimum building standards and abate buildings that a City board has found amounts to a threat to public health and safety, which have repeatedly been held to "clearly [be] within the police or regulatory power of government" and "classic exercises of police power, and thus excepted by [section] 362(b)(4)." *Javens*, 107 F.3d at 364 (citing *SmithGoodson v. CitFed Mortgage Corp.*, 144 B.R. 72 (Bankr. S.D. Ohio 1992) (holding actions related to city housing, nuisance, and fire prevention ordinance by their very nature are related to the public safety and health, and hence are exercises of the police power exempt from the automatic stay)).

23. More specifically, under the "pecuniary interest" test, the City is not proposing to collect any money damages from the Debtor. The only actions the City proposes are to perform the demolition and cleanup that Debtor refuses to do himself. The City does not propose to impose or seek any money damages or to impose any money judgment against the Debtor. Admittedly, the City may assess or enforce a lien against the Property for expenses incurred in the demolition and cleanup of the Property. Tex. Loc. Gov't Code Ann. § 214.001(n) (providing for assessment and lien for costs incurred by City for demolition and cleanup of property). But this action alone does not cause the underlying action of enforcing the City's building codes to be sufficiently related in a meaningful way to the City's pecuniary interest. *Javens*, 107 F.3d at 368. In addition, the action of assessing the costs of demolition and cleanup of the property is authorized under a completely different exemption to the automatic stay. *See generally infra* Part B.

24. The enforcement of the City's building codes and minimum building standards is clearly an effectuation of public policy, rather than an adjudication of private rights. *Javens*, 107 F.3d at 368 n.8 ("Clearly, enforcement of building codes is an effectuation of public policy, rather than an adjudication of private rights."). The Nautilus Substandard Building Board found that "the life, health, property or safety of the public are endangered" by the conditions of these structures. *See* Exh. A-10, ¶ 5. In addition, the fact that this Property has been the subject of numerous citizen complaints reinforces the notion that the abatement of the complained-of conditions concerns the interests of the public, not any single private individual. *See* Exhs. B, ¶ 3; C, ¶ 3.

25. The law is clear that it is not the job of a bankruptcy court to inquire into the legitimacy or correctness of the underlying findings concerning the conditions of the Property. *E.g.*, *Javens*, 107 F.3d at 365-66. For example, in *Gandy*, the property owner submitted substantial evidence that his property was not a threat and not a violation of the law. 327 B.R. at 805. The bankruptcy court, however, noted that:

> This Court will not address the merits of those disputes. If a governmental unit is attempting to enforce its police and regulatory powers, this Court (as does a state court with concurrent jurisdiction) only looks to the four corners of the complaint to determine if the purpose of the litigation by the governmental unit is to enforce its police and regulatory powers. If the purpose of the state court lawsuit is police and regulatory, the inquiry as to the application of the automatic stay is completed

> and the action is not stayed. This Court should not examine the merits of the litigation.

Id. (internal citation omitted) (citing *Bd. of Governors of The Fed. Reserve Sys. v. MCorp Fin.*, 502 U.S. 32, 40, 112 S. Ct. 459 (1991)).

> 26. As similarly stated by the United States Supreme Court in the *MCorp* case: [Debtor] contends that in order for [section] 362(b)(4) to obtain, a court must first determine whether the proposed exercise of police or regulatory power is legitimate and that, therefore, in this litigation the lower courts did have the authority to examine the legitimacy of the Board's actions and to enjoin those actions. We disagree. MCorp's broad reading of the stay provisions would require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity. Such a reading is problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts. We therefore reject [this] reading of [section] 362(b)(4).

MCorp Fin., 502 U.S. at 40, 112 S. Ct. at 464.

27. Thus, the courts have recognized that it was not Congress's intent to have bankruptcy courts become super-appellate review tribunals for every enforcement action taken against a debtor or a debtor's property. A bankruptcy court's inquiry into whether the police and regulatory authority exception to the automatic stay applies is limited to the purpose of the action, not whether the action is legitimate, correct or proper. In this case, the Nautilus Substandard Building Board has found that the structure on the Property threatens the "life, health, property, or safety of the public" and that the structures should be vacated, then demolished or removed. *See* Exh. A-10, ¶¶ 5 & 7. It is the purpose of this Court, in deciding whether the stay exception applies, to review the orders of the Board and the allegations of the City and determinate whether the purpose of the proposed action falls within the City's "police and regulatory" power. This Court should not, however, engage in an appellate review of the Board's orders nor determine whether the decisions of the Board expressed in those orders are correct.

28. For the foregoing reasons, the City asks for an order that the City's proposed actions in enforcing its building codes and property maintenance codes on the Property, including actions to repair or demolish and clean up the structures on the Property and the removal of any and all junk, trash and debris from the Property and abatement of tall grass and weeds fall within the "police and regulatory" power exception to the application of the automatic stay.

B. Any Statutory Liens Resulting from Demolition and Cleanup of the Property are Allowed under Section 362(b)(18)

29. Section 362(a)(4) creates a stay of "any act to create, perfect or enforce a lien

against the property of the estate." 11 U.S.C. § 362(a)(4). The "police and regulatory power" exception under section 326(b)(4), however, is only an exception to the stay under subsections (a)(1), (2), (3) and (6), not subsection (a)(4). *Id.* § 362(b)(4). Thus, even if the "police and regulatory power" exception applies, it would not allow the City to create or perfect any lien concerning the costs incurred in its abatement or cleanup activities.

30. That authority is provided by an independent exception to the automatic stay. Specifically, section 362(b)(18) provides an exception to all stays created by subsection (a) for "the creation or perfection of a statutory lien for . . . a special assessment on real property, imposed by a governmental unit, if such . . . assessment comes due after the date of the filing of the petition." 11 U.S.C. § 362(b)(18). It is axiomatic that any costs incurred by the City in pursuing any action that may be authorized by this Court in the future will come due after the filing of the petition in this case. And, as noted above, the City is a "governmental unit." See *supra* Part A, pp. 8-9, ¶ 17 *infra*. Thus, the only remaining question is whether there is statutory authority for the lien and the assessment on real property.

31. Concerning the repair or demolition and cleanup of the structures on the Property, there is clear statutory authority that provides that a city may, if the landowner fails to do so, demolish the property at the City's own expense. Tex. Loc. Gov't Code Ann. § 214.001(m). If a city incurs those expenses, the statute also provides a city can assess and has a lien against the property for those expenses. *Id.* § 214.001(n) ("If a municipality incurs expenses under Subsection (m), the municipality may assess the expenses on the property on which the building was located"). This exception was expanded to apply to statutory liens for non-ad valorem special assessments in 2005. As a result, case law discussing and applying the new language of this subsection is virtually non-existent.

32. The statutory authority for all Texas municipalities to regulate sanitation, the accumulation of junk and debris and tall grass and weeds on private property comes from Chapter 342 of the Texas Health and Safety Code. Tex. Health & Safety Code Ann. § 342.001-.022 (Vernon 2001 & Supp. 2008). That chapter provides that a city may "regulate the cleaning of a building, establishment, or ground from filth, carrion, or other impure or unwholesome matter." *Id.* § 342.003 (Vernon 2001). The statute also provides that a city can "require the owner of a lot in the municipality to keep the lot free from weeds, rubbish, brush, and other objectionable, unsightly, or unsanitary matter." *Id.* § 342.004. The chapter also provides for noticing a property owner of violations of these types of regulations and further provides that if the property does not comply after notice, that a city can "do the work or make the improvements required" or "pay for the work done or improvements made and charge the expenses to the owner of the property." *Id.* § 342.006(a)(1)(2) (Vernon Supp. 2008).

33. The chapter then provides that a city may "assess expenses incurred under section 342.006 against the real estate on which the work is done or improvements made." *Id.* § 342.007(a) (Vernon 2001) (emphasis added). This section further provides for the filing of a lien statement of the expenses incurred with the county clerk of the county where the city is located and that a lien attaches upon the filing of that statement. *Id.* § 342.007(b). The statute goes on to provide that the only exception to this is if the property is a homestead protected by the Texas Constitution. Tex. Loc. Gov't Code Ann. § 241.001(n); *see generally* Tex. Const. art. XVI, § 51.

The Property must be used as a "home" to be an urban homestead under Texas law. Tex. Const. art. XVI, § 51. The lien is only inferior to tax liens and liens for street improvements, for interest to accrue on the amount incurred. *Id.* § 342.007(c)-(d).

34. Thus, there is statutory authority for the City to make special assessments against the Property and establish statutory liens for any expenses incurred during its proposed activities of demolishing the building on the Property, along with removal and cleanup of all junk, trash and debris located on the Property or the abatement of tall grass and weeds. The creation or perfection of these statutory liens, for expenses that came or will come due after the filing of the bankruptcy petition, is excepted from the automatic stay pursuant to section 326(b)(18).

WHEREFORE, PREMISES CONSIDERED, the City prays that the Court enter an order declaring the proposed actions of the City enforcing its building codes and property maintenance code on Debtor's Property are excepted from the application of the automatic stay by Title 11, United States Code, Sections 362(b)(4) and (b)(18). Specifically, the City asks for an order that these actions are exempted from the automatic stay under the enumerated subsections, including the following proposed actions:

(a) taking steps necessary to demolish or repair the structures on the Property and to clean up all debris;

(b) removing all junk, trash and debris from the Property;

(c) abating conditions of tall grass and weeds existing on the Property; and

(d) creating or perfecting statutory liens on the Property authorized for the assessment of the costs incurred by the City in performing the above-enumerated tasks.

The City of Nautilus, Texas requests that the Court grant the motion and declare that the City's actions concerning the substandard structure on Debtor's Property is excepted from the application of the automatic stay by Title 11, United States Code, Sections 362(b)(4) and (b)(18). The order should allow the City to exercise its rights under the substandard building order and applicable law to demolish and abate the Property and to allow the City to create and perfect liens against the Property for the costs incurred by the City for performing the above-enumerated tasks; and for all such other and further relief, general and special, legal and equitable, to which the City may be justly entitled.

Respectfully submitted,

By: _____
City Attorney

TAYLOR, OLSON, ADKINS, SRALLA,
ELAM, L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107
Phone: (817) 332-2580
Facsimile: (817) 332-4740

ATTORNEY FOR MOVANT, CITY OF NAUTILUS, TEXAS

CERTIFICATE OF CONFERENCE

On August 26, 2010, the undersigned Counsel for the City of Nautilus mailed a letter to Mr. Perry Mason, Debtor's Counsel informing him of Counsel's intent to file a Motion to Determine Application of Exception to Automatic Stay.

Certified this ____ day of September 2010.

_____
CITY ATTORNEY

VERIFICATION OF TRANSMITTAL TO U.S. TRUSTEE

I hereby certify that on September ____, 2010, a true and correct copy of the foregoing document was forwarded to the U.S. Bankruptcy Trustee, 1100 Commerce Street, Room 976, Nautilus, Texas 75242-1496 via certified mail, return receipt requested.

_____
CITY ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was forwarded this ____ day of September, 2010 to Debtor's counsel via certified mail, return receipt requested.

John Doe and Jane Doe

_____

_____

Debtor

Debtor's Attorney

Mr. Perry Mason
6851 N.E. Loop 820
Nautilus, Texas 78555
Standing Chapter 13 Trustee

_____
CITY ATTORNEY

FORM O: SWORN ACCOUNT OF REPAIR OR DEMOLITION EXPENSE

PROPERTY DESCRIPTION: _____

STREET ADDRESS: _____

RECORD OWNER: _____

DATES OF DEMOLITION: _____

DESCRIPTION OF WORK PERFORMED:

	COST
EQUIPMENT USED	$_____
LABOR CHARGES	$_____
OTHER EXPENSES	$_____
TOTAL EXPENSES	$_____

I certify that the above is a true and correct itemization of expenses and costs incurred by the City of Nautilus for the demolition of the above described property.

_____
Building Official

Subscribed and sworn to on this ____ day of _____, 2010, by the above named person, to certify which witness my hand and official seal.

_____
Notary Public, State of Texas

_____
Printed Name

My Commission Expires:

_____

FORM P: NOTICE OF LIEN

STATE OF TEXAS §
§
COUNTY OF SELENA §

WHEREAS, the City of Nautilus is a home rule created in accordance with the provisions of the statutes and Constitution of the State of Texas; and

WHEREAS, the City has adopted ordinances providing for the abatement of dangerous buildings and has followed all required procedures and given all notices required by law in seeking to abate a nuisance by causing the securing, removal, repair, or demolition of a substandard structure or structures on private property; and

WHEREAS, a copy of the Order to abatement is attached as Exhibit "A" and incorporated herein for all purposes; and

WHEREAS, the owner or owners of the private property described herein have failed to perform the required work after proper notice, opportunity for hearing, and time for compliance; and

WHEREAS, the City did secure, repair, remove, or demolish the substandard structure or structures within Nautilus, Selena County, Texas, on property described as follows:

Address of Property: _____

Lot: _____ Tract: _____

Block: _____ Abst.: _____

Addition: _____ Survey: _____

Work Done: _____ Date: _____

Amount of Expenses Incurred by City: _____

Balance Remaining: _____

Owner: _____

Address of Owner: _____

WHEREAS, the owner has failed to pay the charges levied and assessed against the property described.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

The City of Nautilus, for the purpose of perfecting its privileged lien against the above described property, and in compliance with requirements of law, gives notice to all that the above described work was done by, or at the direction of, the City of Nautilus, and the costs described are due and owing to the City of Nautilus, together with interest thereon from the date the work was performed at a rate of ten percent (10%) per annum. No utility service, building permit or certificate of occupancy shall be allowed on said property until the assessment is paid and this lien is released by the City.

Said assessment with interest, costs of collection and reasonable attorneys' fees, if incurred, is declared to be a first and paramount lien upon said premises (except as to tax liens, existing special assessment liens, and previously recorded bono fide mortgage liens attached to the same property), and a personal liability of the true owner or owners payable to City of Nautilus, its successors or assigns, as set forth above.

The proceedings with reference to performing such demolition or repair have been regularly had in compliance with the law, and the terms of this Notice of Lien and all prerequisites to the fixing of the assessment lien against the property herein described and the personal liability of the owner or owners have been performed.

The property may be sold for the purpose of realizing any amount then due hereon with interest and reasonable attorneys' fees and costs of collection, if incurred, said sale to be made in the manner provided by law for the sale of property for the collection of taxes.

_____
Building Official, City of Nautilus

Attest:

_____
City Secretary

STATE OF TEXAS §
§
COUNTY OF SELENA §

This instrument was acknowledged before me on this the _____ day of _____, 2010, by _____.

_____
Notary Public in and for the State of Texas

_____
Type or Print Notary's Name

My Commission Expires:

_____

FORM Q: RELEASE OF LIEN

STATE OF TEXAS §
§
COUNTY OF SELENA §

WHEREAS, on the _____ day of _____, 2010, the undersigned Building Official of the City of Nautilus ("City") recorded a Notice of Lien encumbering the following property:

Address: _____

Lot: _____
Tract: _____

Block: _____
Abst.: _____

Addition: _____
Survey: _____

WHEREAS, the Lien was imposed to secure the payment of $_____ together with interest of ten percent (10%) per annum from the date payment became due for work done on the property by the City to abate the nuisance of a substandard structure or structures; and

WHEREAS, the City has been paid $_____, which amount fully reimburses the City for its costs and required interest;

NOW, THEREFORE, I, _____, Building Official for the City, certify that the amount owed the City pursuant to the Lien noticed on the _____ day of _____, 2010, and entered in _____, has been fully paid to the City, and on behalf of the City, I do hereby release and discharge the lien previously claimed by the City for work done on the property to abate the nuisance of a substandard structure or structures.

_____
Building Official
City of Nautilus

Sworn and subscribed before me by _____, this _____ day of _____, 2010, to certify which witness my hand and seal of office.

_____
Notary Public in and for the State of Texas

_____
Notary Name Typed or Printed

My Commission Expires:

_____