United States Court of Appeals for the Fifth Circuit

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Fifth Circuit
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Lyle W. Cayce
Clerk

No. 22-40551

THOMAS E. RHONE, *Individually*, *doing business as* RHONE INVESTMENTS,

Plaintiff—Appellant,

versus

CITY OF TEXAS CITY, TEXAS,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:21-CV-74

Before SMITH, SOUTHWICK, and HIGGINSON, *Circuit Judges*.

LESLIE H. SOUTHWICK, *Circuit Judge*:

Thomas Rhone is a property owner in Texas City, Texas. Apartment buildings he owned were declared a nuisance by a Municipal Court of Record. Rhone sought judicial review in state court, but the City removed the case to federal district court. There, Rhone's claims were rejected on summary judgment. On appeal, Rhone challenges the district court's standard of review and its conclusions as to his constitutional claims. Before we can resolve those claims, we need clarity as to the role of the City Attorney in finalizing the Municipal Court's order of abatement in this case. We order a

LIMITED REMAND for the district court to conduct an evidentiary hearing on the City Attorney's role in the order of abatement.

FACTUAL AND PROCEDURAL BACKGROUND

Thomas Rhone owned three apartment buildings in Texas City, which are located on contiguous lots. Rhone leased the units to tenants, though he never had a valid certificate of occupancy. Rhone's property passed a city inspection in 2013 without any mention of the lack of a certificate of occupancy. In January 2020, Texas City again inspected the property, acting on an alleged complaint, and informed Rhone that the structures on his property were substandard. The City also gave Rhone notice of the terms of Property Maintenance Code § 107.6: "It shall be unlawful for the owner of any dwelling unit or structure who has received a compliance order or upon whom a notice of violation has been served to sell, transfer, mortgage, lease or otherwise dispose of such dwelling unit . . . until the provisions of the compliance order" have been satisfied.

Rhone argues that, in the months following the 2020 inspection, city officials, "acting under color of law but without valid authorization or court declaration, visited tenants of the property in question" and informed them the "property was unsafe; that they should vacate, and that they should not pay rent to Rhone." Texas City then, according to Rhone, "interfered with efforts by Rhone to remedy the violations claimed by the City," including an attempt to repair roof damage. Texas City gave allegedly pretextual reasons for refusing to issue Rhone permits, such as permit applications' being emailed incorrectly or Rhone's listing his business address, rather than the property address, on the applications. Rhone further asserted that Texas City ignored plans he submitted and imposed conditions that made it "impossible" for him to preserve the value of his property by repairing the

apartment buildings to bring them into compliance with the Texas City Code instead of demolishing the structures.

Texas City subsequently filed an administrative action in its Municipal Court of Record, which the City dismissed in November 2020 after an evidentiary hearing. Following the dismissal, Texas City filed two separate actions in December 2020. The initial action was against Rhone in the 405th District Court of Galveston County, where the City sought an injunction to prohibit Rhone from renting the apartment units without a certificate of occupancy. *Rhone v. City of Texas City*, 657 S.W.3d 857, 860 (Tex. App.—Houston [14th Dist.] 2022, no pet.). A temporary injunction was granted. *Id.* at 859. A Texas court of appeals affirmed the injunction, concluding that Rhone had not shown any abuse of discretion in the trial court's order and could therefore no longer rent his apartment units. *Id.* at 859–61, 866.

Texas City filed a second abatement action in its Municipal Court of Record. Prior to this filing, Texas City Code Enforcement Officer Marilyn Logan and Fire Marshal Dennis Harris inspected the property on December 2, 2020. Rhone was issued another notice regarding the substandard maintenance of his buildings on December 3, 2020; attached were pictures of the alleged deficiencies. The notice informed Rhone that he would need to obtain a certificate of occupancy to operate his apartment buildings. A structural engineer, however, previously inspected the property on November 3, 2020, and determined nothing in the buildings "would provide a danger to a tenant" or would "suggest the building would collapse."

The Municipal Court conducted the abatement hearing on February 24, 2021. The court entered an order of abatement directing the demolition of the apartment buildings, finding them to be "dilapidated, substandard, unfit for human habitation[,] a hazard to the public health, safety, and

welfare," and a nuisance. The Municipal Court authorized Texas City to demolish the structures without further notice or hearing. Rhone filed a timely motion for a new trial, which the Municipal Court denied.

Rhone then sought review of the Municipal Court's order of abatement in the 122nd Judicial District Court of Galveston County. The appeal to that court was authorized by Texas Local Government Code § 214.0012(a). We need not set out all the claims that appeared in the petition, as only those still pursued on appeal matter. Texas City timely removed the action to the United States District Court for the Southern District of Texas in Galveston under federal-question jurisdiction.

The federal district court granted partial summary judgment on May 23, 2022, deferring the resolution of some claims. A second and final summary judgment was entered on July 18, 2022. Rhone moved for relief from that judgment, in part based on "indications that the City may proceed with demolition in spite of a planned appeal." The district court denied the motion on November 17, 2022, but Rhone had already filed a timely notice of appeal.[1]

Nonetheless, it appears the apartment buildings were demolished between November 2022 and February 2023 pursuant to the Municipal Court's authorization.

DISCUSSION

Rhone argues the district court erred in the following ways: (a) refusing to apply a *de novo* standard of review to the Municipal Court's decisions; (b) denying Rhone a declaratory judgment, which states the

[1] Rhone also twice sought relief from this court prior to the demolition, once before final judgment and once after. Both motions were denied.

Municipal Court cannot constitutionally hear claims in which the City is an interested party; and (c) dismissing Rhone's 42 U.S.C. § 1983 and Fifth Amendment claims. Rhone also urges us (d) to certify those three issues to the Texas Supreme Court. Finally, he insists (e) the case is not moot.

We will analyze each claim of error and the propriety of certification, but not in the same order. We start with mootness because it is jurisdictional.

I. Mootness

The question of mootness arises from the fact that Texas City demolished Rhone's apartment buildings. For this court to redress his harms, the litigant must have suffered, or be threatened with, an actual injury that is likely to be redressed with a favorable decision. *Dierlam v. Trump*, 977 F.3d 471, 476 (5th Cir. 2020). This requirement "subsists through all stages of federal judicial proceedings." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quotation marks and citation omitted). The apartment buildings' demolition, according to Texas City, eliminates the availability of any relief.

Rhone asserts the "capable of repetition, yet evading review" exception to mootness. *Id.* at 17. This exception requires that both "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* (quotation marks and citation omitted).

This exception "applies only in exceptional situations." *Id.* (citation omitted). Regarding the first requirement, "[c]laims need to be judged on how quickly relief can be achieved in relation to the specific claim." *Empower Texans, Inc. v. Geren*, 977 F.3d 367, 370 (5th Cir. 2020). The Supreme Court has further clarified that insufficient time "to receive '*complete* judicial review,' . . . in that Court" satisfies this requirement. *Id.* (emphasis in original) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 774 (1978)).

Rhone alleged that Texas City did not file its complaint against him in the second abatement action until three days prior to the Municipal Court hearing. These three days constitute the too-brief notice period during which Rhone had to prepare for litigation. A hearing on three-day's notice that results in a demolition order likely does not allow for complete judicial review nor sufficient relief prior to the cessation of this litigation.

Rhone must also satisfy the second requirement of the "capable of repetition" exception. He was required to "show either a demonstrated probability or a reasonable expectation" that he, as the complaining party, would "be subject to the same [unlawful governmental] action again." *Libertarian Party v. Dardenne*, 595 F.3d 215, 217 (5th Cir. 2010) (alteration in original) (quotation marks and citations omitted). A theoretical possibility is insufficient to satisfy this requirement. *Id.*

One of our precedents applies this requirement in a relevant manner. *See Benavides v. Hous. Auth.*, 238 F.3d 667 (5th Cir. 2001). There, a resident of a Texas public housing project scheduled to be demolished asserted the same argument Rhone asserts here: that the pertinent housing authority would continue to act according to its unconstitutional regulations even after demolition of the building. *Id.* at 671. We rejected that argument because the resident failed to "demonstrate[] that she . . . [would] again be subject to the demolition . . . process." *Id.* We conclude the same here. While Rhone alleged numerous reasons for the intended demolition of his property, he failed to offer any evidence to suggest he would again own apartment buildings and then have said buildings declared a nuisance and demolished. Only a theoretical possibility exists, which cannot qualify under the "capable of repetition" exception. *See Dardenne*, 595 F.3d at 217. Therefore, any of Rhone's claims that, if upheld on appeal, would only interfere with the demolition of the buildings on his property are moot.

Importantly, demolition of the apartment buildings does not eliminate a takings claims; indeed, it may create one. *See Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2167 (2019). This right allows for the property owner to have "some way to obtain compensation after" the government's unconstitutional actions. *Id.* at 2168. The argument that there was reversible error in the Municipal Court's finding that the apartments were a nuisance, and that the Municipal Court itself is constitutionally infirm, are not moot.

II. The constitutionality of the Municipal Court

In the district court's summary judgment ruling, it held there was no invalidity in the procedures Texas City used to consider whether Rhone's apartment buildings were a nuisance and then to authorize their demolition. Our review of a district court's grant of summary judgment is *de novo*, with all facts and evidence viewed in the light most favorable to the non-moving party. *Amerisure Mut. Ins. Co. v. Arch Specialty Ins. Co.*, 784 F.3d 270, 273 (5th Cir. 2015). Questions of law are also reviewed *de novo*. *Burell v. Prudential Ins. Co. of Am.*, 820 F.3d 132, 136 (5th Cir. 2016).

We stated earlier that Rhone makes two arguments about the Municipal Court. One is that judicial review of the Municipal Court's decision should be *de novo*, and the other is that allowing municipal courts generally, and this judge in particular, to make the demolition decision was unconstitutional.

First, some background. The Texas Legislature authorized the creation of municipal courts of record and the appointment of the necessary municipal judges. Tex. Loc. Gov't Code §§ 30.00003(a), 30.00006(b). These courts are created when there is a necessity "to provide a more efficient disposition of the cases arising in the municipality." *Id.* § 30.00003(a). A chapter of the ordinances for Texas City established such a court and set out rules for its operation. Texas City, Tex. Code §§ 33.01–

33.13. Its municipal judges "shall be appointed by the City Commission." *Id.* § 33.03.

By statute, a state district court reviews a municipal court finding that certain property is a nuisance for substantial evidence. Tex. Loc. Gov't Code § 214.0012(f). One of Rhone's appellate issues is that review of the municipal court's finding of a nuisance instead must be *de novo*. To preserve the issue for appeal, Rhone was required to "address the district court's analysis and explain how it erred." *SEC v. Hallam*, 42 F.4th 316, 327 (5th Cir. 2022) (citation omitted). Rhone's brief neither cites caselaw nor makes any argument explicitly about *de novo* review. *De novo* review is only mentioned in the heading for the first issue in his brief and in a statement declaring that the district court dismissed the argument that *de novo* review was required.

As we understand his brief, Rhone intended to support the need for more searching appellate review by arguing the Texas City municipal judge had insufficient independence from the city when resolving disputes between a citizen and the city. In the brief, Rhone cites one relevant Texas authority on the argument. Rhone discussed it in only one sentence and did not refer us to what it held about standards of review of certain municipal decisions. *See City of Dallas v. Stewart*, 361 S.W.3d 562 (Tex. 2012).

We examine that decision. The Supreme Court of Texas considered whether the City of Dallas could by ordinance allow a municipal board (not a municipal judge) to decide whether property was a nuisance and then limit judicial review of that decision to whether there was substantial evidence. *Id.* at 565–66. The issue arose when the property owner brought a takings claim. *Id.* at 564–65. The Texas high court held the board decision was not entitled to preclusive effect because "unelected municipal agencies cannot be effective bulwarks against constitutional violations." *Id*. at 580.

The legal principle the court applied was a Texas constitutional doctrine that the court described this way: "in the takings context, we may grant deference to findings of historical fact, but mixed questions of law and constitutionally relevant fact — like the nuisance determination here — must be reviewed *de novo*." *Id.* at 576. The state supreme court then stated that United States Supreme Court opinions applying the "constitutional fact doctrine" were similar and provided guidance. *Id.* at 576–78. The court held, applying that caselaw, that a municipal board's "nuisance determination, and the trial court's affirmance of that determination under a substantial evidence standard, were not entitled to preclusive effect." *Id.* at 580–81.

Of course, the decision in the present case was made by a municipal judge appointed by Texas City, not by a city board. The *Stewart* court mentioned that Dallas had abandoned the use of the board for nuisance determinations, "replacing it with a system wherein municipal judges make the initial nuisance determination subject to substantial evidence review in district court." *Id.* at 565 n.6. The court did not make any observation about the applicability of its reasoning to a municipal court's nuisance findings.

The federal constitutional principles set out in *Stewart* have not been briefed to us, so we will not consider them.

There was ample argument in district court and here, though, on whether the relationship between the judge and Texas City is a violation of due process or at least causes an appearance of impropriety. In addition, specifically as to Texas City and not (as far as we know) relevant to Texas's system as a whole, Rhone argues the contract of appointment between the judge and City Attorney Kyle Dickson created a client relationship between the judge and the City.

We start with the general statutory scheme, not Texas City's use of it. The district court found that Rhone cited no authority "that a state policy of

local appointment of municipal court judges is inherently unconstitutional." To the contrary, the district court stated that Texas courts have "repeatedly affirmed the constitutional validity of municipal courts of record" and their judges. *See Leverson v. State*, No. 03-15-90-CR, 2016 WL 4628054 (Tex. App.—Austin Aug. 30, 2016, no pet.); *Martin v. State*, 13 S.W.3d 133 (Tex. App.—Dallas 2000, no pet.; *Aguirre v. State*, 22 S.W.3d 463 (Tex. Crim. App. 1999); *Ex parte Wilbarger*, 55 S.W. 968 (Tex. Crim. App. 1900).

The federal law component of Rhone's argument is that procedural due process requires more independence of a judge from the appointing city. In one of Rhone's cited authorities, the Supreme Court held that due process was violated when a state supreme court justice did not recuse from an appeal in an insurance dispute that raised the exact claim the justice was making in his own litigation against a different insurance company. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 823–25 (1986). In another cited opinion, a mayor was authorized by state law to sit as a judge and decide on violations of city ordinances and traffic offenses, and income from the rulings the mayor-judge made was a significant part of the municipality's revenues. *Ward v. Village of Monroeville*, 409 U.S. 57, 59–60 (1972). The Supreme Court held the mayor was not a "neutral and detached judge," as is required for due process. *Id.* at 61–62.

Rhone gives considerable attention to one case in which enormous campaign contributions were made to a successful candidate for a state supreme court seat; the contributions were made by the chairman of a corporation after a $50 million jury verdict had been entered against that company. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873–74 (2009). The Supreme Court held that "the probability of actual bias rises to an unconstitutional level," and due process required the winning candidate to have recused from his donor's appeal. *Id.* at 886–87.

These are not the only cited cases, but we find none of them — discussed here or not — applicable to a municipality's appointment of municipal judges as authorized by state law and those judges then deciding cases in which the municipality is a party. Indeed, we discover no authority that such courts with similar jurisdiction are constitutionally suspect.

There is a specific Texas City component of Rhone's argument. Rhone insists an "appearance of impropriety" applies in a case where Texas City, represented by the City Attorney, is a party. *Lavoie*, 475 U.S. at 825. He challenges the neutrality of the judge, effectively arguing that the municipal judge's "situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required . . . or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Ward*, 409 U.S. at 60 (quotation marks and citation omitted).

Rhone's argument focuses on the executed contract between Texas City and this municipal judge. Rhone quotes the following from the judge's contract: "all material decisions affecting the Office of Municipal Court Judge will be submitted to [the City Attorney] for approval." What that required in this case is revealed at least in part by the actions of the City Attorney leading up to the February 2021 abatement order. The City Attorney prepared the complaint against Rhone, "seeking an order requiring [Rhone] to abate the Substandard Buildings," or in the event of Rhone's non-compliance, "an order further authorizing the City to abate the Substandard Buildings." An affidavit from Rhone states that the City Attorney presented evidence on behalf of Texas City at the December 2020 temporary injunction hearing that resulted in his tenants' expulsion from the property.

Most significantly, the City Attorney's signature is on the February 25, 2021, order declaring Rhone's property a nuisance and allowing the City

to demolish the buildings. The signature follows a statement that the order was "approved as to form, substance and entry." In sum, the City Attorney prepared the petition for abatement, represented the City at the hearing, then approved the "substance" of the judge's order. All of this, facially at least, is a declaration of a lack of independence of judge and city.

Rhone's summary judgment briefing alleged this was a violation of procedural due process, but the district court did not analyze the effect of these details in the municipal judge's contract. Instead, the district court acknowledged that Rhone "stresse[d] that the relationship between Texas City and its judges is spoiled by the very nature in which judges are appointed by contract between the city and the judge's law firm instead of by election." It recognized that, "[f]ollowing Rhone's logic," Texas City was "the municipal judge's client." The court then mentioned Texas City's rebuttal arguments that municipal judges are authorized by the Texas Legislature and have been repeatedly upheld as constitutional by Texas courts.

The district court distinguished Rhone's case, not by targeting the explicit contractual language with which Rhone takes issue, but by classifying this case as involving "a *de minimis* pecuniary interest of [a] judge" who was appointed by state policy, which is a matter of legislative discretion. Relying on Supreme Court precedent, the court ultimately determined the Municipal Court judge's decision was valid because "most matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948).

Neither the district court nor Texas City, however, addressed Rhone's specific attack on the contractual language between the Municipal Court judge and the City Attorney. The state statute, which assigns nuisance cases to municipal judges and allows the decisions of those judges to be reviewed on appeal for substantial evidence, does not violate any principles

of federal constitutional law that have been argued to this court. It is Texas City's manner of implementing the statutory scheme that raises substantial questions in this appeal. There is evidence that the City Attorney has final authority on what the order on his own petition for abatement would say.

We will grant a limited remand to have the district court conduct an evidentiary hearing on the City Attorney's role in finalizing the Municipal Court's order of abatement in the City's case against Rhone. Should the City Attorney assert any privilege in what his responsibilities were as to this municipal judge's order, the district court can address it. The district court should then decide whether that role violated due process.

III. Takings claim

Our limited remand will keep open the issue of whether the Municipal Court's determination that the property was a nuisance and allowed demolition was not the result of sufficiently independent decision-making. The remainder of the opinion is premised on the Municipal Court's decision's being a valid one. If that premise changes, this opinion will as well.

Rhone challenges the district court's dismissal of his Fifth Amendment takings claim, saying there are fact issues requiring a trial. A property owner may bring a Fifth Amendment takings claim under Section 1983 as soon as the government takes his property without just compensation. *Knick*, 139 S. Ct. at 2170. Rhone maintains he was subjected to a taking without compensation by the City's imposing of unnecessary and expensive repair obligations before Rhone would be allowed to use his property; by requiring he keep the property vacant; and by interfering with his efforts to repair, sell, or otherwise address the identified deficiencies in the property. This claim relies on the City's actions prior to the Municipal Court's order of abatement that allowed the property's demolition. Rhone's legal argument includes that these compliance costs were invalid under the

doctrine of unconstitutional conditions. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

First, the relevant facts. Two Texas City employees, the Texas City Fire Marshal and a City Code Enforcement Officer, inspected the property, found multiple property code violations, and determined it to be substandard. Texas City gave notice to Rhone that he must comply with city code requirements on the appearance of his buildings and adjacent property, that he must obtain a certificate of occupancy and submit plans for repairs and adjustments, and that his buildings had to remain vacant until he complied.

The principles of unconstitutional conditions can arise in different contexts. One land-use example is "conditioning a building permit on the owner's deeding over a public right-of-way." *Id.* at 605 (discussing *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987)). That constitutes "pressur[ing] an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Id.*

Nothing comparable to that occurred here. Basically, the City determined that the property did not meet city code standards, and the apartments could not be occupied until corrections were made. "Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.'" *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491–92 (1987) (quoting *Mugler v. Kansas*, 123 U.S. 623, 665 (1887)). The interference with the use of property, even barring its use, "for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property." *Id.* at 489 (quoting *Mugler*, 123 U.S. at 668–69)). Therefore, compensation is not required under the Fifth Amendment when

the property is determined to be a nuisance. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 160(2021).

To be fair, Rhone is not disputing all that. He is arguing it was constitutionally defective for the City to give the Fire Marshal code-enforcement authority without any review by higher-level officials or a court, including authority to prevent use of the property pending repairs. The one authority Rhone discusses in support of this argument concerns how a mistaken, single decision by a municipal government policymaker could be the basis for municipal liability. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 (1986). There, a county prosecutor, who the Court concluded was a policymaker on the question of whether sheriff deputies could enter the plaintiff's property, directed officers that they had a right to enter and should proceed into the property. *Id.* at 473, 484. Rhone insists on appeal that the actions of the Fire Marshal should be imputed to the City, and those actions violated the Constitution.

We do not see *Pembaur*'s consideration of when an individual government employee's actions can be the basis for liability under Section 1983 relevant here. Unlike the prosecutor in *Pembaur*, the Texas City employees who found Rhone's property violated city code were not making any final decision. They were not, as Rhone's briefing states, "the ultimate and only decision makers as to whether a building was 'substandard' so as to seek demolition," at least if the argument is that no review was available prior to demolition. The injury of the loss of the structures did not arise until an order permitting demolition was entered by the Municipal Court based on evidence presented in that court, and, if appealed, finally affirmed. The Fire Marshal's authority was thus not constitutionally suspect.

Rhone also considers the effect of initial determination of code violations a temporary taking. The one authority he cites concerned a city's

adoption of an "interim" ordinance that prohibited the use of the plaintiff's campground and retreat center because of a flood risk exemplified by recent, serious flooding. *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 307–08 (1987). The Court held that "temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 318 (quotations marks omitted).

Rhone argues the Fire Marshal's independent decision that his property violated certain code provisions and use needed to stop until corrections were made is comparable to a temporary taking. We find it, instead, to be in the nature of city code enforcement that such authority exists, without any constitutional obligation identified to us that internal review must occur first. Importantly, we find no discussion in either brief regarding possible procedural rights a property owner may have under the city code to contest these initial determinations, or any authority regarding constitutional requirements.

We do know that after the Fire Marshal's initial finding, the City filed suit in state district court prior to the Municipal Court abatement order. *Rhone*, 657 S.W.3d 857. We mentioned the suit earlier and now give more explanation. The City sought a temporary injunction preventing Rhone's apartments from being occupied in light of the City Fire Marshal's determination that significant city code violations existed on the property. *Id.* at 859. The date the suit was filed is not identified, but the City's brief is available electronically. *See* Brief of the Appellee, *Rhone v. City of Texas City*, 657 S.W.3d 857 (Tex. App.—Houston [14th Dist.] 2022, no pet.) (No. 14–20–854–CV), 2021 WL 655429.

The brief states the City brought suit against Rhone on November 3, 2020, and oral argument was heard exactly one month later. *Id.* at *5. A

temporary injunction was subsequently issued, preventing use of the property. *Rhone*, 657 S.W.3d at 859. At the hearing, the City introduced evidence about the condition of the property from the Fire Marshal and others. *Id.* The district court, affirmed by the state court of appeals, agreed with the City that the evidence sufficiently showed a substantial danger of injury or adverse health consequences. *Id.* at 863.

This 2022 Texas appellate court decision shows, independent of the abatement action in Municipal Court, Rhone had opportunities to contest the Fire Marshal's decision on the condition of his property. We mentioned already the scant law given to us on what rights Rhone did or did not have to contest the Fire Marshal's determination. We will not review Texas municipal law to determine if it is flawed. It is enough to say Rhone has not shown that an initial inspection by a city fire marshal and an issuance of a citation that has consequences on his use of the property violate federal law.

We do not find in Rhone's appellate brief any separate argument that the evidence before the Municipal Court was insufficient to support that the property was a nuisance. The Municipal Court found the evidence sufficiently established a code violation, a nuisance determination, and the resulting abatement. We have not been presented any arguments to the contrary, and there is no evidentiary issue for us to consider.

We order a LIMITED REMAND so that the district court can conduct an evidentiary hearing on the City Attorney's role in finalizing the Municipal Court's order of abatement in the City's case against Rhone. The court should make findings on that role and also analyze how that role affects the validity of the order of abatement. We retain jurisdiction.

JERRY E. SMITH, *Circuit Judge*, dissenting:

This case is moot and must be dismissed. Even if it were not moot, I would affirm on the merits. Therefore, I respectfully dissent.

I.

"A case is moot . . . when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *DeOtte v. Nevada*, 20 F.4th 1055, 1064 (5th Cir. 2021) (cleaned up). Citing *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), the majority identifies what it sees as effectual relief—compensation for the destruction of Rhone's property. And the majority is quite right that *Knick* does allow for the possibility of a takings claim after demolition. *See id.* at 2168.

But the majority errs in thinking that there is any live argument that Rhone is entitled to compensation. Take for example the majority's description of what remains "not moot": "The argument that there was reversible error in the Municipal Court's finding that the apartments were a nuisance, and that the Municipal Court itself is constitutionally infirm, are not moot."

Stipulate for now that both arguments are not only live but correct. Even so, Rhone would not have a takings claim. Neither the constitutionality of the Municipal Court nor the standard of review for its determinations is a relevant consideration when applying nuisance exception to a takings claim. Rather, the crucial question is whether the property was *actually* a nuisance. "[T]he government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021). That language does not take into account process failures but, instead, the actual character of the property.

We should avoid collapsing due process and takings claims. The

majority provides no caselaw to suggest that we can.

Even if we give zero import to the Municipal Court's finding and decide the issue anew, Rhone's property was undoubtedly a nuisance. To the best knowledge of the city, the property never had a certificate of occupancy. An inspection by a fire marshal and code enforcement officer, neither of whose credibility Rhone impugns, led the marshal to believe that "the Property is dangerous and unsafe for dwelling by any persons." The marshal's sworn statement paints a disturbing picture of a property with grave problems, including, but not limited to

- "holes, cracks, loose and rotten, warped boards throughout the property,"
- "upstairs units[']floors . . . sagging and not properly supported,"
- "structural deterioration throughout the structures on [the] property" such that the "structures would not perform adequately under minimal fire conditions, and would not give reasonable protection to any occupants of the building . . . from danger of collapse or fire"
- "proper roof drainage [which was] virtually nonexistent" leading to severe damage, "rotten wood", and "what appears to be mold."

In a related matter, a state trial court found that substantially similar evidence "show[ed] a substantial danger of injury or an adverse health impact to any person or to the property of any person other than the defendant," and a state appellate court affirmed. *Rhone v. City of Texas City*, 657 S.W.3d 857, 863 (Tex. App.—Houston [14th Dist.] 2022, no writ). The only material evidence the majority notes to the contrary is a signed declaration from a private engineer who, after inspecting Rhone's properties,[1] made

[1] According to the majority, roughly a month before the fire marshal.

conclusory statements about the structure and its need to be vacated. The only condition that engineer discussed in any level of depth was the sturdiness of the handrails. And tellingly, Rhone's focus here appears to be on his efforts to repair the buildings instead of on whether the buildings were in fact a nuisance. In short, the record is certain that Rhone's property was a nuisance.

Since Rhone can never obtain compensation for takings because his properties were, in fact, a nuisance, he cannot obtain effectual relief, and this case is moot.

II.

If it were proper to reach the merits of Rhone's claim, I would affirm the summary judgment. The majority sets aside most of Rhone's claims on the merits but leaves two.[2]

First, the majority leaves open a challenge to Texas City's specific municipal court arrangement as an "appearance of impropriety" under *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). *Inter alia*, it points to language in the abatement order that the city attorney approved the order "as to form, substance and entry" and the judge's contract with the city, which states that "all material decisions affecting the Office of Municipal Court Judge will be submitted to [the City Attorney] for approval" and concludes that "facially at least" the evidence suggests a "lack of independence of

[2] The majority's treatment of *City of Dallas v. Stewart*, 361 S.W.3d 562 (Tex. 2012), is not particularly clear. The majority does not leave room for a *Stewart* claim post-remand. But if the majority is punting on the *Stewart* claim, I would affirm the district's courts rejection of that claim. As the majority recognizes, *Stewart* was explicitly limited to "a municipal board (not a municipal judge)," and "Rhone discussed [*Stewart*] in only one sentence, and did not refer us to what it held about standards of review of certain municipal decisions." We ought not do work on Rhone's behalf to read a piercing constitutional argument into his brief where it does not exist.

judge and city."

That challenge fails for two reasons. First, Rhone nowhere advances that theory. "In our adversarial system of adjudication, we follow the principle of party presentation. That means we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. Therefore, we normally decide only questions presented by the parties." *Elmen Holdings, L.L.C. v. Martin Marietta Materials, Inc.*, 86 F.4th 667, 673–74 (5th Cir. 2023) (cleaned up). Yet the question Rhone presents differs from the one the majority asks. Although Rhone references the municipal judge's contract, he does not explain why it is implicated. That is, Rhone does not explain why this nuisance determination is a "material decision[] affecting the Office of Municipal Court Judge." And I can understand Rhone's choice. This nuisance determination plainly does not "affect[] the Office of Municipal Court Judge." How could it? That is why Rhone—and, strikingly, the majority—don't say anything at all to explain why the contractual provision is implicated.

That's perhaps also why the majority places a higher degree of reliance on language at the bottom of the abatement order apparently indicating that it "approved as to form, substance and entry" by the City Attorney. But the majority's reliance on this language is an even more egregious violation of the party-presentation principle. Not only does Rhone make no argument about this language's being problematic, but he does not reference that language *at all*. The majority cannot allow its newfound curiosity about the structure of Texas City's municipal courts to trample the bounds of what is actually presented in this case.

Even if that argument had been properly presented, it is without merit. The majority's biggest concern is that "[t]here is evidence that the City Attorney has final authority on what the order on his own petition for abate-

ment needed to say." But there is no evidence that the language at the bottom of the abatement order is anything other than boilerplate. The majority presents no evidence, other than that language, to suggest that the City Attorney actually exercised any influence over the outcome of this abatement petition. Thus, as the record stands, there is insufficient evidence of a due process violation.[3]

The second claim the majority leaves open is Rhone's takings claim, but it does so only insofar as the Municipal Court's nuisance determination is invalid. I have already explained why the procedural validity of the Municipal Court's decision has nothing to do with Rhone's takings claim. And the majority forecloses the rest of Rhone's takings claim. Therefore, I would affirm summary judgment on the takings claim.

The majority uses a wrinkle in what is—charitably—a messily argued case to threaten an unknown, potentially massive number of municipal adjudications over what appears to be boilerplate contractual language. We should exercise more caution before possibly unsettling the foundations of municipal law with the blunt instrument that is our due process jurisprudence. I respectfully dissent.

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[3] Imposing a limited remand only kicks the can down the road. Instead, this case needs to be put promptly out of its misery.