

Junked Vehicles: Piece of Art or Piece of Junk

Like many things in our communities, junk vehicles come in all shapes, sizes, and accoutrements. Some would say that a few of them travel down our roadways on a daily basis. Under Texas law, however, that cannot be the case. If it drives, it may not be legally roadworthy but one thing is certain: it ain't junk!!

Junked vehicles are regulated by state law; however, state law permits city ordinances as long as those ordinances do not conflict with State law, and with respect to the definition of "junked vehicle" city ordinances may be more inclusive. Just like many other areas of state and municipal law, this leaves us with some question concerning how this squares with the general rule of statutory construction that a city ordinance may not conflict with state law.

Let us begin our foray into the world of junk with Texas Transportation Code, § 683.071, where you will find the definition of a junked vehicle:

Sec. 683.071. DEFINITION. In this subchapter, "junked vehicle" means a vehicle that is self-propelled and:

- (1) does not have lawfully attached to it:
 - (A) an unexpired license plate; and
 - (B) a valid motor vehicle inspection certificate; and
- (2) is:
 - (A) wrecked, dismantled or partially dismantled, or discarded; or
 - (B) inoperable and has remained inoperable for more than:
 - (i) 72 consecutive hours, if the vehicle is on public property; or
 - (ii) 30 consecutive days, if the vehicle is on private property.

Notice that much of this definition is written in the conjunctive; that is, under State law a junked vehicle must have both an unexpired license plate and an invalid vehicle inspection certificate, before one can move into determining whether or not the vehicle in question meets the second part of the test - operability. In many cases this will not play a part, but occasionally a person will keep the registration current on a vehicle that is inoperable, or the vehicle might have a 9 month old inspection sticker and no license plate. In such cases, under the State law, the vehicle is not a junked vehicle.

In 2003 the Texas Legislature passed a bill that "would authorize a municipality or county to adopt an ordinance that imposes additional requirements that exceed the minimum standards for *junked vehicles* as defined in Section 683.072, Transportation Code." 78th Legislative Session (2003) HB 1773 – Bill Analysis. As passed, the Texas Transportation Code was amended, in part, to read:

§ 683.0711: Municipal Requirements.

An ordinance adopted by a governing body of a municipality may provide for a more inclusive definition of junked vehicle subject to regulation under this subchapter.

The operative language, then, is what is meant by the words “more inclusive” in relation to the legislative intent that the definition exceeds the minimum standards for junked vehicles. Oddly, the legislative committee notes refer to the public nuisance standards, not the junked vehicle definition. In other words, the legislative intent is far from clear. That would probably mean that if someone challenged a city ordinance, the legislative history would be of little use. This has not stopped municipalities from tweaking their definition of junked vehicle as a long time problem liked junked vehicles occasionally demands creative solutions.

The City of San Marcos junked vehicle ordinance is much the same as the State law, but does vary in one important respect:

§ 34.191 of the San Marcos City Code states:

junked vehicle means a vehicle that is self-propelled, inoperable and: (1) does not have lawfully affixed to it **both** an unexpired license plate and a valid motor vehicle safety inspection certificate; (2) is wrecked, dismantled, or discarded; or. . . (emphasis added).

Thus in San Marcos, and other cities, if a vehicle does not have both a current registration and inspection, and the vehicle is inoperable, then the vehicle may be subject to either citation or removal. I haven’t found any case law or Attorney General Opinion that discusses or challenges the legality of broadening the definition of a junked vehicle. This aspect of the San Marcos ordinance was not part of the challenges brought in a recent case that is winding its way through the 5th Circuit Court of Appeals. As a matter of note, with respect to junked vehicles, there are few cases, and even less AG opinions, available as guides.

SO YOU HAVE A JUNKED VEHICLE, WHAT CAN YOU DO NEXT?

Like many aesthetic and nuisance problems there are a couple of ways to proceed: (1) educate the violator (really read voluntary compliance), (2) criminal citation (\$\$\$), (3) removal of the offending vehicle; or (4) some combination of the three. This is one case where state law is actually of assistance as it declares that a junked vehicle is a public nuisance:

Sec. 683.072. JUNKED VEHICLE DECLARED TO BE PUBLIC NUISANCE.

A junked vehicle, including a part of a junked vehicle, that is visible at any time of the year from a public place or public right-of-way:

(1) is detrimental to the safety and welfare of the public;

- (2) tends to reduce the value of private property;
- (3) invites vandalism;
- (4) creates a fire hazard;
- (5) is an attractive nuisance creating a hazard to the health and safety of minors;
- (6) produces urban blight adverse to the maintenance and continuing development of municipalities; and
- (7) is a public nuisance.

State law also creates an offense for maintaining a junked vehicle as a public nuisance:

- Sec. 683.073. OFFENSE. (a) A person commits an offense if the person maintains a public nuisance described by Section 683.072.
- (b) An offense under this section is a misdemeanor punishable by a fine not to exceed \$200.
- (c) The court shall order abatement and removal of the nuisance on conviction.

Without more, a violator can be cited, but the fine is limited which, arguably, limits its effectiveness. Many cities also have parking ordinances that forbid parking vehicles in front and side yards, with potentially higher fines, and if worded as a health or zoning offense, then the fines can be assessed daily (and can be as high as \$2,000 per day).

Interestingly, for a recalcitrant citizen, one could use both approaches, beginning with a citation and smaller fine for a junked vehicle; and, at a later date assess a fine for unlawful parking, or unlawfully storing abandoned vehicles on residential property (or whatever your local ordinance provides). On first blush you might think this would raise issues of double jeopardy, but in an unpublished opinion the Houston Court of Appeals has held to the contrary. See, *Detamore v. State of Texas*, 1994 Tex. App. LEXIS 1893 (Tex.App. Houston [1st Dist] 1994). Although this case is not really precedential, the logic and analysis are sound – and could be used to support an argument that both citations are valid. If your city, however, has decriminalized parking (as we have in San Marcos) then the parking citation is a civil penalty, and double jeopardy is not an issue at all!

Frequently citation acts as delay tactic, the vehicle may be covered, for a while, but the problem reappears. What the neighborhood and the municipality really wants is abatement, to rid itself of the nuisance (and neighborhood eyesore). To do so, the State law sets out procedures to be followed:

- Sec. 683.074. AUTHORITY TO ABATE NUISANCE; PROCEDURES. (a) A municipality or county may adopt procedures that conform to this subchapter for the abatement and removal from private or public property or a public right-of-way of a junked vehicle or part of a junked vehicle as a public nuisance.
- (b) The procedures must:

- (1) prohibit a vehicle from being reconstructed or made operable after removal;
- (2) require a public hearing on request of a person who receives notice as provided by Section 683.075 if the request is made not later than the date by which the nuisance must be abated and removed; and
- (3) require that notice identifying the vehicle or part of the vehicle be given to the department not later than the fifth day after the date of removal.

(c) An appropriate court of the municipality or county may issue necessary orders to enforce the procedures.

(d) Procedures for abatement and removal of a public nuisance must be administered by regularly salaried, full-time employees of the municipality or county, except that any authorized person may remove the nuisance.

(e) A person authorized to administer the procedures may enter private property to examine a public nuisance, to obtain information to identify the nuisance, and to remove or direct the removal of the nuisance.

(f) On receipt of notice of removal under Subsection (b)(3), the department shall immediately cancel the certificate of title issued for the vehicle.

(g) The procedures may provide that the relocation of a junked vehicle that is a public nuisance to another location in the same municipality or county after a proceeding for the abatement and removal of the public nuisance has commenced has no effect on the proceeding if the junked vehicle constitutes a public nuisance at the new location.

Proper procedure is important and any municipal ordinance must take care that constitutionally sound procedures are utilized. A junked vehicle is certificated property, therefore as a matter of constitutional law the owner has some rights under Article I, section 17 of the Texas Constitution:

“No person’s property shall be taken, damaged or destroyed... without adequate compensation...”

That brings up the old constitutional standard of “notice and opportunity to be heard,” both of which must be part of any abatement program. Absent such procedures a city could be liable for damages under a takings theory. In one of the few cases addressing a takings claim related to junked vehicles the court held that a City would not escape trial on a plea to the jurisdiction. See, *City of El Paso v. Robert Millard*, 2004 Tex. App. LEXIS 6927(Tex.App. 8th Dist 2004)(which is included in the appendix to this paper).

Proper procedure also includes proper notice, and as in the case of many nuisance problems (such as buildings) notice may well include doing one’s homework to determine whether there are other parties of interest, particularly lien holders. State law sets out who must receive notice, how such notice must be served, and when you may proceed in the absence of receipt of notice:

Sec. 683.075. NOTICE.

(a) The procedures for the abatement and removal of a public nuisance under this subchapter must provide not less than 10 days' notice of the nature of the nuisance. The notice must be personally delivered, sent by certified mail with a five-day return requested, or delivered by the United States Postal Service with signature confirmation service to:

- (1) the last known registered owner of the nuisance;
- (2) each lienholder of record of the nuisance; and
- (3) the owner or occupant of:
 - (A) the property on which the nuisance is located; or
 - (B) if the nuisance is located on a public right-of-way, the property adjacent to the right-of-way.

(b) The notice must state that:

- (1) the nuisance must be abated and removed not later than the 10th day after the date on which the notice was personally delivered or mailed; and
- (2) any request for a hearing must be made before that 10-day period expires.

(c) If the post office address of the last known registered owner of the nuisance is unknown, notice may be placed on the nuisance or, if the owner is located, personally delivered.

(d) If notice is returned undelivered, action to abate the nuisance shall be continued to a date not earlier than the 11th day after the date of the return.

Proceeding without proper procedure or notice can be detrimental. In 1998, the City of El Paso seized a tool trailer, which met the junk vehicle standard. The trailer was eventually sold at auction without notice to the trailer's owner (although he apparently, at one point, knew the trailer had been towed away, but couldn't afford the \$1,060 storage charge). The owner filed an inverse condemnation suit against the City, *City of El Paso v. Robert Millard*, 2004 Tex. App. LEXIS 6927(Tex.App. 8th Dist 2004). The Court analyzed the facts under Article I, Section 17 of the Texas Constitution, which provides:

No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

Ultimately, the Court denied the City's plea to the jurisdiction. The Court analyzed the city's potential immunity from liability: "[S]tated simply, when a governmental entity takes, damages, or destroys property for public use, immunity from both suit and liability is waived. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149, 38 Tex. Sup. Ct. J. 282 (Tex.

1995); *Steele v. City of Houston*, 603 S.W.2d 786, 791, 23 Tex. Sup. Ct. J. 507 (Tex. 1980).”

The Court then looked at the three elements necessary to find whether or not sufficient facts were alleged to support a compensable taking: 1) the City intentionally performed certain acts, (2) which resulted in a "taking" of the property, (3) for public use. *City of Abilene v. Smithwick*, 721 S.W.2d 949, 951 (Tex.App.--Eastland 1986, writ ref'd n.r.e.).

Millard, the plaintiff, pled that the City entered onto private property and purposefully took his trailer. The Court held that, for the purpose of pleading, such acts by the city are intentional. Accordingly, the Court found that the pleadings sufficiently alleged a taking, and the city's immunity was waived. At that point the case was sent back to the trial court for further development (and more than likely settled by the City).

THE WAITING GAME – PROCEDURES AFTER NOTICE

Many times city staff is under pressure to “get rid” of that piece of junk; however, State law gives the owner up to ten days to request a hearing, and that time may be extended if the notice is returned (action to abate shall be continued to a date not earlier than the 11th day after date of the return). The good news is that after the proper time has elapsed, the nuisance can be abated without further legal action. The better practice, however, is to schedule a hearing in accordance with § 683.076 and have the judge sign an order that includes the information set out in that section:

Sec. 683.076. HEARING.

(a) The governing body of the municipality or county or a board, commission, or official designated by the governing body shall conduct hearings under the procedures adopted under this subchapter.

(b) If a hearing is requested by a person for whom notice is required under Section 683.075(a)(3), the hearing shall be held not earlier than the 11th day after the date of the service of notice.

(c) At the hearing, the junked motor vehicle is presumed, unless demonstrated otherwise by the owner, to be inoperable.

(d) If the information is available at the location of the nuisance, a resolution or order requiring removal of the nuisance must include the vehicle's:

- (1) description;
- (2) vehicle identification number; and
- (3) license plate number.

When the vehicle is taken “notice identifying the vehicle or part of the vehicle be given to the department not later than the fifth day after the date of removal.” (Texas Transportation Code § 683.074(b)(3)), and the vehicle must be properly disposed of:

Sec. 683.078. JUNKED VEHICLE DISPOSAL.

(a) A junked vehicle, including a part of a junked vehicle, may be removed to a scrapyards, a motor vehicle demolisher, or a suitable site operated by a municipality or county.

(b) A municipality or county may operate a disposal site if its governing body determines that commercial disposition of junked vehicles is not available or is inadequate. A municipality or county may:

- (1) finally dispose of a junked vehicle or vehicle part; or
- (2) transfer it to another disposal site if the disposal is scrap or salvage only.

At this point your saga should be complete, and in most, but not all, cases that will be true.

CAN THERE BE AN APPEAL FROM THE MUNICIPAL COURT’S DECISION

The issue of appealing a municipal court decision is an interesting discussion that frequently does not lead to clear answers. The problem is that the legislature has expanded the role of municipal courts, particularly municipal courts of record; however, the legislature has not really addressed some of the appellate questions, particularly when the municipal court is acting in a civil or quasi-civil capacity. Junked vehicle hearings, outside hearings on a citation, are really more civil in nature.

This is more than an academic question, as I have had a federal judge intimate that in his thinking, constitutionally speaking, all municipal court decisions are appealable and the state must provide some procedure to accomplish such an appeal. Far be it for me to argue that the only constitutional standard (outside of criminal charges where there are serious liberty interests) I am aware of is the requirement for “notice and opportunity to be heard” which does not demand a second bite at the apple.

Before any further discussion on the appellate issue, and to better illustrate what can actually happen, I want to discuss one of my recent cases: *Michael Kleinman d/b/a Planet K vs. City of San Marcos*, which began in the San Marcos Municipal Court of Record and is now pending before the 5th Circuit Court of Appeals in New Orleans, on issues that you wouldn’t even have thought about.

Planet K opened a store in San Marcos along the frontage road to IH-35. In a manner similar to what it did in Austin, the store obtained an old car and held a car bashing fundraiser. After bashing up the car, it was moved to the side of their lot (by their sign) and filed with dirt. Cactus was planted in the dirt, and two artists painted the sides of the car. Before the car was, in the words of Mr. Kleinman, “transformed” the business, through its manager, was cited having a junked vehicle on its premises in public view. Kleinman timely requested a hearing. Shortly before the hearing Kleinman hired an attorney, who requested a continuance in order to give him time to brief certain constitutional issues. When the hearing was finally conducted (about three weeks later) all of the “art work” had

been completed. Kleinman neither briefed nor raised (other than a single passing statement) any constitutional issues during the municipal court trial.

At the conclusion of the hearing the municipal court held that the vehicle was a junked vehicle and a public nuisance. Kleinman was given five days to either move the vehicle or screen it from public view. Rather than comply with the Court's order, Kleinman filed a suit in state district court seeking a temporary restraining order and permanent injunction based on a claim that the junked vehicle had been transformed into "art" and as such "constitutes a protected form of expression that the City cannot prohibit, destroy or prevent." Even though Kleinman never invoked specific constitutional references, it was clear that a constitutional claim (made for the first time) was the basis of his argument.

The City immediately removed the case to Federal court, and filed its answer and a motion to dismiss under Federal Rule 12(b)(6). In that motion the City argued that Kleinman's suit was (1) a collateral attack on a valid court judgment, and (2) Kleinman could not, even upon amendment of pleading, raise a valid constitutional challenge to the City's legitimate use of its police power. Kleinman's attorney (then) was not licensed in Federal court, and did not respond to the City's motion. The Court, after further notice to Kleinman, dismissed the suit (order is included in the appendix). Interestingly, and somewhat unexpectedly, the Court stated that, with respect to the Municipal Court's Judgment:

Kleinman's right to appeal the judgment of the Municipal Court is governed by Texas Government Code § 30.0014, which allows an appeal from the judgment of a municipal court to the county courts at law. *Id.* at (a). The appellant "may give notice of appeal orally in open court on the overruling of the motion." *Id.* at (d). However, "to perfect an appeal, the appellant must file a written motion for a new trial with the municipal court clerk not later than the 10th day after the date on which the judgment is rendered." *Id.* at (c). This motion must set out the grounds for error relied on by the appellant. *Id.* "The appellate court shall determine each appeal...on the basis of the errors that are set forth in the appellant's motion for new trial and that are presented in the [record of the municipal court proceedings]. An appeal from the municipal court of record may not be by trial de novo." *Id.* at (b).

The court noted that Kleinman did not request a new trial and did not appeal the municipal court's decision, but filed an entirely new suit. Since the time for appeal had expired, the municipal court's order was a final unappealable order finding that the vehicle was a junked vehicle, and that fact is established as a matter of law entitled to *res judicata*. The Court also held that Kleinman failed to establish a constitutional violation.

Kleinman then hired another attorney, who, within the proper time limit, filed a motion for reconsideration, along with a proposed Amended Complaint. Kleinman's motion and amended complaint raised some new issues in addition to a plea for reinstatement based on lack of representation. With respect to appellate court jurisdiction, Kleinman cited an attorney general opinion, GA-316. This opinion (see, appendix), however does not fully answer the question:

The Code of Criminal Procedure still contemplates that appeals from municipal courts will involve solely criminal matters. See Tex. Code Crim. Proc. Ann. Art. 44.02 (Vernon 1979 & Supp. 2004-05). Likewise, the Government Code does not appear to specifically provide for an appeal of a purely civil matter within a municipal court's jurisdiction. See Tex. Gov't Code. Ann. § 30.0014(a) (Vernon 2004). However, we do not address whether there is a general right of appeal of civil matters within a municipal court's jurisdiction.

As is most often the case in dismissals under Rule 12(b)(6), the federal court reopened the case to allow full consideration of all the issues, including the new issues brought forth in Kleinman's Amended Complaint (which now included two new Plaintiff's – the artists). The issue on whether or not there is a general right of appeal from a municipal court decision is still an open question (not an issue before the 5th Circuit Court of Appeals) – one that really needs legislative intervention.

THE NEED FOR CLEARER APPELLATE JURISDICTION

As stated above, the idea that a municipal court judgment, particularly from a municipal court of record, is a final appealable order is not merely an academic consideration. This is particularly true where the appeal must be "on the record." Many, if not most, municipal court litigants limit their argument to the narrow issues raised in the municipal court proceeding. In such cases, upon appeal or later litigation, the city would then be able to raise the argument that claim preclusion bars subsequent litigation of issues not raised in the municipal court. Litigants can't reserve federal issues for a federal court. See *San Remo Hotel, L.P. v. San Francisco*, 545 U.S. 323 (2005).

Another, but somewhat related, issue is the abstention doctrine; that a federal court should abstain from interfering in the citation-adjudication system. See *Younger v. Harris*, 401 U.S. 37 (1971), and its successors. "If the case were at all complex, we might abstain whether asked to do so or not—for a litigant can't wait out state processes and then turn to federal court." See *Hicks v. Miranda*, 422 U.S. 332 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). For many matters the consideration could, and should, be choice of forum. The municipality may well want, at least the ability, to fully consider matters on the local level, and have certainty that such issues are fully redressed.

IS ONE PERSON'S JUNK REALLY ANOTHER'S TREASURE – OR CAN A JUNKED VEHICLE BECOME COMMERCIAL SPEECH?

In Kleinman's Amended Complaint he added a pair of new plaintiffs, Scott Wade and John "Furly" Travis the two persons who painted the "art" on the junked vehicle. Their issues were raised under the Visual Rights Act of 1990, Pub. L. No. 101-650 (tit. VI), 104 Stat. 5089, 5128-33 (1990) ("VARA"), which amended the copyright law to recognize artists' rights of attribution and integrity in their visual works. Specifically, the statutory "right of

integrity” provides the author of a work of visual art the right to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his honor or reputation. 17 U.S.C. § 106(a)(3)(A). VARA also provides the author of a work of visual art of recognized stature the right to prevent any destruction of the work. 17 U.S.C. § 106(a)(3)(B). Violations of the right of integrity are deemed an infringement of the right of the author under § 17 U.S.C. § 501.

Not all art is protected by VARA. For example, applied art (a certain type of commercial art) is excepted from protection. In addition, under VARA there is no right to the placement or public presentation of a piece of art under the exception in 17 U.S.C. § 106A(c)(2). See, *Phillips v. Pembroke Real Estate, Inc.* 288 F.Supp. 2d 89, 100 (D.Mass. 2003) also *Board of Managers of SOHO Int’l Arts Condo v. City of New York*, 2003 U.S. Dist. LEXIS 10221, 2003 WL 21403333, *10 (S.D.N.Y. 2003). Both of these issues play to the City’s argument that none of the artists’ rights were violated.

From the City’s standpoint the issues concerning “art” are really a red herring and the City consistently argued that it was not regulating art, or content, only the “canvas.” As a matter of police power a municipality has the right to reasonable time, place and manner restrictions, and this can include regulation of the “canvas” (analogizing to sign cases, e.g., where cities have outlawed portable signs). In other words a junked vehicle is just that, a junked vehicle regardless of what is painted on its surface.

On the big picture side, particularly from the angle of municipal regulation, such a claim is problematic, as it would trump all forms of regulating order, aesthetics, and nuisances – all of which are legitimate public interests. As was argued, consideration of VARA would put the City into regulating “content,” something the City can’t and doesn’t want to get into. A city doesn’t want to get into the argument that some gang members tagged car up on blocks is artistic expression, nor do Cities want junked vehicles to be turned into commercial messages.

Historically, the problem with junked vehicles is one that was faced, statewide. In fact the problem was bad enough that, in 1995, the Legislature enacted a bill that set out most of the present junked vehicle standards. Many, if not most, cities have faced this problem, and nearly all of them have similar ordinances. San Marcos is no exception – in fact since the establishment of the code enforcement/marshal’s department three years ago, nearly 1,000 junked vehicles have been removed from the City.

Another issue that arose in the Kleinman suit concerns commercial speech. Mr. Kleinman testified that “painted junked vehicle planters” were “emblematic” of his business (two of his businesses in Austin also have such vehicles). Commercial speech does not enjoy the same “full” freedom of speech protection under the First Amendment. Municipalities, and other governmental entities are entitled to regulate commercial speech particularly if the regulations are “content neutral.” Also, municipalities may forbid, altogether, certain modes of disseminating commercial speech – such as use of “portable signs” See, *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987). The City’s argument then is that in a

similar way, the City is under no obligation to allow the use of a vehicle, or any material – most particularly nuisance material – as a sign, or any other “form” of commercial speech.

The issue of commercial speech is also important under VARA. Certain commercial art, applied art, is excepted from protection under VARA.

Ultimately, the district judge did not buy Kleinman’s arguments. First the Court held that the junked vehicle fell into the realm of applied art, still subject to some First Amendment consideration. Most importantly the Court held that when it considered the vehicle, in context, it was important that the chosen artistic medium is in itself a problem that an entire chapter of the San Marcos City Code is designed to regulate. The Court further noted that the City ordinance (and for that matter state law) does not require that the vehicle be destroyed, merely enclosed from public view. A content-neutral ordinance “need not be the least restrictive or least intrusive means” of satisfying a legitimate government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). The Court held that screening in accordance with the law would leave an adequate alternative channel of expression. Thus the Court denied Kleinman’s “as applied” constitutional claim.

The Court also found, that under VARA, given there was no right “placement or public presentation” and that the Municipal Court order allowed screening (as an alternative to destruction) the artist plaintiffs failed to state a claim for which relief may be granted under the statute. The case was dismissed with prejudice.

THE AFTERMATH

These plaintiffs were not satisfied and filed an appeal with the Fifth Circuit Court of Appeals. They recently filed their brief, and the appealed issues are rather interesting, both from the standpoint of what was raised, and what has been apparently abandoned. Kleinman presented the following issues:

1. Does the First Amendment allow a city to prohibit any public display of artwork constructed from junked vehicles?
2. Does the First Amendment permit a city to require that any artwork made from a junked vehicle be screened entirely from public view, on pain of seizure and destruction of the artwork?
3. Do the plaintiff artists, whose visual work is displayed on private property with consent of the property owner, have a cause of action under the Visual Artists Rights Act to prevent the City of San Marcos from seizing and destroying their artwork?
4. Did the District Court, in this federal civil rights action against a city, exceed its authority in affirmatively ordering the Plaintiffs to comply with a municipal court order and a city ordinance, particularly when the City sought no such affirmative relief?

The plaintiffs do not challenge any of the findings under the junked vehicle ordinance. Their challenges are based solely on the basis that the junked vehicle is no longer a junked vehicle but a “public display of artwork.”

The first two issues, as framed, are, in an important respect, broader than what was considered by the trial court. Since the issues are framed in terms of “any artwork constructed from a junked vehicle” they seek a ruling that would be much broader than the “as applied” challenge raised in the trial court. As a general rule the Courts of Appeals will not consider issues raised for the first time on appeal. The City will raise the argument that Kleinman is seeking more than he is entitled to seek.

The third issue goes, to some extent, to the heart of the trial court’s ruling under VARA; however it ignores the finding that screening is an ample way of providing an alternative means of expression.

The fourth issue is rather interesting as it is a direct attack on some the wording in the trial court’s judgment. First, even though the City removed the case to federal court, the City is the defendant and not really seeking affirmative relief. From the City’s standpoint the Municipal Court’s Order is a valid, binding, now non-appealable order. It is presently stayed by the posting of a bond, and suspension of the District Court’s Order on appeal. Even absent a directive from the District Court, absent any affirmative relief granted to the Plaintiff, that is a temporary restraining order (or injunction), the City would have full right to enforce the municipal court’s order. If the Court of Appeals finds in favor of the City, then all stays and restraining orders are dissolved. The City does not need a federal court’s blessing to enforce its order.

"Ars est celare artem." ("True art conceals the means by which it is achieved.")

But for now, the saga continues.

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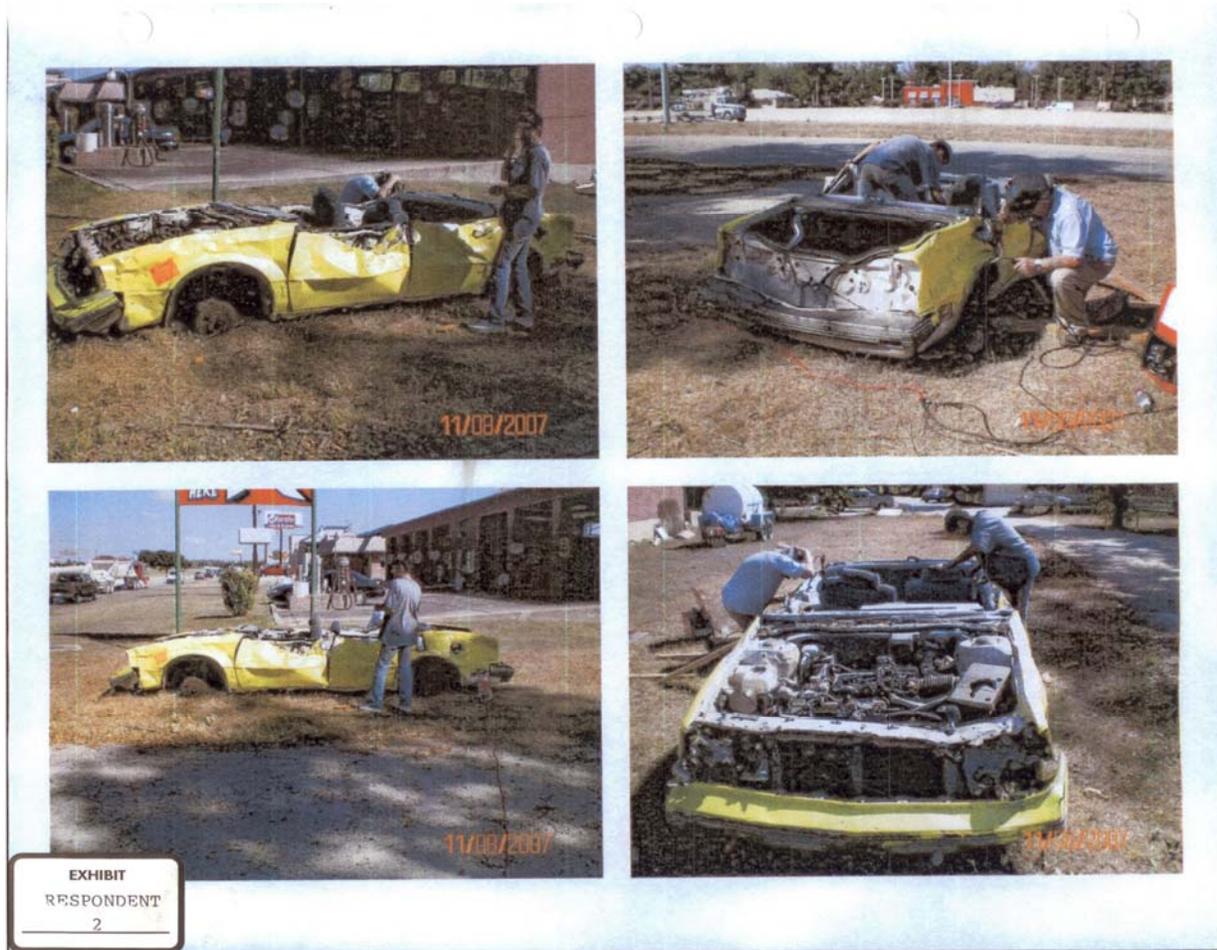
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Junked Vehicle – Art Car – Planter or Sign?



TEXAS TRANSPORTATION CODE

SUBCHAPTER E. JUNKED VEHICLES: PUBLIC NUISANCE; ABATEMENT

Sec. 683.071. DEFINITION. In this subchapter, "junked vehicle" means a vehicle that is self-propelled and:

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 - (B) a valid motor vehicle inspection certificate; and
- (2) is:
 - (A) wrecked, dismantled or partially dismantled, or discarded; or
 - (B) inoperable and has remained inoperable for more than:
 - (i) 72 consecutive hours, if the vehicle is on public property; or
 - (ii) 30 consecutive days, if the vehicle is on private property.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 746, Sec. 1, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 798, Sec. 1, eff. Sept. 1, 2001.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 500, Sec. 1, eff. September 1, 2007.

Sec. 683.0711. MUNICIPAL REQUIREMENTS. An ordinance adopted by a governing body of a municipality may provide for a more inclusive definition of a junked vehicle subject to regulation under this subchapter.

Added by Acts 2003, 78th Leg., ch. 1073, Sec. 1, eff. Sept. 1, 2003.

Sec. 683.072. JUNKED VEHICLE DECLARED TO BE PUBLIC NUISANCE. A junked vehicle, including a part of a junked vehicle, that is visible at any time of the year from a public place or public right-of-way:

- (1) is detrimental to the safety and welfare of the public;
- (2) tends to reduce the value of private property;
- (3) invites vandalism;
- (4) creates a fire hazard;

(5) is an attractive nuisance creating a hazard to the health and safety of minors;

(6) produces urban blight adverse to the maintenance and continuing development of municipalities; and

(7) is a public nuisance.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 2003, 78th Leg., ch. 1073, Sec. 2.

Sec. 683.073. OFFENSE. (a) A person commits an offense if the person maintains a public nuisance described by Section 683.072.

(b) An offense under this section is a misdemeanor punishable by a fine not to exceed \$200.

(c) The court shall order abatement and removal of the nuisance on conviction.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 683.074. AUTHORITY TO ABATE NUISANCE; PROCEDURES. (a) A municipality or county may adopt procedures that conform to this subchapter for the abatement and removal from private or public property or a public right-of-way of a junked vehicle or part of a junked vehicle as a public nuisance.

(b) The procedures must:

(1) prohibit a vehicle from being reconstructed or made operable after removal;

(2) require a public hearing on request of a person who receives notice as provided by Section 683.075 if the request is made not later than the date by which the nuisance must be abated and removed; and

(3) require that notice identifying the vehicle or part of the vehicle be given to the department not later than the fifth day after the date of removal.

(c) An appropriate court of the municipality or county may issue necessary orders to enforce the procedures.

(d) Procedures for abatement and removal of a public nuisance must be administered by regularly salaried, full-time employees of the municipality or county, except that any authorized person may remove the nuisance.

(e) A person authorized to administer the procedures may enter private property to examine a public nuisance, to obtain information to identify the nuisance, and to remove or direct the removal of the nuisance.

(f) On receipt of notice of removal under Subsection (b)(3), the department shall immediately cancel the certificate of title issued for the vehicle.

(g) The procedures may provide that the relocation of a junked vehicle that is a public nuisance to another location in the same municipality or county after a proceeding for the abatement and removal of the public nuisance has commenced has no effect on the proceeding if the junked vehicle constitutes a public nuisance at the new location.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 1226, Sec. 1, eff. June 18, 1999.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 500, Sec. 2, eff. September 1, 2007.

Sec. 683.075. NOTICE. (a) The procedures for the abatement and removal of a public nuisance under this subchapter must provide not less than 10 days' notice of the nature of the nuisance. The notice must be personally delivered, sent by certified mail with a five-day return requested, or delivered by the United States Postal Service with signature confirmation service to:

(1) the last known registered owner of the nuisance;

(2) each lienholder of record of the nuisance; and

(3) the owner or occupant of:

(A) the property on which the nuisance is located; or

(B) if the nuisance is located on a public right-of-way, the property adjacent to the right-of-way.

(b) The notice must state that:

(1) the nuisance must be abated and removed not later than the 10th day after the date on which the notice was personally delivered or mailed; and

(2) any request for a hearing must be made before that 10-day period expires.

(c) If the post office address of the last known registered owner of the nuisance is unknown, notice may be placed on the nuisance or, if the owner is located, personally delivered.

(d) If notice is returned undelivered, action to abate the nuisance shall be continued to a date not earlier than the 11th day after the date of the return.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 2001, 77th Leg., ch. 413, Sec. 13, eff. Sept. 1, 2001.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 369, Sec. 1, eff. June 15, 2007.

Sec. 683.076. HEARING. (a) The governing body of the municipality or county or a board, commission, or official designated by the governing body shall conduct hearings under the procedures adopted under this subchapter.

(b) If a hearing is requested by a person for whom notice is required under Section 683.075(a)(3), the hearing shall be held not earlier than the 11th day after the date of the service of notice.

(c) At the hearing, the junked motor vehicle is presumed, unless demonstrated otherwise by the owner, to be inoperable.

(d) If the information is available at the location of the nuisance, a resolution or order requiring removal of the nuisance must include the vehicle's:

- (1) description;
- (2) vehicle identification number; and
- (3) license plate number.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 683.0765. ALTERNATIVE PROCEDURE FOR ADMINISTRATIVE HEARING. A municipality by ordinance may provide for an administrative adjudication process under which an administrative penalty may be imposed for the enforcement of an ordinance adopted under this subchapter. If a municipality provides for an administrative

adjudication process under this section, the municipality shall use the procedure described by Section 54.044, Local Government Code.

Added by Acts 2001, 77th Leg., ch. 413, Sec. 14, eff. Sept. 1, 2001.

Sec. 683.077. INAPPLICABILITY OF SUBCHAPTER. (a) Procedures adopted under Section 683.074 or 683.0765 may not apply to a vehicle or vehicle part:

(1) that is completely enclosed in a building in a lawful manner and is not visible from the street or other public or private property; or

(2) that is stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or junkyard, or that is an antique or special interest vehicle stored by a motor vehicle collector on the collector's property, if the vehicle or part and the outdoor storage area, if any, are:

(A) maintained in an orderly manner;

(B) not a health hazard; and

(C) screened from ordinary public view by appropriate means, including a fence, rapidly growing trees, or shrubbery.

(b) In this section:

(1) "Antique vehicle" means a passenger car or truck that is at least 25 years old.

(2) "Motor vehicle collector" means a person who:

(A) owns one or more antique or special interest vehicles; and

(B) acquires, collects, or disposes of an antique or special interest vehicle or part of an antique or special interest vehicle for personal use to restore and preserve an antique or special interest vehicle for historic interest.

(3) "Special interest vehicle" means a motor vehicle of any age that has not been changed from original manufacturer's specifications and, because of its historic interest, is being preserved by a hobbyist.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 2001, 77th Leg., ch. 413, Sec. 15, eff. Sept. 1, 2001; Acts 2001, 77th Leg., ch. 1431, Sec. 1, eff. Sept. 1, 2001.

Sec. 683.078. JUNKED VEHICLE DISPOSAL. (a) A junked vehicle, including a part of a junked vehicle, may be removed to a scrapyards, a motor vehicle demolisher, or a suitable site operated by a municipality or county.

(b) A municipality or county may operate a disposal site if its governing body determines that commercial disposition of junked vehicles is not available or is inadequate.

A municipality or county may:

(1) finally dispose of a junked vehicle or vehicle part; or

(2) transfer it to another disposal site if the disposal is scrap or salvage only.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

**John Ed PRICE, et al., Plaintiffs-Appellants, v. CITY OF JUNCTION,
TEXAS, Defendant-Appellee**

No. 83-1097

**UNITED STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT**

711 F.2d 582; 1983 U.S. App. LEXIS 26589; 19 ERC (BNA) 1693

June 20, 1983

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Texas.

DISPOSITION: Affirmed.

COUNSEL: Bradley C. Miles, San Angelo, Texas, for Appellant.

Graves, Dougherty, Hearon & Moody, Austin, Texas, David H. Donaldson, Jr., Austin, Texas, for Appellee.

JUDGES: Clark, Chief Judge, Goldberg and Politz, Circuit Judges.

OPINION BY: CLARK

OPINION

[*585] CLARK, Chief Judge:

Six residents of Junction, Texas sued the city seeking a declaration that Junction's "junk car" ordinance was unconstitutional. The owners of cars subject to the ordinance also brought a section 1983 action against named city officials. After a number of pretrial stipulations and the dismissal of the section 1983 claim and the named defendants, the suit came before the district judge as a declaratory judgment action with the city as the sole defendant. The plaintiffs sought a declaration that the ordinance was an improper exercise of

the city's police power; violated the plaintiffs' procedural due process rights; deprived them of equal protection of the laws; subjected their property to taking without just compensation, and subjected them to warrantless searches and seizures. The district court rejected [**2] all of the constitutional claims and upheld the statute. We affirm.

The city of Junction, Texas, responding to what it characterized as "a long history of concern by [its] citizens . . . about the junked, wrecked and abandoned vehicles that littered the city," began the process in May, 1979 of implementing a "junk car ordinance." The ordinance which was adopted¹ allowed the city to order the removal [*586] or to actually remove junked vehicles from public or private property.² A junked vehicle was defined as any inoperative motor vehicle which has both expired license [*587] plates and an invalid motor vehicle safety inspection certificate. The vehicle must be wrecked, dismantled, partially dismantled or discarded or it must remain inoperable for more than 120 days.

1 The text of the amended ordinance challenged in this case reads:

SECTION I. DEFINITIONS.

Whenever the following terms are used in this article they shall have the meaning respectively ascribed to them in this section:

JUNKED VEHICLE. Means any motor vehicle as defined in Section 1 of Article 6701d-11, Vernon's Texas Civil Statutes, as amended, which:

(a) is inoperative and which does not have lawfully affixed thereto both an unexpired license plate or plates and a valid motor vehicle safety inspection certificate and which is wrecked; dismantled; partially dismantled; or discarded; or

(b) remains inoperable for a continuous period of more than 120 days.

SECTION 2. LOCATION OR PRESENCE OF JUNKED VEHICLES WITHIN CITY DEEMED PUBLIC NUISANCE; EXCEPTIONS.

The location or presence of any junked vehicle or junked vehicles on any lot, tract, parcel of land or portion thereof, occupied or unoccupied, improved or unimproved, within the City of Junction shall be deemed a public nuisance and it shall be unlawful for any person or persons to cause or maintain such public nuisance by wrecking, dismantling, rendering inoperable, abandoning or discarding his or their vehicle or vehicles on the property of another or to suffer, permit or allow the same to be placed, located, maintained or exist upon his or their own real property; provided that this section shall not apply to (1) a vehicle or part thereof which is completely enclosed within a building in a lawful manner where it is not visible from the street or other public or private property; (2) a vehicle or part thereof which is stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or a junkyard; or (3) unlicensed inoperable vehicles stored on private property provided, however, that the

vehicles and outdoor storage areas are maintained in such a manner that they do not constitute a health hazard and are screened from ordinary public view by means of a fence, rapidly growing trees, shrubbery, or other appropriate means.

SECTION 3. ABATEMENT OR REMOVAL ORDER: CONTENTS: SERVICE.

(a) Whenever such public nuisance exists in the city in violation hereof, the Chief of Police and/or his employees, who shall administer this ordinance, shall not give less than ten (10) days notice to the owner of the real property of the occupant, if any, of the premises whereon such public nuisance exists to abate or remove the same, stating the nature of the public nuisance of private property and that it must be removed and abated within ten (10) days and further that a request for a hearing must be made before expiration of said ten (10) day period by the aggrieved person, such notice to be mailed, by certified or registered mail with a 5-day return receipt requested, to the owner or the occupant of the private premises whereupon such public nuisance exists. If the notice is returned undelivered by the United States Post Office, official action to abate said nuisance shall be continued to a date not less than ten (10) days from the date of such return.

(b) Whenever such public nuisance exists in the city in violation hereof, the Chief of Police and/or his employees, shall give not less than a ten (10) day notice, stating the nature of the public nuisance on the public property or on a public right-of-way and that it must be removed and abated within ten (10) days and further that a request for a hearing must be made before expiration of said ten (10) day period, such notice to be

mailed, by certified or registered mail with a 5-day return receipt requested, to the owner or the occupant of the public premises or to the owner or the occupant of the premises adjacent to the public right-of-way whereupon such public nuisance exists. If the notice is returned undelivered by the United States Post office, official action to abate said nuisance shall be continued to a date not less than ten (10) days from the date of such return.

(c) After a vehicle has been removed it shall not be reconstructed or made operable.

(d) A public hearing prior to the removal of the vehicle or part thereof as a public nuisance is to be held before the governing body of the City, or official of the City as designated by the governing body, when such a hearing is requested by the owner or occupant of the public or private premises or by the owner or occupant of the premises adjacent to the public right-of-way on which said vehicle is located, within ten (10) days after service of notice to abate the nuisance. Any resolution or order requiring the removal of a vehicle or part thereof shall include a description of the vehicle, and the correct identification number and license number of the vehicle, if available at the site.

SECTION 4. REMOVAL WITH PERMISSION OF OWNER OR OCCUPANT

If within ten (10) days after receipt of notice from the Chief of Police and/or his employees, or his duly authorized agent, to abate the nuisance, as herein provided, the owner or occupant of the premises shall give his written permission the Chief of Police and/or his employees, or his duly authorized agent for removal of

the junked motor vehicle from the premises, the giving of such permission shall be considered compliance with the provisions of Section 3.

SECTION 5. DISPOSAL OF JUNKED VEHICLES.

(a) If such public nuisance is not abated by said owner or occupant after notice is given in accordance with this ordinance, official action shall be taken by the City of Junction to abate such nuisance. Junked vehicles or parts thereof may be disposed of by removal to a scrapyards, demolishers, or any suitable site operated by the City of Junction for processing as scrap or salvage, which removal or process shall be considered with Section 5, Subdivision (b) of this ordinance. A junked vehicle disposed of to a demolisher, in accordance with this ordinance, must be transferred to such demolisher by a form acceptable to the Texas Department of Highways and Mass Transportation (Form #MVD 71-5).

SECTION 6. AUTHORITY TO ENFORCE.

The Chief of Police and/or his employees, or his agent, may enter upon private property for the purposes specified in this ordinance to examine vehicles or parts thereof, obtain information as to the identity of vehicles and to remove or cause the removal of a vehicle or parts thereof declared to be a nuisance pursuant to this ordinance. The Municipal Court of the City of Junction shall have authority to issue all orders necessary to enforce such ordinance.

SECTION 7. APPLICATION.

Nothing in this Article shall effect ordinances that permit immediate removal of a vehicle left on public

property which constitutes an obstruction to traffic.

SECTION 8. PENALTY.

Upon conviction for violation of any provisions of this article relating to the maintaining of a public nuisance as described herein or in permitting or allowing such public nuisance to exist, such violator shall be punished by a fine of not exceeding two hundred dollars (\$ 200.00) and each day that such nuisance shall continue after the time for abatement as herein set out shall constitute a separate offense.

[**3]

2 The city acted pursuant to state law. The state granted cities, towns and counties the authority to enact procedures for the abatement and removal of junked vehicles as public nuisances from private and public property, including public rights-of-way. *Tex.Rev.Civ.Stat.Ann.art. 6687-9, now codified at, Tex.Health Code Ann.art. 4477-9a § 5.01 et seq.*

The presence of a junked vehicle anywhere in the city constitutes a public nuisance. Exceptions to this were made for: (1) vehicles completely enclosed in buildings where not visible from public or private property; (2) vehicles on private property in connection with the operation of a vehicle dealer or junkyard; and (3) unlicensed antique or "special interest" vehicles stored by a collector on his property and screened from public view by a fence, trees or shrubbery. The ordinance provides for notice to the owner and a public hearing before the city council or its designee before the vehicle may be seized.

The council amended the ordinance on May 12, 1980 to broaden the third exception to include all inoperable, unlicensed vehicles. [**4] The council then directed the new city attorney, Donnie J. Coleman, to enforce the ordinance. Ms. Coleman prepared a letter that

was to be sent to all persons who were considered to be in violation of the ordinance as amended. Her letter ran in the Junction newspaper on Thursday, May 15, 1980. She waited approximately two weeks for voluntary compliance. During this period, she had the local police investigate reports of junked cars and conduct a survey of junked vehicles.

On May 28, 1980, Ms. Coleman sent out the same letter to sixteen people, including all of the people who later became plaintiffs. After receiving their letters, plaintiffs John Ed Price, Arthur D. Wallace, and C. W. Schaefer came into her office and obtained a copy of the ordinance. Ms. Coleman sent out four more groups of letters during June.

On June 2, ten persons, including all of the plaintiffs, requested a hearing before the council. Several of the plaintiffs appeared June 9 at the city council meeting which was attended by sixty to seventy people who supported the ordinance. The council decided to hold a special hearing on June 16. That announcement was made at the meeting and by a form letter mailed [**5] to all those who had requested a hearing.

At the hearing, police officer Freddy Gazaway testified that the plaintiffs (and others) were violating the ordinance. The owners did not cross-examine Gazaway. During the hearing, Ms. Coleman explained that the police would need either the owner's permission or a search warrant to examine a vehicle on private property.

The council, on June 23, agreed that nine of the ten owners were violating the ordinance and ordered Ms. Coleman to proceed with enforcement. The next day, Ms. Coleman mailed a letter to these persons notifying them that the council had made a preliminary finding that they were not in compliance with the junked car ordinance. As criminal prosecution began, the car owners filed their suit. Since the filing of this appeal, city officials proceeded

with the impounding procedure and have enforced the ordinance against these plaintiffs.

POLICE POWER

The plaintiffs contend that the "junk car" ordinance might be a valid zoning ordinance, but that it cannot be a legitimate exercise of the city's general police powers because it is an unconstitutional restriction upon the plaintiffs' use of private property which serves no valid [**6] public interest. The plaintiffs' brief fails to make clear whether they raise this claim under the federal or state constitutions. Because the plaintiffs cite only Texas cases in this section of their brief, we assume that they are attacking the statute on state constitutional grounds.³

3 The district court addressed the issue under both federal and state constitutional law.

[*588] The plaintiffs argue that the statute is invalid under *Spann v. Dallas*, 111 Tex.350, 235 S.W. 513 (1921). *Spann* held that:

Since the right of the citizen to use his property as he chooses so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked for the abridgment of a particular use of private property, unless such use reasonably endangers or threatens the public health, the public safety, the public comfort or welfare. A law which assumes to be a police regulation but deprives the citizen of the use of his property under the pretense of preserving the public [**7] health, safety, comfort or welfare, when it is manifest that such is not the real object and purpose of the regulation, will be set aside as a clear and direct invasion of the

right of property without any compensating advantages.

235 S.W. at 515. *Spann* was decided, however, prior to the landmark Supreme Court holding in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926), and the 1927 passage of legislation by the Texas legislature giving cities the power to enact zoning laws.

Subsequent Texas cases also distinguish *Spann*. In *City of Brookside Village v. Comeau*, 633 S.W.2d 790 (Tex.), cert. denied, 459 U.S. 1087, 103 S. Ct. 570, 74 L. Ed. 2d 932 (1982), the Texas Supreme Court upheld the village's ordinance regulating the location of mobile homes. The case is applicable here because while the Court found that the ordinance had the effect of a zoning ordinance, *id.* at 793, it considered the law as a land-use ordinance passed pursuant to the village's police powers. *Id.* at 793 n. 4. The Court directs us in reviewing the [**8] police powers of municipalities under the Texas Constitution to presume the ordinance is valid. *Id.* at 792. We may not interfere unless the ordinance is "unreasonable and arbitrary -- a clear abuse of municipal discretion." *Id.* (quoting *Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex.1971)). This places an "extraordinary burden" on the party attacking the ordinance to show that "no conclusive or even controversial or issuable fact or condition existed" which would authorize the passage of the ordinance. *Id.* at 792-93 (quoting *Thompson v. City of Palestine*, 510 S.W.2d 579 (Tex.1974)). If reasonable minds may differ as to whether a particular ordinance has a substantial relationship to the protection of the general health, safety or welfare of the public, then there exists an issuable fact and the ordinance must stand. *Id.* at 793. See also *City of Houston v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d 774 (Tex.Civ.App. -- Houston 1972, writ ref'd).⁴

4 In *Johnny Frank's Auto Parts*, the Court of Civil Appeals upheld the constitutionality of a city ordinance that required that oil, gasoline and other flammable liquids be drained from wrecked vehicles in wrecking yards. The ordinance also required that wrecking yards be surrounded by solid fences or walls.

The question remains whether the ordinance here involved was such an unreasonable exercise of police power as to be invalid. Even though an ordinance is passed to accomplish a purpose properly within the scope of a city's police power, it must not be wholly unreasonable nor unduly oppressive in its operation upon those affected by it. It must be reasonably necessary for the preservation of health, safety and welfare. 40 Tex.Jur.2d Municipal Corporations, sec. 327 (1962). However, when the validity of an ordinance is attacked on this basis there is a presumption of validity and the attacker, to prevail, must clearly show that it is arbitrary, unreasonable and an abuse of the police power. *City of Weslaco v. Meltor*, 158 Tex. 61, 308 S.W.2d 18 (1957). The question of its reasonableness is a question of law, not of fact. *City of Coleman v. Rhone*, 222 S.W.2d 646 (Tex.Civ.App. -- Eastland 1949, writ ref'd).

480 S.W.2d at 779.

[**9] The stipulated record in this case indicates that the city was concerned about junk cars being a fire hazard and a hinderance in the fighting of fires; an attractive nuisance to children; an obstacle in the luring of professional persons to locate in a city known as "Junky Junction"; a liability in encouraging tourist trade; and an eye-sore. While *Spann* does say that purely aesthetic considerations are not a proper basis for the exercise of police powers, later cases indicate that aesthetics should not be [*589] ignored, but may properly be considered by a city as one of a number of factors followed in the exercise of police powers. *City of Houston v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d at 780; *Connor v. City of University Park*, 142 S.W.2d 706, 712 (Tex.Civ.App. -- Dallas 1940, writ ref'd).

We presume this ordinance to be valid. The plaintiffs then must, under their "extraordinary burden," show us that there are no facts or conditions which would authorize the passage of the ordinance. They have failed to do that. The city on the other hand has shown that the ordinance not only furthers an aesthetic goal, but also serves the [**10] interests of the health, safety and welfare of the residents of Junction. We find the ordinance, therefore, to be a proper exercise of the city's police powers.

Finally, the plaintiffs argue that the ordinance establishes junked cars as a "nuisance *per se*" in violation of Texas law. We need only reply that the Texas legislature has determined junk cars to be a public nuisance punishable under state law. Tex.Health Code Ann. art. 4477-9a, § 5.08(a)-(c).

PROCEDURAL DUE PROCESS

The plaintiffs also complain that the ordinance deprives them of their procedural

due process rights under both the federal and state constitutions because they are denied a meaningful hearing before an impartial tribunal.⁵

5 The plaintiffs also argue that they are denied a hearing before an impartial "judicial" tribunal, that the ordinance violates the separation of powers, and that it shifts the burden of proof to the private landowner. These contentions border on the frivolous. There is no requirement that the impartial tribunal be a judicial tribunal. Moreover, in this case, after a hearing before the city council, the city must go to municipal court to enforce its findings thus implicitly granting the judicial hearing the residents say they are due. Additionally, there is no plausible separation of powers issue. To so rule would call into question the entire system of agency regulatory authority which resides in the executive level of government. Finally, there is no shift in the burden of proof. Before the city council and the municipal court, the city officials bear the burden of proving that the vehicles are inoperable and unlicensed, thus falling within the ordinance. The residents then may show that the vehicles in fact are operable.

[**11] The ordinance provides in section 3(d) that when the city believes that a vehicle is being maintained in violation of the ordinance, the owner shall receive ten days' notice to abate the violation or remove the vehicle. The owner also has ten days within which to request a hearing. Section 3(d) requires that, when requested, a public hearing must be held before the city council or a designated city official to determine if there is a violation. In this case, each of the plaintiffs received notice that they were maintaining vehicles in violation of the ordinance. Each requested a hearing, and a hearing was held at which the city presented

evidence that they were in violation of the ordinance. The plaintiffs offered no defenses.

The central theme of procedural due process under the federal constitution is that parties whose liberty or property rights are affected by governmental action are entitled to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 901-02, 47 L. Ed. 2d 18 (1976). It is necessary that property or liberty interests within the meaning of the due process clause [**12] be involved before the notice and hearing rights are created. Whether a junk car has little or great value, it is constitutionally protected property. The plaintiffs here clearly have a property interest within the contemplation of the due process clause.

The timing and nature of the hearing, therefore, is determined by an accommodation of the competing interests which include the importance of the private interest, the finality of the deprivation, the likelihood of government error and the magnitude of government interests. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 1157, 71 L. Ed. 2d 265 (1982). The ordinance deals with the seizure (or re-arranging) of private property. If the property [*590] is seized, the deprivation would be final. There is some chance of government error given the fact that old damaged cars may still be operable. On the other hand, while the government interest is enough to justify the ordinance, it is certainly not enough to warrant seizure prior to hearing. There is a right, therefore, to notice and hearing before governmental action is taken under this statute.

We hold that the notice and hearing provided by [**13] this ordinance is constitutionally sufficient. The ordinance gives ten days' notice of the pending action. Ten days is certainly enough time to clear the junk vehicles, cover them from view or secure license plates. It is also time enough to prepare

for the hearing. Moreover, there are indications in this case that the council is willing to postpone the hearing if notice proves insufficient.

The plaintiffs complain, though, that the hearing is not impartial because it may be before the same group that passed the ordinance. We will not presume that the publicly elected council members would not act impartially in such a hearing. In the setting of teacher disciplinary hearings arising from a strike, the Supreme Court refused to hold that a school board would act unfairly. *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1982). The Court required a showing of actual unfairness or partiality, such as some personal or financial stake amounting to a conflict of interest, to justify the disqualification of the board. 426 U.S. at 491-93, 96 S. Ct. at 2313-14. There is no showing [**14] here of any actual unfairness or partiality.

The analysis under the state constitution merits the same result. The Texas constitution provides that "[n]o citizen of this State shall be deprived of . . . property . . . except by due course of the law of the land." *Tex. Const. art. I, § 19*. This provision encompasses not only procedural, but also substantive due process. *Aladdin's Castle, Inc. v. City of Mesquite*, 701 F.2d 524, 531 (5th Cir.1983). It is clear that the protection afforded under the procedural due process rights granted by article I, section 19, are congruent with those in the Federal Constitution.

The *Federal Constitution*, in the *fifth* and *fourteenth amendments*, also provides against deprivation of life, liberty or property without due processes of law, the *fourteenth amendment* by its language being applicable to prevent the states from carrying

out such a deprivation. It has been held by Texas courts that the clause of the Texas Constitution, to the extent that it is identical with the *fourteenth amendment*, has placed upon the powers of the state legislature the same restrictions as those which have been held to be imposed by the language [**15] of that amendment of the Federal Constitution. *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249 (1887).

Tex. Const. Ann. art. 1, § 19 (Vernon 1955) (Interpretive Commentary) at 448-49. The procedural due process rights vouched safe by the Texas constitution to persons being deprived of property requires reasonable notice and meaningful opportunity to be heard. *Id.* at 447; *In re B M N*, 570 S.W.2d 493, 502 (Tex.Civ.App. -- Texarkana 1978). The same analysis is therefore required and the ordinance is constitutional under state law.

EQUAL PROTECTION

The plaintiffs' next argument is that the ordinance violates the *equal protection clause of the federal constitution* because it makes an irrational classification in exempting from the ordinance junk car dealers, persons who can afford to hide their vehicles from public view, and persons who can get an extension period. In addition, they argue that the ordinance does not limit the discretion of local officials thus engendering the possibility of arbitrary and discriminatory enforcement.

Equal protection claims, when not involving fundamental rights and suspect classes, [**16] are analyzed under the mere rationality test. *Seoane v. Ortho Pharmaceuticals, Inc.*, 660 F.2d 146, 150 (5th Cir.1981). [**591] This test requires that the ordinance promote a legitimate governmental interest. *Id.* We have already found such an

interest. In addition, the burden is upon the challenger to show the restriction is wholly arbitrary. *Id.* The plaintiffs have failed to show this.⁶

6 The plaintiffs appear to be suggesting that the ordinance discriminates against the poor. The ordinance, however, does not make any such distinction. It is to be applied regardless of wealth. Even were we to determine that the ordinance singled out the poor for different treatment, it would not trigger the higher standard of review -- strict scrutiny -- under the *equal protection clause* since the Supreme Court has refused to find the poor to be a suspect class. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 1291, 1294, 36 L. Ed. 2d 16 (1973).

[**17] The uniform grant of such extension periods does not create an equal protection violation. It appears that all who requested an extension were given one, apparently as an accommodation during the initiation period of the new ordinance.

Finally, the plaintiffs' claim about the possibility of arbitrary enforcement is properly raised in a void-for-vagueness claim. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 2299, 33 L. Ed. 2d 222 (1972). The plaintiffs conceded during trial that the ordinance is not vague. The issue therefore must be resolved against them.

TAKING WITHOUT JUST
COMPENSATION

The plaintiffs contend that the ordinance requires them to spend money to make their cars operative, screen them or license them. This they contend is confiscatory, therefore, it amounts to a taking of property without just compensation in violation of the federal and state constitutions. The plaintiffs also contend that if this is not a physical taking, it places a

restriction or servitude upon private property without compensation in violation of Texas law.

Under federal law, whether a state law infringes property in violation of the *takings clause of the* [**18] *fifth amendment* requires examination of whether the restriction forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Armstrong v. United States*, 364 U.S. 40, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960). But the Court has acknowledged that this presents a question which is not susceptible to solution by a set formula and which invariably must be solved upon the particular circumstances in each case. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978). We look for guidance to other decisions of the Court. It is clear that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *Armstrong*, 80 S. Ct. at 1568. When analyzing a governmental action to determine if a taking has occurred, we are directed to inquire into "the character of the governmental action, its economic impact and its interference with reasonable investment-backed expectations." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 100 S. Ct. 2035, 2042, 64 L. Ed. 2d 741 (1980) [**19] (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383, 390, 62 L. Ed. 2d 332 (1979)).

The burden in such cases is upon the plaintiff to show that the ordinance attacked is confiscatory, inordinately burdensome or denies him an economically viable use of his property. *National Western Life Insurance v. Commodore Cove*, 678 F.2d 24, 29 (5th Cir.1982). The plaintiffs here have failed to carry this burden. The ordinance was enacted to further health, safety and aesthetic ends and therefore furthers a significant and proper governmental interest. The ordinance also

requires the plaintiffs to license or hide their inoperable junk vehicles if they do not want them to be seized. By their very nature such inoperable junk vehicles do not embody reasonable, investment-backed expectations. The economic impact on the plaintiffs is insufficient to render the ordinance improper under the *takings clause*.

[*592] The analysis under the state constitution reaches the same conclusion. The plaintiffs argue that the ordinance amounts to either a physical taking of or a restriction or servitude upon private property and, therefore, compensation [**20] must be paid. For this proposition they cite *City of Austin v. Teague*, 570 S.W.2d 389 (Tex.1978); *Du Puy v. City of Waco*, 396 S.W.2d 103 (Tex.1965); and *Southern National Bank of Houston v. Austin*, 582 S.W.2d 229 (Tex.Civ.App. -- Tyler 1979). The *Teague* and *DuPuy* cases are instructive. The Texas Supreme Court in *Teague* discusses at some length the near imponderable distinction between the exercise of police power and eminent domain. The Court in that case contends there is no one sentence test to allay the problem, but finds in that case that a city's denial of a permit application for an owner's use of property imposed a compensable servitude upon the property. The servitude resulted because the governmental action "singled out plaintiffs to bear all of the cost for the community benefit without distributing any cost among the members of the community." 570 S.W.2d at 394. In *DuPuy*, the Court held that the government's correction of something that is a detriment to the public indicates that the action is a regulation and not a taking and therefore compensation should not be allowed. 396 S.W.2d at 107 n. 3. [**21]

Despite the Texas court's position that mere categorization of cases as police power or eminent domain cases is not dispositive, we have already determined that the ordinance here is a proper exercise of the city's police power. Other Texas cases tell us that a

reasonable exercise of the police power does not effect a taking. *City of Waco v. Archenhold Automobile Supply Co.*, 386 S.W.2d 174, 179 (Tex.Civ.App. -- Waco 1964), *aff'd*, 396 S.W.2d 111 (Tex.1965). Even under the rationale of *Teague* and *DuPuy*, though, we find that compensation is not required here. The ordinance is more a regulation than a taking. There is benefit to the general public and the burden is not borne by these plaintiffs alone, but by all Junction residents who would keep junked automobiles. This action does not constitute a taking for which compensation is required.

WARRANTLESS ENTRY

The plaintiffs argue that the ordinance allows the police to enter upon private property to examine or remove vehicles without first obtaining a search warrant. This violates their *fourth amendment* protection against unreasonable searches and seizures.

We agree with the district [**22] court's interpretation that the ordinance does not authorize warrantless searches. Section six of the ordinance provides that law enforcement officials may enter upon private property to enforce the ordinance. It further states however that the municipal court of Junction shall have the authority to issue all orders necessary for this purpose. This requires warrants prior to entry upon private property. Since the ordinance does not explicitly authorize warrantless entry, we must read it, and local officials must enforce it, consistent with the Constitution. If entries occur which appear to violate the Constitution, the entries must be reviewed on a case-by-case basis since the ordinance is not invalid on its face.

The decision of the district court is

AFFIRMED.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2005

<p>The Honorable Kent Grusendorf Chair, House Committee on Public Education Texas House of Representatives Post Office Box 2910 Austin, Texas 78768-2910</p> <p>The Honorable Mike Krusee Chair, House Committee on Transportation Texas House of Representatives Post Office Box 2910 Austin, Texas 78768-2910</p>	<p>Opinion No. GA-0316 Re: Post-hearing procedure in cases involving nonconsent tows (RQ-0278-GA)</p>
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Dear Representatives Grusendorf and Krusee:

Together you inquire about post-hearing procedure in nonconsent tow hearings conducted under chapter 685 of the Texas Transportation Code.⁽¹⁾ You inform us that in three separate nonconsent tow hearings in the City of Arlington Municipal Court, a municipal court of record, the judge serving as a magistrate determined that there was no probable cause for challenged nonconsent tows. See Request Letter, *supra* note 1, at 2. After the hearings, attorneys for the tow companies and apartment complexes, as the parties who initiated the nonconsent tows, submitted various documents (motion for rehearing, motion for new trial, and notice of appeal) seeking to reverse the decisions of the court. See *id.* At the same time, the parties whose vehicles had been towed sought reimbursement for their costs or return of their vehicles. See *id.* You state that it "is unclear under the law how the court can proceed in these matters," *id.*, and ask

[i]s the decision final, after a hearing in a municipal court under [section] 685.003 of the Texas Transportation Code, if the hearing results in a finding of no probable cause for the nonconsent tow? If not, what is the post-hearing procedure?

Id. at 1.

I. Nonconsent Tow Hearings

Pursuant to chapter 685, a person whose vehicle has been towed without consent is entitled to a hearing on whether probable cause existed for the removal of the vehicle. See Tex. Transp. Code Ann. § 685.003 (Vernon 1999). The primary issue at a hearing conducted under chapter 685 is whether probable cause existed for the removal and placement of the vehicle. See *id.* § 685.009(c)(1) (Vernon Supp. 2004-05). If the court conducting the hearing finds there was probable cause for the authorization of the removal and storage of the vehicle, the "person who requested the hearing shall pay the costs of the removal and storage." *Id.* § 685.002(a) (Vernon 1999). On the other hand, if the court finds no probable cause for the removal and storage of the vehicle, the "person or law enforcement agency that authorized the removal shall" pay the costs of removal and storage or reimburse the owner or operator for removal and storage costs already paid by the owner or operator. *Id.* § 685.002(b). Jurisdiction to conduct these probable cause tow hearings is given to the justice of the peace or magistrate in the jurisdiction from which the vehicle was removed.⁽²⁾ See *id.* § 685.004(a) (Vernon Supp. 2004-05). Your inquiry pertains specifically to tow hearings that are conducted before a magistrate⁽³⁾ of a municipal court. See Request Letter, *supra* note 1, at 1.

II. Municipal Courts

Municipal courts are statutory courts created pursuant to the legislature's constitutional authority to create "such other courts" as necessary. See Tex. Const. art. V, § 1 (vesting judicial power in "one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law"); see also Tex. Att'y Gen. Op. No. DM-427 (1996) at 2. There are two kinds of municipal courts in Texas: municipal courts and municipal courts of record.⁽⁴⁾ See Tex. Gov't Code Ann. §§ 29.002 (Vernon 2004) (creating a municipal court in each municipality), 30.00003(a)

(permitting the governing body of certain municipalities to create a municipal court of record); see *also id.* §§ 30.00851-.00856 (pertaining to a municipal court of record for the City of Arlington); *cf. id.* § 30.00003(e) (stating a municipal court of record of a municipality may not exist concurrently with a municipal court of the same municipality).

Because the constitution does not specifically provide for them, or for their jurisdiction, municipal courts and municipal courts of record derive their jurisdiction from statute. See *id.* §§ 29.003 (municipal courts), 30.00005 (municipal courts of record); Tex. Code Crim. Proc. Ann. art. 4.14 (Vernon Supp. 2004-05) (municipal courts and municipal courts of record). As statutory courts, municipal courts and municipal courts of record have only limited jurisdiction that cannot exceed the jurisdiction expressly conferred by the legislature. See Tex. Att'y Gen. Op. No. DM-427 (1996) at 2 (municipal courts "have no jurisdiction other than that which the legislature prescribes"); see *also* Tex. Att'y Gen. Op. No. JC-0216 (2000) at 2 (stating a municipal court is one of limited jurisdiction). Jurisdiction for municipal courts and municipal courts of record is found in the Government Code and the Code of Criminal Procedure. Both statutes grant "exclusive original jurisdiction" to municipal courts, including municipal courts of record, over all criminal cases arising under city ordinances that are punishable by fine.⁽⁵⁾ Tex. Gov't Code Ann. § 29.003(a) (Vernon 2004); Tex. Code Crim. Proc. Ann. art. 4.14(a) (Vernon Supp. 2004-05). In addition to this criminal jurisdiction, municipal courts and municipal courts of record have "concurrent jurisdiction with the justice court of a precinct in which the municipality is located" over certain⁽⁶⁾ state law violations. Tex. Gov't Code Ann. § 29.003(b) (Vernon 2004); Tex. Code Crim. Proc. Ann. art. 4.14(b) (Vernon Supp. 2004-05). Municipal courts of record, in addition to the jurisdiction of municipal courts, see Tex. Gov't Code Ann. § 30.00005(a) (Vernon 2004), have other jurisdiction as provided by the Government Code. See *id.* § 30.00005(b)-(d); *cf. Prince v. Garrison*, 248 S.W.2d 241, 243 (Tex. Civ. App.-Eastland 1952, no writ) (the legislature fixes the jurisdiction of corporation [municipal] courts by statute).

III. Appeal from Municipal Court

The Government Code and the Code of Criminal Procedure provide a limited right to appeal from municipal courts and municipal courts of record. The Code of Criminal Procedure gives a defendant in any criminal action the right to appeal. See Tex. Code Crim. Proc. Ann. art. 44.02 (Vernon 1979 & Supp. 2004-05). Appeal from a municipal court, other than a municipal court of record, is a *de novo* trial in the county court. See *id.* arts. 44.17, 45.042(b) (Vernon Supp. 2004-05). The Government Code provides a right of appeal "from a judgment or conviction in a municipal court of record." Tex. Gov't Code Ann. § 30.00014(a) (Vernon 2004). Appeal from a municipal court of record is to the county criminal courts or county criminal courts of appeal, see *id.*, and is not conducted as a *de novo* trial but as an appeal based on error reflected in the record. See Tex. Code Crim. Proc. Ann. arts. 44.17, 45.042(b) (Vernon Supp. 2004-05), Tex. Gov't Code Ann. § 30.00014(b) (Vernon 2004).

A. Necessity of Criminal Case

It has been said that matters appealed from municipal courts must involve a criminal case. See *City of Lubbock v. Green*, 312 S.W.2d 279, 282 (Tex. Civ. App.-Amarillo 1958, no writ) (stating an appeal from municipal court "would lie only if the proceedings constituted a criminal case."); see *also* 23 David Brooks, Texas Practice: Municipal Law and Practice § 15.19 (1999). The holding in the *Green* case, that there was no appeal from a municipal court where the matter was not a criminal case, was premised on the fact that municipal courts had no civil jurisdiction. See *Green*, 312 S.W.2d at 282 ("Since [the statute] limits the jurisdiction of corporation courts to criminal cases . . ."). The statutes now provide municipal courts of record with limited civil jurisdiction. See Tex. Gov't Code Ann. § 30.00005(d) (Vernon 2004) (providing that governing body of municipality may provide that municipal court of record may have specified civil jurisdiction). The Code of Criminal Procedure still contemplates that appeals from municipal courts will involve solely criminal matters. See Tex. Code Crim. Proc. Ann. art. 44.02 (Vernon 1979 & Supp. 2004-05). Likewise, the Government Code does not appear to specifically provide for an appeal of a purely civil matter within a municipal court's jurisdiction. See Tex. Gov't Code Ann. § 30.00014(a) (Vernon 2004). However, we do not address whether there is a general right of appeal of civil matters within a municipal court's jurisdiction. Because of the unique nature of a chapter 685 nonconsent tow hearing, we do not think the Code of Criminal Procedure and Government Code provisions supply the answer to your question.

B. Nonconsent Tow Hearing Is Neither a Criminal Nor Civil Matter

Chapter 685 tow hearings are clearly not criminal matters. Nonconsent tow hearings contemplated by chapter 685 are not designed to secure a conviction and punishment for a crime. See *Timmons v. Pecorino*, 977 S.W.2d 603, 604 (Tex. Crim. App. 1998). The hearings are not initiated by complaint, but rather by written request from the person whose vehicle has been towed. See Tex. Transp. Code Ann. § 685.007(a) (Vernon 1999). The party against whom the hearing is sought is not a criminal defendant but "the person or law enforcement agency that authorized the removal of the vehicle." *Id.* § 685.009(b). Moreover, a chapter 685 hearing involves no crime or criminal punishment but only an award of specified costs based on the findings of fact and conclusion of law made by the court. See *id.* §§ 685.002(b), .009(d). A chapter 685 hearing does not result in a conviction from which an appeal will lie. See *Hardin v. State*, 248 S.W.2d 487, 487 (Tex. Crim. App.

1952) ("The accused has not . . . been found guilty of anything, and no punishment has been assessed; therefore, this is not a criminal case . . .").

Nor do the provisions for a chapter 685 nonconsent tow hearing suggest a civil adjudication in the traditional sense. A chapter 685 hearing commences with a request, see Tex. Transp. Code Ann. § 685.007(a) (Vernon 1999), instead of a petition or complaint as is expected in a civil case. The parties involved in the hearing are not a plaintiff and defendant, but the person who authorized the tow and the owner or operator of the vehicle that was towed. See *id.* §§ 685.002(a), .003, .009(b). The chapter authorizes a magistrate to make findings of fact and a conclusion of law, see *id.* § 685.009(d), but not to issue a final judgment. Instead, it merely states who "shall pay" certain costs. See *id.* § 685.002. Appeals do not lie from findings of fact and conclusions of law but from final judgments. See *N. E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966).

C. Similar Statutory Hearing Procedures

A chapter 685 nonconsent tow hearing is a kind of statutory proceeding that is uncommon. Texas statutes provide a few other examples of isolated grants of authority to municipal courts to conduct hearings for a particular purpose. Chapter 822 of the Texas Health and Safety Code creates a hearing process to determine whether a dog is dangerous. See Tex. Health & Safety Code Ann. § 822.0423 (Vernon 2003). The hearing is authorized to occur in a justice court, county court, or municipal court. See *id.* § 822.042(c). In such a hearing, the court is directed to determine whether the dog is a dangerous dog as defined by the statute or whether the owner of the dog has complied with certain requirements under the chapter. See *id.* § 822.0423(a); see also *Pecorino*, 977 S.W.2d at 604 (a hearing under Health and Safety Code chapter 822 is not criminal because the dog owner is not charged with or convicted of a criminal offense). The statute expressly provides for an appeal of the court's determination. See *id.* § 822.0423(d) ("An owner or person filing the action may appeal the decision of the municipal court, justice court, or county court in the manner provided for the appeal of cases from the municipal, justice, or county court."). Similarly, hearings conducted to determine the disposition of property alleged to have been stolen are authorized to be conducted before, among others, a "municipal judge having jurisdiction as a magistrate in the municipality." Tex. Code Crim. Proc. Ann. art. § 47.01a(a) (Vernon Supp. 2004-05). The hearing is conducted to determine the superior right to possession of the property. See *id.* The statute expressly provides for an appeal from the hearing. See *id.* § 47.12(b) ("Appeals from a hearing in a municipal court or justice court . . . shall be heard by a county court or statutory county court."). The statute further prescribes the applicable rules of procedure that govern the appeal. See *id.* Both of these hearing procedures are similar to a chapter 685 nonconsent tow hearing in that they contemplate a hearing before a magistrate. However, of these statutory hearings, chapter 685 is the only hearing in which the statute does not provide for an appeal.

D. Legislature Has Not Provided for Appeal

Municipal court jurisdiction over a chapter 685 nonconsent tow hearing comes not from the general statutes governing municipal courts and municipal courts of record but from the Transportation Code. The specific grant of jurisdiction to conduct a nonconsent tow hearing is limited. See Tex. Transp. Code Ann. §§ 685.004(a) (Vernon Supp. 2004-05) (the hearing is limited to a justice of the peace or magistrate in specified territory), 685.009(c) (the hearing is limited to deciding issues specified in the statute). Chapter 685 does not contain a provision authorizing an appeal from the magistrate's determination. We think the few examples of similar statutory hearings, see discussion *supra*, clearly indicate that when the legislature creates a statutory hearing and wishes to grant a right of appeal, it knows how to do so.⁽⁷⁾ See Tex. Att'y Gen. Op. No. GA-0271 (2004) at 2 (stating that when "it wishes to require immunizations for specific categories of persons, the legislature knows how to do so"), Tex. Att'y Gen. Op. No. GA-0144 (2004) at 5 (stating that when "legislature intends to confer on a licensing board [certain] authority . . . , it knows how to do so"); see also *Thorne v. Moore*, 105 S.W. 985, 987 (1907) ("The Constitution leaves the regulation of appeals very largely to the Legislature."), *Equitable Life Assur. Soc'y v. Murdock*, 219 S.W.2d 159, 164 (Tex. Civ. App.-El Paso 1949, writ ref'd n.r.e.) (stating the right of appeal "is a privilege only and does not exist as a matter of right"). The Texas Constitution provides that appellate jurisdiction is subject to regulations as may be prescribed by law. See Tex. Const. art. V, § 5. Thus, appeals are within the control of the legislature and are dependent on statute. See *Thorne*, 105 S.W. at 987; *Murdock*, 219 S.W.2d at 164. Because the legislature did not expressly provide for an appeal of a magistrate's determination in a statutory nonconsent tow hearing, we conclude that the magistrate's determination is final and that no appeal exists.

E. No Inherent Right to Appeal

We received briefing that argues where a vested property right is involved there is an inherent right of appeal that overrides any legislative restrictions on appeals.⁽⁸⁾ The cases cited in support of this proposition are distinguishable on the basis that they involve challenges to adverse rulings of state administrative agencies. See Pierson Behr Brief, *supra* note 8, at 2 (citing *City of Amarillo v. Hancock*, 239 S.W.2d 788, 790 (Tex. 1951) (Civil Service Commission); *Tex. Optometry Bd. v. Lee Vision Ctr., Inc.*, 515 S.W.2d 380, 382 (Tex. Civ. App.-Eastland 1974, writ ref'd n.r.e.) (Texas Optometry Board); *Martine v. Bd. of Regents, State Senior Colls. of Tex.*, 578 S.W.2d 465, 472

(Tex. Civ. App.-1979, no writ) (Board of Regents, State Senior Colleges of Texas)). It is well established in administrative law jurisprudence that "courts should recognize an inherent right of appeal from an administrative body created by an act silent on the question of appeal only where the administrative action complained of violates a constitutional provision." *Hancock*, 239 S.W.2d at 790; see also *Brazosport Savs. & Loan Ass'n v. Am. Savs. & Loan Ass'n*, 342 S.W.2d 747, 750-51 (Tex. 1961), *Bd. of Ins. Comm'rs v. Title Ins. Ass'n of Tex.*, 272 S.W.2d 95, 97-98 (Tex. 1954). We have found no judicial authority for the application of this rule outside the administrative law context.⁽⁹⁾ Accordingly, the cited cases are inapplicable to the action being challenged here - this is an action of a court and not of an administrative agency.

A nonconsent tow hearing conducted before a magistrate of a municipal court or municipal court of record pursuant to chapter 685, Texas Transportation Code, results in a final probable cause determination from which there is no appeal. Because we have concluded the magistrate's determination is final, we do not address the second part of your inquiry about post-hearing procedure.

SUMMARY

Where a nonconsent tow hearing authorized by chapter 685 of the Texas Transportation Code is conducted before a magistrate of a municipal court or municipal court of record, the magistrate's determination is final, and there is no appeal.

Very truly yours,



GREG ABBOTT
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NANCY S. FULLER
Chair, Opinion Committee

Charlotte M. Harper
Assistant Attorney General, Opinion Committee

Footnotes

1. Letter from Honorable Kent Grusendorf and Honorable Mike Krusee, Texas House of Representatives, to Honorable Greg Abbott, Texas Attorney General (Sept. 24, 2004) (on file with Opinion Committee, also available at <http://www.oag.state.tx.us>) [hereinafter Request Letter].

2. In municipalities with a population of 1.9 million or more, the hearing is to be conducted by the judge of "a municipal court in whose jurisdiction is the location from which the vehicle was removed." Tex. Transp. Code Ann. § 685.004(b) (Vernon Supp. 2004-05).

3. Among other officers, justices of the peace, mayors and judges of municipal courts are magistrates. See Tex. Code Crim. Proc. Ann. art. 2.09 (Vernon Supp. 2004-05).

4. As one court explained:

Prior to September 1, 1999, each municipality authorized to have a municipal court of record had its independent subchapter of chapter 30 of the [G]overnment [C]ode, which authorized the governing body of the municipality to create a municipal court of record and established certain provisions for the court. With the legislation effective September 1, 1999, subchapter A authorizes all municipalities listed in chapter 30 to create municipal courts of record and sets out provisions governing all the municipal courts of record. Each municipality then has a separate subchapter containing provisions specific to that municipality.

Martin v. State, 13 S.W.3d 133, 136 n.1 (Tex. App.-Dallas 2000, no pet.) (citations omitted).

5. Permissible fines are not to exceed:

(A) \$2,000 in all cases arising under municipal ordinances or resolutions, rules, or orders of a joint board that govern fire safety, zoning, or public health and sanitation, including dumping of refuse; or

(B) \$500 in all other cases arising under a municipal ordinance or a resolution, rule, or order of a joint board.

Tex. Gov't Code Ann. § 29.003(a)(1) (Vernon 2004).

6. State law violations must arise within the territorial limits of the municipality and must be punishable by fine only. See *id.* § 29.003(b)(1)-(2).

7. See also Tex. Transp. Code Ann. §§ 471.001-.008 (Vernon 1999 & Supp. 2004-05) (chapter 471, Transportation Code, creating the right to a hearing regarding the blocking of a railroad crossing but providing no mechanism for appeal).

8. See Brief from Grey Pierson, Pierson Behr Attorneys, to Honorable Greg Abbott, Texas Attorney General (Nov. 10, 2004) (on file with Opinion Committee) [hereinafter Pierson Behr Brief].

9. Of course, we recognize that where a party has been deprived of property without due process, the party may have a separate cause of action under the Due Process Clause of either the state or federal constitution. See *Boddie v. Conn.*, 401 U.S. 371, 378-79 (1971). We received no briefing on this issue and the question does not inquire about such a cause of action, so we do not consider it in this opinion. We do point out, however, that a party given an opportunity to participate in a chapter 685 nonconsent tow hearing is likely afforded sufficient due process.

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ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 24, 2007

The Honorable Rob Baiamonte

Goliad County Attorney
Post Office Box 24
Goliad, Texas 77963

Opinion No. GA-0542

Re: Whether abandoned vehicles seized by the
county sheriff must be disposed of pursuant to
Transportation Code chapter 683 or Code of
Criminal Procedure article 18.17 (RQ-0549-GA)

Dear Mr. Baiamonte:

You ask about the proper disposition of abandoned vehicles seized by the Goliad County Sheriff (the "Sheriff").⁽¹⁾ You inform us that undocumented persons traveling by motor vehicle through Goliad County, Texas, when stopped by law enforcement officers, "often times . . . run[] out of the vehicle into the brush, never to be seen again, [and] meanwhile the vehicle is abandoned on the side of the road." Request Letter, *supra* note 1, at 1.⁽²⁾ The Sheriff "immediately hauls the vehicle down to his yard" for health and safety reasons and, after attempting to notify the vehicles' owners, sells the vehicles at an auction or retains them pursuant to chapter 683 of the Transportation Code, which authorizes the disposition of abandoned motor vehicles. *Id.*; Brief, *supra* note 1, at 1; see Tex. Transp. Code Ann. §§ 683.001–.016 (Vernon 1999 & Supp. 2006). More recently, the Sheriff has loaned the retained vehicles to other county departments, such as the commissioners court, emergency management, the county extension office, and the courthouse maintenance department. See Request Letter, *supra* note 1, at 1.

You initially ask whether the seized vehicles must be disposed of pursuant to Transportation Code chapter 683 or pursuant to Code of Criminal Procedure article 18.17, which authorizes the disposition of seized unclaimed or abandoned personal property. *Id.* at 2; see Tex. Code Crim. Proc. Ann. art. 18.17 (Vernon 2005). You suggest that article 18.17 governs the disposition of these vehicles. See Brief, *supra* note 1, at 1. But if we conclude that chapter 683 is the governing statute, you ask three additional questions related to vehicle use and disposition under that statute.⁽³⁾ See Request Letter, *supra* note 1, at 2.

I. Transportation Code Chapter 683

We first consider chapter 683 of the Transportation Code. Chapter 683 authorizes a law enforcement agency to "take into custody an abandoned motor vehicle . . . found on public or private property" and to dispose of it. Tex. Transp. Code Ann. §§ 683.011 (custody), 683.014 (auction or use) (Vernon Supp. 2006). For the purposes of chapter 683, a "law enforcement agency" includes "a sheriff or a constable." *Id.* § 683.001(3)(D). If an owner or a lienholder does not claim the vehicle after notice is given regarding the abandoned vehicle, "the law enforcement agency may sell the item at a public auction, transfer the item, if a watercraft, [to the Parks and Wildlife Department], or use the item as provided by Section 683.016." *Id.* § 683.014(a)(2); see *id.* § 683.012 (providing for notice). Under section 683.016, the law enforcement agency that takes the unclaimed abandoned vehicle into custody "may use the vehicle for agency purposes" and "shall auction the vehicle . . . if the agency discontinues use of the vehicle." *Id.* § 683.016(a)–(b).

By its terms, chapter 683 authorizes law enforcement officers to take into custody only "abandoned vehicles." See *id.* § 683.011; see also *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003) ("If the statutory language is unambiguous, we will interpret the statute according to its plain meaning."). Section 683.002 specifically defines the class of motor vehicles that are abandoned for the purposes of the statute: A motor vehicle is abandoned if the vehicle

(1) is inoperable, is more than five years old, and has been left unattended on public property for more than 48 hours;

(2) *has remained illegally on public property for more than 48 hours;*

(3) *has remained on private property without the consent of the owner or person in charge of the property for more than 48 hours;*

(4) *has been left unattended on the right-of-way of a designated county, state, or federal highway for more than 48 hours;*

(5) has been left unattended for more than 24 hours on the right-of-way of a turnpike project constructed and maintained by the Texas Turnpike Authority division of the Texas Department of Transportation or a controlled access highway; or

(6) is considered an abandoned motor vehicle under Section 644.153(r) [impounded commercial vehicles subject to administrative penalty].

Tex. Transp. Code Ann. § 683.002(a) (Vernon Supp. 2006) (emphasis added). A vehicle that does not fall within the defined class under section 683.002 is not an abandoned motor vehicle for the purposes of chapter 683. See *id.*; see also *Old Am. County Mut. Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111, 115 (Tex. 2004) (“[W]e presume that every word of a statute has been included or excluded for a reason”); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006) (quoting *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003)) (“It is an elementary rule of construction that, when possible to do so, effect must be given to every sentence, clause, and word of a statute so that no part thereof be rendered superfluous.”).

An abandoned motor vehicle subject to the statute, as relevant here, would be a vehicle remaining illegally on public property or left unattended for at least 48 hours. See Tex. Transp. Code Ann. § 683.002(a)(2), (4) (Vernon Supp. 2006). The motor vehicles in question, however, are not left unattended for 48 hours. See Request Letter, *supra* note 1, at 1; Brief, *supra* note 1, at 1. Instead, for health and safety reasons, they are removed immediately after the occupants flee the vehicles when stopped by law enforcement officers. See Request Letter, *supra* note 1, at 1 (“Our Sheriff immediately hauls the vehicle down to his yard”); Brief, *supra* note 1, at 1 (“The Sheriff’s position is [that] the vehicle is a health and safety issue and cannot remain there 48 hours[;] therefore he removes it immediately to his impound lot.”). While chapter 683 leaves unaffected any other “law authorizing the immediate removal of a vehicle left on public property that is an obstruction to traffic[.]” it does not contain a health and safety exception to the abandoned vehicle criteria or authorize immediate removal of a vehicle for health and safety reasons. See Tex. Transp. Code Ann. § 683.002(a) (Vernon Supp. 2006), § 683.003(b) (Vernon 1999). The motor vehicles in question therefore are not “abandoned” within the meaning of chapter 683, and the statute’s disposition procedures do not apply to them.

II. Code of Criminal Procedure Article 18.17

We next consider article 18.17 of the Code of Criminal Procedure. This article provides in relevant part as follows:

All unclaimed or abandoned personal property of every kind, other than contraband subject to forfeiture under Chapter 59 of this code . . . , seized by any peace officer in the State of Texas which is not held as evidence to be used in any pending case and has not been ordered destroyed or returned to the person entitled to possession of the same by a magistrate, which shall remain unclaimed for a period of 30 days shall be delivered for disposition to . . . the purchasing agent of the county in which the property was seized. . . . If [a] peace officer [other than a municipal peace officer] seizes the property, the peace officer shall deliver the property to the purchasing agent of the county. If the county has no purchasing agent, then such property shall be disposed of by the sheriff of the county.

Tex. Code Crim. Proc. Ann. art. 18.17(a) (Vernon 2005). The county purchasing agent or the sheriff must give notice stating that if the owner does not claim the property within 90 days of the notice date, the property will be disposed of and the proceeds, less the cost of maintenance and disposal of the property, placed in the county treasury. See *id.* art. 18.17(b) (mailed notice), (c) (published notice); see also *id.* art. 18.17(d) (sale to be preceded by 14-day notice), (i) (insufficient bid and reoffer).

But property scheduled for disposition under article 18.17 need not be sold. See *id.* art. 18.17(d). The “county law enforcement agency that originally seized the property may request and have the property converted to agency use.” *Id.* art. 18.17(g). Additionally, the seizing agency “may transfer the property to another . . . county law enforcement agency for the use of that agency.” *Id.*

We look at the prerequisites for the application of article 18.17 and consider whether they are met here. Initially, the seized motor vehicles in question are personal property as required by the statute. See *San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 640 (Tex. 2000) (citing *Erwin v. Steele*, 228 S.W.2d 882, 885 (Tex. Civ. App.—Dallas 1950, writ ref’d n.r.e.)) (“Personal property is defined broadly to include everything that is subject to ownership not falling under the definition of real estate.”). Additionally, the vehicles are not excluded from the application of the statute by virtue of their being held as evidence for use in a pending case or ordered to be destroyed or returned to the rightful owners or holders: You inform us that because “there is rarely an arrest in these cases[.] there are no charges brought and no evidence that needs to be held” and “no case is ever filed.” Brief, *supra* note 1, at 1.

We cannot, however, determine as a matter of law that the seized vehicles meet the remaining two relevant statutory requirements. First, because article 18.17 is a criminal procedural statute, it necessarily governs the disposition of personal property seized by a peace officer in connection with the enforcement of the state’s criminal laws. See Tex. Code Crim. Proc. Ann. art. 18.17(a) (Vernon

2005). The express purpose of the entirety of the Code of Criminal Procedure is to “govern all criminal proceedings” and to “embrace rules applicable to the prevention and prosecution of offenses against the laws of this State.” *Id.* arts. 1.02, .03; *see also Curry v. Wilson*, 853 S.W.2d 40, 43 (Tex. Crim. App. 1993) (explaining that “criminal law matters” are “[d]isputes which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure, and which arise as a result of or incident to a criminal prosecution”).⁽⁴⁾ Second, article 18.17 excludes from its operation contraband that is disposed of pursuant to chapter 59 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 18.17(a) (Vernon 2005); *see also id.* art. 59.01(2) (Vernon 2006) (defining “contraband” generally as property (1) used in the commission of a first or second degree felony or (2) used or intended to be used in the commission of one of the offenses specifically listed in the definition).

You do not ask about or describe the circumstances surrounding the seizure of a particular vehicle. More importantly, whether a particular vehicle was seized in connection with the enforcement of the criminal laws and, relatedly, whether or not it is contraband raise questions of fact as to the offense or potential offense for which the vehicle was initially stopped or for which the occupants may be prosecuted. *Cf.* Tex. Penal Code Ann. § 1.03(a) (Vernon 2003) (“Conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, order of a county commissioners court, or rule authorized by and lawfully adopted under a statute.”). This office does not find facts or resolve fact questions in the opinion process. *See, e.g.,* Tex. Att’y Gen. Op. Nos. GA-0446 (2006) at 18 (“Questions of fact are not appropriate to the opinion process.”); GA-0106 (2003) at 7 (“This office cannot find facts or resolve fact questions in an attorney general opinion.”). Thus, we can advise you only that the vehicles are subject to the disposition provisions of article 18.17 if they are (1) seized in connection with the enforcement of the state’s criminal laws and (2) not contraband subject to disposition under Code of Criminal Procedure chapter 59.

III. Conclusion

In answer to your initial question, we conclude that Transportation Code chapter 683 does not apply to the disposition of the seized motor vehicles in question. The vehicles may be disposed of pursuant to Code of Criminal Procedure article 18.17 if they are (1) seized in connection with the enforcement of the state’s criminal laws and (2) not contraband subject to disposition under Code of Criminal Procedure chapter 59. We do not answer your remaining three questions, which are predicated on a conclusion that Transportation Code chapter 683 governs the disposition of these motor vehicles.

S U M M A R Y

Transportation Code chapter 683 does not apply to the disposition of motor vehicles that a county sheriff seizes immediately after the occupants flee the vehicles when stopped by law enforcement. The seized motor vehicles, which are neither held as evidence in a pending case nor ordered to be destroyed or returned to the rightful owners, may be disposed of pursuant to Code of Criminal Procedure article 18.17 if they are (1) seized in connection with the enforcement of the state’s criminal laws and (2) not contraband subject to disposition under Code of Criminal Procedure chapter 59.

Very truly yours,



GREG ABBOTT
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KENT C. SULLIVAN
First Assistant Attorney General

ELLEN L. WITT
Deputy Attorney General for Legal Counsel

NANCY S. FULLER
Chair, Opinion Committee

Sheela Rai
Assistant Attorney General, Opinion Committee

Footnotes

1. *See* Letter from Honorable Rob Baiamonte, Goliad County Attorney, to Honorable Greg Abbott, Attorney General of Texas, at 1–2 (Oct. 20, 2006) (on file with the Opinion Committee, *also available at* <http://www.oag.state.tx.us>) [hereinafter Request Letter]; *see also* Brief from Honorable Rob Baiamonte, Goliad County Attorney, at 1–2 (attached to Request Letter) [hereinafter Brief].

2. You do not inform us why the vehicles are stopped. See Request Letter, *supra* note 1, at 1–2.

3. Your three questions related specifically to Transportation Code chapter 683 are:

(1) Can a vehicle retained by the Sheriff's Office under § 683.016 be put into service by another county department?

(2) Is it sufficient when retaining an abandoned vehicle by law enforcement to fill in the TX DOT form “no sale, to be used for law enforcement purposes only as per Transportation Code [§] 683.034” or should the retained vehicle go through the auction and [be] purchased by the Sheriff's Department?

(3) Are the proceeds from the Chapter 683 vehicle auction considered a “new source” by the Auditor pursuant to § 111.0108 of the Texas Local Government Code?

Request Letter, *supra* note 1, at 2.

4. See *also* Tex. Att'y Gen. Op. Nos. C-649 (1966) at 2 (“Article 18.30 [predecessor to article 18.17] is a criminal procedural statute and would cover only such property as is seized in the course of criminal investigations or proceedings or when possession was obtained by a peace officer through some activity related to the enforcement of the penal code of this State.”); C-585 (1966) at 4 (stating that the article 18.30 provision “should govern the disposition of all property coming into the possession of law enforcement officers in connection with the enforcement of criminal laws unless there is another special statute providing for disposition”).



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 13, 2003

The Honorable Dib Waldrip
Comal County Criminal District
Attorney
150 North Seguin, Suite 307
New Braunfels, Texas 78130

Opinion No. GA-0034
Re: Whether a county may
require the owner of a "junked
vehicle" to erect a fence or other
screening objects in order to
shield the vehicle from public
view ([RQ-0605-JC](#))

Dear Mr. Waldrip:

You ask whether a county may require the owner of a "junked vehicle" to erect a fence or other screening objects in order to shield the vehicle from public view.

Subchapter E, chapter 683 of the Transportation Code addresses the abatement of junked vehicles as a public nuisance. Section 683.072 provides, in relevant part, that "[a] junked vehicle, including part of a junked vehicle, that is *visible from a public place or public right-of-way* . . . is a public nuisance." Tex. Transp. Code Ann. § 683.072(7) (Vernon 1999) (emphasis added). Section 683.071 of the Transportation Code defines "junked vehicle":

In this subchapter, "junked vehicle" means a vehicle that is self-propelled and:

(1) does not have lawfully attached to it:

- (A) an unexpired license plate; or
- (B) a valid motor vehicle inspection certificate; and

(2) is:

- (A) wrecked, dismantled or partially dismantled, or discarded; or
- (B) inoperable and has remained inoperable for more than:
 - (i) 72 consecutive hours, if the vehicle is on public property; or
 - (ii) 30 consecutive days, if the vehicle is on private property.

Id. § 683.071 (Vernon Supp. 2003). Under section 683.073 of the Transportation Code, the offense of maintaining "a public nuisance described by section 683.072" is "a misdemeanor punishable by a fine not to exceed \$200." *Id.* § 683.073(a)-(b) (Vernon 1999). Upon conviction, the court must "order abatement and removal of the nuisance." *Id.* § 683.073(c). Additionally, pursuant to section 683.074, a municipality or county is empowered to "adopt procedures that conform to this subchapter for the abatement and removal from private or public property

or a public right-of-way of a junked vehicle or part of a junked vehicle as a public nuisance." *Id.* § 683.074(a) (Vernon Supp. 2003). Sections 683.074, 683.075, and 683.076 describe the procedures a county must follow in order to abate and remove the nuisance, including notice, public hearing, judicial orders, and cancellation of the vehicle's certificate of title. Section 683.078 governs removal of a junked vehicle to "a scrapyard, a motor vehicle demolisher, or a suitable site operated by a municipality or county." *Id.* § 683.078(a) (Vernon 1999). You ask whether a county, pursuant to its authority to abate and remove a "junked vehicle" as a nuisance, may impose fencing and screening requirements. A junked vehicle may be classified as a "public nuisance" subject to abatement and removal under subchapter E, chapter 683 of the Transportation Code, *only* if it "is visible from a public place or public right-of-way." *Id.* § 683.072. We must therefore consider the meaning of the term "visible." The term is not defined by statute or Texas case law. According to its common usage, "visible" means "capable of being seen; that by its nature is an object of sight; perceptible by the sense of sight." XIX Oxford English Dictionary 687 (2d ed. 1989). *See* Tex. Gov't Code Ann. § 311.011(a) (Vernon 1998) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."). The few out-of-state judicial decisions that have considered the meaning of "visible" accord with this definition. *See, e.g., Striefel v. Charles-Keyt-Leaman P'ship*, 733 A.2d 984, 990 (Me. 1999) ("Visible' means capable of being seen by persons who may view the premises."); *Colonial Trust v. Breuer*, 69 A.2d 126, 129 (Pa. 1949) ("Visible' means perceivable by the eye . . ."); *Tritt v. Judd's Moving & Storage, Inc.*, 574 N.E.2d 1178, 1185 (Ohio App. 3d 1990) ("Visible means perceivable by the eye.").

Thus, in order to avoid classification as a "public nuisance" under section 683.072 of the Transportation Code, a junked vehicle or a part thereof, need only be *non-visible* from a public place or public right-of-way. No particular kind of camouflage is required by the statute to render the vehicle non-visible. Consequently, a county may not compel the owner of a junked vehicle to erect fencing, trees, shrubbery, or any other specific kind of screening. In order to abate and remove the nuisance, the county must demonstrate that a junked vehicle "is visible from a public place or public right-of-way," *i.e.*, capable of being seen from such location. Whether any particular form of camouflage is sufficient in a given instance to render a junked vehicle non-visible is of course a question of fact for the county to determine in the first instance.

You also ask whether a county may import the fencing and screening requirements applicable to automotive salvage yards and junkyards to vehicles parked on other private property. Section 396.021(b) of the Transportation Code provides, in relevant part:

(b) A person who operates a junkyard or an automotive wrecking and salvage yard shall screen the junkyard or automotive wrecking and

salvage yard with a solid barrier fence at least eight feet high. The fence must be painted a natural earth tone color and may not have any sign appear on its surface other than a sign indicating the business name.

(c) A person who operates a junkyard or an automotive wrecking and salvage yard in a county with a population of 200,000 or less shall screen the junkyard or automotive wrecking and salvage yard to at least six feet in height along the portion of the junkyard or automotive wrecking and salvage yard that faces a public road or residence. The person may screen the yard by any appropriate means, including:

- (1) a fence;
- (2) natural objects; or
- (3) plants. ⁽¹⁾

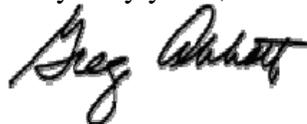
Tex. Transp. Code Ann. § 396.021(b)-(c) (Vernon 1999).

The fencing and screening standards applicable to junked vehicles in the possession of licensed automotive salvage yards and junkyards under chapter 396 are not applicable to junked vehicles maintained by individuals or businesses that do not fall within that category. In addition, subchapter E, chapter 683 of the Transportation Code, which, as previously discussed, addresses the abatement of junked vehicles as a public nuisance, is specifically inapplicable to a vehicle or vehicle part "that is stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or junkyard," provided that the vehicle or vehicle part is, *inter alia*, "screened from ordinary public view by appropriate means, including a fence, rapidly growing trees, or shrubbery." *Id.* § 683.077(a)(2)(C) (Vernon Supp. 2003). Licensed automotive salvage yards and junkyards must follow the fencing and screening requirements of section 396.012(b). Individuals not embraced within the ambit of chapter 396 need only render a junked vehicle non-visible from a public place or public right-of-way.

SUMMARY

A county may abate and remove as a "public nuisance" any "junked vehicle" that is visible from public or private property or a public right-of-way. A county may not require a particular kind of camouflage to render the vehicle non-visible. The fencing and screening standards applicable to licensed automotive salvage yards and junkyards under chapter 396 of the Transportation Code do not apply to junked vehicles parked on other private property.

Very truly yours,



GREG ABBOTT

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BARRY R. MCBEE

First Assistant Attorney General

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Chair, Opinion Committee
Rick Gilpin
Assistant Attorney General, Opinion Committee

Footnotes

1. Section 396.021 does not apply to automotive wrecking and salvage yards covered by chapter 397 of the Transportation Code, *i.e.*, those in a county with a population of 3.3 million or more, not located in a municipality in that county, and established on or after September, 1983. *See* Tex. Transp. Code Ann. ch. 397 (Vernon 1999 & Supp. 2003).

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LOREN A. DETAMORE, Appellant v. THE STATE OF TEXAS, Appellee

No. 01-94-00062-CR

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

1994 Tex. App. LEXIS 1893

July 28, 1994, Rendered and Delivered

July 28, 1994, Filed

NOTICE: [*1] PURSUANT TO RULE 90(i) OF THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

SUBSEQUENT HISTORY: Appellant's Petition for Discretionary Review Refused December 14, 1994.

PRIOR HISTORY: On Appeal from the County Court at Law Number Five. Harris County, Texas. Trial Court Cause No. 5034.

DISPOSITION: Judgment affirmed

JUDGES: O'Connor, Cohen, Hutson-Dunn

OPINION BY: MICHOL O'CONNOR

OPINION

OPINION

A jury convicted the appellant, Loren A. Detamore, of storing abandoned vehicles on his residential property and assessed a \$ 1,200 fine. We affirm.

Fact Summary

On August 24, 1992, the city of Houston cited the appellant for storing abandoned and junk cars on his property at 12722 Kingsride. ¹

The appellant was charged with two separate offenses -- unlawfully, as owner occupant of a residential building structure, utilizing the premises for the open storage of abandoned vehicles; ² and unlawfully and knowingly maintaining a public nuisance by having a junked vehicle that was visible from a public place or public right of way. ³ The appellant pled not guilty to the first charge. A jury found him guilty and he was fined \$ 1,200. The municipal [*2] court judge denied his motion for new trial. He appealed to county criminal court, which affirmed the municipal court's ruling.

1 The cars included a 1978 Oldsmobile with an expired license plate and inspection sticker. Community Service Inspector Angela Glover, who issued the citation, testified it did not appear to have a radiator or a fan. Also, there was a 1978 Cadillac that did not have a hood. A yellow raincoat was placed on the inside over the engine. Glover said the parts inside seemed to have rusted. The third car was a Buick with a Canadian license plate. Glover went to Detamore's home a total of six times and found the cars in the same condition. On August 24 Glover went back to the house, but no one was there. She talked with a neighbor, John Ligon. After the conversation with Ligon, she went back to office and then received a call from Detamore, who said

he needed an extension. No extension was authorized. Glover said she waited until Aug. 24 to issue a ticket because no one was ever home at the 12722 Kingsride address. The only time she reached him was on February 20, 1992. She asked him to remove the abandoned vehicles. He said there were no abandoned vehicles. She told him he would be issued a citation if there was no compliance. He told her he had received the two notices sent to him.

[*3]

2 This is the case before us as cause number 027544-1-1.

3 This is the case to which the appellant pled nolo contendere and paid a \$ 100 fine -- cause number 027544-1-2.

Two separate charges -- no double jeopardy

In point of error one, the appellant contends his constitutional rights against double jeopardy were violated because he was tried twice for the same offense. He contends this is the same offense to which he pled nolo contendere and paid a \$ 100 fine on April 13, 1993. His charge in that offense was leaving a junked vehicle visible from a public place or public right of way.

The appellant contends this case violates Tex. Const. art. 1, 14, which provides that "no person for the same offense shall be twice put in jeopardy of life or liberty." He also contends it violates *Tex. Code Crim. P. art. 28.13* (Vernon 1989), which provides:

A former judgment of acquittal or conviction in a court of competent jurisdiction shall be a bar to any further prosecution for the same offense, but shall not bar a prosecution for any higher grade of offense over which said [*4] court had not jurisdiction, unless such judgment was had upon indictment or information, in which case the prosecution shall be barred for all grades of the offense.

In cause number 027544-1-1, the appellant was charged with violating 10-176 (e) of the city ordinance of the City of Houston, Texas, ⁴ which stated:

4 We note this ordinance was repealed on December 8, 1993.

It shall be unlawful for the owner or occupant of a residential building, structure or property to utilize the premises of such property for the open storage of any abandoned motor vehicle....For the purposes of this section, an *abandoned motor vehicle is defined as one that is in a state of disrepair and incapable of being moved under its own power.*

⁵ It shall be the duty and responsibility of every such owner or occupant to keep the premises of such residential property clean and to remove from the premises all such abandoned items....

5 The appellant argues this definition of an abandoned vehicle creates a presumption that a vehicle is abandoned if it is in a state of disrepair and incapable of being moved under its own power. He makes the argument that this is a presumption that shifts the burden of proof from the prosecution to the appellant. He cites a Court of Criminal Appeals case that holds it is error to instruct a jury that there is a presumption of an intent to commit theft when there is a nonconsensual nighttime entry into a home. *Browning v. State, 720 S.W.2d 504, 506 (Tex.Crim.App.1986)*. We do not find this case analogous to this situation.

[*5]

In cause number 027544-1-2, the appellant was charged with violating *Tex. Rev. Civ. Stat. art. 4477-9a* 5.08 (Vernon Supp.1994), which states:

a) A junked vehicle that is located in a place where it is

visible from a public place or public right-of-way is detrimental to the safety and welfare of the general public, tends to reduce the value of private property, invites vandalism, creates fire hazards, constitutes an attractive nuisance creating a hazard to the health and safety of minors, and is detrimental to the economic welfare of the state by producing urban blight adverse to the maintenance and continuing development of the municipalities in the state, and is a public nuisance.

b) A person commits an offense if that person maintains a public nuisance as determined under this section.

c) A person who commits an offense under this section is, on conviction, subject to a fine not to exceed \$ 200. On conviction, the court shall order removal and abatement of the nuisance.

The definition of junked vehicle under *Tex. Rev. Civ. Stat. art. 4477-9a*, 5.01 (5) (Vernon Supp. 1994) is a motor vehicle:

A) that is inoperative; and

B) that [*6] does not have lawfully affixed to it *either an unexpired license plate or a valid motor vehicle safety inspection certificate; that is wrecked, dismantled, partially dismantled, or discarded, or that remains inoperable for a continuous period of more than 45 days.*

(Emphasis added.)

In analyzing whether successive prosecutions are barred by double jeopardy, the Texas Court of Criminal Appeals and this Court have applied the test announced in *Blockburger v. United States*, 284 U.S. 299, 303-304, 52 S.Ct. 180, 182, 76 L. Ed. 306 (1932). *Rice v. State*, 861 S.W.2d 925, 925 (Tex.Crim.App.1993); *Cochran v. State*, 874 S.W.2d 769, 772 (Tex.App.--Houston [1st Dist.] 1994, no pet.). Under the *Blockburger* test we must determine whether each of the two offenses requires proof of an additional fact that the other does not. *Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182. If they do, double jeopardy does not bar a successive prosecution. *Rice*, 861 S.W.2d at 925.

In *Blockburger*, the court wrestled with the issue of whether a party could be charged under two sections of a statute for one sale of a drug. [*7] *Blockburger*, 284 U.S. at 303-304, 52 S.Ct. at 182. The court upheld the conviction on two offenses, finding that each section of the statute required proof of a different element. *Id.* at 304.

A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Id.

We hold double jeopardy does not bar the appellant's prosecution here because the two statutes require different proof. The case against the appellant involved in this appeal required proof that the motor vehicle was in a state of disrepair and incapable of being moved under its own power. The case against the appellant to which he pled nolo required proof that the vehicle not have affixed to it an unexpired license plate or a valid motor vehicle

safety inspection certificate; and that the car be wrecked, dismantled, partially dismantled, or discarded, or that it remained inoperable for a continuous period of more than 45 days; and, in addition, that it be visible from a public place.

In [*8] support of his double jeopardy claim, the appellant cites *Parrish v. State*, 851 S.W.2d 864 (Tex.Crim.App.1993). We note, however, that the U.S. Supreme Court vacated the judgment in *Parrish* and remanded it to the Court of Criminal Appeals for further consideration in light of *United States v. Dixon*, 125 L. Ed. 2d 556, 113 S. Ct. 2849 (1993). In *Dixon*, the U.S. Supreme Court held there was no double jeopardy bar when the defendant, who was prosecuted for violating a civil protection order by assaulting his wife, was later prosecuted for assault with intent to kill. *Id.* at 2858-59. The court held the assault offense required proof of the specific intent to kill and the contempt offense required proof of knowledge of the civil protection order. *Id.* at 2858. In *Dixon*, the Supreme Court overruled the same-conduct test set out in *Grady v. Corbin*, 495 U.S. 508, 510, 110 S. Ct. 2084, 2087, 109 L. Ed. 2d 548 (1990). *Dixon*, 113 S.Ct. at 2860. The same-conduct test stated that "if, to establish an essential element of an offense charged to that prosecution, the government will prove conduct that constitutes [*9] an offense for which the defendant has already been prosecuted," a second prosecution may not be had. *Grady*, 495 U.S. at 510, 110 S.Ct. at 2087. We have reviewed *Parrish* on remand, and find no additional analysis is required. ⁶ *Parrish v. State*, 869 S.W.2d 352, 353 (Tex.Crim.App.1994).

6 The court remanded Parrish again to determine whether there is a separate analysis under the Texas Constitution in light of *Heitman v. State*, 815 S.W.2d 681 (Tex.Crim.App.1991). Parrish, 869 at 353. The opinion has not yet issued.

We hold there is no double jeopardy bar to his prosecution in this case and overrule point of error one.

Was the affidavit supporting the complaint valid?

In point of error two, the appellant complains the affidavit of Ruth J. Robinson was entirely conclusory and void of any factual allegations to support the complaint. He contends the Code of Criminal Procedure requires that a municipal court proceeding on a complaint include an affidavit [*10] that is supported by a belief that the appellant committed the offense.

The complaint, signed by Robinson as affiant, states:

In the name and by authority of the State of Texas, I the undersigned affiant, do solemnly swear that I have good reason to believe, and do believe that Detamore, Loren A, Hereinafter called defendant, heretofore, on or about the 24th day of August A.D., 1992, and before making and filing of this complaint, within the incorporated limits of the City of Houston, County of Harris and State of Texas, did then and there unlawfully and knowingly as occupant of a residential property located at 12722 Kingsride did utilize the said premises for the open storage of abandoned vehicles.

The appellant contends the complaint does not meet the requirements of *Tex. Code Crim. P. art. 15.05* (Vernon 1977), which states:

The complaint shall be sufficient, without regard to form, if it have these substantial requisites:

1. It must state the name of the accused, if known, and if not known, must give some reasonably definite description of him.

2. It must show that the accused has committed some offense against the laws of the State, [*11] either directly or that the affiant has good reason to believe, and does believe, that the accused has committed such offense.

3. It must state the time and place of the commission of the offense, as definitely as can be done by the affiant.

4. It must be signed by the affiant by writing his name or affixing his mark.

Tex. Code Crim. P. art. 15.05. The complaint in this case contained all these requirements.

The appellant contends the complaint is invalid because the information is entirely conclusory. The Dallas Court of Appeals held the requisites of a complaint or an affidavit to support a prosecution under an information are not as stringent as the requirements of a complaint or affidavit for a search warrant. *Rose v. State*, 799 S.W.2d 381, 384 (Tex.App.--Dallas 1990, no pet.); see also *Cisco v. State*, 411 S.W.2d 547, 548 (Tex.Crim.App.1967); *Smith v. State*, 811 S.W.2d 665, 668 (Tex.App.--Houston [14th Dist.] 1991, pet. ref'd). The *Rose* court held that the purpose of a complaint is to apprise the accused of the facts surrounding the charged offense to permit him to prepare a defense to such charge. [*12] *Rose*, 799 S.W.2d at 384. A complaint valid on

its face is sufficient to support a prosecution by information. The court went on to state there is no requirement that the affiant have firsthand knowledge, and the court need not inquire into the nature of the knowledge upon which an affiant bases her factual statements. *Id.*

In *Rose*, the Dallas court held the complaint in which the affiant stated she had good reason to believe and did believe that Rose was speeding was sufficient. *Id.* The court reasoned the statements in the complaint corresponded to the information contained in the traffic citation issued to Rose by the officer. *Id.* The court also noted that Rose made no showing that the complaint did not adequately inform him of the charges against him or that it was invalid on its face. *Id.*

We apply the Dallas court's reasoning here. The complaint meets the requisites of the Code of Criminal Procedure -- it names the appellant, states Robinson has good reason to believe the accused committed the offense, names the offense and the time and date it occurred, and is signed by Robinson. The appellant does not contend [*13] the complaint did not adequately inform him of the charges against him or that it was invalid on its face. We overrule point of error two. ⁷

⁷ We note the appellant cites several cases to show that where the information contained in a complaint is conclusory, the complaint is invalid. *Reyes v. State*, 741 S.W.2d 414 (Tex.Crim.App.1987); *Miller v. State*, 736 S.W.2d 643 (Tex.Crim.App.1987); *Madden v. State*, 664 S.W.2d 735 (Tex.Crim.App.1983); *Villegas v. State*, 791 S.W.2d 226 (Tex.App.--Corpus Christi 1990, pet.ref'd). These cases do not contradict our holding here. These cases all involve complaints that must be supported by probable cause for a magistrate to issue an arrest warrant. *Cisco*, 411 S.W.2d at 548.

Were the cars sufficiently identified in the complaint?

In point of error three, the appellant contends the complaint did not identify by name, kind, number and ownership the personal property alleged in the charging instrument. He also argues the complaint does not give him notice [*14] as to whether he is charged with the storage of one vehicle or three vehicles.

The appellant did not preserve this point for our review as there is no motion to quash in the record. An objection to a defect, error, or irregularity of form or substance in an information must be made before the date on which trial on the merits commences; otherwise, the defect is waived. *Tex. Code Crim. P. Ann. art. 1.14(b)* (Vernon Supp. 1994); *Ho v. State*, 856 S.W.2d 495, 498 (Tex.App.--Houston [1st Dist.] 1993, no pet.). The failure to object, or to present a motion to quash before or at the time trial, waives any right to assert the objection on appeal. Id.

We overrule point of error three.

Address in complaint different than one proved at trial

In point of error four, the appellant contends he was entitled to a directed verdict of "not guilty" because there was a variance between the address alleged in the charging instrument and the address as provided. The appellant argues the complaint lists his address as "12722 Kingsride," while the evidence at trial proved the address is "12722 Kingsride Lane."

Angela Glover, city of Houston community service inspector, [*15] repeatedly testified that the name of the street was Kingsride. On cross-examination, the appellant asked her if Kingsride was a lane, street, or court. Glover said she thought it was a lane. The appellant then asked her, "So the address then would be

12722 Kingsride Lane?" Ms. Glover responded with "To my knowledge, yes, sir."

We hold that any conflict is for the jury to resolve. The jury could have believed Glover's testimony that the address was "12722 Kingsride," as alleged.

We overrule point of error four.

Michol O'Connor

Justice

Justices Cohen and Hutson-Dunn also sitting.

Judgment rendered and opinion delivered
JUL 28 1994

**CITY OF EL PASO, Appellant, v. ROBERT MILLARD, Individually
and d/b/a of El Paso County, Texas EL PASO SPORTS &
RECREATION CO., and SAR INVESTMENTS, INC., d/b/a
CONSTRUCTION INVESTMENT DEVELOPMENT &
PLAYGROUND CONSTRUCTOR, INC., Appellees.**

No. 08-03-00493-CV

COURT OF APPEALS OF TEXAS, EIGHTH DISTRICT, EL PASO

2004 Tex. App. LEXIS 6927

July 29, 2004, Decided

SUBSEQUENT HISTORY: [*1] Released for Publication November 19, 2004.

PRIOR HISTORY: Appeal from County Court at Law No. 3. (TC# 2000-3128).

DISPOSITION: Affirmed.

JUDGES: ANN CRAWFORD McCLURE, Justice. Before Panel No. 4 Barajas, C.J., Larsen, and McClure, JJ.

OPINION BY: ANN CRAWFORD McCLURE

OPINION

MEMORANDUM OPINION

The City of El Paso appeals the partial denial of its plea to the jurisdiction. It brings this accelerated interlocutory appeal pursuant to *Section 51.014(a)(8) of the Texas Civil Practice and Remedies Code*. We affirm.

FACTUAL SUMMARY

Around October 30, 1990, Robert Millard purchased a trailer which he reconditioned and parked on property owned by SARS Investments and located in El Paso County. Millard used the trailer to store tools, equipment, furniture, and other personal property.

In late July 1998, Millard needed tools and other items from the trailer and sent an

employee out to the property to retrieve them. When the employee arrived, the trailer wasn't there. He notified Millard who then went to the property to see for himself. Upon verifying that [*2] the trailer was missing, Millard filed a report with the police department.

Sam's Club Warehouse employees told Millard that the police department may have removed the trailer since they had seen three police vehicles in the area. When Millard went to the police department with this information, he was told that three patrol cars would not have been dispatched to handle such a situation. A detective was to be assigned to the case and Millard was advised

to find out which company removed the trailer. He discovered that El Paso Towing had towed it and that there was a \$ 1,060 storage fee, which he was unable to pay. Millard asked to see the trailer and check its contents, but the towing company denied his request. Millard filed a complaint and ultimately learned that the trailer had been sold at auction by El Paso Towing without notice to him. He was later notified by the police department that an internal affairs investigation had been conducted. The impounding officer reported that he had removed the trailer for safekeeping because it had been heavily vandalized. The investigation resulted in a finding of misconduct by the officer and disciplinary action was taken.

Millard sued the [*3] City of El Paso and El Paso Towing, alleging inverse condemnation. The City answered and filed a motion for summary judgment and plea to the jurisdiction. Millard then amended his pleadings, alleging inverse condemnation and fraud by the City, and conversion, negligence *per se*, and fraud by El Paso Towing. The trial court granted the plea as to the fraud allegations but denied it with regard to the constitutional taking. It also denied summary judgment on the issue of limitations. This accelerated appeal follows.

GOVERNMENTAL ENTITY FRAUD

For purposes of convenience, we will address the City's issues in reverse order. In Point of Error Two, the City complains that a governmental entity cannot be liable for fraud. Although the trial court granted the City's motion to dismiss based on the allegation of fraud, the City anticipated that Millard would raise the issue on appeal. Since the City raised this issue in anticipation of a cross point which did not materialize, we overrule Point of Error Two.

PLEA TO THE JURISDICTION

In Point of Error One, the City argues that Millard failed to properly plead a constitutional cause of action for a "taking" in order to waive sovereign immunity, [*4] and thus, the trial court erroneously denied its plea to the jurisdiction. A plea to the jurisdiction is a dilatory plea by which a party contests the trial court's authority to determine the subject matter of the cause of action. *City of Saginaw v. Carter*, 996 S.W.2d 1, 2 (Tex.App.--Fort Worth 1999, *pet. dismiss'd w.o.j.*); *State v. Benavides*, 772 S.W.2d 271, 273 (Tex.App.--Corpus Christi 1989, *writ denied*). The plaintiff has the burden to allege facts affirmatively demonstrating that the trial court has subject matter jurisdiction. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446, 36 Tex. Sup. Ct. J. 607 (Tex. 1993); *City of Saginaw*, 996 S.W.2d at 2.

Standard of Review

Subject matter jurisdiction is a legal question, and we review the trial court's ruling on a plea to the jurisdiction under a *de novo* standard. *City of Saginaw*, 996 S.W.2d at 2; *Texas Dept. of Health v. Doe*, 994 S.W.2d 890, 892 (Tex.App.--Austin 1999, *pet. dismiss'd by agr.*). In reviewing the trial court's denial of a plea to the jurisdiction, we look solely to the allegations in the petition and accept [*5] them as true. *See City of Saginaw*, 996 S.W.2d at 2-3; *Firemen's Ins. Co. of Newark, New Jersey v. Board of Regents of the University of Texas System*, 909 S.W.2d 540, 541 (Tex.App.--Austin 1995, *writ denied*). We do not examine the merits of the case. *See City of Saginaw*, 996 S.W.2d at 3. If the petition does not allege jurisdictional facts, the plaintiff's suit is subject to dismissal only when it is impossible to amend the pleadings to confer jurisdiction. *City of Saginaw*, 996 S.W.2d at 3; *see Texas Ass'n of Bus.*, 852 S.W.2d at 446; *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 739 (Tex.App.--Austin 1994, *writ denied*).

The Constitutional Provision

Article I, section 17 provides:

No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but [*6] all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

Tex. Const. art. I, § 17. Stated simply, when a governmental entity takes, damages, or destroys property for public use, immunity from both suit and liability is waived. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149, 38 Tex. Sup. Ct. J. 282 (Tex. 1995); *Steele v. City of Houston*, 603 S.W.2d 786, 791, 23 Tex. Sup. Ct. J. 507 (Tex. 1980).

Was There a "Taking"?

Millard sued for inverse condemnation, which is "an action brought by a property owner for compensation from a governmental entity that has taken the owner's property without bringing formal condemnation proceedings." Black's Dictionary 287 (7th ed. 1999). Millard alleged that the City's act of entering upon private property and taking his trailer to abate a public nuisance amounted to an intentional taking or destruction of, or damage to, his property for a public use without adequate compensation. The petition referenced notations in the police records that the trailer had been removed because it was heavily damaged by graffiti, [*7] some of

which involved a local gang. Millard complained that the City's actions resulted in an inverse condemnation because he received no notice of the trailer's removal or sale and that as a result, any governmental immunity was waived.

The City countered that Millard had to establish that (1) the City intentionally performed certain acts, (2) which resulted in a "taking" of Millard's property, (3) for public use. *City of Abilene v. Smithwick*, 721 S.W.2d 949, 951 (Tex.App.--Eastland 1986, writ ref'd n.r.e.). The City argued that its acts were negligent rather than intentional, and that the taking was not for public use.

Negligent or Intentional Act?

Texas jurisprudence has consistently held that the property damage must not result from negligence in order to maintain an inverse condemnation action. *Steele*, 603 S.W.2d at 790. If the damage is clearly attributable to negligent acts of the agents of the governmental unit, there is no liability under the rationale that damages from unintended and negligent acts result in no benefit to the public. *Texas Highway Dept. v. Weber*, 147 Tex. 628, 219 S.W.2d 70, 72 (Tex. 1949) [*8]

The City reminds us of the three elements of negligence: (1) a legal duty; (2) a breach of that duty; and (3) damages proximately resulting from that breach. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525, 34 Tex. Sup. Ct. J. 194 (Tex. 1990). The initial inquiry in a negligence action is whether a duty existed. *See id.* The City contends that a police officer has a duty to prevent and suppress suspected crime and to keep the peace in a manner that a reasonably careful police officer would use in the same or similar circumstances. It admits that the officer involved violated that duty in seizing Millard's trailer, but refers us to the internal affairs investigation which concluded that the

officer had "erroneously impounded" the trailer. It characterizes this "mistake" as "negligence."

Millard counters that the taking was intentional. He focuses on the fact that he did not consent to the taking of his property, that the police entered onto private property, and that his trailer and its contents were removed under their direction. This, he concluded, was a purposeful act. In looking solely to the allegations pled and accepting them as true, we agree.

[*9] We begin by examining two cases in which the courts rejected the plaintiffs' allegations of an intentional taking. In *A.C. Aukerman Co. v. State*, 902 S.W.2d 576, 578 (Tex.App.--Houston [1st Dist.] 1995, *pet. denied*), a case involving patent rights, the court found the plaintiff had not pled that the State itself had appropriated the patent rights but that the State had obtained the benefits of the patents. In a summary judgment context, the court found this insufficient to establish a taking by the State as a matter of law because the plaintiff had failed to allege an intentional act by the State which resulted in the taking of its property. *Id.* In *Texas Highway Department v. Weber*, 147 Tex. 628, 219 S.W.2d 70, 71 (Tex. 1949), the plaintiff alleged that his hay crop had been taken or damaged when a fire set by Texas Highway Department employees spread to the crop and destroyed a substantial part of it. The court found the damage occasioned by the fire was not necessarily an incident to, or necessarily a consequential result of, the act of the employees in clearing the grass from the highway, but that the spreading of the fire onto his premises [*10] was purely and solely the result of negligence. *Id.* Consequently, it could not be said that the hay crop was taken or damaged for public use. *Id.* Here, Millard did not contend that the City obtained benefits from a third party's taking of his trailer or that the damage was merely

consequential to another act of the City. He pled that the City entered onto private property and purposefully took his trailer. Accordingly, the pleadings allege a taking due to an intentional act by the City.

Public Use?

The Constitution limits compensation to damages "for or applied to public use." *Tex. Const. art. I, § 17*. What constitutes public use is a question for the court. *Dyer v. Texas Electric Service Co.*, 680 S.W.2d 883, 884 (Tex.App.--El Paso 1984, *writ ref'd n.r.e.*). A constitutional taking for public use occurs only when there results to the public some definite right or use in the business or undertaking to which the property is devoted. *Borden v. Trespalacios Rice & Irrigation Co.*, 98 Tex. 494, 86 S.W. 11, 14 (Tex. 1905), *aff'd by*, 204 U.S. 667, 27 S. Ct. 785, 51 L. Ed. 671 (1907); *Loesch v. Oasis Pipe Line Co.*, 665 S.W.2d 595, 597 (Tex.App.--Austin 1984, *writ ref'd n.r.e.*) [*11] . The trend in Texas leans toward defining public use in terms of the general benefit to the State. *Dyer*, 680 S.W.2d at 885, *citing Housing Authority of City of Dallas v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79, 85 (1940). Except in isolated instances, judicial decisions have narrowed the meaning of "public use" to those situations in which the damages are incident to the construction and operation of a public work. *Steele*, 603 S.W.2d at 790. In *Steele*, the plaintiffs were away when escaped convicts hid out in their house. *Id.* at 789. Police discharged incendiary material into the residence in a manner designed to cause, and with the intent to cause, the residence to catch fire. *Id.* The Steeles sued, alleging they were entitled to compensation. *Id.* at 788. However, the court found that judicial restraints limited the damages that were compensable. *Id.* at 790. Whether property was destroyed for public use could be established by proof that the City ordered the destruction because of a real or supposed

public emergency to apprehend armed and dangerous men who had taken refuge [*12] in the house. *Id.* at 792. Similarly, "public use" may include matters of public health and safety, including unsafe buildings which constitute nuisances. *City of Houston v. Crabb*, 905 S.W.2d 669, 674 (Tex.App.--Houston [14th Dist.] 1995, no pet.).

In searching the El Paso Municipal Code, we find provisions declaring junked vehicles public nuisances if they: (1) are located in a place where they are visible from a public place or public right-of-way and (2) are detrimental to the safety and welfare of the general public, (3) tend to reduce the value of the private property, (4) invite vandalism, (5) create fire hazards, (6) constitute an attractive nuisance creating a hazard to the health and safety of minors, and (7) are detrimental to the economic welfare of the City by producing urban blight adverse to the maintenance and continuing development of the city. El Paso Municipal Code § 9.08.010 (2003). Junked vehicles are defined as motor vehicles, truck-tractors, trailers and semitrailers that (1) do not have a lawfully attached unexpired license plate or a valid motor vehicle inspection certificate; (2) are wrecked, dismantled, or discarded; [*13] (3) are inoperable or have remained inoperable for more than seventy-two hours if on public property or thirty consecutive days if on private property. El Paso Municipal Code § 9.08.020 (2003). Section 9.08.030 allows removal of a junked vehicle to abate a public nuisance. El Paso Municipal Code § 9.08.030 (2003).

Millard's trailer would have qualified as a junked vehicle. It was a trailer that may be transported upon a public highway; it bore unknown expired Michigan plates; and it was inoperable due to a flat left rear tire. *See* El Paso Municipal Code § 9.08.020. The presence of the trailer apparently invited vandalism since it had already been

vandalized by gang-related graffiti which would qualify the trailer as a public nuisance. *See* El Paso Municipal Code § 9.08.010. Therefore, the taking of the trailer falls within one of the limited exceptions to the requirement that the public use be one of construction or maintenance of public works. Again taking the allegations in the petition as true, Millard has demonstrated that his trailer was towed for "public use" because it was removed to abate a public nuisance due to gang-related graffiti. *See Tex. Const. art. I, § 17* [*14] .

Because we conclude that Millard properly pled an intentional act by the City which resulted in a taking of his property for public use under *Article I, section 17*, we overrule Point of Error One. The judgment of the trial court is affirmed.

July 29, 2004

ANN CRAWFORD McCLURE, Justice

IN THE MATTER OF

MICHAEL KLEINMAN d/b/a

PLANET K

§
§
§
§
§

IN THE MUNICIPAL COURT

CITY OF SAN MARCOS

HAYS COUNTY, TEXAS

On January 10, 2008, the Court conducted a hearing on the matter of the determination by the City that a junk vehicle was located at 910 N IH-35, San Marcos, Hays County, Texas on the premises of Planet K.

The vehicle in question is a four door sedan of undeterminable make or model, located on the side yard of the Planet K, next to their business sign. The vehicle is painted by artists, and filled with dirt and cacti. The VIN number is not visible in the normal places, and due to lack of access was not obtainable at the time of the hearing.

After hearing the evidence presented at the hearing, the Court finds that:

1. The vehicle does not have a license plate;
2. The vehicle does not have a motor vehicle inspection certificate; and,
3. The vehicle is partially dismantled and inoperable.

As a result of the above findings of fact the Court finds that the vehicle is a junked vehicle as defined by Section 34.191 of the City of San Marcos Code of Ordinances.

The Court further declares that the vehicle is a public nuisance, as such is defined by Section 34,194 of the City of San Marcos Code of Ordinances.

It is therefore

ORDERED that within FIVE (5) BUSINESS DAYS from the signing of this order the vehicle be removed from the premises, or otherwise brought into compliance with the City Code. If Planet K does not remove the vehicle from the premises, or otherwise bring the

vehicle into compliance with City Ordinances, the vehicle may be removed by the City pursuant to Section 34.200 of the San Marcos Code of Ordinances.

SIGNED AND ENTERED this 11th day of January 2008.

/s/ John Burke
John Burke, Judge Presiding
Municipal Court, San Marcos, Texas