No. 04-0981

IN THE SUPREME COURT OF TEXAS

JAYANTI PATEL

V.

CITY OF EVERMAN, TOM KILLEBREW
D/B/A METRO CODE ANALYSIS, L.L.P

On review from the May 28, 2004 Opinion and Judgment of the Court of Appeals for the Twelfth District of Texas, No. 12-02-00174-CV

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RESPONDENT JAYANTI PATEL'S BRIEF ON THE MERITS

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STATEMENT OF JURISDICTION

This Court's power of discretionary review is limited to the review of decisions actually made by the courts of appeals. TEX. CONST. ART. V, § 5; Art. 44.45; TEX. R. APP. P. 67.1, 68.1. *Davis v. State,* 870 S.W.2d 43, 47 (Tex. Crim. App.1994); *Montalbo v. State,* 885 S.W.2d 160, 161 n. 1 (Tex. Crim. App.1994)); *Owens v. State,* 827 S.W.2d 911, 917-18 n. 7 (Tex. Crim. App.1992). Thus, Plaintiff disputes this Court's authority to determine City of Everman's judicial review point which was not properly raised and determined by any lower court.

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The City of Everman's Brief on the Merits presents the following issues:

1. May the City of Everman raise the defense that Patel is estopped from asserting a takings claims by the requirements of Texas Local Government Code Section 214 for the first time on motion for rehearing before the court of appeals and/or on petition for review before this Court?
2. Does Texas Local Government Code Section 214 operate to preclude a property owner from obtaining his or her day in court on a constitutional taking claim after a demolition order has been carried out?
3. Where the judicial review procedures of Texas Local Government Code Section 214.0012 apply to "an order of a municipality issued under Section 214.001," are such procedures applicable in this case where the demolition orders were issued not pursuant to Chapter 214 but, rather, under a city code that does not include judicial review procedures?
4. Is a municipality's own determination that a property is a nuisance binding on courts in subsequent proceedings regarding the legality and propriety of the municipality's nuisance determination?
5. Did the Court of Appeals properly rule that summary judgment was improper on Plaintiff's takings claim?
6. Did the Court of Appeals properly apply the ten year statute of limitations to

Patel's claims?

SUMMARY OF THE ARGUMENT

Everman seeks discretionary review on two points.[1] The first, the Judicial Review Issue, is not properly before this Court as Everman failed to raise it before the lower courts. It is fundamental that this Court cannot review issues which have not first been presented to and ruled upon by the trial court and the court of appeals.

Furthermore, even if the Court were able to consider Everman's Judicial Review Issue, this would not be an appropriate case for addressing the review requirements of Local Government Code Section 214.0012 for several reasons. First, interpreting Section 214.0012 so as to deprive property owners of their day in court is a violation of due process. Second, the discretionary judicial review afforded by Section 214.0012 does not apply to this case because Patel is not seeking to prevent a demolition order from becoming final. Rather, Patel is seeking damages incurred as a result of a final demolition that was unlawful. Third, the demolition orders issued in this case were not issued pursuant to Section 214.0012. Hence, there exists (at least) a fact issue as to whether or not Section 214.0012 even applies. Fourth, a municipality's own designation that a property is a nuisance is not conclusive and binding proof that the property was, in fact, as the municipality declared. If the law were as Everman suggests, municipalities could demolish private property with impunity and there would be no recourse for aggrieved property

[1] To avoid confusion, Patel will refer to the issues raised by Everman as the "Limitations Issue" and the "Judicial Review Issue."

owners. Texas law does not support such a result.

Equally unavailing is Everman's claimed need for discretionary review over the applicable limitations period. Texas courts have routinely stated that the statute of limitations applicable to an inverse condemnation is the ten year period correctly applied by the Court of Appeals in this case. Patel has alleged a valid claim for a "taking" that is separate from, and in addition to, any claim for mere "damaging" of his property. Thus, the Court of Appeals properly applied the longer limitations period applicable to "takings" claims in this case.

STATEMENT OF FACTS RELEVANT TO THE CITY OF EVERMAN'S PETITION FOR REVIEW

Jayanti Patel was the owner of twenty (20) apartment buildings (the "Properties") located in a high-crime area of Everman, Texas. [1 CR Supp, 6; 5 CR 20; 2 CR 241]. In April of 1997, Patel received notice that the City of Everman ("Everman") intended to demolish fifteen of his twenty apartment buildings for the stated reason that their doors and window had been boarded up for more than six months. [5 CR 878; 1 CR Supp. 6; 3 CR 496-97]. In response, Patel filed an action in district court seeking injunctive relief. Instead of injunctive relief, an Agreed Order was accepted by the parties. [2 CR 276]. Under the Agreed Order, Patel was to bring his Properties into compliance with Everman city codes and Everman was enjoined from hindering his efforts or demolishing the buildings prior to February 9, 1998. [2 CR 276].

Four days before the Agreed Order expired, Everman enacted Ordinance No. 467

amending the portion of the Code of the City of Everman dealing with substandard buildings ("Everman Code"). [1CR 71]. The Everman Code was enacted pursuant to Chapter 214 of the Local Government Code which authorizes municipalities to regulate substandard buildings. [1CR 71]. The Everman Code, as enacted on February 5, 1998, does not contain any provision or requirements for judicial review. [1 CR 71-81].

On February 9, 1998, the Agreed Order expired. The next day, Everman code officer, Tom Killebrew phoned Patel and told him that they would be posting notices to demolish his buildings. [5 CR 889]. Killebrew did not inform Patel what was wrong with the buildings. [5 CR 889]. At that time, Patel testified, every unit in the Properties was newly remodeled and undamaged. [1 CR Supp. 6].

On February 20, 1998, Killebrew inspected the Properties. [5 CR 889]. Sometime thereafter, Patel received notices of substandard building reports and inspection reports for each of his properties. [2 CR 281; 5 CR 891]. Interestingly, the defects cited in the 1997 notices were not listed as still being substandard at the time of the 1998 report. [1 CR 62; 5 CR 878, 891; 2 CR 281; 3 CR 496-97; 1 CR Supp. 6].

Patel acknowledges receiving a letter informing him that a public hearing would be held regarding the demolition of (not 15) but all 20 of his Properties. [2 CR 282]. However, Patel was not given notice that he was to submit evidence or repairs at the Public Hearing. [4 CR 623]. Nevertheless, on March 5, 1998 a meeting of the newly created Board of Appeal was held. [2 CR 282; 5 CR 893]. Patel was represented by attorney, Pete

Legendre. [5 CR 893]. Mr. Legendre informed the City that several of the allegations in the reports were false. [3 CR 349-50]. Mr. Legendre pointed out that Patel would correct the newly alleged conditions. [3 CR 349-50]. Mr. Legendre pointed out that the newly alleged conditions were not substantial defects and asked that Patel be given thirty (30) days to address the newly cited problems.[2] [3 CR 349; 4 CR 637; 5 CR 893].

On or about March 6, 1998, Everman's Building Board of Appeals issued orders for the demolition of each of Patel's twenty buildings (the "Demolition Orders"). [4 CR 642-662].

Less than thirty days later, on April 3, 1998, Patel filed a second lawsuit in district court seeking to enjoin the City from demolishing his buildings and complaining that the demolition orders were arbitrary, capricious and illegal. [1 CR 142]. In that proceeding Patel requested a writ of certiorari. [1 CR 142]. The district court did not rule on Patel's certiorari request. Everman demolished the Properties in April of 1998.

ARGUMENT AND AUTHORITIES

I. This Court Cannot Grant Discretionary Review on the Judicial Review Issue Because Everman Never Presented the Issue to the Lower Courts. (In response to Everman's Judicial Review Issue).

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[2] The City voted to demolish all twenty of the Properties. [4 CR 636-640]. Interestingly, Texas Bank had a lien on two of Patel's structures and asked that they not be demolished. [4 CR 638]. At first the City offered the Bank thirty days to improve the structures. [4 CR 638]. When Patel requested the same period of time to make repairs, the City reversed its position and ordered all structures (even the two with liens) demolished. [4 CR 638]. Those two properties, however, were the only two that were not demolished – despite the existence of orders to do so. [1 CR 166].

This Court's power of discretionary review is limited to the review of decisions actually made by the courts of appeals. TEX. CONST. ART. V, § 5; Art. 44.45; TEX. R. APP. P. 67.1, 68.1. That is, this Court cannot review issues which have not first been properly presented to and rule on by the court of appeals. *Davis v. State,* 870 S.W.2d 43, 47 (Tex. Crim. App.1994)(Court cannot review issues which have not first been ruled on by the court of appeals); *Montalbo v. State,* 885 S.W.2d 160, 161 n. 1 (Tex. Crim. App.1994)(Court lacks authority to address a legal issue not addressed by the court of appeals); *Owens v. State,* 827 S.W.2d 911, 917-18 n. 7 (Tex. Crim. App.1992)(the function of this Court is to pass only on legal questions that have been resolved by the courts of appeals).

In its petition for review, the City of Everman raised for the very first time its contention that Patel's failure to exhaust administrative remedies afforded by Local Government Code Section 214.0012 definitively establishes that the Properties were a nuisance. This argument was not presented to the trial court in Everman's summary judgment motion. It was not presented to the Court of Appeals in Everman's Appellee's Brief. Indeed, Everman's appellate brief only mentioned the Local Government Code through a passing reference to the fact that Everman's procedures for addressing substandard structures were authorized by that statute generally.[3] [Appellee's Br. 2]. At

[3] Nor did Everman ever once reference its seminole case, *Nash v. City of Lubbock*, in its briefing to the Court of Appeals.

most, Everman made a collateral estoppel argument on motion for rehearing regarding the Local Government Code section that was itself improper for not having been presented earlier.

Having failed to present its current argument at any earlier time, Everman cannot now invoke this Court's discretionary review over a decision that was not presented or ruled upon by any lower court.

II. Patel's Damage Claims Are Not Defeated by the Judicial Review Requirements of Local Government Code Section 214.0012. (In response to Everman's Judicial Review Issue).

Even if the Court were inclined to permit consideration of Defendants' newly asserted claim (which it should not), relief should still be denied because Everman's substantive arguments are without merit. Everman's position appears to be that its own determination that Patel's Property's were a nuisance conclusively precludes any future claim arising from the destruction of the Properties.[4] Everman is mistaken for several reasons. First, interpreting Section 214.0012 so as to deprive property owners of their day in court is a violation of due process. Second, the discretionary judicial review afforded by Section 214.0012 does not apply to this case because Patel is not seeking to prevent a

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[4] In making this new argument, Evermant relies upon Texas Local Government Code Section 214.0012 which provides in relevant part: "(a) any owner, lienholder, or morgagee of record of property jointly or severally aggrieved by an order of a municipality . . . may file in district court a verified petition setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. The petition must be filed. . . within 30 calendar days . . . or such decision shall become final as to each of them upon the expiration of each such 30 calendar day period." TEX. LOC. GOV. CODE. s 214.0012.

demolish order from becoming final. Rather, Patel is seeking damages incurred as a result of a final demolition that was unlawful. Section 214.0012 addresses finality; not liability. Third, the demolition orders issued in this case were not issued pursuant to Section 214.0012. Hence, there exists (at least) a fact issue as to whether or not Section 214.0012 even applies. Fourth, a municipalities own designation that a property is a nuisance is not conclusive and binding proof that the property was, in fact, as the municipality declared. And finally, if the law were as Everman suggests it ought to be, municipalities could demolish private property with impunity and there would be no recourse for aggrieved property owners. Texas law does not support such a result.

A. Application of Chapter 214 to deprive property owners of their right to a judicial determination of whether their property is a public nuisance would be an impermissible violation of due process.

Everman wrongly contends that the Court of Appeals erred by applying the standard of review for a summary judgment motion rather than merely making a substantial evidence review of the demolition order. Everman bases its claim of limited review jurisdiction upon Texas Local Government Code Section 214.0012. That provision provides that:

> (a) Any owner, lienholder, or mortgagee of record of property jointly or severally aggrieved by an order of a municipality issued under Section 214.001 may file in district court a verified petition setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality.
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> * * *
>
> (f)Appeal in the district court shall be limited to a hearing

> under the substantial evidence rule. The court may reverse or affirm, in whole or in part, or may modify the decision brought up for review.

TEX. LOC. GOV. CODE ANN. s 214.0012(a-f)(emphasis added). The clear import of Section 214.0012 is that any petition seeking to prevent a municipality's demolition order from being carried out will be subjected to a substantial evidence review. There is nothing in Section 214.0012 that limits the evidence to be considered in a separate constitutional takings claim.

This Court has long held that a property owner is not to be deprived of his right to a judicial determination of the question whether his property is a public nuisance to be abated by demolition. *City of Houston v. Lurie*, 224 S.W.2d 871, 873 (1949).

> The authority to decide such a question involves the exercise of judicial discretion, and ordinarily includes the authority to weigh evidence, to make findings of fact, and to apply rules of law. It may well be doubted that a limited review of the facts, as under the substantial evidence rule, would amount to a judicial determination of the justiciable question here involved. Trial under that rule would not establish whether or not the buildings are in fact nuisances, 'in the same manner as any other fact.'

Id. (emphasis added), *citing, Crossman v. City of Galveston,* 112 Tex. 303, 315, 247 S.W. 810, 815, 26 A.L.R. 1210; *City of Texarkana v. Reagan,* 112 Tex. 317, 323, 247 S.W. 816, 818. Defendant's reading of Chapter 214 as requiring a mere substantial evidence review of all issues touching upon a nuisance determination is an unconstitutional extension of the limited context in which such an abbreviated review is

appropriate. The Court of Appeals adherence to the general summary judgment review standards was appropriate based on the facts of this case and should be affirmed.

B. Texas Local Government Code Section 214.0012 applies only to determinations regarding the finality of a demolition order; not to separate takings claims regarding the legality and liability of such order.

Even if Section 214.0012 could be constitutionally applied to limit Plaintiff's rights of judicial review, its application is inappropriate in the present case. There is a difference between a plaintiff's petition for damages based on legal liability (such as is presently at issue), and a plaintiff's petition under section 214.0012 to strike down a demolition order before it has become final (which is not at issue in this case). If the Section 214.0012 petition is not filed, the demolition order may well become *final* (i.e. the demolition may occur) but that *finality* does not establish *legality* or an absence of liability. Notably, there is no language in Section 214.0012 that requires Plaintiff to challenge the legality of the order by administrative appeal as a pre-condition for a damage claim.

Moreover, the "substantial evidence" review Everman repeatedly cites is the standard that applies only to verified petitions pursuant to Section 214.0012. The cases cited by Everman in support of applying a "substantial evidence" review involved *only* an attempt to strike down the demolition order pursuant to section 214.0012. *E.g.,, Nussbaum v. City of Dallas* 948 S.W.2d 305, 307 (Tex.App. Dallas 1996, no writ); *Cedar Crest No. 10, Inc. V. City of Dallas*, 754 S.W.2d 351, 353 (Tex.App.–Eastland

1988, writ denied, 490 U.S. 1081 (1989). They did not involve a claim for damages subsequent to a final demolition. By contrast, this present action is not a Section 214.0012 proceeding aimed at preventing a demolition order from being finalized. This is a constitutional takings claim for monetary damages.

"It is well established that the substantial evidence rule does not apply when a court reviews the decision of a city to demolish buildings under authority of a city ordinance." *City of Houston v. Lurie,* 148 Tex. 391, 224 S.W.2d 871, 874-75 (1949). Thus, the lower court acted correctly in finding viable claims under the applicable standard of review.[5]

C. The judicial review requirements of Section 214.0012 do not apply in this case because the demolition orders were not issued pursuant to that section.

Section 214.0012 applies only to an owner aggrieved by "an order of a municipality issued under Section 214.001." TEX. LOC. GOV. CODE s 214.0012(a). Nowhere in the Demolition Orders is a statement that the orders were issued pursuant to Section 214.001. [4 CR 642-662]. In fact, the Texas Local Government Code is not listed at all in the orders. [4CR 642-662]. Simply stated, Everman did not issue the

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[5] The fact that the discretionary procedure for challenging a substandard building determination must take place within only *thirty* days and is limited to the facts presented before the building commission demonstrates that it is intended only to address the finality of the demolition order – rather than the legality of the order. It would be a violation of due process to require a property owner to prepare and establish proof of every element bearing upon the legality of a government units action (e.g. discriminatory motive, failures of notice, negligence, fraud, etc.) in such a limited period of time.

demolition orders pursuant to Section 214. Because the judicial review provision Everman now invokes applies only to orders issued pursuant to Section 214 and the Demolition Orders were not issued under that section, any limits on judicial review contained therein are not applicable to the present action.

The small but significant distinction between the underlying codes separates the present case from Everman's caselaw authority as well. In Everman's key case, *Nash v. City of Lubbock*, the city issued a demolition order based on violations of the Lubbock Housing Code. 888 S.W.2d 557, 559-560 (Tex.App.– Amarillo 1994, no writ). The property owners in *Nash* did not file an appeal within ten days as they were required to do by the Lubbock Housing Code. *Id*. Thus, the court concluded that the order against them had become final pursuant to the Lubbock code. *Id.* Unlike Nash, Everman is attempting in this case to juxtapose *city* ordinances with *state* code provisions that do not contain the same restrictions and requirements. Here, the City of Everman issued the Demolition Orders based upon the Everman housing code. But now, several years later, it seeks to have finality of those orders imposed – not by the procedural requirements of the applicable Everman code – but by a wholly separate Texas state code provision not invoked by the Demolition Orders. *Nash* does not support Everman's unprecedented extension of statutory requirements.

Not surprisingly, Everman has glossed over the absence of any judicial review provision in its housing code in order to make its present argument for review. However,

if the Court looks at the full record, it is apparent that the only authority cited in any of the demolition orders is Chapter 4 of the Everman City Code. [E.g. 4 CR 642-662]. The Everman City Code includes no requirement that a petition must be filed within 30 days in order to prevent an adverse order from becoming final. [1 CR 71-89]. At most, the amendments to the Everman code list as their purpose "provid[ing] a . . . method, to be cumulative with and in addition to any other remedy [under Chapter 214] . . . whereby buildings. . . may be required to be . . . demolished." [4 CR 617]. Thus, by its express language Everman adopted nothing more than the means by which properties could be demolished under Chapter 214. It did not adopt the property owner's review protections; only the municipalities demolition options.[6] Everman cannot defeat Patel's claims on the basis of a procedural requirement not applicable to the authorities Everman itself chose to invoke.

D. A municipality's own designation that a property is a nuisance is not conclusive and binding proof of a property's condition.

Everman complains that a city's determination that demolition is appropriate will be undermined by the Court of Appeal's opinion. In reality, it is the rights of private property owners that will be unfairly abridged if the standards are as Everman argues.

In its simplest terms, Everman argues that every city should be permitted to rely

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[6] That this is the case is implicitly affirmed by the fact that the amendments to the Everman Code closely track the language of Chapter 214 throughout all provisions dealing with a municipalities remedies for substandard buildings but excludes any language regarding a property owners' rights of review or the governing legal standards upon such review. [*Compare* 4 CR 617-633; TEX. LOC. GOVT. CODE s 214.001].

upon its own unchallenged designation that a building is substandard as conclusive proof of a nuisance defense. Texas law does not permit this approach. In *Reagan*, this Court stated:

> If the building was in fact a nuisance, the city may defend on that ground, but its own definition of a nuisance, set forth in its ordinance, is not conclusive and binding on the courts. The question as to whether or not the building is a nuisance remains a justiciable question. . . Whether or not the building here in controversy was in fact a nuisance is to be established by legal and competent evidence, in the same manner as any other fact, and the burden is upon the city to do this."

City of Texarkana v. Reagan, 242 S.W.815 (Tex. 1923)(emphasis added). Here, the City of Everman chose to demolish the Properties prior to a judicial determination that they were a nuisance. While Everman had the right to take such action, Texas courts admonish that a city which chooses to take such action does so at its own peril and must be prepared to defend its nuisance determination. *Jones v. City of Odessa,* 574 S.W.2d 850 (Tex.Civ.App.-El Paso Nov 29, 1978, writ refused n.r.e.). Everman should not be relieved of the burden it assumed by destroying Patel's Properties.

E. Public policy requires that property owners be given an opportunity to present their liability claims.

Everman would understandably like having assurance that it could not be held liable for demolishing a property owner's buildings. But public policy cautions that such assurance must come from a principled nuisance determination that can withstand judicial scrutiny; not from an abridgment of a property owner's right to have the nuisance

determination assessed by a court. Certainly, a statute intended simply to provide timely finality cannot be intended to insulate a municipality from liability without even permitting a property owner time and opportunity to marshall and present all the evidence bearing upon his claims.

III. The Court of Appeals Correctly Applied the Ten Year Statute of Limitations to Plaintiff's Takings Claim. (In Response to Everman's Limitations Issue).

Article I Section 17 of the Texas Constitution states that "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." TEX. CONST. Art. I Sec. 17. Thus, the Texas Constitution authorizes compensation to individuals whose private property is taken for public use.[7] *City of Houston V. Crabb*, 905 S. W.2d 669 (Tex.App.-Houston[14th Dist.]

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[7] Texas law indicates, and Defendants do not contest in their petition for review or briefing to this court, that Patel's property was taken for "public use." Courts have defined "public use" to include the demolition of a building due to an alleged health of safety concerns. *City of Houston v. Crabb*, 905 S. W.2d 669 (Tex.App.-Houston[14th Dist.] 1995). A "public use" is one that concerns the customers of the entire district – as distinguished from a particular individual. *Bay Ridge Utility Dist. v. 4M Laundry,* 717 S.W.2d. 92, 101 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). In fact, one's property may only be taken without consent when the taking is for public use. *Mercier v. Mid Texas Pipeline Co.,* 28 S.W.3d. 712 (Tex.App.-Corpus Christi 2000); *Tenngasco Gas Gathering Co. v. Fischer*, 653 S.W.2d 469 (Tex.App.-Corpus Christi 1983); *Atwood v. Willacy County Nav. Dist.,* 271 S.W.2d 137 (Tex.App.-San Antonio 1954).

Each of the twenty Demolition Orders ("Demolition Orders") issued by the Everman Building Board of Appeals state that Patel's Properties are to be destroyed because "defects or conditions exist to the extent that the life, health, property or safety of the public are endangered." [1 CR 97-117]. Assuming for the sake of argument that such safety conditions existed (which they did not), the City's actions in demolishing the Properties were intended to benefit their citizenry as a whole – not any individual in particular. Under Texas law, these facts establish (or at least raises a fact issue regarding) the public use purpose of Defendants' actions. This precisely the action Texas courts have determined to be a "public use." Accordingly, the trial court erred in granting summary judgment against Patel on the basis that his property was

1995).

Defendant acknowledges that Texas courts have "consistently" stated that claims for compensation for property taken for public use are governed by a ten year statute of limitations. [See Brief of Petitioner City of Everman at p. 23]. Indeed, numerous Texas courts have held that the proper statute of limitations to be applied to an inverse condemnation claim is the ten-year statute of limitations otherwise applied to adverse possession claims. *Trail Enters., Inc. v. City of Houston,* 957 S.W..2d 625, 631 (Tex.App.—Houston [14th Dist.] 1997, pet. Denied); see also Tex. Civ. Prac. & Rem.Code Ann. § 16.026(a) (Vernon Supp.2002); *Brazos River Auth. v. City of Graham,* 163 Tex. 167, 354 S.W.2d 99, 110 (1961); *Hudson v. Arkansas Louisiana Gas Co.*, 626 S.W.2d 561, (Tex.Civ.App.—Corpus Christi 1978, writ ref'd n.r.e.). Nevertheless, Defendants contend that the two year limitations period applicable to property damage claims should apply because Patel's property was "damaged" rather than "taken." Texas law, as well as the facts and procedural posture of this case, demonstrate otherwise. Thus, the Court of Appeals correctly held that the ten year statute of limitations applied to Plaintiff's inverse condemnation claim.

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not taken for public use.

Although all Plaintiff's claims have been brought within the proper ten year statute of limitations, it is worth noting that even if the two year statute of limitations were to apply (which it does not) it would affect no more than eleven of Plaintiff's properties. Namely, Defendants admit only the properties at 406 King, 408 King, 404 King, 502 Race, 402 Race, 306 Race, 412 Race, 408 Race, 410 Race, 414 Race, and 406 Race were demolished over two years prior to the filing of this action. [4 CR 567].

A. The Distinction Between a "Taking" and a "Damaging" Is Itself a Question of Fact Precluding Summary Judgment.

The very distinction Everman attempts to draw illustrates why summary judgment was improper in this case. "The distinction between a taking of land and a damaging of land is often largely an evidentiary matter." *Hubler v. City of Corpus Christi,* 564 S.W.2d 816 (TexCivApp.-Corpus Christi 1978, writ refused n.r.e.); *Brazos River Authority v. City of Graham,* 163 Tex. 167, 354 S.W.2d 99, 109 (1961)*; City of Perryton v. Houston*, 454 S.W.2d 435 (Tex.Civ.App. Eastland 1970, writ ref'd n.r.e.). "A single pleading will often be sufficient to state a cause of action for either a taking or a damaging." *Hubler v. City of Corpus Christi*, 564 S.W.2d 816 (TexCivApp.-Corpus Christi, 1978, writ refused n.r.e.), *citing, Brazos River Authority v. City of Graham,163* Tex. 167, 354 S.W.2d 99 (1961). Thus, the difference between property that has been "taken" and property that has been "damaged" may be a matter of degree and depends heavily upon the particular facts of the case. Because Patel has alleged damage to his property of such magnitude that it amounts to a taking of the property, the Court of Appeals was correct in holding that the two-year limitations period applicable to damage-only claims did not apply to bar Patel's action as a matter of law. Simply stated, the existence of a taking is a matter of factual dispute not appropriate for summary judgment.

B. Patel's claim is for a "taking" rather than a "damaging" and so is governed by a ten year statute of limitations.

Even if the existence of a taking was not itself a fact issue precluding summary

judgment, the Court of Appeal's limitations ruling should be affirmed because Patel has raised a fact issue regarding the "taking" of his property. To state a claim that property has been "taken" Patel must have established that: (1) the State intentionally performed certain acts; (2) which resulted in a "taking" of his property; (3) for public use. *See Steele v. City of Houston,* 603 S.W.2d 786, 788-92 (Tex. 1980). As the Court of Appeals recognized, Patel has made each of these allegations. Consequently, Patel has alleged that his property was "taken" such that the ten year limitations period does apply.

Everman's position is essentially that Patel's property could not have been "taken" because the public entity was not vested with title in the property. [Brief of Petitioner City of Everman p. 25]. In order to make its limitations argument, Everman focuses upon Patel's land as being separate from the structures existing upon them. That is, Everman contends nothing has been taken because it did not take title to the land itself. That position has been rejected by this Court. See Crabb, 905 S.W.2d at 672-74 (court held taking occurred where city demolished building for the public use even though the underlying property retained a value of $5,000) The better approach, and the one suggested by Texas case law, would distinguish a "taking" from a "damaging" based upon the extent of the invasion.

This Court has looked at the distinction between a damaging and a taking and has clearly stated that "Where there has been a taking of the property by a physical invasion or appropriation thereof, "the land limitation rather than the general limitation statutes apply to such inverse condemnation proceedings." *Brazos River Authority v. City of Graham*, 163

Tex. 167, 354 S.W.2d 99, 109 (1961); *City of Port Arthur v. Bowling*, 551 S.W.2d 155 (Tex.Civ.App.-Beaumont 1977), writ granted (Sep 27, 1977), writ withdrawn (Oct 04, 1978), writ refused n.r.e. (Oct 04, 1978). Thus, a taking occurs when property has been (1) physically invaded or (2) appropriated. The plain meaning of appropriation includes not merely possession but also "mak[ing] use of [the property] without authority or right." MERRIAM WEBSTER COLLEGIATE DICTIONARY, 10th Ed., p.59 (1993). That is precisely what occurred in this case. Here, Defendants both physically entered the Properties for injurious purposes and wrongfully assumed dominion over the use of the apartment units.

Several factors support the view of Patel's property as having been taken rather than merely damaged. *See Hubler,* 564 S.W.2d 816. First, the harm to the Properties was permanent rather than intermittent or temporary. Second, the harm to the Properties was deliberate in the sense that it was not an unintentional result of an emergency or accident. Third, the harm occurred on the Patel property rather than an adjacent or nearby area. Fourth, it was not just a small portion of the Patel apartment complex that was damaged. Instead, the demolished apartment units were taken from Patel's use in their entirety. Moreover, even under Defendant's own conceptualization of the limitations test, Everman's actions are most akin to an adverse possession claim in that Defendants openly asserted a dominion and control over the physical structures of Patel's apartment units that was adverse and hostile to Patel's own possession. Consequently, the Appellate Court's determination that the two year limitations period could not be held to bar Patel's claims as a matter of law

should be affirmed.

CONCLUSION

The Court of Appeals correctly reversed the trial court's grant of summary judgment on Plaintiff's takings claim as to four of his twenty Properties. For that reason, Plaintiff respectfully requests that the Court deny the Petition for Review of the City of Everman and/or deny Everman's appeal in its entirety and permit Plaintiff's takings claim to be tried on its merits. Patel additionally prays for all further and other relief, in law or in equity, to which he may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that on the 7th day of June, 2005, a true and correct copy of the foregoing document was served by certified mail, return receipt requested on the following counsel listed below:

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CERTIFICATE OF COMPLIANCE

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Date: June 7, 2005