

Appellate Docket Number 03-13-00580-CV
Texas Third Court of Appeals

Response to Appellee Motion for Involuntary Dismissal

Marc T. Sewell Petition for Judicial Review
under Local Government Code Sec 211

Vs.

Llano Board of Adjustment (Chairman Mikel Virdell)

(a) Identity of Parties and Counsel

Appellant and Filer of this document:

Marc T. Sewell
108 Summit
Llano, TX 78643
Pro Se

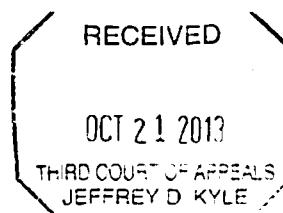
Appellee:

City of Llano
Mikel Virdell Chairman & Mayor
301 West Main
Llano, TX 78643

Appellee Attorney:

Carey L. Bovey
2251 Double Creek Drive
Round Rock, TX 78664

Oral Argument Requested



TO THE HONORABLE THIRD COURT OF APPEALS:

I respectfully present the following counter-points to the Appelle's motion for Involuntary Dismissal:

Appelle's Argument #1 - Summary Statement

This statement is merely a summary. His items in the summary will be addressed separately.

Appelle's Argument #2 - Trial Court Lacked Jurisdiction

1. The trial court did not claim lack of jurisdiction but rather accepted jurisdiction when it ruled on another issue. The specific process actions of the District Court are the sole issues of this appeal. District Court jurisdiction is not one of them and should be discussed in court by the District Court Judge if and when this matter is returned to him.
2. According to the process defined by Section 211.011(a), (b), (c)¹, the appellee would not be allowed to question jurisdiction until after the writ of certiorari had been issued. Since the writ was denied, no motion on district

¹ Appendix C - Local Government Code Sec 211.011. Judicial Review on page 13

court jurisdiction is appropriate and thus no motion for involuntary dismissal that is based on District Court jurisdiction is appropriate.

3. In my mind, this is an involved issue and not appropriate for a motion to dismiss which limits the response to 10 days and doesn't allow verbal discussion for which I have requested – particularly for a pro se appellant without access to Lexus/Nexus to research the references made by appellee with providing the documents.
4. That said, my argument is that the District Court has jurisdiction based on line one of Sec 211.011(a)² which states “Any of the following persons may present to a district court... is illegal in whole or in part...” I (taxpayer) *presented* to the district court and *specified* “the grounds of the illegality.” The objection the appellee regards who performed the illegal act(s). In the City of Llano, the City Council is also the Board of Adjustment and the mayor is the chairman of the Board of Adjustment so a decision by the City Council is congruous to one made by a Board of Adjustment. Section 211.011(g)¹ reaffirms this by stating that the “court may not apply a different standard of review..” based on a Board of Adjustment composed of City Council members. City Council voted on the illegal zoning law change and

² Appendix C - Local Government Code Sec 211.011. Judicial Review on page 13

the Planning and Zoning Board voted to approve and submit the illegal zoning law change to City Council and I perceive all involved are culpable.

But this gets to the issues in my original petition which shouldn't be pertinent to my appeal for illegal process by the District Court?

5. The section directly following 211.011 Judicial Review, is Section 211.012³ Penalty which indicates penalties for a “person” who violates “this subchapter or an ordinance or regulation adopted under this subchapter” is a misdemeanor. The subchapter referenced is the Municipal Zoning Chapter which I contend was illegally violated. Thus, Section 211.012 defines penalties for any individuals violating any aspect of Code 211 and Section 211.011 is the process for identifying those individuals, wherever they committed the crime. Thus, the clear intent of 211.011 is a process for addressing illegal zoning actions of any individual. Also, since the penalty is a misdemeanor, the only mechanism available to property owners for appeal of a zoning law violation is the Judicial Review documented in Section 211.011.
6. I believe the appellee has properly but not completely stated that the Board of Adjustment has authority to hear and decide an appeal that alleges error in

³ Appendix B - Local Government Code Sec 211.012. Penalty on page 12

a decision made by an administrative official “in the enforcement of this subchapter or an ordinance adopted under this subchapter.” Parts of the subchapter and ordinances adopted under this subchapter are precisely those that have been my original petition claims were violated. So it would be appropriate to appeal to the Board of Adjustment. However, since “administrative official(s)” on City Council are those that made the error, one would be appealing an error to the same individuals that made the error so the next level of appeal is a Judicial review based on 211.011.

7. I suggest that any discussion of District Court jurisdiction be regulated to the District Court.
8. If I have not communicated this effectively, I humbly request I be given more time to document this issue and present at the Oral Argument.

Appelle’s Argument #3 - Personal Jurisdiction

1. This is not my error. The error in the case style was created by the District Court Clerk and propagated by the Appeals Court Clerk. This is one of my issues documented in my appeal brief and, at the least, should be decided with the other issues in my appeal. I humbly suggest that it should not be used to dismiss the case since it is not my error.

2. The original case style⁴ and the case style for this appeal (page 1) were correct.
3. I have sent three emails⁵ to the 3rd Court of Appeals Clerk in an attempt to rectify this error. There was not a reply to the first two and the third, recent email, suggested I submit a motion. I request, again, that this issue be resolved. If this motion does not accomplish the change, then I will issue my own motion.
4. I believe the appellee agrees that it was a Court error but then presents a circular argument suggesting that I should have notified the people I didn't put in the case style. He extrapolates from this non sequitur that the trial court didn't have jurisdiction. First, the trial court made the error in the opinion which is after I "should have notified." Second, my appeal is primarily based on "notification" so any discussion of notification should be in the appellee brief response, and third, I didn't make the error.

Appellee's Argument #4 - Affidavit

⁴ Appendix A – Cover from Original Petition on page 11

⁵ Emails #1, #2, and #3 in Appendix E - Email Correspondence between Sewell & Appeals Courton page 17

The affidavit of Brenton Lewis presents the same overtly false statements that are the subject of my original petition for judicial review and in that petition I found him culpable for the illegal actions. Since the District Court never allowed a Judicial Review or hearing nor was there any discussion on the merits of the petition, this document is completely inappropriate. The content of my petition is not at issue in this appeal nor was any of the information in this affidavit presented to the District Court. Allowing this information into the public record is prejudicial without rebuttal and questioning at a hearing and I don't believe it appropriate for a motion. Also, since I am not allowed to present new information in the record, neither should the appellee. Please ask the appellee to remove it.

Appelle's Argument # 5 – No Final Judgment

There must be something not distinguishable to the pro se appellant because I saw the District Judge's actions as final. Following receipt of the Judge's Order, I attempted three different times⁶ to allow for an alternative approach and the Judge's clerk replies⁷ contained the either the cause was disposed or denied. That seemed pretty final to me.

⁶ Emails #1, #3, and #5 in Appendix D - Email Correspondence between Sewell & District Court beginning on page 15

⁷ Emails #2, #4, and #6 in Appendix D - Email Correspondence between Sewell & District Court beginning on page 15

Of course there was no judgment on the actual merits of my complaint but this was due to a procedural error by the District Court and that is all that I am appealing. Surely “due process” is not satisfied when the court makes a procedural error that precludes the outcome based the merits.

The Fourteenth Amendment to the United States Constitution protects against deprivation of life, liberty, or property by the State “without due process of law.” The Texas Constitution Article 1 Sec. 19. DEPRIVATION OF LIFE, LIBERTY, ETC.; DUE COURSE OF LAW. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

The appeals process ensures that the decision of the lower court is correct based on sound legal reasoning and established law and fair.

Procedural due process guarantees the right to a fair procedure. I was denied “due course” because, I believe, a district court judge made a procedural/legal error. I am appealing that decision only and my hope is that the Appeals Court, at least, hears the merits of my appeal.

That is ultimate jurisdiction.

Prayer

Thus, I believe I have successfully refuted the appellee's arguments and I respectfully request that the Appellee's motion for involuntary dismissal be denied.

Alternately just based on my Due Process argument above, please do not deny our right to present our brief to the Court of Appeals. There were 79 citizens denied their rights and are victims of eminent domain by zoning ordinance. Please let our case be heard on the merits. Personally, I have spent over 100 retirement hours and over \$600 to address an illegal action by our town government. It wouldn't be "fair" to deny presentation of our arguments – a second time.

M - Sewell

Marc Sewell

108 Summit

Llano, TX 78643

Appendix

Appendix A – Cover from Original Petition

STATE OF Texas)
) SS: IN THE County COURT
COUNTY OF Llano) CASE NUMBER: _____ (created by County)
IN RE: PETITION to County Court for Judicial Review of Board Decision)

VERIFIED PETITION UNDER Local Government Code Sec 211

Comes now the Petitioner Marc T. Sewell and pursuant to Texas Local Government Code Section 211.011 petitions the Court for a Judicial Review of Llano City Planning and Zoning Commission and Llano City Council. Petition is attached in laymen’s terms and format since Texas Local Government Code Section 211.011 says that a taxpayer may present the petition.

VERIFICATION

I affirm, under the penalties for perjury, that the foregoing representations are true.

(signed) Marc T. Sewell

Marc T. Sewell
Print your name

108 Summit
Mailing Address

Llano, TX 78643
Town, State and Zip Code

325-247-2508
Telephone number, with area code

Sworn to and subscribed
before me
this 20th day of June 2013

Pattie Bradford (Seal)
Notary Public



Appendix B - Local Government Code Sec 211.012. Penalty

Sec. 211.012. ENFORCEMENT; PENALTY; REMEDIES. (a) The governing body of a municipality may adopt ordinances to enforce this subchapter or any ordinance or regulation adopted under this subchapter.

(b) A person commits an offense if the person violates this subchapter or an ordinance or regulation adopted under this subchapter. An offense under this subsection is a misdemeanor, punishable by fine, imprisonment, or both, as provided by the governing body. The governing body may also provide civil penalties for a violation.

(c) If a building or other structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained or if a building, other structure, or land is used in violation of this subchapter or an ordinance or regulation adopted under this subchapter, the appropriate municipal authority, in addition to other remedies, may institute appropriate action to:

- (1) prevent the unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use;
- (2) restrain, correct, or abate the violation;
- (3) prevent the occupancy of the building, structure, or land; or
- (4) prevent any illegal act, conduct, business, or use on or about the premises.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987.

Appendix C - Local Government Code Sec 211.011. Judicial Review

TEXAS LOCAL GOVERNMENT CODE

TITLE 7. REGULATION OF LAND USE, STRUCTURES, BUSINESSES, AND RELATED ACTIVITIES

SUBTITLE A. MUNICIPAL REGULATORY AUTHORITY

CHAPTER 211. MUNICIPAL ZONING AUTHORITY

SUBCHAPTER A. GENERAL ZONING REGULATIONS

Sec. 211.011. JUDICIAL REVIEW OF BOARD DECISION. (a) Any of the following persons may present to a district court, county court, or county court at law a verified petition stating that the decision of the board of adjustment is illegal in whole or in part and specifying the grounds of the illegality:

- (1) a person aggrieved by a decision of the board;
- (2) a taxpayer; or
- (3) an officer, department, board, or bureau of the municipality.

(b) The petition must be presented within 10 days after the date the decision is filed in the board's office.

(c) On the presentation of the petition, the court may grant a writ of certiorari directed to the board to review the board's decision. The writ must indicate the time by which the board's return must be made and served on the petitioner's attorney, which must be after 10 days and may be extended by the court. Granting of the writ does not stay the proceedings on the decision under appeal, but on application and after notice to the board the court may grant a restraining order if due cause is shown.

(d) The board's return must be verified and must concisely state any pertinent and material facts that show the grounds of the decision under appeal. The board is not required to return the original documents on which the board acted but may return

certified or sworn copies of the documents or parts of the documents as required by the writ.

(e) If at the hearing the court determines that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take evidence as directed. The referee shall report the evidence to the court with the referee's findings of fact and conclusions of law. The referee's report constitutes a part of the proceedings on which the court shall make its decision.

(f) The court may reverse or affirm, in whole or in part, or modify the decision that is appealed. Costs may not be assessed against the board unless the court determines that the board acted with gross negligence, in bad faith, or with malice in making its decision.

(g) The court may not apply a different standard of review to a decision of a board of adjustment that is composed of members of the governing body of the municipality under Section 211.008(g) than is applied to a decision of a board of adjustment that does not contain members of the governing body of a municipality.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987. Amended by Acts 1997, 75th Leg., ch. 363, Sec. 3, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 646, Sec. 1, eff. Aug. 30, 1999.

Appendix D - Email Correspondence between Sewell & District Court

EMAIL Number 1.

From: Marc Sewell [mailto:marcs@simonlabs.com]
Sent: Thursday, July 25, 2013 4:29 PM
To: 'Lisa Bell'
Subject: RE: Cause no. 18504 - Judicial Review

From your communication, I understand that you have not denied my petition for judicial review rather you have denied a writ of certiorari as a possible procedure for affecting the judicial review. Since you provided no detail and I am confident of the merits of my petition, I must deduce that I made a procedural error. I have attempted to fix that by sending a copy of the petition to the Mayor and Chairman of the Board of Adjustment, Mike Virdel (mvirdell@cityofllano.com), and the City Attorney, Cary Bovey (cary@boveylaw.com).

I also request a hearing.

Marc Sewell

EMAIL Number 2.

From: Lisa Bell [mailto:33coordinator@dcourttxas.org]
Sent: Thursday, August 01, 2013 8:51 AM
To: Marc Sewell
Subject: Re: Cause no. 18504 - Judicial Review

Mr. Sewell,

The ordered signed by the Judge disposed of your cause.

Thank you,

Lisa Bell

EMAIL Number 3.

From: Marc Sewell [mailto:marcs@simonlabs.com]
Sent: Thursday, August 01, 2013 9:13 AM
To: 'Lisa Bell'
Subject: RE: Cause no. 18504 - Judicial Review

There are other ways to do a Judicial Review. I am surprised that my request was denied without an explanation. I request a hearing to discuss this. I paid for it. marc

EMAIL Number 4.

From: Lisa Bell [mailto:33coordinator@dcourttxas.org]
Sent: Thursday, August 01, 2013 11:47 AM
To: Marc Sewell
Subject: Re: Cause no. 18504 - Judicial Review

Mr. Sewell,

I believe you were told that you needed to notice the opposing sides and then set it for a hearing and you informed us that was not necessary. The Judge reviewed it by submission and denied your request.

EMAIL Number 5.

From: Marc Sewell [mailto:marcs@simonlabs.com]
Sent: Thursday, August 01, 2013 2:22 PM
To: 'Lisa Bell'
Subject: RE: Cause no. 18504 - Judicial Review

I eventually notified the opposing side and attorney and sent you the confirmation. I would now like to set the hearing. If the Judge reviewed my petition, what did he find that caused the denial?

Thank you,
marc

EMAIL Number 6.

From: Lisa Bell [mailto:33coordinator@dcourttxas.org]

Sent: Thursday, August 01, 2013 2:55 PM|

To: Marc Sewell

Subject: Re: Cause no. 18504 - Judicial Review

You did this after the judgment was signed and submitted to the court. The cause is now considered disposed.

Appendix E - Email Correspondence between Sewell & Appeals Court

EMAIL Number 1.

From: Marc Sewell [mailto:marcs@simonlabs.com]

Sent: Thursday, August 29, 2013 10:44 AM

To: 'Jeff Kyle'

Subject: Appeals Court Record Update Docket 03-13-00580-CV

Mr. Kyle,

In reviewing your online case records for Docket 03-13-00580-CV, I found the following discrepancies:

1. Under heading Calendars, there is an outstanding requirement for "Court reporters record due". Since the case was dismissed prior to trial, there is no reporter's record.
2. The case style is incorrect. This case style was created by the District Court and is in error. The correct case style is on my docket statement as follows:

Marc T. Sewell Petition for Judicial Review under Local Government Code Sec 211 Vs. Llano Board of Adjustment (Chairman Mikel Virdell)

Thank you,

Marc Sewell

EMAIL Number 2.

From: Marc Sewell [mailto:marcs@simonlabs.com]
Sent: Friday, August 30, 2013 10:56 AM
To: 'Jeff Kyle'
Subject: FW: Appeals Court Record Update Docket 03-13-00580-CV

Thank you for changing the “court reporters due” status. Will you also be able to change the docketing statement as described in my request #2?

2. The case style is incorrect. This case style was created by the District Court and is in error. The correct case style is on my docket statement as follows:

Marc T. Sewell Petition for Judicial Review under Local Government Code Sec 211 Vs. Llano Board of Adjustment (Chairman Mikel Virdell)

Also, Diane Firestone, Letitia McCasland, Marcy Methvin, Todd Keller, Jeanne Puryear and Tom Milam should be removed as parties. This resulted from a error made by the district court and will be explained in my brief.

Thank you,

Marc Sewell

EMAIL Number 3.

From: Marc Sewell [mailto:marcs@simonlabs.com]
Sent: Thursday, October 10, 2013 10:12 AM
To: 'Jeff Kyle'
Subject: FW: 03-13-00580-CV; 3rd Court of Appeals - Incorrect Docket Record

Jeff Kyle,

The letter below from the appellee shows that he agrees the appleeles you named in the docket should be removed. He is now using that against me to have the case dismissed. Please remove the names from your docket record case style and list of appellees. Please see Issue #4 on page 15 of my appeal brief to understand why I have been requesting the change.

Thank you,

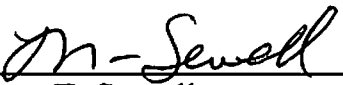
Marc Sewell

Appendix F – Certificate of Service

Certificate of Service

I certify that I have served this Response to Motion for Involuntary Dismissal for Docket Number 03-13-00580-CV on all other parties—which are listed below—on 10/16/13 as follows:

1. Llano City Attorney Carey Bovey **via email**
Law office of Cary L. Bovey, PLLC
2251 Double Creek Drive, Suite 204
Round Rock, TX 78664
(512) 904-9441
cary@boveylaaw.com
2. Llano City Secretary Toni Milam **in person** for distribution to: Board of Adjustment Chairman/Mayor Mikel Virdell, City Attorney Carey Bovey
City of Llano
301 West Main
Llano, TX 78643
(325) 247-4158
tmilam@cityofllano.com



Marc T. Sewell
108 Summit
Llano, TX 78643-1127
325-247-2508
marcs@simonlabs.com

Certificate of Compliance

I certify that the Appellant Brief I submitted on 10/16/13 was prepared with Microsoft Office Word 2007, and that, according to that program's word-count function, the sections covered by TRAP 9.4(i)(1) contain 1488 words.

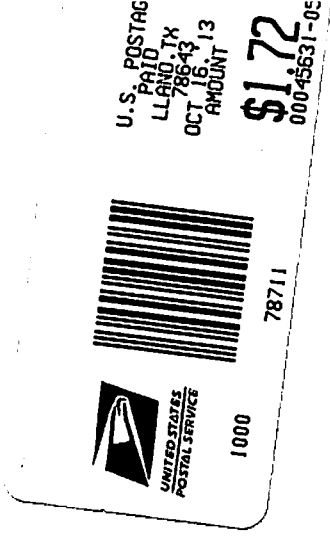
M. Sewell

Marc Sewell

108 Summit

Llano, TX 78643

MARC SEWELL
108 SUMMIT
LLANO, TX 78643



TEXAS THIRD COURT OF APPEALS
P.O. BOX 12547
AUSTIN, TX 78711