

**Appellate Docket Number 03-13-00580-CV**

**Texas Third Court of Appeals**

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**Motion for En Banc Reconsideration**

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

Vs.

Llano Board of Adjustment (Chairman Mikel Virdell)

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**Appellant and Filer of this document:**

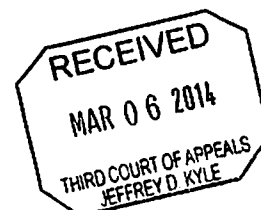
Marc T. Sewell  
108 Summit  
Llano, TX 78643  
Pro Se

**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

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**Oral Argument Not Required**



TO THE HONORABLE THIRD COURT OF APPEALS:

Under Texas Rules of Appellate Procedure 49.7, I submit this motion for en banc reconsideration. I believe my Motion for Rehearing successfully refuted all jurisdiction concerns stated in the appellate court's judgment and yet that motion was overruled without any explanation. I believe that motion successfully articulated the following:

1. The district court did completely dispose of my judicial review petition. I also showed that email by the district court was an acceptable way to present this disposition. I also showed that the district court's action was an abuse of discretion, not based in law, and thus the appeals court has jurisdiction.
2. The appellate court's decision was based on case law that is not pertinent. For example, a judicial review is not the same as a regular case, as the Texas Supreme Court espouses in *Tellez v. City of Socorro*<sup>1</sup> : "The procedures for challenging a zoning board's decision are rather **unique**."

If the case references are not pertinent, shouldn't a review be appropriate since this does show a possible error in the logic of the judges?

3. My base complaints to the district court and this appeals court remain valid and unchallenged. The district judge, thru errors in law and process denied my access to the judicial review process. The district judge's disposition of the case in an email is apparently denying my access to the appeals court. These court errors have caused a

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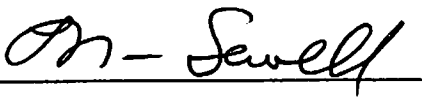
<sup>1</sup> Appendix A - *Tellez v. City of Socorro* on page 5

violation of state and federal constitutions. Thus, my violated constitutional rights should supersede the finality requirement.

4. Other jurisdiction issues such as §211.011(e) and §211.011(f) were not pertinent while §211.011(g) is pertinent.
5. As a separate and distinct issue, the Motion for Sanctions was not moot and could appropriately be addressed independently by this court regardless of the disposition of the other issues.

### **Prayer**

My prayer is that my technical and legal arguments with this court's judgment be sufficient to have the Motion for Rehearing approved. Alternately, my hope is that this court would extend additional courtesy and respect by articulating the flaws in these arguments.



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Marc Sewell

108 Summit

Llano, TX 78643

## **Appendix**

### **Appendix A - *Tellez v. City of Socorro***

#### **TELLEZ v. CITY OF SOCORRO**

**Supreme Court of Texas.**

**Juan Manuel TELLEZ, Petitioner v. CITY OF SOCORRO, Respondent.**

**No. 05-0629.**

**– June 01, 2007**

Justo Fernandez-Gonzalez, El Paso, for Juan Manuel Tellez. Richard Contreras, El Paso, for City of Socorro.

Subject-matter jurisdiction “involves a court's power to hear a case.” U.S. v. Cotton, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002); accord CSR Ltd. v. Link, 925 S.W.2d 591, 594 (Tex.1996). Because the trial court had power to hear this appeal of a zoning board's decision, we hold the court of appeals erred in dismissing it for lack of subject-matter jurisdiction.

Juan Tellez has operated an auto salvage yard in the City of Socorro in El Paso County since 1982. He alleges that six months after he purchased an adjacent lot in 1998 for the same use, the City enacted its first zoning laws and designated the lot as residential. He filed suit after the City's Zoning Board of Adjustment denied his application for a non-conforming use permit. See Black's Law Dictionary 577 (8th ed.2004) (defining “non-conforming use” as “Land use that is impermissible under current zoning restrictions but that is allowed because the use existed lawfully before the restrictions took effect.”). The trial court affirmed the Board, and Tellez appealed again. Rather than reaching the merits, the court of appeals dismissed the suit sua sponte for lack of subject-matter jurisdiction. 164 S.W.3d 823, 830 (Tex.App.-El Paso 2005).

The procedures for challenging a zoning board's decision are rather unique. The Local Government Code requires such challenges to be filed within ten days after a board's decision, to be made by “verified petition stating that the decision of the board of adjustment is illegal . and specifying the grounds of the illegality,” and to be initiated by writ of certiorari directed to the board indicating when its “return” must be made. Tex. Loc. Gov't Code § 211.011(a)-(c).

In *Davis v. Zoning Board of Adjustment*, we rejected a claim that failing to serve the writ of certiorari required by the Code deprived the courts of subject-matter jurisdiction. 865 S.W.2d 941, 942 (Tex.1993) (per curiam). Instead, we held that service of the writ was the procedure by which a trial court conducts

its review; jurisdiction exists “[o]nce a party files a petition within ten (10) days after a zoning board decision.” Id.

Here, the court of appeals dismissed Tellez's suit because he sued the City of Socorro rather than its Zoning Board, and because his petition did not specify how the Board's decision was illegal. The City never objected to either defect. Although subject-matter jurisdiction cannot be waived, see *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex.2000), these procedural defects can be waived because they do not affect subject-matter jurisdiction (as we held in *Davis*).

We agree with the court of appeals that, while the Local Government Code does not specify against whom suit should be filed, its requirements suggest that zoning boards are the proper party as they must be served with the writ, file a verified answer, and pay costs if found to have acted in bad faith. See Tex. Loc. Gov't Code § 211.011. But whether suit should be dismissed because the zoning board was not joined as a defendant is a prudential rather than jurisdictional question. See Tex.R. Civ. P. 39; *Brooks v. Northglenn Ass'n*, 141 S.W.3d 158, 162-63 (Tex.2004); *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 204 (Tex.1974). By failing to object, the City waived any complaint that the proper party was its appointed Board. Tex.R.App. P. 33.1; *Brooks*, 141 S.W.3d at 163.

Similarly, while the Code requires specific allegations of illegality, nothing indicates the Legislature intended compliance to be jurisdictional. See *Univ. of Texas Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 359 (Tex.2004). If the City considered Tellez's petition deficient, it could have objected. Having failed to do so, it waived any defect, and the court of appeals erred in dismissing the appeal on this basis. See *Roark v. Allen*, 633 S.W.2d 804, 809-10 (Tex.1982).

Accordingly, without hearing oral argument, see TEX. R. APP. P. 59.1, we grant Tellez's petition for review, reverse the judgment of the court of appeals, and remand the case to that court for further proceedings.

PER CURIAM.

## Appendix B – Certificate of Service

### Certificate of Service

I certify that I have served this Motion for Rehearing for Docket Number 03-13-00580-CV on all other parties—which are listed below—on 3/5/14 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



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marcs@simonlabs.com

## **Appendix C - Certificate of Compliance**

I certify that this motion 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 358 words.

A handwritten signature in black ink, reading "M- Sewell", is written over a horizontal line.

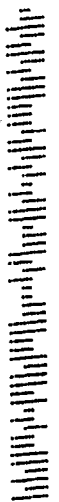
Marc Sewell

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## **Appendix D – Certificate of Conference**

Not required based on Texas Rules of Appellate Procedure Rule 49.12.



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