

No. 08-0413

IN THE SUPREME COURT OF TEXAS

CITY OF HOUSTON, TEXAS,

Petitioner,

v.

TRAIL ENTERPRISES, INC. D/B/A WILSON OIL COMPANY, ET. AL.,

Respondents.

On Petition for Review
From the Tenth Court of Appeals at Waco
No. 10-05-00382-CV

RESPONSE TO PETITION FOR REVIEW

THE MCCLEERY LAW FIRM
Stephen E. McCleery
State Bar No. 00794258
1800 St. James Place, Suite 105
Houston, Texas 77056
(713) 622-3555 Telephone
(713) 784-7797 Facsimile

SHEEHY, LOVELACE & MAYFIELD, P. C.
Philip E. McCleery
State Bar No. 13395000
Peter K. Rusek
State Bar No. 17400400
Rex D. Davis
State Bar No. 05535800
510 N. Valley Mills Drive, Suite 500
Waco, Texas 76710
(254) 772-8022 Telephone
(254) 772-9297 Facsimile

ATTORNEYS FOR RESPONDENTS
TRAIL ENTERPRISES, INC. D/B/A
WILSON OIL COMPANY, ET. AL.

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STATEMENT OF THE CASE

Because Respondents are dissatisfied with that portion of the Petition Respondents include a statement of the case, pursuant to Texas Rules of Appellate Procedure 53.3(b).

Nature of the Case: This is an inverse condemnation case in which Respondents allege that the Petitioner's adoption of City of Houston Ordinance No. 97-1394 on November 5, 1997 prohibiting the drilling of oil wells on their property near Lake Houston resulted in a taking or damaging of their mineral interests.

Trial Court: County Civil Court at Law No. 1 of Harris County, Texas, the Honorable Jack Cagle presiding.

Trial Court's Disposition: Upon conclusion of a bifurcated trial on all of the issues, the trial court found and determined that an inverse condemnation had occurred and entered a Final Judgment on the jury's verdict that Respondents recover \$16,849,099.37 from Petitioner. Thereafter, the Court dismissed the case for lack of jurisdiction upon concluding Respondents failed to ripen their taking claims prior to filing suit.

Parties in the Court of Appeals:

Appellants: Trail Enterprises, Inc. d/b/a Wilson Oil Company
Thomas G. Rogers
Catherine Baumann
Carolyn Whipple
Mrs. S. Kelley Bruce
John Hobbs Kelley
Mary Virginia Kelley Ingram
Daystar Oil and Gas Corporation
John Alexander
Rebecca Bruce Jones
Angus McReynolds, Independent Executor of the Estate
of Eleanor Bruce McReynolds
Robert D. Bruce
Mary Bruce

Appellee: City of Houston, Texas

Court of Appeals: Tenth Court of Appeals

Justice Gray authored the first part of the Opinion which was unanimous wherein the Court held:

“Trail’s claims were ripe upon enactment of the ordinance. The trial court erred in holding that Trail’s claims were not ripe and that the court thus lacked jurisdiction”

Justice Vance authored the remainder of the Opinion joined by Justice Reyna wherein the court rendered judgment.

Justice Vance authored an Opinion on Rehearing in which Justice Reyna joined.

Justice Gray dissented to the judgment to render based not on the law, but on a possibility that some potential factual issues had not been addressed.

STATEMENT OF JURISDICTION

Petitioner incorrectly states that the Supreme Court has jurisdiction over this appeal pursuant to Sec. 22.001(a)(1), (2) and (6) of the Texas Government Code.

Section 22.001(a)(1)

The Tenth Court of Appeals was unanimous on the sole question of law material to the disposition of this case. The Tenth Court unanimously held that Respondents' claims were ripe and the trial court had jurisdiction. Justice Gray's dissent, solely as to an appropriate judgment to enter, did not address any questions of law, but was limited solely to suggesting the possible existence of some undecided fact issues which would dictate a remand.

Section 22.001(a)(2)

The Tenth Court of Appeals' unanimous decision as to the sole question of law material to the disposition of this case does not conflict with any prior decision of another court of appeals or this Court. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928-32 (Tex. 1998); *Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50, 58-60 (Tex. 2006); *Trail Enterprises v. City of Houston*, 957 S.W.2d 625, 632 (Tex. App.–Houston [14th Dist.] 1997, writ denied); *Maguire Oil Co., v. City of Houston*, 243 S.W.3d 714, 718 (Tex. App.–Houston [Dist. 14] 2007); *Maguire Oil Co., v. City of Houston*, 69 S.W.3d 350, 347 (Tex. App.–Texarkana 2002, pet. denied).

Specifically, a unanimous Tenth Court of Appeals, following this Court's holdings in *Mayhew* and *Hallco*, correctly held that no administrative action was necessary to ripen Respondents' inverse condemnation claim because any administrative action would be

futile. *See Mayhew*, 964 S.W.2d at 928-32 (holding that “. . .futile variance requests or re-applications are not required.”) *Hallco*, 221 S.W.3d at 58-60 (following *Mayhew* and holding that the very language of the ordinance unambiguously communicated a “final decision” upon its enactment, and when there is no ambiguity and no means to appeal from the prohibitions of the ordinance, any further ‘final decisions’ are simply redundant and effort expended is futile); *Trail Enterprises*, 957 S.W.2d at 632 (following *Mayhew* and holding because Houston City Ordinance provided no procedure for variance or appeal, Houston City Ordinance was final when implemented and any further action was futile).

Section 22.001(a)(6)

A unanimous Tenth Court of Appeals correctly decided and did not commit any errors of law in holding that Respondents’ claims are ripe for adjudication. *See Mayhew*, 964 S.W.2d928, *Hallco*, 221 S.W.3d at 58-60, *Trail Enterprises*, 957 S.W.2d at 632. Moreover, in following this Court’s holdings in *Mayhew* and *Hallco*, the Tenth Court did not create any material issues of such importance to the jurisprudence of the state as to require correction.

ISSUES PRESENTED

Respondents include a statement of the issues presented, pursuant to Rule 53.3(c)(1) *Texas Rules of Appellate Procedure* because Respondents are dissatisfied with the statement made in the Petition.

Issue 1

This Court made it clear in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928-932 (Tex. 1998) and again in *Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50, 58-60 (Tex. 2006) that when an ordinance is adopted which absolutely prohibits the use intended for the property (in this case drilling for oil on Respondents' property) and nothing in the ordinance suggests any exceptions would be made, and there are no procedures for appeal, a request for a variance or permit would be futile and Respondents' taking claims are ripe upon enactment of the ordinance. Did the Court of Appeals correctly conclude that Respondents' claims were ripe and the trial court had jurisdiction?

Issue 2

There is no location on or off of Respondents' property where the City's ordinance would permit Respondents to drill wells from which they could produce their minerals. After a full bench trial on liability and a full jury trial on damages during which seven experts (petroleum engineers, geologists and surveyors) testified, the City produced no evidence of the existence of any location and the Respondents produced evidence that there were no locations. The ordinance was an absolute prohibition without provision for variance or appeal. Did the Court of Appeals correctly hold that Respondents' claims were ripe upon enactment of the ordinance?

Issue 3

In *Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50, 58-60 (Tex. 2006) this

Court said:

“... the ordinance here prohibited precisely the use Hallco intended to make of this property and nothing in the ordinance suggested any exceptions would be made. Hallco’s taking claim was ripe upon enactment because at that moment the ‘permissible uses of the property [were] known to a reasonable degree of certainty.’”

In *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, this Court held that actions which would be futile need not be taken to ripen an inverse condemnation claim. Did the Court of Appeals correctly apply the ripeness principles approved by this Court in *Mayhew* and *Hallco Texas*?

Issue 4

Following a full bench trial on liability and a full jury trial on damages, the City moved for summary judgment on jurisdiction and Respondents moved for entry of judgment on the Court’s findings and the jury’s verdict, and a summary judgment on jurisdiction. (CR 1055; Response Appendix 1; CR 1132) When both parties seek final judgment by their motions, and the trial court grants one and denies the other, on appeal the Court of Appeals should enter the judgment the trial court should have entered. *Bowman v. Lumberton Indep. School Dist.*, 801 S.W.2d 883, 889 (Tex. 1990). Under this record, did the Court of Appeals correctly render the judgment the trial court should have entered?

Issue 5

The trial court entered a final judgment based upon his finding that an inverse condemnation had occurred and the jury's verdict on damages (CR 1132; Petition Appendix 1). Thereafter, the trial court granted the City's motion contesting jurisdiction on ripeness grounds. On appeal, the City failed to bring forward by cross-point any complaints or matters which would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict. Did the Court of Appeals correctly hold that the City waived any complaints about the verdict by failing to raise or complain by cross point on appeal about any matters which would have vitiated the verdict?

Issue 6

At the conclusion of all proceedings in the trial court, the judge issued a Final Judgment, reciting his determination that inverse condemnation had occurred and entering a judgment on the jury's verdict. (CR 1132; Petition Appendix 1) He then granted the City's post-trial motion for summary judgment on ripeness grounds. Having concluded that the case was ripe and the trial court had jurisdiction, did the Court of Appeals correctly render judgment for Respondents?

Issue 7

The trial court's findings, conclusions and actions are set forth in his Final Judgment entered in this case. Nothing prevented the City from presenting cross points on appeal raising any perceived errors of law or matters which would have vitiated the jury's verdict. Both parties moved for judgment in the trial court and on appeal, the Court of Appeals rendered the judgment the trial court should have entered. Did the Court of

Appeals, having correctly ruled that Respondents' claims were ripe, properly render judgment for Respondents?

TO THE HONORABLE SUPREME COURT OF TEXAS:

Trail Enterprises, Inc. d/b/a Wilson Oil Company, et. al. (“Trail”) submits this Response to Petition for Review asking that Review be denied and that the Opinion, Opinion on Rehearing, and Judgment rendered by the Tenth Court of Appeals be affirmed.

STATEMENT OF THE FACTS

In 1967, the City of Houston passed an ordinance (67-2544; Response Appendix 2) which prohibited drilling oil wells in the control area of Lake Houston nearer than 1,000 feet from the lake or its drains, streams or tributaries. In 1977, the City passed Ordinance No. 77-545 which defined “Control Area” as “that land contained in the extraterritorial jurisdiction of the City, which contains waters that flow into or adjacent to the watershed of Lake Houston.” Respondents’ land, until 1996, was in the City’s extraterritorial jurisdiction and within 1,000 feet of the normal waters’ edge of Lake Houston or its drains, streams, or tributaries. Accordingly, the Ordinance prohibited Respondents from drilling wells. In 1994, Trail Enterprises d/b/a Wilson Oil Company requested a variance which request the City ignored.¹

¹*Trail Enterprises v. City of Houston* 957 S.W.2d 625, 629 (Tex. App.- Houston [14th Dist.] 1997, writ denied) The City complains that Trail never filed an application for a permit. However, Trail could not file an application for a permit because after the adoption of Ordinance No. 97-1394, Chapter 23 of the Code of Ordinances (23-102) absolutely prohibited drilling any where on the property.

When the City ignored its request for a variance, Trail filed suit (*Trail I*)² but the Court ruled that limitations barred the claim and dismissed the suit. The Fourteenth Court of Appeals affirmed and review was denied.³

Following the ruling in *Trail I* dismissing the case, the City adopted Ordinance No. 96-1115 (the “Kingwood Annexation Ordinance”) on December 23, 1996 which annexed into the Houston city limits the “Kingwood” area. (CR 1152-1154). The direct effect of this ordinance was to annex into the City limits the real property on which the mineral interests involved in the present case (*Trail III*) are located and thus lifting the drilling prohibition on the property. When the land was annexed by Houston, drilling was no longer prohibited because the ordinances did not prohibit drilling within the city limits. Following this annexation, Trail contacted the City of Houston regarding a permit to drill for oil and gas. (CR 457-463). The City’s response to this contact was to adopt Ordinance No. 97-1394 on November 5, 1997. Ordinance No. 97-1394 was to include in the definition of the “Control Area” land that was located within the city limits of the City of Houston. The adoption of Ordinance No. 97-1394 absolutely prohibited Respondents from drilling wells on their property.⁴

History of Prior Litigation

²For ease of understanding, the current and prior litigation is best laid out as: *Trail I, Trail II & Trail III*. These designations were adopted by the trial court in its Final Judgment. (CR 1133-1134, Petition for Review at Appendix 1).

³*Trail Enterprises*, 957 S.W.2d 625.

⁴At page 2, Footnote 1 of its Petition for Review, the City argues that prior to adopting Ordinance No. 97-1394 it “interpreted” the drilling restriction to apply to properties both within the City and in the City’s extraterritorial jurisdiction. The City cites *Trail Enterprises v. City of Houston*, 957 S.W.2d 625, 629 (Tex. App.-Houston [14th Dist.] 1997, writ denied) as support for this contention. However, the case does not support this assertion, but at page 634 clearly states otherwise.

Trail I

In Trail I, the City of Houston argued—through the City Attorney’s Office—that Trail’s claims were barred by limitations, because limitations began to run upon the adoption of City Ordinance No. 67-2544. The City Attorney did not argue Trail’s claims were not ripe, rather the City’s position was that the claims arose when the ordinance was adopted. The City made no argument about how the City “interpreted” the ordinance.

Thirteen (13) years ago, in June of 1995, Trail brought an inverse condemnation action against the City of Houston to obtain declaratory relief and to recover damages resulting from the adoption of Houston City Ordinance No. 67-2544. Trail alleged Ordinance No. 67-2544 inversely condemned its mineral interests by prohibiting Trail from drilling oil and gas wells on its approximately 985 acre mineral lease located under land in the Kingwood area lying adjacent to and touching the shores of Lake Houston—*Trail I*. (CR 1802-1813) *Trail Enterprises, Inc., supra.*(Response Appendix 3)

Like the present case, *Trail I* involved claims of inverse condemnation based on the City of Houston’s passage of an ordinance. (CR 1149-1165). Specifically, in *Trail I*, Trail claimed City Ordinance No. 67-2544, passed on December 20, 1967, and regulating drilling near Lake Houston, inversely condemned Trail’s mineral interests. (CR 1150-1151). In *Trail I*, the City defended against the inverse condemnation claim, in part, based on the affirmative defense of limitations. The City asserted that any cause of action for inverse condemnation accrued on December 20, 1967 and was barred as a matter of law ten (10) years later. (CR 1152). Specifically, the City alleged, among other things, that Trail’s claims were time barred because as the City asserted: “any taking occurred when the Ordinance prohibiting drilling was passed.” (CR 1809). The 80th Judicial

District Court granted summary judgment for the City stating the statute of limitations had run on Trail's causes of action. (CR 1802).

On appeal, the City's position that the Ordinance was final upon adoption and any action would be futile was made crystal clear. The City of Houston's Brief of Appellee⁵ said:

“The plain language of the face of City of Houston Ordinance §23-102 (previously Ordinance 67-2544) shows that it was intended as an absolute prohibition on drilling within the one thousand foot control area around Lake Houston from the date it was enacted. Any cause of action for inverse condemnation, therefore, accrued on the day that the Ordinance was enacted. The Ordinance provided no administrative appeal of the absolute drilling prohibition, nor does it contain any exceptions to the prohibition, nor any process by which a variance to the Ordinance might be obtained. The Ordinance, on its face, represented the ‘final determination’ on the part of the governmental unit charged with implementing the regulations at issue. Any further action would have been futile and unnecessary. *Town of Sunnyvale v. Mayhew*, 905 S.W.2d 234, 246 (Tex. App. – Dallas 1994, writ granted). Any claims against the City accruing as a result of the passage of the Ordinance would have been ripe on the date the Ordinance was enacted without any further showing on the part of a plaintiff asserting a cause of action for inverse condemnation.”⁶

The Fourteenth Court of Appeals affirmed the trial court's summary judgment citing *Sunnyvale v. Mayhew* and holding: “Because it provided no procedure for a variance or appeal, the City's Ordinance [No. 67-2544] was final when implemented and any further action was futile.” (CR 1809).

Trail II

In Trail II, the City of Houston argued—through the City Attorney's Office—that Trail's claims were barred by limitations, because: 1) Trail's claims were collaterally estopped

⁵See Response Appendix 4 page 13, City of Houston's Brief. The portion of the City of Houston's Brief was also included as Exhibit 22 to Plaintiffs' Motion for Partial Summary Judgment in Trail II.

⁶Actually §23-102 which is the codification of Ordinance 67-2544, absolutely prohibited drilling any well nearer than one thousand (1,000) feet from the normal water's edge of Lake Houston or any of its drains, streams or tributaries (Response Appendix 5).

by the 14th Court of Appeals Decision in *Trail I*; and 2) the statute began to run upon the adoption of City Ordinance No. 67-2544 and not from the adoption of City Ordinance No. 97-1394. The City Attorney did not argue that it “interpreted” the ordinance so that *Trail’s* claims were not ripe.

After the Kingwood annexation, drilling was no longer prohibited on Respondents’ property because the ordinances did not prohibit drilling within the city limits. Following this annexation, Trail contacted the City of Houston regarding a permit to drill for oil and gas. (CR 457-463). The City’s response to this contact was to adopt Ordinance No. 97-1394 on November 5, 1997. (Response Appendix 6) The effect of Ordinance No. 97-1394 was to include in the definition of the “Control Area” land that was located within the city limits of the City of Houston. The adoption of Ordinance No. 97-1394 absolutely prohibited Respondents from drilling wells on their property.

In 1998, ten (10) years ago, Trail brought an inverse condemnation action against the City to obtain declaratory relief and to recover damages resulting from the adoption of Ordinance No. 97-1394 which Trail again alleged inversely condemned its mineral interests by prohibiting Trail from drilling oil and gas wells on its mineral lease located adjacent to Lake Houston—*Trail II*. (CR 451-479). Again, the City asserted a variety of defenses including limitations, but never argued, asserted, mentioned or even suggested that it “interpreted” the ordinance in such a manner so as to make the matter not ripe for consideration. *See Trail II* at Footnote 3.⁷

Like in *Trail I*, the 80th Judicial District Court granted summary judgment for the City of Houston. However, unlike in *Trail I*, the Fourteenth Court of Appeals reversed the

⁷*Trail Enterprises, Inc. d/b/a Wilson Oil Co. v. City of Houston*, 2002 Tex. App. LEXIS 1872 (not designated for publication) (Response Appendix 8)

trial court's summary judgment and remanded Trail's claims for a trial on the merits. (CR 935). *See Fourteenth Court of Appeals Opinion dated March 14, 2002.* (Appendix "8"). Thereafter, the parties discovered jurisdiction was not proper in the district court but was proper in a County Court at Law for Harris County. Accordingly, *Trail II* was dismissed by agreement subject to re-filing in a Harris County Court at Law.

Trail III

In Trail III, prior to a complete trial on the merits, the City of Houston—through the City Attorney's Office—never argued that Trail's claims were not ripe because of its "interpretation" of the ordinance. It was only after eleven (11) years of litigation, having the Court find a taking of Trail's mineral interests, the jury assessing \$19 million in damages and Trail seeking to have its judgment entered, that the City replaced its City Attorneys with outside counsel, and the City's outside counsel argued for the first time, that Trail's claims were not ripe for consideration because the City interprets its ordinance to only preclude drilling within 1000' of the 45 m.s.l. contour.

A trial on the merits in *Trail III* was held in County Civil Court at Law No. 1 of Harris County, Texas. The trial was bifurcated at the request of the City. After a bench trial on liability in which the Court found that the adoption of Ordinance 97-1394 resulted in an inverse condemnation, a trial to a jury on the issue of damages was held. The jury returned a verdict on February 11, 2005. (Appendix 9) Both parties thereafter moved for final judgment. A Final Judgment was entered on August 29, 2005. The Court found that inverse condemnation occurred and adopted the jury's verdict. However, the Court dismissed the case on ripeness grounds. (Petition Appendix 1) This appeal followed.

A unanimous Tenth Court of Appeals, following this Courts' holdings in *Mayhew* and *Hallco*, correctly found that: 1) Ordinance No. 97-1394 created an absolute prohibition against drilling wells within the Control area; 2) it is unambiguous, provides

no basis for a variance or appeal; and 3) any attempts at administrative remedies would have been futile and that Respondents' claims were ripe upon enactment of the Ordinance.

SUMMARY OF THE ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONCLUDED RESPONDENTS' CLAIMS WERE RIPE.

In *Trail Enterprises, Inc. v. City of Houston*, 957 S.W.2d 625 (Tex. App.-Houston [14th Dist.] 1997) (*Trail I*) the Court said, at 632: "because it [the Ordinance] provided no procedure for a variance or appeal, the Ordinance was final when implemented and any further action was futile."

Section 23-102 of the Code of Ordinances of the City of Houston (Response Appendix 7) absolutely prohibits drilling oil wells on Respondents' property. Following the Kingwood annexation in 1996, nothing in the Code prohibited Respondents whose property then was in the City of Houston, from drilling wells on their property. Then, in 1997 the City passed Ordinance No. 97-1394 which amended the definition of Control Area and thereby prevented Respondents from drilling wells and producing their minerals. The Ordinance is unambiguous and means exactly what it reads. There is no provision in the Code for variances or appeals. The Court of Appeals, relying on *Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50 (Tex. 2006) and *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) correctly found that Respondents' claims were ripe for adjudication upon adoption of the Ordinance in 1997.

II. THE COURT OF APPEALS PROPERLY RENDERED JUDGMENT.

After a full trial on the merits, bifurcated at the request of the City, both parties moved for a final judgment. The City on the basis that the trial court lacked jurisdiction. The Respondents on the basis of the Court's finding that the City's adoption of Ordinance No. 97-1394 resulted in an inverse condemnation and the verdict of the jury on damages. (Response Appendix 1) When both parties move for final judgment in the trial court, on appeal the Court of Appeals may, when overruling a summary judgment for one of the parties render the judgment which the trial court should have rendered. *Bowman v. Lumberton Indep. School Dist.*, 801 S.W.2d 883, 889 (Tex. 1990)

The Court of Appeals also correctly applied Rule 38.2 of the *Texas Rules of Appellate Procedure* and determined that the City waived any complaints or matters which would have vitiated the jury's verdict by failing to present their complaints by cross-point. The judgment of the Court of Appeals should be affirmed in all respects.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONCLUDED RESPONDENTS' CLAIMS WERE RIPE.

The Court of Appeals correctly determined that Respondents' claims are ripe for judicial consideration. *Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50 (Tex. 2006); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922-932 (Tex. 1998); *Palazzolo v. Rhode Island*, 533 US 606, 620 (2001); *Maguire Oil Company, et al v. City of Houston*, No. 14-05-01272-CV, 2007 (Tex. App. - Houston [14th Dist.] 2007, no pet. (*Maguire Oil II*); *Trail Enterprises, Inc. d/b/a Wilson Oil Company v. City of Houston*, 2002 Tex. App. LEXIS 1872 (not designated for publication) (*Trail II*); *Trail Enterprises, Inc. d/b/a*

Wilson Oil Company v. City of Houston, 957 S.W.2d 625 (Tex. App.-Houston [14th Dist.] 1997, writ denied) (*Trail I*).

The City of Houston Ordinance at issue provides in pertinent part:

"No well shall be drilled within the control area of Lake Houston which is nearer than one thousand (1,000) feet from the normal water's edge of Lake Houston or any of its drains, streams or tributaries."

The City Ordinance does not provide for any variances or for any mechanism for appeal. The drilling prohibition prohibits exactly the "use"-drilling-which the Respondents must engage in to recover, use or obtain any economic benefit from their property-oil and gas. *Maguire Oil II*.

In *Hallco*, the Texas Supreme Court acknowledged the very clear distinction between general zoning or land use restriction ordinances and an absolute prohibition on intended use. *See Hallco* at page 60 (citing *Mayhew* in explaining how zoning cases may not be ripe until variance is finally ruled on). The Supreme Court held *Hallco*'s claim was ripe upon the enactment of the ordinance, because at that moment "permissible use of the property was known to a reasonable degree of certainty." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001).

Here, this distinction between surface land use zoning regulations which include mechanisms for obtaining variances and ordinances which contain absolute prohibitions with no mechanism for variances is clear. The City Ordinance at issue prohibited the intended use-drilling-from the very day it was enacted. There are no provisions for a

variance or appeal and the permissible uses of the property were known to a positive degree of certainty. *See Hallco, Palazzolo, Maguire Oil II, Trail I and Trail II.*

The City criticizes the Court of Appeals' reliance on *Hallco* because that portion of *Hallco* relied upon by the Court was supported by just four (4) of the Justices. Even though the fact that the portion of the opinion in *Hallco* at issue was only supported by four (4) justices may affect the precedential value of the opinion, it certainly is no indication that *Hallco* is not a correct expression of the law.

Despite the very clear distinction in the ordinance in question and the surface use zoning regulations at issue in *Mayhew*, the City of Houston has repeatedly relied on *Mayhew* to suggest Respondents' claims are not ripe. The City's reliance on *Mayhew* is misplaced. In fact, *Mayhew* supports Respondents' position that its claims are ripe for consideration. Although the court held in *Mayhew* that a final administrative decision must be obtained, the court also clearly states **futile variance requests or reapplications are not required to ripen a claim.** *See Mayhew* at 929 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 n.3, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992)).

The City contends that Trail should have filed an application for a permit before filing suit. In making this contention, the City points to unofficial speculation by a certain City employee suggesting his view that there might be locations on the property where a well could be drilled without violating the ordinance. However, the history of this litigation (which includes a recitation of the efforts Trail went to in trying to develop the minerals beginning with a request for a variance in 1994 (Trail I, 957 S.W.2d. 629) all the way through a full trial on the merits in this case) fails to show even a single location

identified by the City's witnesses where a well could be drilled -any well, not just a well from which oil and gas could be economically produced. Trail's witnesses, of course testified unequivocally that there are no such locations.

Each of the five (5) courts which have addressed this very issue on this very City Ordinance have all found exactly the same thing: the City Ordinance created a total prohibition on drilling, any attempts at a variance or appeal would have been futile and any claims were ripe upon the Ordinance's enactment. *See Trail I; Trail II; Maguire Oil Co. v. City of Houston*, 69 S.W.3d 350, 372 (Tex. App.-Texarkana 2002, pet. denied); *Maguire Oil II*.

II. THE COURT OF APPEALS PROPERTY RENDERED JUDGMENT

Rule 43.3, *Texas Rules of Appellate Procedure* provides:

When reversing a trial court's judgment, the court must render the judgment that the trial court should have rendered, except when:

- (a) a remand is necessary for further proceedings; or
- (b) the interests of justice require a remand for another trial.

The cases construing and applying this rule clearly illustrate the law's strong preference for rendition, except in those cases when a remand is **necessary** for further proceedings, or, the interests of justice **require** a remand for another trial. *Bradleys' Electric, Inc. v. Cigna Lloyds Insurance Company*, 995 S.W.2d 675 (Tex. 1999); *WalMart Stores, Inc. v. Bolado*, 54 S.W.3d 837 (Tex. App.-Corpus Christi 2001); *Natural Gas Pipeline Company of America v. Pool*, 124 S.W.3d 188 (Tex. 2003).

This principle is fully discussed in *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245 (Tex. 2004). In that case, even though the Supreme Court was considering *Texas Rules of*

Appellate Procedure 60.2 and 60.3 regarding judgments in the Supreme Court, the rules are substantially identical to Rule 43.3 relating to courts of appeals. In *Kerr-McGee*, the Supreme Court reversed a judgment for plaintiffs in excess of \$1,000,000.00 on the basis that plaintiffs' expert's damage projection was unreliable and constituted no evidence. The Supreme Court denied Plaintiffs' request for a remand in the interest of justice in order to develop another damage model.

The relevant facts in the Trail trilogy of cases are strikingly similar to *Kerr-McGee* in that the parties had many years to prepare for trial. There was a full trial to the Court on liability. There was a full jury trial on damages. The City of Houston had ample opportunity to introduce testimony. Trail presented five expert witnesses. The City produced two expert witnesses. The facts were fully developed. In seeking a remand, the City of Houston simply seeks "another bite at the apple." Under these circumstances, giving Houston "another bite at the apple" would not be in the interest of justice and would work a substantial injustice on Respondents.

In arguing that this Court erred in rendering the Judgment the trial court should have rendered, the City cites a number of cases in which summary judgments were reversed. *Jones v. Strauss*, 745 S.W.2d 898 (Tex. 1988); *C. U. Lloyds of Texas v. Feldman* 977 S.W.2d 568 (Tex. 1998); *Bowman v. Lumberton Independent School District*, 801 S.W.2d 883, 889 (Tex. 1990); *Ackermann v. Vordenbaum*, 403 S.W.2d 362 (Tex. 1966). These cases provide that ordinarily when a summary judgment is overruled

by an appellate court, the proper action is to remand for a trial. However, if both parties move for summary judgment and one is granted and the other denied, on appeal, the appellate court should render the judgment the trial court should have rendered. It is not necessary to remand for further proceedings. *See Ackermann*, citing *Tobin v. Garcia*, 316 S.W.2d 396 (Tex. 1958).

A review of these cases shows that the reason why, ordinarily, when a case is determined on summary judgment and that judgment is reversed on appeal, the appellate court should remand for a full trial is to allow the litigants to fully develop the evidence.

The reason to remand rather than render is certainly not applicable in this case in which there was a full trial on the merits before the Summary Judgment for Lack of Jurisdiction was erroneously granted. *See* Final Judgment entered by the trial court on August 29, 2005. C.R. 1132-1139; Petition Appendix 1.

In its Petition for Review, the City incorrectly argues that the Court of Appeals erred in rendering judgment for Respondents because Respondents' Cross Motion for Summary Judgment was a partial motion. However, the trial court made very clear what was before him, i.e. both parties motions for judgment.

It is clear that the parties have had an opportunity for a full trial of all the issues in this case. All the matters at issue were presented to the Court including the City's request for a summary judgment on the issue of jurisdiction and Respondents' request for entry of judgment. In view of the above, any contention that full and final relief had not been requested by all of the parties is incorrect. The Court of Appeals in reversing the trial court's determination of jurisdiction, properly rendered the judgment which the trial court

should have rendered, intended to render, and would have rendered, but for his erroneous determination that Respondents' claims were not ripe

Finally, the City argues that this Court's rendition of judgment denies the City all of its post-trial remedies. In support of its argument, the only case the City cites is *Kirschberg v. Lowe*, 974 S.W.2d 844 (Tex. App.-San Antonio 1998, no writ). *Kirschberg* provides no support for the City's position. *Kirschberg* only dealt with whether or not a Notice of Appeal was timely filed.

The City complains that the trial court's erroneous grant of its Summary Judgment on Jurisdiction prevented it from filing a motion for judgment notwithstanding the verdict, for a new trial or to modify the judgment. The City argues it has been denied the ability to challenge the Respondents' damages theory, the trial court's evidentiary rulings or the jury's verdict. Clearly, this is incorrect. There was a full record of both the bench trial and the jury trial before the Court of Appeals. The trial court's rulings, on evidence and challenges to the evidence were all in the record before the Court. The Court of Appeals had the authority to enter the judgment which the trial court should have entered. Rule 43.3, *Texas Rules of Appellate Procedure*. The complaints, if any, the City alludes to could all have been decided and determined by the Court of Appeals, the same as the trial judge. Whether or not there has been an inverse condemnation in this case is a question of law. *Hallco Texas, Inc. v. McMullen County*, supra. No evidence points and sufficiency of the evidence points may be determined by an appellate court as a matter of law based on the record. Respondents' damages theories and the trial court's evidentiary rulings are, without question, subjects which can be determined on appeal based on the

record. *Kerr-McGee v. Helton*, supra. In summary, any relief which the trial court could have afforded the City could have been afforded by the Court of Appeals. All of these matters, of course, were considered by the trial court as recited in his Final Judgment.

PRAYER

Respondents respectfully pray that this Court DENY Petitioner's Petition for Review and that they have general relief.

Respectfully submitted,

SHEEHY, LOVELACE & MAYFIELD, P.C.

Phillip E. McCleery

State Bar No. 13395000

Peter K. Rusek

State Bar No. 17400400

Rex D. Davis

State Bar No. 05535800

510 N. Valley Mills Drive, Suite 500

Waco, TX 76710

(254) 772-8022 Telephone

(254) 772-9297 Facsimile

THE MCCLEERY LAW FIRM

Stephen E. McCleery

State Bar No. 00794258

1800 St. James Place, Suite 105

Houston, TX 77056

(713) 622-3555 Telephone

(713) 784-7797 Facsimile

Philip E. McCleery

ATTORNEYS FOR RESPONDENTS

Trail Enterprises, Inc. d/b/a

Wilson Oil Company, et al.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been sent by certified mail, return receipt requested on this 30th day of July, 2008.

7007 1490 0001 0227 4178

Frederick D. Junkin

J. Mark Breeding

Paul S. Radich

Andrews & Kurth, LLP

600 Travis, Suite 4200

Houston, TX 77002

7007 1490 0001 0227 4185

Denise Lastnick Miller

City of Houston Legal Dept.

P. O. Box 1562

Houston, TX 77251 1562

Philip E. McCleery