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

BRIEF OF AMICI CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, TEXAS MUNICIPAL LEAGUE, AND TEXAS CITY ATTORNEYS ASSOCIATION

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TEXAS MUNICIPAL LEAGUE, AND TEXAS CITY ATTORNEYS ASSOCIATION

INTRODUCTION

The amici curiae, national and statewide organizations representing the interests of local governments, pursuant to Rule 11 of the Texas Rules of Appellate Procedure, respectfully submit this brief urging the Court to grant the Petition for Review filed by the City of Houston (the "City") and reverse the erroneous decision of the Court of Appeals.

The Court of Appeals' disposition of this case is truly extraordinary in several important respects. First, it is, so far as amici are aware, the only case in U.S. history in which a court has concluded that a regulation with the acknowledged purpose and effect of preventing environmental pollution (in this case, the pollution of Lake Houston, one of the City's primary sources of drinking water) constitutes a compensable taking. Respondents forthrightly acknowledge the pollution-preventing purpose of the City's ordinance,[1] and they have not challenged either the need to prevent this pollution or the scientific foundation of the City's response to this threat. Not surprisingly, Respondents cite not a single case supporting their novel position that the Takings Clause can be read to require the public to pay a polluter not to pollute. In fact, all relevant legal authority is to the contrary.

As the U.S. Supreme Court recognized many years ago in *Mugler v. Kansas,* "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." 123 U.S. 623, 665 (1887). In that case, the Court affirmed that "police power" legislation designed to protect the public health, welfare, and morals does not constitute a taking, even if it extends "to the destruction of property." *Id.*; *see also Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001) (holding that regulation controlling "harmful runoff" pollution "is the type of governmental action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations").

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[1] *See* Response to Petition for Review, App. I at 10 ("The City sought to obtain and did pass an ordinance to protect from oil and gas production which would allow pollutants into a probable area that could ultimately pollute Lake Houston.")

Second, the case is remarkable because it cannot plausibly be contended that the goals of "fairness and justice" would be served by paying millions of taxpayer dollars for what amounts to an administrative error committed in the course of City's legislative annexation process. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). For over 40 years, the City has had in place an ordinance prohibiting the drilling of oil and gas wells in and adjacent to Lake Houston, including in the City's "extraterritorial jurisdiction." In 1996, the City annexed certain areas, including the properties at issue in this case. Respondents contend this had the effect – no doubt unintended – of "lifting" those drilling restrictions with respect to the annexed properties. The following year, once the oversight was discovered, the City amended the ordinance to make clear that the restriction on drilling applied to properties both in the City's extraterritorial jurisdiction and inside the city limits. If, as Respondents contend, this amendment precludes drilling in pursuit of their minerals, the burden is no different than has been in place for decades (apart from the one year gap). Under these circumstances, Respondents cannot establish the kind of interference with reasonable investment-based expectations necessary to support a takings claim. *See generally Palazzolo v. Rhode Island*, 533 U.S. 660 (2001).

Finally, the case is remarkable because the Court of Appeals' entry of judgment in Respondents' favor is based on an erroneous statement regarding the history of this litigation – an error Respondents perpetuate. According to Respondents, the trial court, after conducting a full trial on the liability and damages issues, entered a "Final Judgment" in their favor. Respondents suggest the trial court later reversed course based on its conclusion that the taking claims were never ripe to begin with. Respondents thus

argue that when the Court of Appeals determined on appeal that their claims were in fact ripe, it properly rendered judgment in their favor since the liability and damages issues had already been resolved on the merits.

While Respondents' logic is unobjectionable, their argument must be rejected because the facts of the case do not support it. Contrary to Respondents' assertions, the trial court never entered a "Final Judgment" on the merits: the City denies that a Final Judgment for Respondents was ever entered, Respondents fail to provide a record reference where such a Final Judgment can be found, and amici have located no such Final Judgment. More significantly, following the bench trial of the liability issue and the jury trial of the damages issue, the trial court granted the City's motion for reconsideration of its finding that there had been a taking and specifically directed that the parties present additional evidence on whether Respondents could recover minerals from their properties notwithstanding the City ordinance. This was the state of the proceedings at the time the motion for summary judgment on ripeness grounds was presented to and granted by the trial court.

The trial court's ruling that it would hear further evidence regarding the scope and effect of the City's drilling ordinance implicates both ripeness (because it indicates the ordinance does not necessarily impose a categorical ban on the recovery of the minerals underlying Respondents' properties) and the merits of the takings claims (because the factual issues that remain to be developed will shed light on how far the regulation goes). For the reasons discussed in greater detail below, based on the *actual* facts and rulings in this case, the Court should grant review and hold that Respondents' claims are not ripe

for adjudication or (at a minimum) that the parties are entitled to present additional evidence on whether there has been a taking, as the trial court ordered before disposing of the case on jurisdictional grounds.

The decision by the Court of Appeals represents a serious miscarriage of justice that this Court can and should remedy.

IDENTITY AND INTERESTS OF AMICI CURIAE

The International Municipal Lawyers Association (IMLA) is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. Since it was established in 1935, IMLA has advocated for the rights and privileges of local governments and the attorneys who represent them through its Legal Advocacy Program. IMLA has appeared as amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The U.S. Conference of Mayors (USCM) is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,139 such cities in the country today. One of the primary roles of the USCM is to promote the development of effective national urban/suburban policy, and participation in this brief comports with that policy.

The National League of Cities (NLC) is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States communities. Founded in 1924, NLC strengthens local government through research, information sharing, and advocacy on behalf of hometown America.

The Texas Municipal League (TML) is a non-profit association of Texas cities organized in 1913. Its purpose is to serve the needs and represent the interests of Texas cities. More than 1,000 cities, with populations from fewer than 100 to more than 1,000,000, are members of TML. TML's members often act to protect the health and safety of their citizens through regulations governing oil and gas exploration.

The Texas City Attorneys Association (TCAA) is an affiliate organization of TML. TCAA is a voluntary association of attorneys who are employed as city attorneys or assistant city attorneys or who regularly represent Texas cities as outside counsel. TCAA's members are aware of the important role that cities play in modern society, and they assist elected and appointed officials with the implementation of policies designed to protect city residents.

The amici share a strong interest in promoting a reasonable interpretation of regulatory takings jurisprudence that protects communities from premature takings litigation as well as from burdensome takings awards that have no legal or factual foundation, especially when communities are acting to protect public water supplies and other vital aspects of the public welfare.

No fee was paid for the preparation of this brief.

STATEMENT OF JURISDICTION

Amici adopt the statement of jurisdiction contained in the Petition for Review.

ISSUES PRESENTED

Whether a regulatory takings claim is ripe for adjudication if the claimant has not filed a single development application or taken any other affirmative step to

obtain a final and authoritative determination from the governmental defendant about the type and intensity of development legally permitted under an ordinance?

Whether a court of appeals, after reversing a trial court's dismissal of a takings claim on jurisdictional grounds, can itself directly enter judgment for the claimant when the trial court did not enter a Final Judgment on the merits, the trial court had granted the defendant's motion to reconsider a finding of liability, and the trial court had scheduled further evidentiary proceedings to address the merits of the takings claim?

STATEMENT OF FACTS

The amici adopt the Statement of Facts contained in the Petition for Review.

SUMMARY OF THE ARGUMENT

The Court of Appeals' judgment awarding Respondents $16.8 million (plus very substantial interest) imposes an unwarranted financial penalty on taxpayers as a result of the City of Houston's ("City") vitally important effort to protect the community's drinking water supply. Its opinion also constitutes an anomalous legal precedent that threatens to seriously undermine the authority of local governments in Texas and around the country to control water pollution and protect other aspects of the public welfare. For several independent reasons, this Court should grant the City's Petition and summarily reverse.

First, the Court of Appeals erred in holding that Respondents' claims were "ripe" for adjudication. Before filing a takings claim, a claimant must obtain a final and authoritative determination from the relevant governmental body about the type and

intensity of development legally permitted. In this case, as the trial court correctly ruled, Respondents failed to ripen their claims because they never filed an application to drill, making it entirely uncertain how (if at all) the City's ordinance restricting the drilling of oil and gas wells in and around Lake Houston constrains their ability to exploit their property interests. While the Court of Appeals ruled that it was "futile" for Respondents to file an application for a drilling permit, this ruling ignored the City's evidence that Respondents could place wells on portions of their properties without violating the ordinance, and that they could have exploited their minerals through directional drilling. In addition, if the ordinance actually barred all drilling, Respondents had the option of seeking regulatory relief from the City Council, another avenue they did not pursue.

The Court of Appeals' ruling on futility is contradicted by the trial court's post-trial Order, issued on June 16, 2005, reopening the record in order to receive evidence on "whether or not the adoption of Ordinance 97-1394 resulted in a prohibition on drilling from any location, whether inside or outside of Plaintiffs' mineral leases, that would allow a sufficient quantity of minerals to be extracted in an economically feasible manner so that the Plaintiffs could realize an economic benefit from the entirety of their leases." (2d SCR 2299.) Because the trial court did not resolve whether the ordinance bars Respondents from pursuing their minerals, it cannot be determined based on the current record whether or not Respondents might receive a drilling permit. Respondents thus have not carried their burden of demonstrating that it would be futile to file an application.

Second, even if Respondents' claims were ripe, the Court of Appeals erred by entering its own final judgment for Respondents rather than remanding the case to the trial court. The Court of Appeals' justification for handling the case in this unusual fashion was that the trial court had conducted a bench trial on the issue of liability and impaneled a jury to fix the appropriate level of compensation. The Court reasoned that since both liability and compensation had already been resolved, there was no reason, once the Court reversed the trial court's ruling on ripeness, to not immediately enter final judgment. But the Court of Appeals ignored a crucial ruling by the trial judge – its June 16 Order – after the bench trial and the jury proceedings. That Order "set aside" the finding of liability and stated that the trial court would hear further evidence on how the drilling ordinance affected Respondents' ability to exploit their mineral interests. The premise underlying the Court of Appeals' decision to enter judgment in favor of Respondents – that there was nothing left for the trial court to address – thus was incorrect. Even assuming Respondents' claims were ripe, therefore, the Court of Appeals should have remanded the case to the trial court for further evidentiary proceedings on whether a taking actually occurred rather than short circuiting the litigation by entering judgment. Accordingly, at a minimum, the Court of Appeals' judgment should be reversed for failing to remand this case to the trial court.[2]

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[2] While the City has not raised the point on appeal, the judgment of the Court of Appeals is also incorrect because the Court determined, in response to a motion for reconsideration filed by plaintiffs, that the City was not entitled to receive any actual property interest in exchange for its payment of just compensation pursuant to the Court's finding of liability. *See Trail Enters., Inc. v. City of Houston*, 2007 WL 4157244 at * 8-9 (Tex. App. –Waco, Apr. 9, 2008) (opinion on rehearing). This unprecedented approach is inconsistent with the fundamental character of a taking claim. When the government "takes" private property, it acquires an actual interest in the property, for which it must pay just compensation, typically

Finally, although it obviously would be premature for the Court to address the merits of Respondents' takings claims given that those claims are not ripe and, in any event, the submission of evidence at the trial level is still not complete, it bears noting that several factors weigh against these claims. For example, all or most of the Respondents have reaped and will continue to reap substantial profits from existing wells on the property, negating any suggestion that they have been deprived of all economically viable use of their mineral interests. In addition, at least some of the Respondents acquired their interests with knowledge of the restrictions contained in Ordinance 97-1394, and all Respondents have been subject to those restrictions for many years (apart from a one year gap), negating the possibility of a reasonable, investment-backed expectation that they would be able to pursue their minerals without having to comply with the drilling restriction. Moreover, because the ordinance is designed to protect public health and welfare by preventing pollution of the City's major water supply, the relevant precedents suggest that even if there were an impact on Respondents' ability to recover their minerals, it would not constitute a taking.

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measured by the fair market value of the property interest being acquired. An inverse condemnation case, such as this action, is initiated by the owner rather than the government, but the governing legal principles remain the same. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."). In those rare instances where a regulation rises to the level of a permanent taking, the courts routinely require claimants to tender title to their property in exchange for receiving compensation. *See, e.g., Bowles v. United States*, 31 Fed. Cl. 37, 53 (1994) (directing plaintiff to "tender the deed" to the property upon the government's "satisfaction of the judgment" awarding just compensation). The Court of Appeals' ruling that a defendant in an inverse condemnation is not entitled to receive the property for which it has paid threatens to revolutionize takings doctrine in the State of Texas.

As a result of its missteps, the Court of Appeals, with essentially no analysis or explanation, entered a judgment that would cost the City's taxpayers in excess of $20 million when the law and evidence dictate that Respondents' claims be rejected. The strength of the City's case on the unresolved issue of liability provides even further grounds for granting the Petition for Review and reversing the Court of Appeals' erroneous rulings.

ARGUMENT AND AUTHORITIES

A. The Court of Appeals Erred in Overruling the Trial Court's Ruling that Respondents' Takings Claims Were Not Ripe for Adjudication.

1. A claimant must ripen a takings claim by seeking a final and authoritative decision regarding the proposed land use.

A takings claim is ripe only if the claimant has obtained "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *Mayhew v. Town of Sunnyvale*, 964 S.W. 2d 922, 929 (Tex. 1998)(quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986)). This requirement stems from the fact-intensive nature of regulatory takings analysis and the need to know how a regulation applies to a particular property in order to determine whether the regulation has resulted in a taking. *Id.* ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.").

A final decision typically requires the owner to file an application and, if the application is denied, pursue a variance or some other type of regulatory relief. *See Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 59 (Tex. 2006); *Mayhew*, 964 S.W.2d at 929. However, the steps a claimant must take to secure an authoritative

determination of the type and intensity of development legally permitted are not rigidly defined. For example, as explained in *Mayhew*, "the term 'variance' is 'not definitive or talismanic;' it encompasses 'other types of permit or actions [that] are available and could provide similar relief.'" *Mayhew*, 964 S.W.2d at 930(quoting *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990)); *see also id.* ("The variance requirement is . . . applied flexibly in order to serve its purpose of giving the governmental unit an opportunity to 'grant different forms of relief or make policy decisions which might abate the taking.'").

The ripeness doctrine does not require a prospective takings claimant to pursue pointless administrative procedures that serve no purpose in clarifying how the regulations actually apply to the property in question. As the U.S. Supreme Court has stated, "[r]ipeness doctrine does not require a landowner to submit applications for their own sake." *See Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2001). Thus, when a law establishes with a fair degree of certainty what is and is not allowed, an applicant is not required to pursue futile efforts seeking relief. *Id.*; *see also Hallco Tex., Inc.*, 221 S.W.3d at 60.

2. Respondents did not ripen their claims.

Respondents never obtained a final and authoritative determination regarding the type and intensity of development of their oil and gas interests that would be allowed. Ordinance 97-1394 prohibits the drilling of wells from surface sites on at least some portion of the land overlying some of Respondents' mineral interests. But City officials have consistently taken the position that there are some locations on the properties from

which wells could be drilled without violating the ordinance. (SCR 1045-S, 1050-S); *see also Trail Enters., Inc. v. City of Houston*, 2002 WL 389448 (Tex. App.—Houston [14th Dist.] 2002) (observing that "[t]he City's expert concluded that 'it would be physically possible to locate a drilling rig and production operations within the 985-acre lease' without violating the City's ordinance because 'there are several areas within the lease which are not located within 1,000 feet of a drain, stream, or tributary of Lake Houston as defined by Ordinance 97-1394...."). In addition, it may be legally, physically, and economically possible for Respondents to extract some of the resources through directional drilling. (SCR 823-S to 844-S.) Because Respondents refused to file a drilling application, it remains unclear how (if at all) the ordinance constrains their ability to exploit their mineral interests. Absent a definitive determination about how the ordinance applies to Respondents' property interests, it is impossible for the courts to know how far this regulation actually goes.

Under the applicable precedents, the trial court correctly dismissed Respondents' claims on ripeness grounds. The trial court, applying this Court's teachings from *Mayhew*, observed that Respondents "concede[d] that they have neither filed an application for a permit to drill, nor requested a variance," but nonetheless contended that they should have been permitted to proceed with their litigation based on "futility." To evaluate the claim of futility the court examined whether a party in the same situation would ordinarily be expected to file an application and, based on its review of "the record and the pertinent authorities," answered that question in the affirmative The court next examined whether, even if a formal application would normally have been expected, the

Respondents could be deemed to have filed an application based on, for example, "significant negotiations" with City officials or submission of an informal proposal to City staff or policy makers. Based on its review of the record, the court answered this question in the negative. Finally, the trial court examined whether Respondents could be deemed to have filed a variance application based on evidence of discussions with City officials or submission of a modified application. Once again, the trial court answered that question in the negative. Amici assert the trial court's analysis was well reasoned, in accord with the precedent of this Court, and should have been affirmed.

The Court of Appeals – based on no analysis whatsoever – summarily reversed the trial court's ruling on the ripeness issue. Following a brief summary of relevant legal principles and a description of the parties' competing contentions about the ripeness issue, the Court of Appeals' evaluation of the ripeness argument consisted of the following: "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." *See Trail Enters., Inc. v. City of Houston*, 255 S.W.3d 105, 109 (Tex. App.—Waco 2007, pet. filed). This kind of unexplained ruling obviously is entitled to no particular deference from this Court.

Respondents attempt to rebut the City's arguments that various drilling options were available to them by contending that they offered persuasive evidence about the lack of drilling options and argue that this evidence supported the conclusion that filing an application was futile and therefore the claims were ripe. *See* Response, at 11. But the trial court's Order of June 16, 2005, is dispositive of whether there are still issues to

be resolved in deciding whether these claims are ripe. The Order states that the court "shall hear further evidence and testimony regarding whether or not the adoption of Ordinance 97-1394 resulted in a prohibition on drilling from any location, whether inside or outside of Plaintiffs' mineral leases, that would allow a sufficient quantity of minerals to be extracted in an economically feasible manner so that the Plaintiffs could realize an economic benefit from the entirety of their leases." (2d SCR 2299.) The trial court has yet to hold this promised evidentiary hearing. Since the trial record was expressly left open to determine what drilling options are actually available to Respondents, they cannot plausibly contend, at least at this stage of the litigation, that they have conclusively demonstrated that filing a drilling application would be futile.

Respondents also mechanically recite the point that Ordinance 97-1394 includes no provision authorizing a variance. *See* Response, at 9-10. Respondents contend that it would have been futile to seek an application that was completely barred by the terms of the ordinance. But this contention misses the point of the ripeness requirement, which is to obtain an authoritative determination of what development the regulation will and will not allow.

There is apparently no dispute that, as the ordinance is currently drafted, no additional surface wells may be constructed in those areas covered by the ordinance's prohibition and the ordinance contains no provision authorizing a variance from that prohibition. For purposes of this dispute, however, the decisive questions are: (1) whether there are some parts of the properties overlying the mineral resources not subject to the ordinance's prohibition where new wells could be drilled; and (2) whether the

minerals could be exploited through directional drilling from other areas not subject to the ordinance. In other words, the critical point is not whether the ordinance specifically provides for regulatory relief, but what development can take place in spite of the ordinance. Respondents' mantra that the ordinance provides no opportunity for a variance simply begs the question. Finally, even if it were correct that the ordinance barred all drilling, Respondents had the option of seeking regulatory relief from the City Council, an avenue they did not pursue.

3. Neither *Mayhew* nor *Hallco* supports the Court of Appeals' holding.

A comparison of the facts of this case with the facts of *Mayhew* demonstrates why Respondents' claims are not ripe. In *Mayhew*, the issue was whether the plaintiffs' takings claim based on the denial of an application to construct a major planned development was ripe despite the plaintiffs' failure to seek a variance. This Court ruled that while a variance application (in addition to an original development application) is ordinarily required to ripen a claim, it was not required under the "unique circumstances" of that case. The Court noted in particular that the plaintiffs had engaged in over a year of negotiations with the Town of Sunnyvale, they had spent over $500,000 preparing and developing an application, they had drastically reduced the scale of the proposed development during the course of the negotiations, and their legal theory (which the Court ultimately rejected) was that any more modest development would deny them all economically viable use of the property. *Mayhew*, 964 S.W.2d at 931. These facts obviously stand in dramatic contrast to the facts of this case, where Respondents

apparently had only modest, informal discussions with government officials and failed to file even a single development application.

Nor does the decision in *Hallco Texas* support Respondents' position on the ripeness issue. 221 S.W.3d 50. The question in that case was whether the plaintiff was barred from pursuing a claim because it had had an opportunity to litigate the same claim in a prior proceeding. In urging that there was no bar, the plaintiff argued that the claim in the second proceeding was based on the County's denial of a variance application, and it could not have prosecuted this claim in the prior proceeding because it would not have been ripe. In rejecting this argument, four members of the Court noted that the regulation included no opportunity for a waiver; that is, the ordinance categorically prohibited "precisely the use Hallco intended to make of this property, and nothing in the ordinance suggested any exceptions would be made." *Id*. at 60. Those Justices thus reasoned that the plaintiff's filing of the application for a variance was a pointless exercise and did not create a distinct, new legal claim.

This case is decisively different from *Hallco Texas* because there is substantial evidence that Ordinance 97-1394 does not completely bar Respondents from developing their mineral resources. Indeed, the trial court has expressly left that issue open for subsequent resolution. Although the ordinance apparently imposes restrictions that Respondents have to work around, that is very different from the kind of outright prohibition on the proposed development at issue in *Hallco Texas*.[3]

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[3] Plaintiffs pursue a red herring in contending that there is some kind of inconsistency between the City's position in *Trail I* (*see Trail Enters., Inc. v. City of Houston*, 957 S.W.2d 625 (Tex. App.–Houston [14th

The trial court correctly held that Respondents' claims are not ripe. The Court of Appeals erred in summarily reversing that holding, and this Court should grant the Petition to correct this serious distortion of the ripeness doctrine.

B. The Court of Appeals Erred by Entering a Final Judgment Itself in Favor of Respondents Rather than Remanding this Case to the Trial Court.

The Court of Appeals' decision to render judgment rather than remanding the case to the trial court for further proceedings was based on an apparent misreading of the record in this case. The Court of Appeals understood that, prior to granting the City's motion for summary judgment on the ripeness issue, the trial court had conducted a bench trial on liability and presided over a jury trial on compensation. Since it reversed the trial court's dismissal of the claims on ripeness grounds, the Court reasoned there was no reason why, in the interests of efficiency, it should not immediately enter a judgment in favor of the Respondents "based on the trial court's finding that an inverse condemnation occurred." *Trail Enters.*, Inc., 255 S.W.3d at 110.

This reasoning was demonstrably incorrect. The record shows that the trial court, following the bench trial and the jury proceedings, decided to set aside its initial determination of liability in favor of Respondents. In response to a filing by the City, captioned "City of Houston's Motion for Reconsideration of the Court's Holding that There has Been a Taking" (*see* CR III 786), the trial court entered an Order on June 16,

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Dist.] 1997, pet. denied)) that Respondents' takings claims were barred by the applicable statute of limitations and the City's position in this case that the claims are not ripe. In *Trail I*, the appellate court ruled that the filing of variance applications did not reset the limitations period for claims based on the ordinance because the ordinance included no provision authorizing variances. That ruling has no bearing on why the trial court correctly dismissed Respondents' takings claims on ripeness grounds; Respondents appear to have options for developing their mineral interests that are not precluded by the ordinance and that have not been pursued.

2005. *See* App. A. This Order "granted" the City's motion (which addressed several issues other than the liability issue) "in part." Specifically, the Order "set aside" the "Court's finding that the adoption of Ordinance 97-1394 resulted in a prohibition on all drilling from any location, whether inside or outside Plaintiffs' mineral leases, that would allow a sufficient quantity of minerals to be extracted in an economically feasible manner that the plaintiffs could realize an economic benefit from the entirety of their leases." The Order then explained the procedural import of this determination by stating that the trial court would "hear further evidence and testimony regarding whether or not the adoption of Ordinance 97-1394 resulted in a prohibition on drilling from any location, whether inside or outside of Plaintiffs' mineral leases, that would allow a sufficient quantity of minerals to be extracted in an economically feasible manner so that the Plaintiffs could realize an economic benefit from the entirety of their leases."

In fairness, the Court of Appeals may have been confused by some of the language in the "Final Judgment" entered by the trial court on August 29, 2005, from which this appeal was taken. After the trial court issued its June 16 Order setting aside its prior ruling on the issue of liability, the City filed a motion for summary judgment seeking dismissal of Respondents' claims based on ripeness. The Final Judgment granted the City's motion and dismissed Respondents' claims. Unfortunately, however, in explaining the history of the litigation, the Final Judgment included several significant misstatements and omissions.

For example, the trial court explained that after a bench trial it had found the City to be liable for a taking, but it failed to mention that it had subsequently set aside that

finding. In addition, the trial court referred to an "entry of Judgment based upon the Jury Verdict" on damages and stated that "[t]he final judgment is incorporated for all purposes by reference." So far as amici can determine, however, the trial court never entered a judgment in favor of Respondents at any point in this litigation.[4]

Notwithstanding the confusion apparently created by some of the language in the August 29 Final Judgment, it is clear that the trial court's June 16 Order set aside the finding of liability. Nothing in the August 29 Final Judgment altered that ruling. Any possible doubt on this point is resolved by the fact that, in addition to addressing the ripeness issue, the Final Judgment explicitly denied Respondents' request that the trial court reconsider its Order setting aside the liability determination.

On July 1, 2005, Respondents made a filing captioned "Plaintiffs' Motion to Reconsider the Court's Order Granting Reconsideration of the Court's Holding of a Taking, Second Motion for Entry of Judgment, Response to Defendant's Motions for Summary Judgment/Plea to the Jurisdiction and Cross-Motion for Summary Judgment as to the Jurisdiction." *See* Response to Petition for Review, App. I. In that filing, the Respondents "request[ed] the court to reconsider its order to reopen the evidence" and urged instead that the trial court enter a judgment against the City. *Id.* at 5. In its Final Judgment, the trial court explicitly denied this motion. (CR III 1132, 1139.) Since the trial court's Final Judgment *explicitly* rejected Respondents' motion for reconsideration

[4] The Final Judgment also states that, following the trial court's initial liability determination, the plaintiffs filed a "Motion for New Trial." In fact, the City's filing was captioned "City of Houston's Motion for Reconsideration of the Court's Holding that There has Been a Taking." (CR III 786.)

of the June 16 Order, it cannot sensibly be contended that the Final Judgment *implicitly* reversed this very same Order.

In their Response to the City's Petition for Review, Respondents attempt to bolster the Court of Appeals' mistakes and misrepresent the record by referring to a "Final Judgment" supposedly issued based on the jury verdict when no such Final Judgment was ever entered. They also fail to acknowledge or explain the significance of the fact that the trial court's June 16 Order granted the City's motion for reconsideration of the finding of liability, or the fact that the trial court scheduled further evidentiary proceedings to resolve the liability issue. Respondents thus fail to present any reasoned defense of the Court of Appeals' decision to enter judgment for Respondents rather than remanding this case to the trial court. Based on this second independent error by the Court of Appeals, this Court should grant the Petition and reverse.

C. Respondents Will Almost Certainly Fail to Carry Their Burden of Demonstrating a Taking in this Case.

The procedural issues aside, the ultimate question that remains to be resolved is whether Ordinance 97-1394 results in a taking of Respondents' property. Assuming for the sake of argument that Respondents' claims are determined to be ripe, the City should be permitted to complete the presentation of its evidentiary case, as the trial court intended. Only then can the trial court, in the first instance, make a fully informed decision about whether or not there has been a taking.

Certainly, given the procedural posture of the proceedings when Respondents' claims were dismissed, it would be inappropriate for this Court to address the merits of

those claims in this appeal. Nonetheless, in considering the propriety of the Court of Appeals' decision to render judgment notwithstanding the absence of a finding of liability, it is worthwhile to observe that there are strong reasons to believe that Respondents will fail to carry their burden of establishing a taking.

This Court has generally interpreted Article I, Section 17, of the Texas Constitution in conformity with the U.S. Supreme Court's interpretation of the Takings Clause of the Fifth Amendment to the U.S. Constitution. *See Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928-29 (Tex. 1998). Amici presume the Court would adopt the same approach in assessing Respondents' claims.

The federal Takings Clause was originally understood to apply only to direct appropriations of private property and physical invasions, not to regulations of the use of property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1028 n.15 (1992) ("early constitutional theorists did not believe the Takings Clause embraced regulations of property at all"); *see generally* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 782 (1995) ("The original understanding of the Takings Clause of the Fifth Amendment was clear on two points. The clause required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used."). However, beginning in the early part of the last century, the U.S. Supreme Court recognized that in rare cases regulations can be so burdensome that

they should be regarded as the equivalent of appropriations or physical invasions. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

In accordance with the original understanding of the Takings Clause, federal regulatory takings analysis now focuses on whether the "law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 n.17 (2002). In other words, the issue in a regulatory takings case is whether the regulation is so burdensome that it is the "functional[] equivalent of the classic taking in which government directly appropriates [or occupies] private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

In modern takings doctrine, a regulatory taking claim must be analyzed in two steps, with the first question being whether the claimant can point to a protected "property" interest. *See, e.g., Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). This inquiry includes analysis of whether "background principles" of property or nuisance law bar a claimant from asserting an entitlement to engage in the regulated activity to begin with. *See Lucas*, 505 U.S. at 1029. Assuming a claimant can meet the threshold requirement of a protected property interest, the next question is whether the regulation is so burdensome that it amounts to a "taking."

Under the broad umbrella of "functional equivalence," the U.S. Supreme Court and this Court have articulated two distinct standards for determining whether a regulation results in a taking. First, they have adopted a *per se* approach to liability "where a regulation 'compel[s] the property owner to suffer a physical 'invasion' of his

property.'" *Sheffield Dev. Co.*, 140 S.W.3d at 671(quoting *Lucas*, 505 U.S. at 1015). A *per se* rule also is applied to regulations that eliminate "all economically viable use." *Lucas*, 505 U.S. at 1028. The U.S. Supreme Court has emphasized that the *Lucas* rule only applies to regulations that result in "the complete elimination of a property's value." *Lingle*, 544 U.S. at 539; *see also Tahoe-Sierra*, 535 U.S. at 330. In accordance with this guidance, courts have consistently rejected takings claims under *Lucas* when the restrictions do not literally destroy all value. *See, e.g., Cooley v. United States*, 324 F.3d 1297 (Fed. Cir. 2003) (rejecting a *Lucas* claim when property lost 98.8% of value).

Second, the U.S. Supreme Court and this Court have adopted the analysis articulated in *Penn Central Transportation Co. v. City of New York*, for regulations that stop one step short of destroying all value. 438 U.S. 104 (1978). The *Penn Central* analysis calls for an "ad hoc" analysis primarily focused on three factors: (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Sheffield Dev. Co.*, 140 S.W.3d at 672 (quoting *Connolly v. Pension Benefits Guar. Corp.*, 475 U.S. 211, 225 (1986)).

There is no precise threshold of economic impact necessary to support a claim under *Penn Central*, but courts routinely reject claims involving diminutions in value approaching 90% and above. *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (92.5% diminution); *William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (95% diminution). The investment-expectations factor primarily focuses on whether the regulation was in place when the claimant acquired the property

and/or the degree to which the nature of the regulated activity or the regulatory environment put the owner on notice of potential regulatory restrictions. *See Commonwealth Edison v. United States*, 271 F.3d 1327, 1348 (Fed. Cir. 2001) (en banc) (discussing the expectations factor in detail). Finally, the "character" factor calls for consideration of both the comprehensiveness of the regulation, *see, e.g., Wensmann Realty, Inc. v. City of Eagan*, 734 N.W. 623, 640 (Minn. 2007) (ruling that the character factor weighed in favor of the claimant because the regulation targeted a single property), and the degree to which the regulation is designed to protect the community from harm. *See, e.g., M & J. Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995); *see also Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (rejecting takings challenge based on restrictions on sand and gravel operation designed to safeguard community's water supply).[5]

So far as amici can determine, Respondents have never contended that they can establish a taking under *Lucas*, and any such claim would be frivolous in view of the fact that at least some of the Respondents have already extensively exploited these resources and continue to receive income from production from existing wells on the property. *Cf. Rith Energy, Inc v. United States*, 270 F.3d 1347, 1349-50 (Fed. Cir. 2001) (coal that company mined prior to imposition of regulatory restriction must be taken into account in evaluating overall impact of regulation). The *Penn Central* factors, to the extent they can

[5] For many years the U.S. Supreme Court stated that a claimant could also prevail under the Takings Clause by demonstrating that a regulation failed to "substantially advance" a legitimate governmental interest. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). However, in *Lingle*, the Supreme Court, in a unanimous decision, repudiated this ostensible takings test, observing that this type of allegation raises an issue under the Due Process Clause rather than the Takings Clause. 544 U.S. at 532; *see Hallco Texas, Inc.*, 221 S.W.3d at 61 n.6.

be addressed based on the current record, strongly suggest that Respondents would fail to carry their burden of establishing a taking under that analysis, as we discuss below.

The full impact of Ordinance 97-1394 remains unresolved, given that the trial court has invited, but not yet received, additional evidence on the extent to which Respondents can exploit these resources. In addition, so far as amici can determine, the appellate record does not reflect what price Respondents originally paid for their interests and how those amounts compare to the current values of those interests. *See Mayhew*, 140 S.W2d at 677 (emphasizing the importance of evidence of the original cost of the property in assessing a regulation's economic impact). At a minimum, however, the adverse economic impact (if any) of the City's ordinance has been mitigated by the historical and continuing oil and gas production and the resulting income.

As to the investment-expectation factor, Respondents cannot credibly contend that the ordinance seriously interferes with their reasonable, investment-back expectations. Some Respondents apparently purchased their interests after the ordinance was already in place. *Cf. Mayhew*, 964 S.W.2d at 937-38 ("The existence of zoning of the property at the time it was acquired is to be considered in determining whether the regulation interferes with investment-backed expectation."). In addition, some Respondents apparently have held their property interests for many years subject to the regulatory restrictions (with only a brief one year gap), belying any argument that enforcement of the regulation as to them interferes with any distinct *investment*-backed expectation. *Cf. id.* at 937 ("After four decades of ranching their property in a Town with a population of no more than 2,000 people, [plantiffs] did not have a reasonable investment-backed

expectation that they could pursue an intensive development of 3,600 units that would more than quadruple the Town's population."). Respondents are in an especially weak position to claim an interference with reasonable investment-backed expectations given that these claims arose solely as a result of an inadvertent error during the legislative process of expanding the City's boundaries.

Finally, the fact that the ordinance safeguards a vital municipal drinking water supply from the threat of pollution weighs strongly against the claims. As noted at the outset of this brief, the potential harm to the public avoided by a regulatory restriction is an important aspect of the "character" of the government action for the purpose of takings analysis. *See also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 481-92 (1987). Courts have repeatedly recognized that regulations addressing threats to public water supplies will rarely if ever give rise to takings liability. *E.g., Goldblatt*, 369 U.S. at 590; *Hallco Texas, Inc.*, 221 S.W.3d at 61 ("McMullen County unquestionably had the power to regulate land use, especially around a water supply like Choke Canyon Reservoir, and in the abstract, its doing so would hardly ever give rise to takings liability."); *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1350-51 (Fed. Cir. 2004) (holding that determination that proposed mine would cause water pollution supported conclusion that regulation did not result in a taking). Amici are not aware of any court that has ruled that the Takings Clause requires the public to pay polluters not to pollute.

Ultimately, the issue in this appeal is not whether the takings claims will succeed or fail. However, the fact that the City has a reasonable probability of prevailing on the merits demonstrates that the Court of Appeals' resolution of the procedural questions has

caused the City genuine prejudice. Moreover, the public and the bar are ill-served by the Court of Appeals' decision, because it offers no reasoned explanation for how this improbable takings award can be justified in light of established takings precedents. In sum, both the City's entitlement to fair treatment at the hands of the judiciary and the public's strong interest in the orderly and transparent development of the law will be served if the Court grants the Petition and reverses the decision of the Court of Appeals.

CONCLUSION AND PRAYER

For the reasons stated in the City's Petition for Review, and for the reasons stated above, the Court should grant the Petition, reverse the decision of the Court of Appeals, and remand the case with instructions that the case be dismissed on ripeness grounds or, alternatively, that the trial court conduct further evidentiary proceedings to resolve whether Respondents can carry their burden of establishing that a taking has occurred.

Respectfully submitted,

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I hereby certify that this __ day of August, 2008, a true and correct copy of the **Brief of Amici Curiae International Municipal Lawyers Association, et al** was sent by First Class U.S. mail to all parties of record as follows:

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