IN THE SUPREME COURT OF TEXAS

NO. 02-1176

HALLCO TEXAS, INC., PETITIONER,

v.

MCMULLEN COUNTY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued January 4, 2005

JUSTICE HECHT, joined by JUSTICE MEDINA and JUSTICE WILLETT, dissenting.

A regulatory-takings claim may challenge a land-use restriction on its face or as applied to particular property.[1] A facial challenge is ripe when the restriction is imposed,[2] but an as-applied claim is not ripe until the regulatory authority has made a final decision regarding the application of

[1] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987) (recognizing "an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation"); *City of Corpus Christi v. Pub. Utils. Comm'n of Texas*, 51 S.W.3d 231, 247 (Tex. 2001) (describing a takings claim as "an as-applied constitutional challenge, rather than a facial challenge").

[2] *Yee v. City of Escondido*, 503 U.S. 519, 533-534 (1992) ("While respondent is correct that a claim that the ordinance effects a regulatory taking as applied to petitioners' property would be unripe [because petitioners did not seek an exception], petitioners mount a facial challenge to the ordinance. . . . As this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe." (citations omitted)); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 930 (Tex. 1998) ("[A] final decision on the application of the zoning ordinance to the plaintiff's property is not required if the plaintiff brings a facial challenge to the ordinance.").

the regulation to the property.[3] "A 'final decision' usually requires . . . the denial of a variance from the controlling regulations" unless a request for variance would be futile.[4]

This case illustrates how the government can use this ripeness requirement to whipsaw a landowner. The government can argue either that there was no request for a variance when there should have been, or that the request was not specific enough, or that it was not reasonable enough, or that there was insufficient time to consider it — and therefore the landowner's regulatory-takings claim is premature, unripe, and should be dismissed. Or else it can argue that a request for a variance would be a waste of time, or that none was authorized, or that the landowner should have known his ridiculous proposal would never be seriously considered — and therefore his claim is late, barred, and should be dismissed. One way or the other, the result is the same. Ripening a regulatory-takings claim thus becomes a costly game of "Mother, May I", in which the landowner is allowed to take only small steps forwards and backwards until exhausted.

When Hallco Texas, Inc. first sued McMullen County, alleging that an ordinance aimed at stopping Hallco from using its property as a nonhazardous industrial waste landfill effected a compensable taking, the County argued that it "ha[d] the authority to grant a variance, or even to rescind the ordinance, if Hallco present[ed] sufficient justification", and therefore, Hallco's action was not ripe because it "ha[d] not obtained a final decision from the County". This embarrassing fact is buried in a footnote to the Court's opinion[5] and never discussed. After Hallco lost, it submitted a lengthy and detailed request for a variance, which the County summarily denied. Now in this, Hallco's second state-court suit against the County on its regulatory-takings claim (it has also

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[3] *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."); *Mayhew*, 964 S.W.2d at 929 ("[I]n order for a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue.").

[4] *Mayhew*, 964 S.W.2d at 929.

[5] *Ante* at ___ n.4.

sued three times in federal court), the County argues that the prior action was ripe after all and bars this one because requesting a variance was futile. The Court agrees and holds that Hallco should not have "another bite at the apple",[6] as if being forced to bob for apples is the same as ever getting a bite.

The Court wants Hallco to know that "[w]e are sympathetic".[7] But it adds: "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*."[8] Poor Hallco. It should have known better than to take the County at its word because it could "hardly ever" win anyway, even if it was successful in obtaining a permit to operate a landfill, even if the County deprived Hallco of the lawful use and economic benefit of its property. After spending millions of dollars over twelve years, Hallco, I rather imagine, would prefer justice to sympathy.

I would take the County at its word and remand the case for proceedings on the merits, if Hallco can endure yet another round of litigation. Accordingly, I respectfully dissent.

I

In January 1991, Hallco bought 128 acres of raw land in rural McMullen County (1,142 sq. mi., 1990 pop. 817), a little under two miles from Choke Canyon Reservoir, a 26,000-acre lake on the Frio River halfway between San Antonio and Corpus Christi. The lake supplies water to Corpus Christi and others and provides a setting for recreational activities. The only community in the vicinity of Hallco's property is Calliham, some two-and-one-half miles away, which had about 50 residents. Otherwise, the area is mostly pasture.

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[6] *Ante* at ___.

[7] *Ante* at ___.

[8] *Ante* at ___ (emphasis added).

Hallco bought the property for use as a Class I nonhazardous industrial waste landfill.[9] No local land-use regulations restricted solid waste disposal on the property Hallco acquired. Since 1971, Texas counties have been authorized to prohibit by ordinance the disposal of solid waste in specific areas where it is a threat to public health, safety, and welfare,[10] but McMullen County had never had such an ordinance. All Hallco needed to operate a landfill was a state permit from what was then the Texas Water Commission (later the Texas Natural Resource Conservation Commission, and now the Texas Commission on Environmental Quality, all referred to simply as "the Commission").[11] Hallco applied for the permit in July 1992.

The County opposed Hallco's plans from the start. Eleven days after Hallco acquired the property, the commissioners court adopted a resolution opposing the proposed landfill, expressing concern that it might contaminate the reservoir, the Frio River, the nearby Nueces River, and groundwater, jeopardize residents, livestock, vegetation, and soil, and stink.[12] The County also

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[9] TEX. HEALTH & SAFETY CODE § 361.003(2)-(3) ("(2) 'Class I industrial solid waste' means an industrial solid waste or mixture of industrial solid waste, including hazardous industrial waste, that because of its concentration or physical or chemical characteristics: (A) is toxic, corrosive, flammable, a strong sensitizer or irritant, or a generator of sudden pressure by decomposition, heat, or other means; and (B) poses or may pose a substantial present or potential danger to human health or the environment if improperly processed, stored, transported, or otherwise managed. (3) 'Class I nonhazardous industrial solid waste' means any Class I industrial solid waste that has not been identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. Section 6901 et seq.)."); *see also* 40 C.F.R. § 261.4(b) (2006) (listing nonhazardous solid wastes).

[10] County Solid Waste Disposal Act, 62nd Leg., R.S., ch. 516, § 18, 1971 Tex. Gen. Laws 1757, 1762 (stating in part that a county "may prohibit the disposal of any solid waste within the county if the disposal of the solid waste is a threat to the public health, safety, and welfare") (codified as amended at TEX. HEALTH & SAFETY CODE § 364.012).

[11] *See* TEX. HEALTH & SAFETY CODE § 361.061 (stating that with exceptions not material to the present case, the Texas Commission on Environmental Quality "may require and issue permits authorizing and governing the construction, operation, and maintenance of the solid waste facilities used to store, process, or dispose of solid waste under this chapter"); *id*. § 361.086(a) ("A separate permit is required for each solid waste facility."); 30 TEX. ADMIN. CODE § 335.2 (2006).

[12] McMullen County, Texas, Resolution No. 1-16-91 (Jan. 14, 1991):

A RESOLUTION to oppose the establishment of an industrial landfill at a site on the Hallco Texas, Inc. property, being that 128.192 acre tract of land, found upon resurvey to contain 128.214 acres of land in the James Garner Survey No. 6, Abstract 5 of McMullen County.

WHEREAS the McMullen County Commissioner's Court has reviewed this proposal and agreed unanimously that the establishment of this project would present a potential hazard to the health and well being of the residents of

intervened in the Commission proceeding along with Corpus Christi and others to oppose Hallco's permit application. But not until June 1993, after the application had been pending nearly a year and Hallco had spent some $800,000 on the proposed landfill and permit process, did the commissioners court adopt an ordinance[13] prohibiting solid waste disposal within three miles of the reservoir.[14]

McMullen County and:

WHEREAS the project could, in the event of a spill, leak, or accident, contaminate the waters of the Frio and Nueces River and the water supplies of downstream users of water from those rivers:

WHEREAS the establishment of this project could in the event of a spill, leak or accident, pollute and contaminate the underground water sands that are the main source of drinking water for the rural residents of McMullen County livestock, and the Federal Correctional Institute, Three Rivers:

WHEREAS the the project could, in the event of a spill, leak, or accident, contaminate the vegetarian, animal life, and soil adjacent to and on the watershed below the proposed site:

WHEREAS this project could create an objectionable odor to neighboring residents of McMullen County.

NOW THEREFORE BE IT RESOLVED that the McMullen County Commissioner's Court opposes the establishment of an industrial landfill on the Hallco Texas, Inc. property located in the James garner Survey No. 6, Abstract 5 of McMullen County.

Duly adopted at a meeting of the McMullen County Commissioner's Court this 14th day of January, 1991.

[13] McMullen County, Texas, Ordinance No. 01-06-93 (June 14, 1993):

AN ORDINANCE PROHIBITING SOLID WASTE DISPOSAL WITHIN THREE MILES OF CHOKE CANYON LAKE AND PROVIDING CIVIL AND CRIMINAL PENALTIES

Be it ordained, ordered and adopted by the commissioners court of McMullen County, Texas:

SECTION 1. GENERAL PROVISIONS

WHEREAS, the McMullen County Commissioners Court has both the responsibility and the authority to protect the health, safety, and welfare of the citizens of McMullen County, Texas; and

WHEREAS, a safe and abundant supply of drinking water is necessary to preserve and protect the health and welfare of the citizens of McMullen County, Texas; and

WHEREAS, the Choke Canyon Lake provides a portion of the drinking water for McMullen County as well as other counties and municipalities; and

WHEREAS, the soil in the area of the lake is porous and subsurface materials tend to be unstable and volatile;

WHEREAS, the disposal of solid waste within three (3) miles of Choke Canyon Lake would constitute a threat to the public health, safety and welfare; and

WHEREAS, the present technology available with regard to the installation, operation and maintenance of solid waste disposal sites is insufficient to prevent contamination of adjacent areas; and

WHEREAS, adequate waste disposal sites are available in portions of the county which are not in close proximity of the lake;

(a) IT IS THEREFORE ORDAINED AND ORDERED that the disposal of solid waste is prohibited within three (3) miles of Choke Canyon Lake.

(b) IT IS FURTHER ORDAINED AND ORDERED that the disposal of solid waste is not prohibited in any other area of the county, provided that any such site complies with all applicable state requirements.

SECTION 2. CIVIL REMEDIES AND PENALTIES

(a) Any violation of this ordinance is subject to a civil penalty of $10,000.00 for each violation. Such penalty to be forfeited to McMullen County, Texas. Each day that a violation continues constitutes a separate ground for recovery.

(b) The commissioners court of McMullen County, Texas, may bring a legal action to enjoin violations of this ordinance and seek judgment for any civil penalties.

SECTION 3. CRIMINAL PENALTY

(a) Disposal of solid waste in violation of this ordinance constitutes a Class C misdemeanor punishable by a fine not to exceed $500.00.

(b) Each day that a violation continues constitutes a separate offense under this ordinance.

SECTION 4. SEVERABILITY

If any portion of this ordinance is deemed to be in violation of the statutes or the constitution of this state or the United States by a court of competent jurisdiction, said portion shall be severed, and the remaining portions of the ordinance shall remain in full force and effect.

SECTION 5. EFFECTIVE DATE

This ordinance shall become effective immediately upon adoption.

Read and adopted this 14th day of June, 1993, by a vote of 5 ayes and 0 nays.

[14] In 1999, the Legislature amended section 364.012 of the Health and Safety Code to add subsections (e) and (f) as follows:

> (e) The commissioners court of a county may not prohibit the processing or disposal of municipal or industrial solid waste in an area of that county for which:
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> (1) an application for a permit or other authorization under Chapter 361 has been filed with and is pending before the commission; or
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> (2) a permit or other authorization under Chapter 361 has been issued by the commission.
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> (f) The commission may not grant an application for a permit to process or dispose of municipal or industrial solid waste in an area in which the processing or disposal of municipal or industrial solid waste is prohibited by an ordinance, unless the county violated Subsection (e) in passing the ordinance. The commission by rule may specify the procedures for determining whether an application is for the processing or disposal of municipal or industrial solid waste in an area for which that processing or disposal is prohibited by an ordinance.

Act of May 25, 1999, 76th Leg., R.S., ch. 570, § 5, sec. 364.012, 1999 Tex. Gen. Laws 3110, 3111. The amendment does not apply to a permit application filed before September 1, 1998, if on or before September 1, 1999, a county had enacted an ordinance under section 364.012. *Id.* § 6, 1999 Tex. Gen. Laws at 3112. Thus, this amendment does not

Although the County had no technical or scientific studies to support the restriction, the ordinance recited that

> the soil in the area of the lake is porous and subsurface materials tend to be unstable and volatile; . . . the disposal of solid waste within three (3) miles of Choke Canyon Lake would constitute a threat to the public health, safety and welfare; and . . . the present technology available with regard to the installation, operation and maintenance of solid waste disposal sites is insufficient to prevent contamination of adjacent areas . . . .[15]

Despite this ordinance and opposition by the County and others, the Commission did not determine that Hallco's operation of a landfill would be harmful to the public and instead issued a 78-page revised final draft permit in February 1995, detailing the specifications for a landfill operation as recommended by the Commission staff.

Two weeks later, Hallco sued the County in the United States District Court for the Southern District of Texas,[16] alleging in part that the County's ordinance was a regulatory-taking requiring compensation under the Fifth Amendment to the United States Constitution.[17] Around the same time, Hallco also filed its regulatory-taking claim in state court, asserting violations of both the Fifth Amendment and article I, section 17 of the Texas Constitution.[18] The County immediately moved to dismiss the federal-court action, asserting that it was not ripe for two reasons: Hallco had not obtained a final decision from the county regarding the application of the ordinance — in effect, a variance — and Hallco had not fully pursued relief in state court. Both were prerequisites to suit in federal court under the United States Supreme Court's decision in *Williamson County Regional*

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apply in this case.

[15] McMullen County, Texas, Ordinance No. 01-06-93 (June 14, 1993).

[16] *Hallco Texas, Inc v. McMullen County*, 934 F. Supp. 238, 240 (S.D. Tex. 1996), *aff'd*, 109 F.3d 768 (5th Cir. 1997) (table).

[17] *Id.* at 240; *see* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

[18] TEX. CONST. art. I, § 17 ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . .").

Planning Commission v. Hamilton Bank.[19] Hallco responded that it should be excused from requesting a variance since the ordinance did not provide for one and any request would be futile. In reply, the County insisted that a variance was possible and that, in any event, state proceedings had to be exhausted:

> [T]he Supreme Court [in *Williamson*] has held that regulatory takings claims, such as the one presented in this case, are not ripe for federal adjudication unless the Plaintiff: 1) obtains a final decision from the regulatory entity (here, the County) regarding the application of the ordinance or regulation . . . to his property; and 2) seeks just compensation through available state procedures.
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> . . . Hallco does not dispute that it has satisfied neither prong of *Williamson*: it has not obtained a final decision from the County and it has not sought redress through available state procedures. Instead, Plaintiff argues only that it would be futile to approach the county for a final decision on the application of the ordinance to its property.
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> [Hallco] offers absolutely no authority for the proposition that futility is an excuse to the requirement of finality. Even if there were a futility exception, at least one application for variance would be required to establish futility. Contrary to [Hallco's] assertion, the fact that the ordinance does not contain a provision for reviewing how the ordinance will be applied to particular property does not establish that it is futile; the Commissioners Court has the authority to grant a variance, or even to rescind the ordinance, if Hallco presents sufficient justification. Therefore, [Hallco's] argument has no merit.
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> Moreover, [Hallco] wholly fails to address the consequences of its failure to seek redress through available state court procedures. The *Williamson* case itself makes it abundantly clear that state remedies must be sought in state court prior to bringing a federal takings claim.

Without deciding whether Hallco had satisfied *Williamson County*'s first requirement, the district court dismissed the case in August 1995 for failure to satisfy the second:

> It is arguable whether Hallco meets the first condition. Apparently, it has neither submitted a plan to the County nor sought a variance or waiver from the Commissioners Court. Hallco argues that the ordinance constitutes a final decision

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[19] 473 U.S. 172, 185-197 (1985); *but see San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323, 348 (2005) (Rehnquist, C.J., concurring) (indicating the Court may need to reconsider *Williamson County's* requirement that a litigant pursue relief in state court first); Scott A. Keller, Note, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims*, 85 TEX. L. REV. 199 (2006); J. David Breemer, *You Can Check Out But You Can Never Leave: the Story of San Remo Hotel--the Supreme Court Relegates Federal Takings Claims to State Courts under a Rule Intended to Ripen the Claims for Federal Review,* 33 B.C. ENVTL. AFF. L. REV. 247 (2006).

> because, unlike the regulation in *Williamson County,* this ordinance does not expressly provide any means for obtaining variances from its provisions. . . . The Court will not dwell on this argument since Hallco has not met the second ripeness condition.
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> "[B]efore a takings claim is ripe, the claimant must unsuccessfully seek compensation. Short of that, it must be certain that the state *would* deny that claimant compensation were he to undertake the obviously futile act of seeking it." *Samaad v. City of Dallas*, 940 F.2d [925, 934 (5th Cir. 1991)] (emphasis in original). Under Article I, § 17 of the Texas Constitution, property owners claiming an uncompensated taking may seek compensation through an inverse condemnation suit. *See Westgate Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992). Hallco makes no claim to have sought just compensation; therefore, its takings claim is premature.[20]

The parties then turned to the state-court action, referred to as *Hallco I*. Though Hallco still had not requested a variance from the County, the state court, like the federal court, did not determine whether such a request was a prerequisite to Hallco's action. Instead, the trial court in May 1996 granted summary judgment for the County in part on the ground that prohibiting Hallco's proposed landfill operation did not constitute a taking of its property requiring compensation under the state and federal constitutions. In April 1997, the court of appeals affirmed, reasoning as follows:

> We find that Hallco's takings claim must fail because he did not have a cognizable property interest of which the government action could deprive him.
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> Hallco's takings claim is grounded in the idea that it has a constitutionally protected property interest or entitlement to use its property for waste disposal, and that the McMullen County ordinance deprived him of that right or entitlement. However, Hallco has never had the right to dispose of industrial waste on its property, and does not now have a right to dispose of such waste. . . .
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> In Texas, the Legislature has defined when property owners may dispose of solid waste on their property via the permitting process; TEX. HEALTH & SAFETY CODE ANN. § 361.061-.345 (Vernon 1992 & Supp. 1997). Even if Hallco already had a permit, by definition it would not have a property interest in disposal of solid waste. TNRCC regulations define permits as not being a property interest or a vested right in the permittee. *See* 30 TEX. ADMIN. CODE § 305.122(b) (West 1996).
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> The only way the McMullen County regulation affected Hallco was in denying it the right to operate a solid waste facility on the proposed site. A mere

[20] *Hallco*, 934 F. Supp. at 240.

> expectancy of future services which would render the land more valuable, in the absence of a contract, is not a vested property right for purposes of determining whether a taking has occurred. *Estate of Scott v. Victoria County,* 778 S.W.2d 585, 592 (Tex. App.—Corpus Christi 1989, no writ). The McMullen County ordinance does not otherwise impact on use of the property. Because Hallco did not have a property interest in disposal of solid waste on its property, we hold that the ordinance in question did not constitute a taking as a matter of law.[21]

The court of appeals did not discuss whether the case was ripe given that Hallco had not requested a variance. Hallco did not appeal further.

The Commission never approved Hallco's permit, but its application remained pending.[22] In August 1999, about two years after the judgment in *Hallco I* was final on appeal, Hallco requested a variance from the ordinance. The lengthy request included the revised final draft permit issued by the Commission and a valuation of the property, both of which were obtained after the County enacted its ordinance. The valuation showed that the property was worth $5.2 million if operated as a landfill but only $58,300 otherwise, and that a landfill business operated on the property would be worth $15,870,000. The County heard Hallco's presentation of its request but took no further action.

In December 1999, Hallco filed this action, referred to as *Hallco II*, against the County, again asserting a regulatory taking of its property. Besides its constitutional claims, Hallco also sued under the Texas Private Real Property Rights Preservation Act.[23] Concerned that the state action might not prevent the running of limitations on a federal action, Hallco also filed the same action in federal

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[21] *Hallco Texas, Inc. v. McMullen County*, No. 04-96-00681-CV, 1997 Tex. App. LEXIS 2020, at *6-9, 1997 WL 184719, at *3 (Tex. App.—San Antonio April 16, 1997, no writ) (not designated for publication) ("*Hallco I*").

[22] In 2003, the Legislature required the Commission to "adopt rules governing all aspects of the management and operation of a new commercial landfill facility that proposes to accept nonhazardous industrial solid waste for which a permit has not been issued" and to "suspend the permitting process for any pending application for [such] a permit . . . until the rules adopted . . . take effect." Act of May 27, 2003, 78th Leg., R.S., ch. 1117, §§ 1-2, 2003 Tex. Gen. Laws 3207, 3207-3208. The Commission complied on March 19, 2004. 29 Tex. Reg. 2888 (2004); *see also* 30 TEX. ADMIN. CODE §§ 335.580-.594.

[23] TEX. GOV'T CODE § 2007.001-.045.

court.[24] The federal court rejected Hallco's concerns and dismissed the action.[25] The County moved for summary judgment in the state proceeding, arguing that Hallco had not suffered a compensable taking of its property. The County did not argue that it lacked authority to grant a variance or reconsider Hallco's proposal; the County argued only that Hallco had not made a case for a variance or reconsideration. The County also argued that this action is barred by *Hallco I* and by limitations and laches. The trial court granted summary judgment for the County without specifying the grounds.

The court of appeals "reaffirm[ed]" its holding in *Hallco I* that "because Hallco did not have a property interest in the disposal of solid waste on its property, the ordinance did not constitute a taking as a matter of law."[26] The court added that without a state permit for a landfill, "Hallco did not have a distinct investment-backed expectation that it could use the property for solid waste disposal, and use of the property for solid waste disposal was neither an existing nor a permitted use."[27] The court did not mention Hallco's statutory claim.

II

The ripeness requirement for regulatory-takings claims stems from the root of such claims, first stated by Justice Holmes:

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[24] At the time, case authority indicated that a party suing in state court to satisfy the *Williamson* exhaustion requirement could reserve federal claims for later litigation in federal court so that the state-court judgment would not bar the federal action. *See Guetersloh v. State*, 930 S.W.2d 284, 289-290 (Tex. App.—Austin 1996, writ denied), *cert. denied*, 522 U.S. 1110 (1998) (citing *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411, 415-416 (1964); *Jennings v. Caddo Parish Sch. Bd.*, 531 F.2d 1331, 1332 (5th Cir. 1976); and *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1305-1306 (11th Cir. 1992)). Since then, however, the United States Supreme Court has held that such a reservation does not avoid the preclusive effect of the state-court judgment. *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 338 (2005) (*"England* does not support [the] erroneous expectation that [a] reservation would fully negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in the future federal litigation.").

[25] *Hallco Texas, Inc. v. McMullen County*, No. L-00-14 (S.D. Tex. April 24, 2000) (order dismissing action without prejudice for want of jurisdiction).

[26] *Hallco II*, 94 S.W.3d 735, 738-739.

[27] *Id*. at 738.

> while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . [T]his is a question of degree — and therefore cannot be disposed of by general propositions. . . . [T]he question at bottom is upon whom the loss of the changes desired should fall.[28]

"It follows from the nature of a regulatory takings claim," the United States Supreme Court has since observed, "that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."[29]

Thus, as we noted above, the Supreme Court held in *Williamson County* that "a claim that the application of government regulations effects a taking of a property interest [under the Fifth Amendment] is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[30] More recently, the Supreme Court has explained:

> *Williamson County*'s final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer." *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 738 [] (1997). While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.
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> * * * *
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> [A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the

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[28] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-416 (1922); *accord Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 670 (Tex. 2004) (footnotes omitted).

[29] *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *accord Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex. 1998).

[30] *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985); *accord Mayhew*, 964 S.W.2d at 929 ("[I]n order for a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue.").

> property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. See *Suitum, supra,* at 736, and n. 10 (noting difficulty of demonstrating that "mere enactment" of regulations restricting land use effects a taking). Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision. . . .[31]

This Court has said that "[a] 'final decision' usually requires . . . the denial of a variance from the controlling regulations" unless a request for variance would be futile.[32] Futility was the reason Hallco gave the federal court in its first action for not having requested a variance from the ordinance. The ordinance was crystal clear, Hallco argued, and applied specifically to its property, and there were no procedures for granting a variance. The County responded:

> Contrary to [Hallco's] assertion, the fact that the ordinance does not contain a provision for reviewing how the ordinance will be applied to particular property does not establish that it is futile; the Commissioners Court has the authority to grant a variance, or even to rescind the ordinance, if Hallco presents sufficient justification. Therefore, [Hallco's] argument has no merit.

The County now insists that Hallco's request for a variance should not have the effect of reviving its claim.

But ripening is not reviving. In a regulatory-takings case, the dispute must be sufficiently focused for the court to determine exactly how far a general land-use restriction extends in specific circumstances. General restrictions almost always have exceptions. The final-decision requirement allows regulators full discretion in adjusting restrictions to particular property before a constitutional obligation to compensate a landowner can be triggered. The County enacted its ordinance out of a concern, expressly stated, that "*present* technology available with regard to the installation, operation and maintenance of solid waste disposal sites is insufficient to prevent contamination of adjacent areas" (emphasis added). That was 20 months before the Commission issued Hallco a 78-page

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[31] *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-621 (2001).

[32] *Mayhew*, 964 S.W.2d at 929.

revised final draft permit with detailed specifications for the safe operation of the proposed landfill, and six years before Hallco requested a variance. It was certainly not unreasonable to expect that the County might be willing to reconsider the appropriateness of a three-mile zone if a landfill were required to be operated as set out in Hallco's revised final draft permit, or as a result of changes in technology, or simply after taking another look at the situation. At least the County has always professed in court its willingness to do so, until now, and here we should take it at its word.

Hallco claims in this case that the County's ordinance effects a taking *as applied*, not of *any and all* property proposed to be used as a landfill within three miles of Choke Canyon Lake, but only of property on which the prohibited operation is one that is subject to specifications like those in Hallco's revised final draft permit. Just as a zoning authority might adjust generally applicable front- or side-yard requirements, or height or size restrictions, or other regulations affecting construction on property, depending on particular circumstances, a county's determination of whether a landfill can be operated in an area may depend on the details of the operation.

Despite the County's assurances in federal court that it could and would consider Hallco's request for a variance, or for that matter, to repeal the ordinance altogether, it now protests that no procedure is prescribed for any such request to be made. Perhaps the County did not previously consider the absence of such procedure an inhibition to a request for a variance because it knew that general procedures permitted the request. As we have said,

> the term "variance" is "not definitive or talismanic;" it encompasses "other types of permits or actions [that] are available and could provide similar relief." The variance requirement is therefore 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 alleged taking."[33]

In fact, the County received the request and allowed Hallco to present it to the commissioners court. In this way, the details of Hallco's proposed operation as specified in the revised final draft permit

[33] *Id*. at 930 (citations omitted).

and an evaluation of the economic impact of the ordinance on Hallco were presented to the commissioners court for its consideration. The County cites nothing that affirmatively prohibited it from amending its ordinance in response to the request. Instead, it insists that Hallco provided no justification for reconsideration.

The County suggests, apparently in the alternative, that Hallco should have requested a variance sooner, but the County cites no deadline for such a request and no authority for the argument that Hallco should have acted more diligently. A landowner's decision to request a variance may involve many considerations, personal, economic, technical, and political. Timing may be critical. A landowner who wishes to make a facial challenge to a regulation, as Hallco did, should not be forced to request a variance before he believes he is in the best position to do so, or risk losing the facial challenge to limitations or the as-applied challenge to res judicata.

The County argues that allowing a regulatory-takings claim after every denial of a variance gives a landowner multiple bites at the apple, threatening repetitious and harassing litigation. But a landowner who is denied a variance, sues, loses, requests another variance, is denied again, and sues again, can expect the same result if the facts have not changed. If the apple is wormy, it is not clear why someone would take multiple bites. The expense of litigation and the possibility of sanctions for groundless lawsuits are ample deterrents. And if the facts have changed, so that the regulation as finally applied effects a taking, there is no reason to deny the landowner the compensation promised by the constitution.

The County adopted its ordinance without a scientific or technical basis for a zone of three miles as opposed to a shorter distance, and without a specific proposal for a landfill operation. In such circumstances it is especially important that there be an ample opportunity to consider a proposed land-use in detail before making a final decision that may result in a compensable taking. The Court says that the facts regarding Hallco's proposed landfill operation have not changed since

Hallco I. Perhaps not, but Hallco did not request the variance the County said it would consider until after *Hallco I* was concluded.

"Res judicata, or claims preclusion, prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in a prior suit."[34] Because the as-applied claim Hallco makes in the present case was not ripe while *Hallco I* was pending, it was not, and could not have been, adjudicated in that case, and thus it is not barred by res judicata.

The County also argues that this action is barred by collateral estoppel. Collateral estoppel bars a claim only if "(1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action."[35] The only fact specifically determined in *Hallco I* was that Hallco had no inherent right to operate a landfill. This fact is, of course, undisputed, and as I explain below, is not determinative of whether a compensable taking occurred. None of the issues on which Hallco's claim depends — the economic impact of the ordinance on Hallco, the reasonableness of Hallco's investment-backed expectations, and whether the ordinance singled Hallco out instead of promoting a public interest — was "fully and fairly litigated" in *Hallco I*. Even if the parties raised these issued in *Hallco I*, they were not "essential to the judgment", which was based solely on the only issue specifically determined — that Hallco had no inherent right to operate a landfill. Moreover, the Court has held that courts should not strictly apply the elements

[34] *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992).

[35] *John G. and Marie Stella Kenedy Mem. Found. v. Dewhurst*, 90 S.W.3d 268, 288 (Tex. 2002); *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994).

of collateral estoppel when the purposes of the doctrine are disserved thereby.[36] Those purposes are disserved when the doctrine is used by the County to escape its representations to a federal judge.

The County further argues that this action is barred by limitations and laches. But the County does not argue that a regulatory-takings claim accrues for limitations purposes before it is ripe, and there is authority that it does not.[37] It is not entirely clear what statute of limitations applies to such claims,[38] but none is as short as three months, the time Hallco waited to file suit after the County refused to grant a variance. Thus, the claim is not barred by limitations. "Generally in the absence of some element of estoppel or such extraordinary circumstances as would render inequitable the enforcement of petitioners' right after a delay, laches will not bar a suit short of the period set forth in the limitation statute."[39] No such circumstances are present in this case.

III

The County contends that it has established that its ordinance did not effect a compensable taking of Hallco's property. In *Sheffield Development Co. v. City of Glenn Heights*, we explained

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[36] *Sysco Food Servs.*, 890 S.W.2d at 801-804 (holding that collateral estoppel would not be applied, even though all three factors were present, because application would not serve the doctrine's intended purposes – it would not conserve judicial resources, prevent multiple lawsuits, or avoid the possibility of inconsistent findings – and fairness concerns were especially important in light of the procedural uniqueness of the case) (citing *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 328 (1971) (stating that preclusion doctrines have the "goal of limiting relitigation of issues where that can be achieved without compromising fairness in particular cases")).

[37] *Biddison v. City of Chicago*, 921 F.2d 724, 728-729 (7th Cir. 1991) ("several regulatory taking cases hold that a taking accrues at the same time that it ripens") (citing *Norco Constr. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986); *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990); and *McMillan v. Goleta Water Dist.*, 792 F.2d 1453, 1457 (9th Cir. 1986)).

[38] *Compare Maguire Oil Co. v. City of Houston*, 69 S.W.3d 350, 358 n.4 (Tex. App.—Texarkana 2002, pet. denied) ("There is no specific statute of limitations for an inverse condemnation claim. However, courts have held the ten-year statute of limitations to acquire land by adverse possession applies. *Trail Enters., Inc. v. City of Houston*, 957 S.W.2d 625, 631 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.026(a) (Vernon Supp. 2002); *Brazos River Auth. v. City of Graham*, 163 Tex. 167, 354 S.W.2d 99, 110 (1961); *Waddy v. City of Houston*, 834 S.W.2d 97, 102 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *Hudson v. Arkansas Louisiana Gas Co.*, 626 S.W.2d 561, 563 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.); *Hubler v. City of Corpus Christi*, 564 S.W.2d 816, 823 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.)."), *with* TEX. CIV. PRAC. & REM. CODE § 16.003(a) ("a person must bring suit for trespass for injury to the estate or to the property of another . . . not later than two years after the day the cause of action accrues").

[39] *Barfield v. Howard M. Smith Co.*, 426 S.W.2d 834, 840 (Tex. 1968) (citing *K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv.*, 314 S.W.2d 782 (Tex. 1958), and *Culver v. Pickens*, 176 S.W.2d 167 (Tex. 1944)).

how a land-use regulation should be analyzed to determine whether it has effected a compensable taking:

> [W]hether regulation has gone "too far" and become too much like a physical taking for which the constitution requires compensation requires a careful analysis of how the regulation affects the balance between the public's interest and that of private landowners. While each case must therefore turn on its facts, guiding considerations can be identified, as the Supreme Court first explained in *Penn Central Transportation Co. v. City of New York*:
>
> > In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.
>
> The Supreme Court has restated these factors simply as:
>
> > (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."
>
> Nevertheless, the Supreme Court has cautioned that these factors do not comprise a formulaic test. "*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required." "The temptation to adopt what amount to *per se* rules in either direction must be resisted."
>
> Thus, for example, the economic impact of a regulation may indicate a taking even if the landowner has not been deprived of all economically beneficial use of his property. Nor are the three *Penn Central* factors the only ones relevant in determining whether the burden of regulation ought "in all fairness and justice" to be borne by the public. Whether a regulatory taking has occurred, the Supreme Court has said, "depend[s] on a complex of factors *including*" the three set out in *Penn Central*. The analysis "necessarily requires a weighing of private and public interests" and a "careful examination and weighing of all the relevant circumstances in this context." As we have ourselves said of regulatory-takings issues, "we consider all of the surrounding circumstances" in applying "a fact-sensitive test of reasonableness".
>
> We have said that while

> determining whether a property regulation is unconstitutional requires the consideration of a number of factual issues, the ultimate question of whether a zoning ordinance constitutes a compensable taking or violates due process or equal protection is a question of law, not a question of fact. In resolving this legal issue, we consider all of the surrounding circumstances. While we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property, the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law.[40]

The court of appeals did not engage in this analysis. In *Hallco I*, it held simply that the County's ordinance did not effect a taking of Hallco's property because no landowner has "a property interest in disposal of solid waste on its property".[41] The court simply "reaffirm[ed]" this holding in *Hallco II*. But no landowner has an unrestricted right to *any* use of property. Businesses can be zoned out of residential neighborhoods.[42] Home construction can be limited in size, height, and placement on the property.[43] Nuisances can be prohibited.[44] Every landowner's right to use his property may be restricted by the government in the legitimate exercise of its police power and by the common law. These restrictions do not mean that landowners have no property interest in the use of their land, and stating that a particular use is subject to permit requirements says nothing about whether an ordinance prohibiting a use *with* the requisite permit constitutes a compensable taking. A taking occurs when the government interferes too far in a landowner's use of property, regardless of the nature of the intended use.

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[40] *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 671-673 (Tex. 2004) (footnotes omitted).

[41] *Hallco I*, 1997 Tex. App. LEXIS 2020, at *8, 1997 WL 184719, at *3.

[42] *See, e.g.*, *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 390, 397 (1926) (upholding zoning regulations creating "residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded"); *Lombardo v. City of Dallas*, 73 S.W.2d 475, 478 (Tex. 1934) ("The right to establish zoning districts is well established throughout the United States, and has been approved by the courts of many jurisdictions.").

[43] *See, e.g.*, *City of Dallas v. Vanesko*, 189 S.W.3d 768 (Tex. 2006).

[44] *See, e.g.*, *Northwestern Laundry v. City of Des Moines*, 239 U.S. 486, 491-492 (1916) ("So far as the Federal Constitution is concerned, we have no doubt the State may by itself or through authorized municipalities declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such . . . .").

Nor is it determinative that Hallco had not yet obtained a permit for its proposed landfill. The government cannot deny a landowner all reasonable use of his property and refuse to compensate him for the taking simply because his proposed use of his property requires a permit he has not yet obtained. If the government could avoid its constitutional obligation by denying permits, there would be little left to the guarantee of compensation.

A requirement that a permit be obtained before property can be used in a particular way does not preclude a landowner from having a reasonable, investment-backed expectation that he will succeed in obtaining the permit and pursue the intended use, contrary to the court of appeals' conclusion in *Hallco II*. To be sure, the uses to which a piece of property has been put historically are important in assessing the reasonableness of a purchaser's expectations,[45] but an expectation of a particular use of property is not unreasonable merely because it is new or subject to a permit requirement. Hallco appears to have anticipated correctly that obtaining a landfill permit was reasonably likely, since the Commission went so far as to issue a revised final draft permit. But the final permit never issued, and the reasons are not clear from the record before us. The record does not establish that Hallco's expectations of operating a landfill were reasonable, but neither does it establish that they were unreasonable.

Even if the record were clearer on this point, and the reasonableness of Hallco's investment-backed expectations could be better assessed, the issue of whether the County's ordinance constituted a compensable taking could not be determined without an assessment of other relevant factors. Again, whether a land-use regulation is an unreasonable restriction amounting to a compensable taking requires a careful analysis of all relevant factors and circumstances. A formulaic approach cannot be used.

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[45] *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 937 (Tex. 1998) ("Historical uses of the property are critically important when determining the reasonable investment-backed expectation of the landowner.").

One factor that must be considered is the economic impact of the ordinance on the landowner. Hallco offered evidence that its property was worth $5.2 million as a landfill but only $58,300 with the ordinance in place, and that its proposed landfill business would be worth nearly $16 million. However, Hallco never obtained a final permit to operate a landfill, so it is unclear what the ultimate economic impact of the ordinance actually was. Also, the price of acquisition and the worth of the property put to other uses must be considered. And whatever the economic impact of the ordinance on Hallco, taking into account all pertinent information, economic impact is but one factor to be considered in determining whether there was a compensable taking.

Another factor, and one especially troubling in this case, is whether the County singled out Hallco without substantially advancing legitimate public interests. Although the United States Supreme Court has made clear that this not "a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test",[46] this Court concluded in *Sheffield* that it may be a consideration in an appropriate case.[47] The County insists that it adopted the ordinance to protect the health and safety of its residents, but the record contains little solid evidence to support that assertion. The County's resolution in January 1991 recited problems that *could* result from a landfill operation, but the County does not claim to have had any evidence that they actually *would*. Rather, the County simply opposed Hallco's proposed use of its property. The operation of a landfill undeniably poses risks to surrounding areas, hence the requirement of a state permit. But the question is whether the County's ordinance was directed at the risks or at Hallco. The Commission's issuance of a revised final draft permit to Hallco over the objection of the County and others after two-and-one-half years of proceedings certainly suggests that the County's professed concerns

[46] *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 540 (2005).

[47] *Sheffield*, 140 S.W.3d 660, 674 (Tex. 2004) ("Furthermore, apart from what the Supreme Court has said, we continue to believe for purposes of state constitutional law, as we held in [*Mayhew*, 964 S.W.2d at 933-934], that the statement in *Agins* is correct: that whether regulation substantially advances legitimate state interests is an appropriate test for a constitutionally compensable taking, at least in some situations.").

lacked firm footing. The county judge conceded that when the ordinance was adopted in July 1993, the County had no scientific or technical information to support the three-mile restriction. The County has yet to point to evidence that a landfill three miles from Choke Canyon Lake was safe when one two miles or one mile from the lake was not. At this point, the conclusion is certainly reasonable that the County's decision was dictated, not by any evaluation of health or safety concerns, but by the fortuity that Hallco acquired property where it did.

The timing of the ordinance also suggests that it may have been directed at injuring Hallco rather than protecting the County. The County argues with some force that it had no reason to enact an ordinance prohibiting landfills near Choke Canyon Lake before Hallco purchased property and made its proposal in January 1991. That was the first time the issue had arisen. But the County offers no explanation for delaying adoption of an ordinance until July 1993. By that time, according to Hallco's evidence, it had spent two years and over $800,000 on Commission proceedings and the proposed landfill, and was on the verge of obtaining a final draft permit. Had the County enacted an ordinance when it first learned of Hallco's plans, Hallco might have deferred its application until it had tested the validity of the ordinance. Even if it had gone ahead, it would have done so knowing the obstacles it faced. A reasonable inference from the record before us is that the County delayed enactment of the ordinance merely to disadvantage Hallco in its proceedings before the Commission.

In *Sheffield*, the evidence was "quite strong" that the city had attempted to take unfair advantage of a developer by imposing a moratorium on development in specific response to the developer's plans, extending the moratorium long after any purpose had been served, and delaying action on the developer's plans until it could muster the votes for rezoning.[48] Although we found the city's conduct "troubling", we concluded that the delay may only have been lethargic, and that in the end the city had completed a comprehensive rezoning that arguably benefitted the entire

[48] *Sheffield*, 140 S.W.3d at 678-679.

community.[49] In the present case, by contrast, the evidence is stronger that the County's delay was ill-motivated, and there is almost no evidence whether the ordinance benefitted the County's residents or not.

Again, however, the character of the ordinance and the manner in which it was adopted are but factors to be considered in determining whether there was a compensable taking of Hallco's property. Whether a regulatory taking has occurred is, as we have said, a question of law, but it must be answered after the relevant facts have been determined. Considering the evidence of the reasonableness of Hallco's investment-backed expectations, the economic impact of the ordinance, and the singling out of Hallco without a legitimate public purpose, I would hold that the County failed to establish its entitlement to judgment as a matter of law. Because Hallco's claim under the Texas Private Real Property Rights Preservation Act is based on its constitutional claims, the County was not entitled to summary judgment on the statutory claim.[50] It, too, should be remanded to the trial court for further proceedings.

* * *

Hallco is entitled to a decision on the merits of its claims that the County's ordinance effected a compensable taking of its property. Because the Court disagrees, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: December 29, 2006

[49] *Id*. at 679.

[50] TEX. GOV'T CODE § 2007.001-.045.