

**ORAL ARGUMENT – 1/4/05**  
**02-1176**  
**HALLCO TEXAS INC. V. MCMULLEN**

BLAIS: This case presents the court with the opportunity to demonstrate that article 1, §17 of the Texas Constitution actually offers protections to landowners who are being singled out to share a substantially disproportionate share of the burden that in all justice and fairness should be shared by the public as a whole.

In adopting its ban on landfills, after Hallco had invested almost \$1 million in the permitting process in its land in McMullen county, the county has in fact singled Hallco out to bear the burden of a public benefit in grossly disproportionate share.

OWEN: You note in your briefs that the county could have adopted an ordinance early on in this process prohibiting landfills. If they had done so after Hallco had bought the property but before it had taken really any substantive steps to obtain the permit, would your position be different? Would that amount to a taking?

BLAIS: Yes. Our position would be different. The issue of significant degree of interference with investment backed expectations is one of degree. And the substantiality of the investment backed expectations is built over time and over the course of reasonable investments in a real estate project or land use project. And so at the point where Hallco had simply purchased the property and had only - not even initiated the permitting process, and had spent much less money in the permitting process and in the investigation of the property, then Hallco would be in substantially the same position as the other landowners in McMullen County when the ban was adopted. And therefore there would be no evidence of singling out. We would have a much less substantial economic impact and much less significant degree of interference with investment backed expectations. And the case would look much more like Sheffield. It would still feel troubling. The county knew when Hallco bought the property that Hallco intended to use it for a land use, and when Hallco purchased the property it was a permitted use of the property.

OWEN: After purchase, before the permit is actually given, where along that continuum do you say is a legal matter, the taking occurred?

BLAIS: That is the difficult question of course that this case presents. And I think the most straightforward resolution for this court is to make it clear to lower courts that at some point the legal line has crossed. And the degree of interference and the economic impact has in fact reached constitutional proportion.

Our proposition is, that the court can simply say, if the allegations that Hallco presented in summary judgment evidence are true, in our motion in opposition to the summary judgment motion, if those are true, then this would be on the other side of the line. The essence of

takings cases are fact intensive inquiries into the totality of the circumstances. And in Sheffield the court actually made clear that it's more fact intensive than we might have thought before, because it doesn't rely simply on the Penn Central, Mayhew factors of substantial economic impact and significant interference. But there are other factors that we...

O'NEILL: What's the status of the permit now?

BLAIS: It's pending. There is still a possibility that Hallco will be permitted. We are in fact just one contested case proceeding, or however long it takes to do the contested case proceeding, from a permit. The administrative staff of the commission, which is now the TCEQ has certified to the commission that as the permit is written this would be a safe landfill. The permit application is pending because if we prevail on our claim for compensation, the county of course well they would have to pay us temporary takings damages might abate or not apply the ordinance to us, and, therefore, we would go forward with our permit application.

In addition, we have pending a statutory claim under the Texas Real Private Property Preservation Rights Act, in which the remedy for that claim would be an injunction against the ordinance.

O'NEILL: Don't we have to presume then to find a taking here that the permit would be granted. Because if it's denied, where would that put us? What if you were to lose the contested case hearing.

BLAIS: I think not. I think that when Hallco began the initial process of permitting the land for a landfill, they had a reasonable expectation to operate a safe landfill in that location. It was an acceptable use under all of the regulatory rules that applied at the time. If the commission denies the permit it will be because it's not a safe landfill. Hallco had no reasonable expectation to operate an unsafe landfill. At the time the county adopted its ordinance, however, there is \$800,000 worth of evidence that this is in fact a safe landfill. Very little evidence, conjectural evidence that it might be unsafe.

O'NEILL: And, yet, it still took two years or so - how long was it between the enactment of the ordinance and the issuance of the final draft permit?

BLAIS: About 1-1/2 years. The ordinance was enacted in June 1993, and the final draft permit was in January 1995.

O'NEILL: Is this in the record? How can we determine that all the evidence showed it was a safe permit? There was no evidence it was unsafe. Who do we...

LAWYER: The court can take judicial notice of the fact that the commission's staff issued a final draft permit. Which is not to say that there are no risks. No land use operates without a risk. In fact every land use in this city has some sort of risk. There is a risk of a fire.

O'NEILL: We don't want to be speculative in our analysis. And if we look at the point in time, because I presume the taking would have occurred when the ordinance was enacted.

LAWYER: It's our allegation that the taking occurred when our request for a variance was denied.

OWEN: We have some jurisprudence that says, some cases that say either under the primary jurisdiction doctrine or the exclusive jurisdiction doctrine, that you've got to wait to see what the agency is going to say before you have a common law claim for example. We don't know the outcome of the agency ruling or appeal. How do we factor all that in because you don't have - this could have been contested. You could have been reversed on appeal. How do we decide there's been a taking when we don't know for sure that you would have been allowed to use this as a landfill?

LAWYER: Most takings cases proceed when the claimant actually has no permits in hand at all. Sheffield - no planned development. Mayhew - no permit. The essence of the takings claim is not that we are guaranteed to have a landfill and we are guaranteed to make a profit on it. The essence of our takings claims is, at the time we began our investment process we had a real expectation to pursue a permit...

OWEN: So what's your measure of damages?

LAWYER: As the court has made clear is the change in value of the property at the point just before the variance was denied verses the value of the property at...

OWEN: It would be a speculative value that you might get a landfill permit?

LAWYER: No. It's not speculative at all. In fact we have evidence in the summary judgment opposition motion that shows that in fact there is a land sale, which is the basis of our valuation, of a piece of property that is in the process of being permitted. And that those in fact are valuable commodities that most of the risks of whether a property will be permitted for a landfill is eliminated by the time you have the draft permit. Very early on in the process, the value of the property would be much less substantially enhanced by the investment in the permitting process.

OWEN: So can surrounding landowners in your - like the people right next door to you, now go in to the county and say these people could have gotten a permit. We could have gotten a permit. And there has been a taking because we could have done exactly what they did and now...

LAWYER: No. Not at all. At the time the ordinance was enacted those other landowners had not invested any resources in the permitting process. The act of a pre-existing ordinance doesn't constitute an inherent limitation on their title. As the SC in Palo(?) Zolo(?) said, their degree of reasonable expectation to pursue a landfill is relatively minimal. They would have an expectation to change the existing rules to their property. And the court said in Mayhew that that's not really a

reasonable expectation. So what makes this case important in the takings context is that with the encouragement of a county, Hallco changed its position with respect to its property and with respect to all the other landowners in the county, so that it had invested substantial resources in a particular land use that was lawful.

WAINWRIGHT: The \$800,00 that was invested. What is that comprised of?

BLAIS: Initially Hallco spent \$200,000 searching out appropriate property. Because the permitting process is quite risky and all operators of landfills know that you might buy a piece of property that will turn out once the scientific investigation occurs to not be geologically well suited. So there was \$200,000 in consulting fees and scientific investigation before they bought the property. \$95,000 purchase price. So about \$300,000 at the purchase. Once the permitting was initiated about \$480,000 of the remaining \$800,000 was in fact the science of the permitting. It wasn't attorneys fees. There are about \$45,000 invested in the permitting attorneys fees.

What the state has entrusted the commission to do is investigate the safety of the property. And what Hallco established in the permitting process was, as far as we can tell, after \$450,000 worth of scientific evidence and rigorous testing by McMullen county, by the City of Corpus Christi, by other interested parties in the permitting process, as far as we can tell at this point, it is a geologically safe place to put a landfill.

MEDINA: Has that testing been challenged by anybody?

BLAIS: Yes. The permitting process has been engaged throughout the process.

BRISTER: Can the county intervene in the permitting process?

BLAIS: The county is involved in the permitting process already.

BRISTER: So the county's argument that it's either safe or unsafe would be something that the commission would determine in the first instance?

BLAIS: Yes. It has been considering. And in fact, Hallco has made changes to its proposed permit. A permitting process is initiated by a landfill applicant who defines what they think are the appropriate safety constraints in the permit. The interested parties then contest whether those are in fact sufficient to guarantee the safety of whatever resource they are addressing. And we have adjusted our permit time and again...

BRISTER: My question is, is the commission process one where they just give you a yes or no, or one where they say we would approve it if you do the following three things?

BLAIS: Much more the lateral and many times over. We have been through many iterations.

BRISTER: So even if they denied it there is a good chance it would be with conditions that might be fulfilled. I assume at some cost you could make any property safe. You could put a complete concrete swimming pool with 10 foot walls and you could at some cost make any property safe.

BLAIS: That may be so. But that's not the structure of the regulator process in Texas.

BRISTER: At some point then it's not worth your client's money.

BLAIS: Not only that, but the TNRCC now the TCEQ wouldn't permit a landfill which proposes so significant risk that it would take such a structure to make it safe. And in fact that's not our permit.

WAINWRIGHT: The numbers that you explained, the \$800,00, is that in the record?

BLAIS: Yes.

OWEN: You say that the county singled out this project and that you're bearing all of the costs of having a landfill free county. What if there had been 10 other landfill projects in the county underway. Would this still be a taking?

BLAIS: It would be a substantially different case. It is possible that the county could single out ten residents to bear a substantially disproportionate share. I don't make the argument we are bearing all the costs. We are bearing a substantially disproportionate share of a public burden that in all justice and fairness should be spread across the public as a whole.

It's possible I think that the county could have singled out adversely 10 residents out of a county of 700. It seems less likely and this would go into the totality of the circumstances. We don't have that case.

OWEN: I'm trying to fit this in the takings. You say, well it's because they singled us out. And if that's true, then what difference does it make if there were 9 others or does it make a difference?

BLAIS: It may make it harder to prove that in fact we were singled out.

OWEN: What's singling out got to do with whether it's a taking?

BLAIS: In fact, I think it has everything to do with whether it's a taking. In fact, I think the Penn Central, Mayhew factors are proxies for a land use regulation, which is otherwise valid but which is directed at an individual. Art. 1, §17 remember is in the Bill of Rights. And the Bill of Rights protects individuals from government overreaching. It doesn't invalidate government action in this context. It simply says if you want to have this benefitting your county, don't impose

the burden disproportionately on identifiable individuals. In this case the fact that there is only one and not 10 lends credence to our claim that this land use restriction fails to substantially advance a legitimate government interest. In fact, the county cares about Choke Canyon, but there is no evidence in the record that Choke Canyon lake, and there is no evidence that the 3-mile radius is substantially related to protecting Choke Canyon lake. Maybe 2 miles would be close enough. Maybe 4 miles on one side depending on the geology of the land and 5 miles on the other. If we were challenging this statute on a rational basis standard, 3 miles would be close enough. But there's a requirement that a land use restriction which has such a substantial economic impact and so significantly interferes with reasonable investment back expectations, there's a requirement in this court's jurisprudence and reiterated in Sheffield that says, it has to substantially advance legitimate government interests.

O'NEILL: I'm going to presume that the county's representation of the potential success of the permit may be different from your own. And how are we to resolve that?

BLAIS: It's not relevant to this case. It's important for the case to realize that we have invested reasonably to get to the point where we have a reasonable expectation to finish the process. And whether we are denied the permit or not by the commission isn't relevant to whether the county's application of the ordinance to us by denying our variance so significantly interfered with our reasonable backed expectation that they should compensate us.

O'NEILL: You say reasonable expectation to finish the process.

BLAIS: And have it resolved on matters of safety before the commission.

O'NEILL: But you are proceeding along that line.

BLAIS: Yes. But if we don't prevail on the takings claim and the county doesn't withdraw the ordinance or \_\_\_\_\_ we will not be able to proceed. The county in fact has tried to bootstrap their ordinance into a motion to abate our...

O'NEILL: I guess where I have problems is, if we were to find a taking and that Hallco was entitled to compensation, what happens if the permit is ultimately denied?

BLAIS: If you find a taking and we're compensated we wouldn't proceed, because the ordinance would be valid and we wouldn't have an \_\_\_\_\_. What you're asking me I guess is, what our expectations are? Our expectations now are embodied in the value of the property. And our summary judgment evidence says that this property at this stage no McMullen county ordinance and a draft permit is worth \$5 million. And we could sell it for that.

O'NEILL: After Hallco won issue, it took over 2 years for Hallco to seek a variance from the ordinance. Why was that?

BLAIS: We changed counsel. We also weren't sure we wanted to fight this battle to the end. But in the end, Hallco took the county on its word. The county promised that they would seriously consider a variance request. And in the end, there was enough invested in the property and the loss was so substantial from the application of the ordinance, that we wanted to give the county a chance to abate their taking first by issuing a variance and not applying the ordinance to us. So it was an attempt to accommodate the county's contention that they shouldn't be allowed the taking because they could grant a variance if in fact it would amount to a taking.

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RESPONDENT

ALLISON: In reviewing the briefs and hearing the opening argument, the court may be struck as I am and I'm sure the citizens of McMullen county are, by the contrast in the positions of the parties in this case. McMullen county believes that it has adopted an ordinance that was authorized by statute, that substantially advanced the legitimate interests of its citizens by protecting the sole drinking water supply for itself in over 1 million people.

JEFFERSON: What is the evidence that this landfill would be unsafe with respect to the drinking water?

ALLISON: There are the opinions of experts hired by the county that are in the over 1,000 pages of record in this case. There are admissions by Hallco that the chemicals that are placed in this type of landfill, these industrial solvents and other chemicals are extremely dangerous, that they would be detrimental to a drinking water supply. There are admissions that these landfills leak. And there is substantial evidence in the record that this landfill if allowed to be placed within site of Choke Canyon Reservoir would be a substantial detriment to the drinking water supply of South Texas.

OWEN: Then why did the commission go as far as it did in permitting this?

ALLISON: The commission goes forward with setting matters for a hearing if there is a showing that there's been substantial compliance with the draft regulations. There was no finding by the commission that this would be a safe location for a landfill. There was no finding by the commission that they intended to issue a permit. A draft permit is just that. It is the basis to go forward to a contested hearing. And that's where this permit was when Hallco lost its first lawsuit challenging the ordinance. And that's where it was when Hallco suspended and requested the abatement of its permit.

BRISTER: If I go out to Lake Travis and tell them I am planning on dumping nuclear waste there, the Texas commission is going to issue me a draft permit and that the staff is going to recommend?

ALLISON: They would have and did at this time.

BRISTER: Do you think they really would do that with its Austin American Statesman lying nearby?

ALLISON: There is no question...

BRISTER: They have to issue the permit regardless of how dangerous they think it is?

ALLISON: No question. Mr. Hall went to McMullen County instead of Travis County for a reason.

BRISTER: I just want to make sure you are telling us that the commission has no opinion about safety when they issue this draft permit and go as far as they've gone in this case? They have done no analysis of safety to this date. Yes or no?

ALLISON: They have now changed the rules. And that's very important and very important that you know that. As cited in our brief the Texas legislature stopped the TNRCC from any further action on permits of this type and froze those until they adopted further regulations, which they have now done. There have been no permits issued of this type since this application was filed.

OWEN: But their argument is, at the point in time that the county passed the ordinance, that they had a market based valuable piece of property because of the money they had invested in the permitting process. Now whether they would have gotten a permit or not, they have at least evidence in a summary judgment setting that says that someone would have paid a lot more money to buy that property as it was on the date of the ordinance even though they didn't have a final permit. So if that's their argument, what difference does it make whether the commission would ever have actually granted the permit?

ALLISON: Our position is that it doesn't matter, that the county was entitled to adopt its ordinance, and the ordinance was upheld, and the ordinance was in the furtherance of a legitimate state interest, and that it was adopted for health and safety purposes, and that Hallco has no claim.

HECHT: Well there is no question that the county has the authority to adopt the ordinance. The question is, do they have to pay for it?

ALLISON: Correct.

HECHT: The government can take your property as long as it is for public purposes. The question is, do they have to pay? And one concern is what did the county know at the time that it adopted the ordinance about 1 mile verses 2 miles, verses 3 miles, then the geology and so forth?

ALLISON: And that bears upon why the county - let's look...



HECHT: What did they know?

ALLISON: They knew from expert testimony that there needed to be a buffer...

MEDINA: That was after the acquisition of this land. Correct?

ALLISON: It was after the acquisition of the land by Mr. Hall and Hallco. Hallco did not come to McMullen county and say, Oh by the way, I'm thinking about buying some land here and I want to put a landfill on it. He came and bought the land first. Then he revealed that he intended to take this 128 acres on the shores of the lake and turn it into an industrial landfill.

HECHT: In all fairness, 2 miles is a pretty long shore.

ALLISON: Yes. But you can see the lake from this property.

HECHT: But does that matter? What did the county know about what difference 2 miles made at the time it passed the ordinance? Is that in the record?

ALLISON: Yes. The expert testimony from the county's expert was that 3 miles was a reasonable buffer for the lake. And you have to take a reasonable approach. The county under the statute was required, not only if it chose to protect certain parts of the county, as it did. It was required to designate other areas where landfills would be permitted. And that's what the statute requires and that's what the county did. The county had to go through this process of determining where is the reasonable line to be drawn? And they hired experts to do that. They developed that information. They adopted their ordinance. But they told Hallco from day one by resolution and in person that we believe this is a bad idea. And if you think an industrial landfill needs to be built somewhere don't build it near the lake.

WAINWRIGHT: Why did the county then wait so long to pass the ordinance?

ALLISON: They waited to determine what was a reasonable buffer. This was not singling out just Hallco.

WAINWRIGHT: But you just said the county said from day one they thought it was a bad idea.

ALLISON: Common sense told them this is a bad idea. And then they developed a scientific basis to back it up. And that's in the record. Their experts found that a 3 mile buffer was a reasonable setback from the lake.

MEDINA: You seem like you have two different opinions. And you have their expert saying one thing, and the city's expert saying another. Isn't that in itself create a fact question?

ALLISON: It could have accept that in Hallco 1, the question of the ordinance itself has

already been litigated. Indeed the takings claim has already been litigated.

HECHT: How can that have been litigated when you took the position it wasn't right?

ALLISON: We did not take that position. That's not correct.

HECHT: So the statements in briefing is wrong?

ALLISON: The statement that the county took any position concerning ripeness, in Hallco 1, the first state court action that determined that this was a valid ordinance and that there was no taking. And that that was upheld by the CA in its first determination. There was no issue concerning ripeness in that case. The county did not object to a full adjudication of this case on the merits, and there was no reservation of any federal rights as well.

O'NEILL: My understanding was the ripeness concern was that it hadn't proceeded in state court first, and not so much that a variance hadn't been sought.

ALLISON: That's correct because a variance is not required in a case where the governmental body has made a final determination concerning the application of the ordinance. There was no issue here concerning whether or not the county had finally determined that landfills would be barred within 3 miles of the lake, and that this property was within 3 miles of the lake. Very much like Mayhew. There was no need for a variance here. The county had already made its determination.

HECHT: I don't understand that statement. The government makes determinations all the time about the height of buildings and setbacks and so on, and then they give variances. What's a variance for if it's not for that?

ALLISON: I would agree.

HECHT: So I don't understand the statement: the county had already make its determination, so there was no need for a variance.

ALLISON: The county had made the determination that it would prohibit landfills, not regulate them, not determine what type of landfill.

HECHT: The city makes a determination that it wants houses setback so far and then it gives a variance. Why couldn't it give a variance in this case?

ALLISON: The statute does not permit it. There's nothing in the statute that says that the county can grant a variance. And there's nothing in the ordinance to indicate a variance would be available. Certainly in the variance they applied for was simply a statement of, We want exception from your ordinance.

O'NEILL: Was there anything that prevented them from seeking a variance in Hallco 1?

ALLISON: If they thought a variance was applicable that's a very good point. Once the ordinance was adopted, Hallco did not come forward seeking a variance. They went directly to court. And they filed litigation challenging...

O'NEILL: But could they have sought a variance at that time, or did they need some sort of final permit in order to be able to seek a variance?

ALLISON: I don't believe \_\_\_\_\_ had any application to the ordinance whether they had a permit or not. They did not have one. So they had no right to dispose of solid waste on the property.

O'NEILL: What I'm saying is, did they need a final draft permit to be able to seek a variance, or could they have sought one?

ALLISON: If they had had a permit to construct and operate a landfill, I would certainly concede this would have been a different case.

O'NEILL: I'm trying to find out could they have sought a variance in Hallco 1, when they did not yet have a final draft permit?

ALLISON: Yes. If they thought the variance was applicable they could have sought one.

OWEN: How far down the road do you have to be to have a nonconforming use? What if this had been a proposed apartment complex and they had done site work, had scientific studies, geological studies done, hired the architects, does substantial work to get this ready to go. And then the county passed an ordinance saying no apartment projects within 3 miles of the lake. How far down the road do you have to go before you have a nonconforming use where you do owe compensation?

ALLISON: I believe you have to be at the point where you are actually put in existing, permitting use to the property. I do not believe speculation that you might someday get a permit, that you might some day be able to operate a landfill, or put up billboards on property when you have not already put them up, as in the City of Houston case, or drill for oil and gas around Lake Houston as in the Trail Enterprise case, where the city of Houston established a buffer around Lake Houston to protect it. The expenditure of money does not create an expectation of a permitted use that does not exist and that has never existed.

MEDINA: Well it existed before the ordinance was passed. Correct?

ALLISON: There has never been a landfill on this property. There has never been a landfill permitted on this property. The prior historical use was agricultural only.

MEDINA: But it wasn't unlawful until the ordinance was passed.

ALLISON: It is unlawful. Under Texas law you cannot dispose of solid waste on property without a state permit. And state law even says that the permit does not give you a property right. That the permit itself does not convey a property right.

MEDINA: So under your scenario any developer should seek permission from the city before they go invest money in property whether it's 2 miles or 4 miles from any resource?

ALLISON: They can certainly go forward at their own risk when the governmental entity has informed them that it will take all necessary action to oppose the project.

I think we would be remiss if we do not as did the CA stop and apply the Penn Central, Mayhew analysis to this case. And the initial part of that is is this a governmental action for which no compensation is required? Not every taking is a compensable taking. And this court and the federal law have upheld over the years and again as recently as last year, this court in denying the petition for review in the City of Houston case involving a billboard ordinance again stated that not every taking is compensable.

MEDINA: Does the city agree that this is a taking? Is that your position here in argument?

ALLISON: No, because we agree with the CA: you can't have a taking where there is no property right. But if you go the step further and say even if you concede that there is some form of taking here, it is not a compensable taking unless we are going to wipe away that 100 years of jurisprudence that says that there are examples of regulation for which there is not compensation required by the government. And those included several examples that the court cited in Penn Central. One of them, a Texas case involving the prohibition of the production of carbon black. Others involved cases in which there was a prohibition against the industrial use of property in a residential area. Those are specific examples where the courts have found that even though there is a regulation that diminishes the value of property if it is done for legitimate, health and safety purposes, then there is not a compensable taking. And we think that's the barrier...

OWEN: Isn't there an exception to that though? The regulatory taking, even if it's for legitimate reasons virtually destroys the value of the property, then you have to pay?

ALLISON: There certainly is in the jurisprudence about regulatory taking. But in regard to health and safety ordinances, no. The value of the property or the amount of the taking does not create the exception. But in this case, the evidence in the record is that there remains substantial value of the property.

OWEN: But that's conflicting. An appraisal report in the record says refusing the variance would cause a 99% reduction in the value. Doesn't that create a fact question that can't be

resolved on summary judgment?

ALLISON: The only issue to be resolved was whether or not the government had taken virtually all the value of the property. And the evidence in the summary judgment record is that it had not. And that's not contested here.

OWEN: Whether it's disputed or not, is there evidence in the record that says 99% of the value would be destroyed without granting the variance?

ALLISON: There is evidence in the record that this property would have substantially greater value as when used as a landfill. We think that begs the question of could it be used as a landfill. Of course the record reflects no it could not. And it cannot until they in fact - now in the present state of the law go back and start over. Under the new regulations that have been adopted by the TCEQ the old ones no longer exist and begin again to seek a permit. There is no basis right now under which they could be granted a permit to operate a landfill on that property. The Texas legislature stopped that process and required the TCEQ to adopt new regulations which they have now done, and there has been no application to reopen this permit.

BRISTER: Do you disagree that the current process for the new rules is as opposing counsel said, one where you make a proposal, the agency says well you need to do this, that and the other, and you go back and forth, or do you have just one shot at it, and if you don't get it perfectly safe you are denied and that's it?

ALLISON: No. It could go back and forth for years.

HECHT: To what extent did the county participate in the agency process?

ALLISON: The county, the City of Corpus Christi and every governmental entity petitioned and became parties in that proceeding, and were actively contesting that application at the time that Hallco lost its first lawsuit and then suspended further action, abated its permitting process.

So what we have here is a situation where the county faced with a proposal to impose a landfill in what its experts told it was a dangerous place, adopted a health and safety ordinance to protect that reservoir. As soon as they had that information that acted on it. If they had acted without that information they would have been accused of acting arbitrarily and capriciously. If they had acted any earlier before obtaining that expert information, then there would have been attacked from that side. So the county has done what it could. Hallco has proceeded now to not seek a permit for a landfill. That's not in their book at all. They are now seeking the exact money from the citizens of McMullen county for taking action that they enjoyed under the police power of this state to protect their citizens. And the CA, we believe, properly found that you have no property interest to engage in what would have been an illegal use of the property without a granted permit and that when the county acted as it did at the proper time before any permit was issued that, that was not a taking and certainly was not a compensable taking.

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## REBUTTAL

BLAIS: The county's position and the 4<sup>th</sup> courts position appear to be simply a straightforward bright line rule that unless a landowner has every permit in hand to undertake a particular use for the property, they never can raise a takings claim. Because they never have a reasonable investment backed expectation which can be interfered with. That's not the law in the State of Texas. It's not the law under the US constitution. If it were the interpretation of the Texas constitution, the Sheffield case would have been resolved by summary judgment.

O'NEILL: By the same token. If you buy property for a purpose that \_\_\_\_\_ use it for, and you know from the get go that you are going to be facing a fight all the way through, how can you have any certain sort of reasonably backed investment expectations?

BLAIS: That's exactly right. In fact, when Hallco bought the property their reasonable investment backed expectation was fairly minimal. Remember we're talking about reasonable expectations, not certainty. And so just in that sense, we have to think of this as an investment on a chance. Every land use project is an investment on a chance. When Hallco bought the property even though they had invested \$300,000, they were still very far from any kind of reasonable expectation to actually operate a landfill. And so the extent of the certainty of the permit fills in the content of the expectations. The expectations can be quite low at the beginning and they grow with the investment.

WAINWRIGHT: So if there were a letter issued by TCEQ last week that said, Hallco is likely to lose its permit. You would lose this case.

BLAIS: I'm not sure for two reasons. One, the TCEQ is bound to review our permit in the contested case scenario under the guidelines that exist. They can't change their rules in the process either. And that's statutory and it's constitutional.

WAINWRIGHT: Assuming TCEQ is not violating its rules. It jumps through the proper hoops and it issues a letter saying, On further consideration, Hallco is likely to lose its permits.

BLAIS: At the time our variance was denied this may well still have been a taking. That doesn't change the degree of interference with our current reasonable investment backed expectations at the time the variance was denied. At the time it was denied, the day before the ordinance, we could have sold this property. If that letter came before the variance was requested and denied, then a reasonable investment backed expectations would have gone down.

WAINWRIGHT: You just explained that the reasonable investment backed expectations built up over time through the effort of Hallco, the increase in the value of the property over this time. Why do we suddenly exclude a fact in that build up of expectations, whether they are a positive buildup or a negative buildup. Aren't they still part of the experience?

BLAIS: We approve all the facts. And a very relevant fact in the determination of reasonable expectations would be the safety of the landfill and the possibility of getting a permit. At the time the variance was denied, the possibility of getting a permit was not certain, but it was substantial. We had a much better chance of getting it at that time than we did when we started. And that's what the \$485,000 in engineering and \$800,000 invested.

On the other hand, if there had been other evidence. If this were a completely different case in which the chances of getting the permit were much less significant, then we might still have had a reasonable expectation. It would have been smaller and the degree of interference therefore would have been smaller. And this might look more like Sheffield. The idea of a takings claim is fact intensive and it is a continuum, and the court has recognized that. And the court has showed that most takings claims will not prevail. The counties are not at risk and the cities are not at risk of constantly being besieged with meritorious compensation claims.

O'NEILL: Could you have sought a variance right after the ordinance was enacted?

BLAIS: I think that anybody in McMullen county can seek a variance at any point.

O'NEILL: And if that's the case, and if Hallco's pleadings in Hallco 1 could have been construed to assert or have the basis for as a applied takings challenge. Why was that case not res judicata as to all these issues?

BLAIS: If this court finds that that was an applied takings challenge, which we think it wasn't, it would be res judicata. We don't think it was or could have been because it wouldn't have been futile to seek a variance and the variance requirement is mandatory for subject matter jurisdiction unless there is a finding that it's futile. And where the county asserted in their pleadings that we couldn't proceed because we had to seek a variance it would have been contrary to the facts for a court to find that it was futile.

OWEN: Even though you asserted facially an as applied claim, it wasn't ripe, so we should declare that it wasn't ripe and therefore it wasn't res judicata.

BLAIS: It wouldn't have been ripe. It wasn't ripe.

OWEN: Even though you asserted it, you are now saying we asserted an unripe claim but we need to recognize that so that res judicata doesn't..

BLAIS: Any as applied challenge that might have been brought at that time was unripe and there was no subject matter jurisdiction.

## **SIDE A RUNS OUT**

O'NEILL: ...not to seek a variance.

BLAIS: Unripe because the county had not had an opportunity to determine exactly how the ordinance would apply.

O'NEILL: Because you had not sought a variance.

BLAIS: Because we had not sought a variance.

O'NEILL: Under that scenario why couldn't you then seek another variance tomorrow and start another lawsuit? There's six years that went by between the original ordinance and now this seeking of a variance. And if it could have been sought early on, I don't understand why res judicata wouldn't bar this whole thing?

BLAIS: There's no indication res judicata that I know of that landowners are obligated to approve their claims as early as they possibly can. We had no as applied challenge until we sought a variance. Seeking a variance was an expensive undertaking. And it wasn't clear to Hallco that they wanted to try to give the county another chance to determine exactly how...

O'NEILL: But res judicata is claims that you brought or could have brought. And if you could have brought it, I don't understand why it wouldn't apply.

BLAIS: We couldn't have brought legal claim because the facts weren't there. Because we didn't undertake the variance application. The facts didn't exist for the legal claim.

O'NEILL: But that was of your own choosing. You could have sought a variance.

BLAIS: We could have sought a variance.

WAINWRIGHT: The appraisal of the property, was that dated as of the time of the denial of the variance?

BLAIS: I believe it was.