NO. _____

IN THE
SUPREME COURT OF TEXAS

CITY OF GLENN HEIGHTS, TEXAS,
Petitioner,

v.

SHEFFIELD DEVELOPMENT COMPANY, INC.,
Respondent.

On Petition for Review from the
Tenth Court of Appeals at Waco, Texas

BRIEF OF AMICI CURIAE TEXAS MUNICIPAL LEAGUE, TEXAS CITY ATTORNEYS ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

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STATEMENT OF THE CASE

Amici hereby adopt the Statement of the Case in the Petition for Review

STATEMENT OF JURISDICTION

Amici hereby adopt the Statement of Jurisdiction in the Petition for Review

ISSUE PRESENTED

1. Whether rezoning of property constitutes a regulatory taking where it substantially advances a legitimate public interest and reduces the value of the affected land by only 38%, and the land is still worth more than four times the claimant's purchase price?

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Amici Curiae respectfully submit this brief under Texas Rule of Appellate Procedure 11 in support of the Petition for Review filed by the City of Glenn Heights seeking review of a decision of the Tenth Court of Appeals at Waco. In an unprecedented ruling, the appellate court held that the City's rezoning of land from six to four lots per acre and an associated planning moratorium constitute a regulatory taking, even though the appellate court assumed that the rezoning reduced the land's value by only 38% and the land is still worth more than four times the claimant's purchase price.

INTEREST OF *AMICI CURIAE*

The Texas Municipal League is a non-profit association of approximately 1,045 Texas cities. The Texas City Attorneys Association, an affiliate of the Texas Municipal League, is an organization of more than 400 attorneys who represent Texas municipalities and local officials in the performance of their duties. The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA members include attorneys from more than 1,400 municipalities across the country, and IMLA serves as the legal voice for the nation's local governments.

Municipal officials "have long engaged in the commendable task of land use planning * * *." *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994). *Amici* thus bring a vital perspective to regulatory takings issues and have a strong interest in ensuring that takings jurisprudence remains appropriately tailored so that it does not undermine legitimate planning and other community protections. Because the appellate court ruling presents a grave threat to reasonable land-use planning, *Amici* respectfully request this Court to grant the petition for review.

STATEMENT OF FACTS

Amici hereby adopt the Statement of Facts in the Petition for Review.

SUMMARY OF THE ARGUMENT

It is no exaggeration to say that the appellate court's ruling in this case sets forth one of the most radical and destructive readings of the Taking Clause ever rendered. The court of appeals held that the challenged rezoning worked a taking even though it

assumed that the land lost just 38% of its value and is worth more than four times what the claimant paid for it just a few years ago. To our knowledge, no other court in Texas or anywhere else in the country has ever found a compensable taking on facts similar to these. The ruling ignores both the plain meaning of the Takings Clause and decades of constitutional precedent.

ARGUMENT

If allowed to stand, the ruling below would have a severe, adverse impact on Texas takings jurisprudence and municipal land-use planning:

- The appellate court's ruling -- which assumes just a 38% value loss -- threatens to open the floodgates to takings challenges, regardless of whether the claimant will continue to make profitable use of the property.

- Under the challenged rezoning, Sheffield Development Co. may continue to build homes on its land on one-quarter-acre lots, a common minimum lot size for single-family-home subdivisions. If 1/4-acre zoning can work a taking, landowners will likely challenge all manner of land-use controls, no matter how well accepted.

- In its expectations analysis, the appellate court's ruling effectively rewrote Texas's vested rights statute to create a compensable vested right where a municipality fails to notify a landowner that it is considering a change to existing zoning. No other jurisdiction in the country has adopted such a one-sided, anti-municipal vested rights doctrine.

Unless reversed, the appellate court ruling will improperly inject the judiciary into the minutiae of the municipal land-use process as landowners bring takings challenges to all kinds of land-use controls, even where the land retains substantial economically viable use and remains profitable. *Compare Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998) ("courts should not assume the role of a super zoning board").

I. The Challenged Rezoning Is Not a Taking Because It Does Not Even Come Close to Approximating a Physical Appropriation of Property.

In ruling that a regulatory taking may occur where land value is reduced by just 38% and the land is still worth more than four times the claimant's purchase price, the appellate court improperly disregarded the plain language of the Takings Clause and decades of controlling precedent, thereby placing itself far outside the mainstream of takings jurisprudence of the U.S. Supreme Court, this Court, and other federal and state courts across the country.

In *Mayhew v. Town of Sunnyvale*, this Court recognized that land-use regulations may work a taking where they "either 1) deny landowners of all economically viable use of their property or (2) unreasonably interfere with landowners' rights to use and enjoy their property." *Mayhew*, 964 S.W.2d at 935. The first prong of *Mayhew* refers to per se takings under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and the second prong refers to non-per se takings analyzed under the multifactor test articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *See Mayhew*, 964 S.W.2d at 935-36 (discussing *Lucas* and *Penn Central*). The U.S. Supreme Court recently reaffirmed this two-pronged approach in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2457 (2001).

When deciding whether a land-use control unreasonably interferes with property rights under the *Penn Central* prong, a court should consider the economic impact of the challenged regulation. *Mayhew*, 964 S.W.2d at 935-36. In discussing the extent of economic impact needed to establish a regulatory taking, the *Penn Central* Court stressed

that takings rulings "uniformly reject the proposition that diminution in value, standing alone, can establish a taking." *Penn Central*, 438 U.S. at 131. The Court cited cases in which no taking was found despite value losses exceeding 75%. *See id.* (citing *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) (no taking despite a 75% value loss) and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no taking despite a 92.5% value loss)); *accord*, *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (no taking despite a 46% value loss, citing *Euclid* and *Hadacheck*); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (no facial taking where new zoning allowed only 1 to 5 homes on a 5-acre tract).

Consistent with these precedents, this Court has held that a land-use regulation did not have a sufficiently severe economic impact to work a taking merely because it allegedly eliminated the land's profitability. *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994) (the Takings Clause "does not charge the government with guaranteeing the profitability of every piece of land subject to its authority"). *A fortiori*, a regulation's economic impact is not severe enough to constitute a taking where, as here, the remaining value is more than four times the claimant's purchase price. *E.g.*, *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999) (three-fold increase in value over 11 years "undermines Forest's contention that its property was taken").

These rulings flow directly from the U.S. Supreme Court's insistence that in regulatory takings cases, a court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County Reg'l Planning Comm'n v.*

Hamilton Bank, 473 U.S. 172, 199 (1985). In other words, even under the *Penn Central* multi-factor inquiry, land-use controls constitute a taking only in the most "extreme circumstances." *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 126 (1985). No taking was found in *Euclid*, *Hadacheck*, *Agins*, and *Concrete Pipe* -- notwithstanding significant value loss -- because the overall economic impact fell short of the "extreme" value loss that constitutes the functional equivalent of an appropriation.

The reason for this relatively circumscribed application of the Takings Clause is plain: the Takings Clause by its terms applies only to takings of property. Prior to the U.S. Supreme Court's landmark ruling in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (citations omitted). "[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *Id.* at 1028 n.15. This narrow, original application flows from the text of the Takings Clause itself, which applies only where private property is "taken," a term that most naturally refers to a physical appropriation of property. *See* Fred Bosselman, et al., THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL 51 (1973) ("The word 'take' ordinarily refers to the act of obtaining possession or control of property, and although there are many other usages of the word none of them seems descriptive of governmental regulation of the use of land.")

In *Mahon*, of course, the Court held that land-use regulation may constitute a taking. *Mahon*, 260 U.S. at 415. But, with due fidelity to the text and original

understanding of the Takings Clause, the Court has carefully confined the doctrine of regulatory takings to restrictions that closely approximate physical appropriation. In *Mahon* itself, the Court found that the mining ban at issue worked a taking because "[t]o make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id*. at 414. As noted above, sixty years later the Court reaffirmed that in regulatory takings cases, a court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County*, 473 U.S. at 199.

Just last month, the Supreme Court of Colorado provided an excellent analysis of the issue in *Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners*, -- P.3d --, 2001 WL 1598634 (Colo. Dec. 17, 2001) (en banc). After reviewing the relevant precedents, the Colorado Supreme Court in *Animas* concluded, "it is apparent that the level of interference must be very high" for a taking claim under *Penn Central* to succeed. *Id*. at *6 (emphasis added). The *Animas* court ruled that to prevail under *Penn Central*, a claimant "must show that it falls into the rare category of a landowner whose land has a value slightly greater than de minimis but, nonetheless, given the totality of the circumstances, has had its land taken by a government regulation." *Id*. at *7.

The *Animas* court drew this "slightly-greater-than-de-minimis" standard from several sources. It observed that "the likely purpose of the fact-specific test is to provide an avenue of redress for a landowner whose property retains value that is slightly greater than de minimis," citing *Lucas*'s discussion of the *Penn Central* factors in response to

concerns that its per se rule does not cover a landowner whose property is diminished in value by 95%. *Id*. at *6. The *Animas* court also relied on *Euclid*, *Hadacheck*, and *Agins* as examples of cases finding no taking notwithstanding significant value losses and interference with investment-backed expectations. *Id*. The *Animas* court concluded that the *Penn Central* test provides "a safety valve to protect the landowner in the truly unusual case," *id*., one where the land retains "a value slightly greater than de minimis." *Id*. at *7.

Courts from virtually every jurisdiction that has addressed the issue are in accord. *See* City's Petition for Review (citing representative rulings from the highest courts of multiple jurisdictions); *see also Jengten v. United States*, 657 F.2d 1210 (Cl. Ct. 1981) (no taking where regulation allowed development of 25% of the claimant's land); *Walcek v. United States*, 49 Fed. Cl. 248, 271 (2001) ("it stretches the concept of partial taking too far to say that a diminution on the order of 60 percent or less has the effect of a taking."); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 346 (N.J. 2001) ("The overwhelming weight of authority from the federal courts and other state courts * * * requires that a plaintiff demonstrate deprivation of all or substantially all economically beneficial uses of property to sustain a claim for a temporary taking."). Tellingly, neither Sheffield nor the appellate court cites a single case ruling that a taking occurred based on a value loss even close to 38%.

Sheffield relies on *Yancey v. United States*, 915 F.2d 1534 (1990), but *Yancey* involved a 77% loss in value (*id*. at 1539), more than twice the value loss assumed by the appellate court in the case at bar. Moreover, *Yancey* involved highly unusual facts, a

government quarantine to control avian influenza which forced the claimant to sell a healthy turkey breeding stock for slaughter for 33 cents on the dollar. *Id*. at 1534-36. *Yancey* is plainly an outlier but whatever its merits, its atypical facts and far more severe value loss cannot be used to justify the appellate court's extraordinary ruling here.

The appellate court's explanation for its ruling that a 38% value loss can give rise to a taking is contained in a singular, circular sentence: "To hold otherwise would be to allow the government to take almost 40% of the value of property without having to pay compensation, as long as the taking substantially advanced a legitimate governmental interest." *City of Glenn Heights v. Sheffield Develop. Co.*, 2001 WL 1299437, *9 (Tex. Ct. App. 2001). This meaningless tautology plainly fails to justify the court's disregard of decades of takings precedent that limits the compensation requirement in regulatory takings cases to the functional equivalent of a physical appropriation.

II. The Court of Appeals Improperly Used the Role of Expectations in Takings Jurisprudence to Rewrite Texas Law on Vested Rights.

In ruling that the rezoning worked a compensable taking despite the land's continuing profitability and a mere 38% value loss, the appellate court placed great weight on the City's failure to advise Sheffield that city officials were considering the rezoning. *Glenn Heights*, 2001 WL 1299437 at *11 ("no one ever advised Sheffield that the city council was anticipating downzoning"). When combined with the holding that a 38% value loss can give rise to a taking, the lower court's expectations analysis in effect created a new vested rights provision in Texas that gives landowners a compensable property interest when a municipality fails to apprise a potentially affected landowner of

possible changes to existing zoning. No jurisdiction in the country has ever adopted such a radical, anti-municipal vested rights measure.

Under a proper expectations analysis, the lack of interference with reasonable expectations generally defeats a takings claim. *E.g. Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984) (lack of interference with reasonable expectations "is so overwhelming * * * that it disposes of the taking question"). As explained by the U.S. Court of Appeals for the Federal Circuit, landowners who buy with knowledge of a land-use restriction assume the risk of any subsequent economic loss caused by the restraint, and the market likely has discounted the land's purchase price to account for the restraint. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994). In these circumstances, requiring compensation for the restraint under the Takings Clause would result in an unfair windfall recovery for the landowner at the taxpayers' expense. *Id*.

On the other hand, where a landowner shows that the challenged regulation interferes with reasonable expectations, that showing does not dispense with the need to show that the restraint is the functional equivalent of an appropriation. Otherwise, virtually every new land-use control would be subject to challenge as a taking. The land-use measures challenged in *Euclid*, *Hadacheck*, *Agins*, and *Concrete Pipe* all involved restraints that interfered with the claimant's expectations, but nonetheless they passed constitutional muster because the economic impact did not constitute the functional equivalent of an appropriation. As noted in *Penn Central*, "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for

development is quite simply untenable." 428 U.S. at 130. Sheffield's extraordinary takings claim is equally untenable and warrants review by this Court.

III. The Court of Appeals Improperly Applied a Due Process Test to Rule that the Planning Moratorium Worked a Compensable Taking.

The U.S. Supreme Court currently is considering the takings implications of a planning moratorium in *Tahoe Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 121 S. Ct. 2589 (2001) (mem. granting cert.). The Court heard oral argument in *Tahoe* on January 7, 2002, and it will issue a ruling before its Term ends this Spring. This circumstance alone counsels in favor of a grant of review to ensure that the appellate court's ruling regarding the City's moratorium is consistent with the new guidance that will be provided by the *Tahoe* ruling.

Additional reasons also strongly warrant review of the appellate court's moratorium ruling. The court held that a portion of the City's moratorium worked a taking because that portion of the moratorium purportedly failed to advance a legitimate public interest. In so ruling, the court cited language in *Mayhew* that supports the use of such a means-end inquiry under the Takings Clause. *Mayhew*, in turn, relied on *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), for the proposition that land-use regulation works a taking where it fails to advance a legitimate public purpose. *See Mayhew*, 964 S.W.2d at 933 (citing *Agins*). *Amici* agree with the City that the appellate court erred in concluding that the City's moratorium failed to advance a legitimate public purpose.

Equally important, just one month after this Court decided *Mayhew*, a majority of Justices on the U.S. Supreme Court expressly disavowed the *Agins* means-end test as an

appropriate standard to determine takings liability. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Court considered the constitutionality of the federal Coal Industry Retiree Health Benefit Act. Justice Kennedy concluded that the statute as applied to the claimant violated the Due Process Clause, but he wrote separately to emphasize that it did not work a taking. He stressed that the *Agins* means-end inquiry is "in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the Government's power to act." 524 U.S. at 545 (Kennedy, J., concurring in the judgment and dissenting in part). He observed that the *Agins* means-end inquiry results from "imprecision" in regulatory takings doctrine and, at best, "equivocal" precedents. *Id*. at 545-46 (citing *Agins* and other cases). Justice Kennedy concluded that in evaluating the reasonableness of regulations, including their means-end fit, "the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." *Id*. at 545.

Justice Breyer and three other Justices in dissent agreed that the reasonableness of legislative determinations is governed by the Due Process Clause, not the Takings Clause: "[T]he plurality views this case through the wrong legal lens. The Constitution's Takings Clause does not apply." *Id*. at 554 (Breyer, J., with whom Stevens, Souter, and Ginsburg, JJ., join, dissenting). Agreeing with Justice Kennedy that the *Agins* means-end test has no appropriate place in takings jurisprudence, these four Justices emphasized that "at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." *Id*. There is "no need to

torture the Takings Clause" to consider the means-end fit of government regulation because these issues find their "natural home in the Due Process Clause, a Fifth Amendment neighbor." *Id*. at 556.

To be sure, the five Justices who disavowed the *Agins* means-end test and found no taking in *Eastern Enterprises* did not author a majority opinion; Justice Kennedy concluded that the statute in question violated the Due Process Clause, thereby providing the critical fifth vote to invalidate the measure. Nevertheless, the five-justice vote against takings liability in *Eastern Enterprises* constitutes binding precedent. *See Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 658-59 (3d Cir. 1999) ("[t]here are five votes against the plurality's Takings Clause analysis" and lower courts "are bound to follow the five-four vote against the takings claim * * *."); *see also Pheasant Bridge,* 777 A.2d at 343 n.1 (discussing the disavowal of the *Agins* means-end standard by Justice Kennedy and the four dissenting Justices in *Eastern Enterprises*).

The U.S. Supreme Court has never applied the *Agins* means-end test to find a taking. Indeed, courts have basically ignored the *Agins* means-end standard as a test of takings liability. *See Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 390 (1988) ("no court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced"). The reason is clear: The Takings Clause "is designed * * * to secure compensation in the event of *otherwise proper* interference amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis added).

Moreover, the compensation requirement set forth in the Taking Clause applies only where the taking is for "public use." Where regulation fails to advance a public use, it makes no sense to require the taxpayers to pay compensation, for they receive nothing in return. The appropriate remedy would be invalidation (and perhaps actual damages) under the Due Process Clause, not fair rental value or other market-based compensation under the Takings Clause.

The case at bar provides this Court with a much-needed opportunity to revisit the assertions in *Mayhew* regarding the *Agins* means-end test in light of the subsequent disavowal of that test by five Justices of the U.S. Supreme Court in *Eastern Enterprises*.

PRAYER

Amici respectfully request that this Court grant the City's Petition for Review, reverse the court of appeals' judgment, enter a judgment in favor of the City, and grant such other relief, general or special, at law or in equity, to which the City of Glenn Heights may be justly entitled.

Respectfully submitted,