No. 08-0159

IN THE SUPREME COURT OF TEXAS

CITY OF HOUSTON, TEXAS,

PETITIONER,

v.

MAGUIRE OIL COMPANY, et al.,

RESPONDENTS.

On Petition for Review from the
Fourteenth Court of Appeals at Houston, Texas
Cause No. 14-05-01272-CV

BRIEF OF AMICI CURIAE THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER CITY OF HOUSTON

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INTRODUCTION

The TEXAS MUNICIPAL LEAGUE and the TEXAS CITY ATTORNEYS ASSOCIATION, acting under authority of Rule 11 of the Texas Rules of Appellate Procedure, hereby submit their brief as *amici curiae* in support of the position of the Petitioner, City of Houston.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

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

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

TML and TCAA share a strong interest in promoting a reasonable interpretation of regulatory takings jurisprudence that balances the legitimate governmental interest in protecting city residents with the rights of property owners and assures that a city council – if it so desires – has the opportunity to make necessary adjustments to municipal regulations to protect the city from astronomical damage awards.

No fee was paid for the preparation of this brief.

STATEMENT OF JURISDICTION

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

ISSUE PRESENTED

Whether a city should be liable for a regulatory taking if the claimant has not sought and obtained from the city's policy-making body a final decision regarding the application of a regulation to his property.

STATEMENT OF FACTS

Amici Curiae adopt the statement of facts contained in the Petition for Review.

SUMMARY OF THE ARGUMENT

A city should not be subjected to potential liability on a regulatory takings claim exceeding $100 million unless the elected city council has been provided the opportunity to make a final decision regarding the application of the regulation to the property at issue. The court of appeals' opinion concludes that an employee's initial disposition of a permit application serves as the "final action" that ripens a regulatory takings claim. In the present case, however, the City of Houston has procedures in place for an appeal from this type of administrative decision. In such

a case, allowing a plaintiff to pursue a regulatory takings claim without first pursuing relief before the governmental unit to be sued is contrary to both settled precedent and sound public policy. Maguire Oil should be required to seek relief from the Houston city council prior to proceeding with its regulatory takings claim.

ARGUMENT AND AUTHORITIES

A city should not be subjected to potential liability exceeding $100 million unless its elected city council is first provided the opportunity to make a final decision regarding the application of a regulation to the property at issue.

Mayhew v. Town of Sunnyvale holds that a regulatory takings claim is ripe only if the governmental unit that has been sued has made "a final decision regarding the application of the regulations to the property at issue." 964 S.W.2d 922, 929 (Tex. 1998). That holding is supported by sound public policy.

The claim in the present case exceeds $100 million. If the claimants were to prevail, those funds would come from the citizens of the City of Houston. Any potential payout of such vast sums of taxpayer dollars should be predicated on a city council's final decision to risk a finding of liability on a takings claim rather than modify its regulations to allow a proposed use of property. Some city councils may believe that certain regulations are worth the costs to the taxpayers,

while others may wish to modify their regulations to ameliorate the financial exposure. With respect to any particular regulation, however, the final authority to balance the benefits and risks associated with its application to a specific land use proposal should remain with a city's elected city council. As this Court has concluded, a city should have "an opportunity to grant different forms of relief or make policy decisions which might abate the alleged taking." *Id.* at 929-30.

Such an approach is wholly consistent with that adopted in numerous other jurisdictions. Indeed, the ripeness doctrine as applied in *Mayhew* has also been vetted in both federal and state courts around the country, and all require that any case before them be "ripe" for adjudication.

The U.S. Supreme Court has ruled that a regulatory takings claim is ripe only when the local governmental body has reached a final decision on how much development it will permit on the subject property. Although development of the final decision ripeness requirement has occurred primarily in the federal courts, state courts generally apply the same reasoning. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928-29 (Tex. 1998); *Hensler v. City of Glendale*, 876 P.2d 1043, 1049 (Cal. 1994); *Ward v. Bennett*, 592 N.E.2d 787, 789-90 (N.Y. 1992); *Williams v. City of Central*, 907 P.2d 701, 707-08 (Colo. Ct. App. 1995); *Long Beach Equities v. County of Ventura*, 282 Cal. Rptr. 877, 891-92 (Ct. App.

1991).

As the U.S. Supreme Court stated in *Williamson County Regional Planning Commission v. Hamilton Bank*, "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." 473 U.S. 172, 186 (1985). The final decision requirement is borne out of the Takings Clause of the U.S. Constitution:

> [O]nly a regulation that "goes too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, results in a taking under the Fifth Amendment, *see, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 ("[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.").

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 734 (1997). A takings claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Comm'n*, 473 U.S. at 191.

A takings claim is unripe where the "potential for ... administrative solutions" remains. *Id.* at 187. In *MacDonald, Sommer & Frates v. Yolo County*, a developer submitted an application to subdivide acreage into 159 lots for development of single family houses. 477 U.S. 340, 347 (1986). The county planning commission rejected the plan. *See id.* The developer immediately sued for a taking. The U.S. Supreme Court held that the suit was premature: "Until a property owner has 'obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property,' it is impossible to tell whether the land [retains] any reasonable beneficial use or whether [existing] expectation interests [have] been destroyed." *Id.* at 349 (quoting *Williamson County Regional Planning Comm'n*, 473 U.S. at 186, 190). The Court found that the county's action "leave[s] open the possibility that some development will be permitted." *Id.* at 352. The Court required the property owner to submit at least one more application to test the limits of the county's regulation before the courts would consider the county's position final. *See id.* at 348-49, 351-52.

The property owner bears a heavy burden to show that a public agency's decision denying an application is final and authoritative. The owner's showing must be "clear, complete, and unambiguous" that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be

put." *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989). A court is not required to – and should not – accept at face value a plaintiff's claim that no further development will be allowed. If the developer has submitted only one application and the agency has not permanently foreclosed development, then the takings claim is unripe. *See Landmark Land Co. of Okla., Inc. v. Buchanan*, 874 F.2d 717, 721 (10th Cir. 1989).

In *Suitum,* the U.S. Supreme Court affirmed that local governments have a "high degree of discretion" to regulate land use. *See Suitum,* 520 U.S. at 1667. The Court stated: "[L]ocal agencies charged with administering regulations regarding property development are singularly flexible institutions; what they take with the one hand they may give back with the other." *Id.* Although the Court indicated in *Williamson County* and *MacDonald* that a property owner must submit at least one application and apply for at least one variance to ripen a takings claim, the Court in *Suitum* emphasized that a claim is unripe unless the agency has no further discretion to allow some development of the property. *See id.* at 738.

With respect to the dispute before this Court, the Houston City Council *did have the discretion* to allow some pursuit of the minerals underlying the property. Moreover, Section 31.30 of the City of Houston's Code of Ordinances clearly provides that:

> In the event the building official should deny the applicant a permit to drill or deepen a well, an appeal to the city council may be made by such applicant by filing written notice of appeal with the city council. Such appeal shall be heard by the city council within thirty (30) days after the filing date.

Maguire Oil, however, did not seek review of the permit revocation and thus did not secure a final decision from the city.

The factual background of the present case is long and storied, and there is some dispute as to which section of the City of Houston Code applies to the permit at issue. The city has clearly briefed its position, and TML and TCAA support that interpretation, which conforms to the clear intent to vest city council with final authority over the issuance of drilling permits. Apparently, Maguire Oil sought meetings with various city officials and was frustrated by the lack of a response. But Maguire Oil ultimately failed to seek redress from the Houston City Council. That failure precludes the present claim.

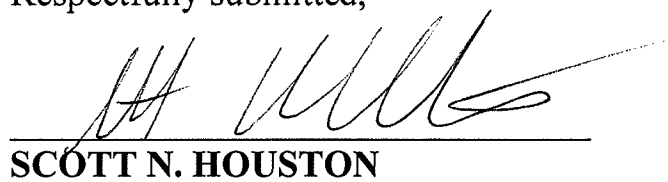
CONCLUSION AND PRAYER

Texas is in the midst of a gas well drilling boom. Many cities, as well as other governmental units, have taken steps to protect the public from the adverse effects of drilling activities. Whether a takings claim will lie in any particular case

will depend on the facts. However, when a city ordinance offers an appeal to city council from the decision of an administrative official and an applicant does not avail himself of that appeal, it is bad public policy to conclude the claim is ripe and allow the applicant to pursue recovery for a regulatory taking. The Court should grant the city's Petition for Review to correct the court of appeals' erroneous holding and provide Texas cities with certainty that they will be subjected to potential liability for takings claims *only* as a result of policy decisions by their governing bodies.

TML and TCAA, as *amici curiae*, thus respectfully request that this Court grant the City of Houston's Petition for Review, reverse the court of appeals' opinion and judgment, and affirm the trial court's grant of the city's plea to the jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April 2008, a true and correct copy of the **Brief Amici Curiae of the Texas Municipal League and the Texas City Attorneys Association in Support of Petitioner City of Houston** was sent by First Class U.S. Mail to all parties of record as follows:

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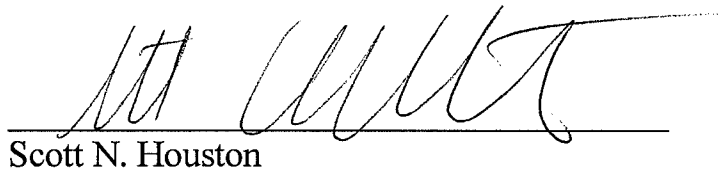

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