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 O'NEILL delivered the opinion of the Court as to Parts I, II, III.B, and V, joined by CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE BRISTER, and JUSTICE JOHNSON, and an opinion as to Part III.A and IV, joined by CHIEF JUSTICE JEFFERSON, JUSTICE BRISTER, and JUSTICE JOHNSON.

JUSTICE HECHT delivered a dissenting opinion, joined by JUSTICE MEDINA and JUSTICE WILLETT.

JUSTICE GREEN did not participate in the decision.

Hallco Texas, Inc. contends McMullen County's denial of a variance from an ordinance prohibiting the location of landfills within three miles of a water-supply reservoir effected an unconstitutional taking of property. We hold that Hallco's claim is barred and thus affirm the court of appeals' judgment.

I. Background

In January 1991, Hallco bought 128 acres of land located about 1.75 miles from Choke Canyon Reservoir, sometimes referred to as Choke Canyon Lake, in McMullen County. The

reservoir impounds water from the Frio River and supplies water to the City of Corpus Christi and a number of other communities in the region. Hallco purchased the property with the intent to operate a Class I nonhazardous industrial waste landfill, a use requiring a permit from the Texas Commission on Environmental Quality[1]. Class I industrial waste may include waste that, because of its concentration or physical or chemical characteristics, "is toxic, corrosive, flammable, a strong sensitizer or irritant, or a generator of sudden pressure by decomposition, heat, or other means," and which may pose a potential danger to human health or the environment. TEX. HEALTH & SAFETY CODE § 361.003(2)(A), (B); 30 TEX. ADMIN. CODE §335.1(18)(18). Class I nonhazardous is distinct from Class I hazardous waste, but "is considered potentially threatening to human health and the environment if not properly managed, because of the constituents and properties this class can include," and thus requires special handling. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, GUIDELINES FOR THE CLASSIFICATION AND CODING OF INDUSTRIAL AND HAZARDOUS WASTES 2 (2005), *available at* http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/rg/rg-022_476238.pdf. In the course of Hallco's purchase, the company's president discussed Hallco's plans for the property with the McMullen County Judge, who voiced opposition. Eleven days after Hallco purchased the property, the McMullen County Commissioners Court adopted a resolution expressing opposition to the proposed use as a potential hazard to local water supplies. Despite the County's disagreement, Hallco proceeded with plans to develop the property as an industrial-waste landfill, and on July 27, 1992, formally filed its application with the Texas Commission on Environmental Quality.

In June 1993, the County enacted the ordinance at issue here pursuant to section 364.012 of

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[1] At the time, the agency was known as the Texas Natural Resource Conservation Commission. In 2002, the agency's name was changed to the Texas Commission on Environmental Quality, *see* 27 Tex. Reg. 8340 (2002), to which we will refer in this opinion.

the Health and Safety Code. While Texas counties generally enjoy fairly limited zoning authority, that provision allows a county to prohibit municipal or industrial solid-waste disposal that presents a threat to the public health, safety, and welfare, so long as the county designates an area in which disposal is permissible. TEX. HEALTH & SAFETY CODE § 364.012(a), (b).[2] McMullen County's ordinance prohibits the disposal of solid waste within three miles of Choke Canyon Lake, but allows disposal in any other area of the county so long as applicable state requirements are met. MCMULLEN COUNTY ORD. NO. 01-06-93. Although the County had conducted no technical studies at the time the ordinance was passed, the ordinance's predicatory provisions state that "a safe and abundant supply of drinking water is necessary to preserve and protect the health and welfare of the citizens of McMullen County;" that "soil in the area of the lake is porous and subsurface materials tend to be unstable and volatile;" that "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 that "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." *Id.* Neither the Health and Safety Code nor the ordinance establish any procedure to obtain a variance from the landfill prohibition.

By the time the County passed the ordinance, Hallco claims it had invested more than $800,000 in the site and the Commission permitting process. The Commission issued a "final draft permit" in January 1995, and a "revised final draft permit" a little over a month later. A final draft permit reflects permit conditions recommended by the Commission's staff after completion of its technical review, but the permit's issuance may still depend on the outcome of a contested-case

[2] In 1999, the statute was amended to prohibit counties from adopting an ordinance for which a permit application was pending. TEX. HEALTH & SAFETY CODE § 364.012(e).

hearing. *See* 30 TEX. ADMIN. CODE § 80.118(a)(1). The County, the City of Corpus Christi, the Nueces River Authority, and several others appeared in the Commission proceedings and raised objections to Hallco's application. Hallco's application apparently remains pending at the Commission.[3]

In June 1995, Hallco challenged the County's ordinance by filing suit in the federal district court; it also filed a parallel proceeding in state court. The federal court dismissed Hallco's substantive due-process and equal-protection claims with prejudice, holding that the ordinance was rationally related to a legitimate governmental purpose. 934 F. Supp. 238, 241–42 (W.D. Tex. 1996). In doing so, the court described an "Issues List," prepared by the Office of Public Interest Counsel and attached as an exhibit to the County's briefing, as "aptly illustrat[ing] that the safety of this proposed project is at least 'fairly debatable.'" *Id.* at 241. The court dismissed without prejudice Hallco's claim alleging an unconstitutional taking in violation of the Fifth Amendment to the United States Constitution, holding that to ripen its federal takings claim Hallco first had to seek compensation through procedures the state had established. *Id.* at 240. The court rested that decision upon *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), which requires a party alleging a Fifth Amendment taking to obtain a final decision regarding application of the challenged regulation to its property, and to first use any available state procedure to obtain just compensation. The court noted that it was "arguable whether Hallco meets the first condition," bypassing Hallco's argument that the ordinance "constitutes a final decision because it

[3] In 2003, the Legislature enacted legislation requiring the Commission to adopt rules governing all aspects of the management and operation of new commercial nonhazardous industrial solid waste landfills, and directed the Commission to suspend processing pending applications until it adopted such rules. Act of May 27, 2003, 78th Leg., R.S., ch. 1117, §§ 2-3, 2003 Tex. Gen. Laws 3207, 3208. The Commission adopted rules in March 2004.

. . . does not expressly provide any means for obtaining variances from the provisions."[4] *Id.* at 240. Instead, the court held that Hallco's Fifth Amendment claim was premature because Hallco had not sought compensation under article I, section 17 of the Texas Constitution. *Id.*

A week after the federal court's dismissal, the County moved for summary judgment in the state court action. With respect to Hallco's takings claims, the County argued that Hallco had no claim for compensation under either the state or federal constitution because Hallco had no cognizable property interest in disposing of waste on its property. The County argued, alternatively, that the ordinance was a reasonable exercise of police power that did not deprive Hallco of all economic use of its property. The County also moved for summary judgment on Hallco's equal-protection, due-process, contracts-clause, and state statutory causes of action. The trial court granted the County's motion as to all claims without specifying the grounds. *Hallco Texas, Inc. v. McMullen County*, 1997 WL 184719, *6 (April 16, 1997) (not designated for publication) ("*Hallco I*").

The court of appeals affirmed the trial court's judgment, holding that "Hallco's takings claim must fail because [Hallco] did not have a cognizable property interest of which the government could deprive [it]." *Id.* at *2, 3. The court reasoned that "the Legislature has defined when property owners may dispose of solid waste on their property via the permitting process" under sections 361.061–361.345 of the Texas Health and Safety Code, and stated that,

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[4] The County responded to Hallco's final-decision argument that,

> [e]ven if there were a futility exception, at least one application for variance would be required to establish futility. Contrary to Plaintiff'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.

Case No. 95-L-22, United States District Court for the Southern District of Texas, Laredo Division, *Defendants' Replies to Both Plantiff's [sic] Motion to Stay Based on Abstention Principles and Plaintiff's Amended Response to Defendant's Motion to Dismiss with Brief in Support.*

> [e]ven if Hallco already had a permit, by definition, it would not have a property interest in disposal of solid waste. [Commission] regulations define permits as not being a property interest or a vested right . . . . 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 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.

Id. at *3 (citations omitted). The court of appeals' judgment issued April 16, 1997, and Hallco did not appeal that decision.

More than two years after the court of appeals' judgment and nearly six years after the ordinance was enacted, Hallco submitted a request for a variance to the McMullen County Commissioners Court. Hallco offered no changes to its proposed landfill. Instead, Hallco's request claimed the ordinance had no scientific basis and alleged the County had singled out Hallco and its property for disparate and unfair treatment. Attached to the request was an appraiser's assessment of the ordinance's economic impact on Hallco. Hallco asked the County to issue a variance permitting it to operate the proposed facility "notwithstanding the provisions of the County's Ordinance." The County permitted Hallco to make a presentation on the request to the Commissioners Court, but took no action on Hallco's request.

Two months later, Hallco filed the lawsuit underlying this appeal. Hallco expressly disavowed any challenge to the ordinance's validity. Instead, Hallco alleged that by denying its variance request the County had taken, damaged, or destroyed Hallco's property for public use in violation of article I, section 17 of the Texas Constitution. Hallco also alleged that the County had taken its property without just compensation in violation of the Fifth Amendment to the United States Constitution. Hallco purported to reserve the federal takings claim for prosecution in the federal courts, citing *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964);

Jennings v. Caddo Parish School Board, 531 F.2d 1331 (5th Cir. 1976); *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992); and *Guetersloh v. State*, 930 S.W.2d 284 (Tex. App.—Austin 1996, writ denied). Hallco later amended its petition to assert a claim under the Texas Private Real Property Rights Preservation Act, which allows property owners to sue for certain governmental actions that result in an unconstitutional taking or restrict the use of property so as to reduce its value by at least twenty-five percent. TEX. GOV'T CODE § 2007.021. Hallco alleged that, as a result of the County's action, it had sustained property-loss damages of $5,141,700, business-loss damages of $15,811,700, and permit-expense damages of $821,706.

In August 2001, the County moved for summary judgment on all of Hallco's claims. The County again argued that Hallco had no constitutionally protected property right to use its land for solid-waste disposal, and that even if it did, the County reasonably exercised its police power. The County also asserted that Hallco's claims were all barred by res judicata because they were or could have been raised in the first state lawsuit. Finally, the County argued that the statute of limitations and laches barred Hallco's claims. The trial court again granted the County's motion without specifying the grounds, and the court of appeals affirmed. *Hallco Texas, Inc. v. McMullen County*, 94 S.W.3d 735 (Tex. App —San Antonio 2002) ("*Hallco II*"). The court of appeals reaffirmed its prior holding that Hallco had no constitutionally protected property interest in the disposal of solid waste on its property, thus defeating Hallco's takings claim whether it was framed as a facial or an as-applied challenge. *Id.* at 738–739. The court also held that, regardless of whether Hallco's federal takings claim was ripe when *Hallco I* was decided, "the issue of whether a taking had occurred under either federal or state law was ripe," and Hallco had failed to reserve its right to return to federal court in the prior lawsuit. *Id.* at 739. We granted Hallco's petition for review.

II. Parties' Arguments

A. Takings Overview

Article I, section 17 of the Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed or applied to public use without adequate compensation being made . . . ." TEX. CONST., art. I, § 17. Absent a cognizable property interest, a claimant is not entitled to compensation under article I, section 17. *Tarrant County v. Ashmore*, 635 S.W.2d 417, 422 (Tex. 1982). Although our takings provision is worded differently than the Takings Clause of the Fifth Amendment to the United States Constitution, we have described it as "comparable" and the parties here agree that it is appropriate to look to federal cases for guidance. *Sheffield Devel. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004). Both provisions recognize that, while "'all property is held subject to the valid exercise of the police power,'" a regulation may, under some circumstances, constitute a taking requiring compensation. *Id*. at 670 (quoting *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984)). "Physical possession is, categorically, a taking for which compensation is constitutionally mandated . . . ." *Id.* at 669–70 (citing *Tahoe-Sierra Pres. Council Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)). Regulatory action short of physical confiscation or invasion may also result in a taking. *Id.* A regulation that deprives a property owner of all economically beneficial or productive use of the property "makes the regulation categorically a taking." *Id.* at 671. Lesser interferences, however, may also result in a taking. These types of regulatory actions require an "essentially ad hoc, factual inquir[y] . . . ." *Id.* at 672 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

A regulation may go so far in imposing public burdens on private interests as to require

compensation. *Id.* at 672. In deciding whether regulatory action goes "too far," we carefully weigh "all the relevant circumstances," including:

> (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.'"

Id. at 670-72 (quoting *Connolly v. Pension Benefits Guar. Corp.*, 475 U.S. 211, 225 (1986) (quoting *Penn Central*, 438 U.S. at 124))). The extent of the governmental intrusion may be a question for the trier of fact, but whether the facts constitute a taking is a question of law. *Id.* at 673 (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932-33 (Tex. 1998)).

B. The Parties' Contentions

Hallco contends the court of appeals misanalyzed its takings claim by holding that, as a matter of law, Hallco could not lodge a regulatory takings challenge against the County ordinance solely because it had not yet obtained an industrial waste-disposal permit. According to Hallco, a landowner *always* has a reasonable investment-backed expectation in pursuing a development project that was lawful when the land was purchased and need not demonstrate that it has secured all necessary permits in order to pursue a takings challenge. Moreover, Hallco complains, the court of appeals improperly elevated one relevant factor — the landowner's investment-backed expectations — to a dispositive threshold inquiry, contrary to *Mayhew* and *Penn Central*. This analysis, Hallco maintains, transformed a nuanced, fact-specific inquiry into the type of formulaic approach the Supreme Court has repeatedly cautioned against. Hallco points out that the landowners in *Penn Central*, *Sheffield*, and *Mayhew* all lacked permits necessary for development, and claims the court of appeals' approach would preclude almost every conceivable takings challenge. Hallco acknowledges this Court's statement in *Mayhew* that "[t]he existing and *permitted* uses of the

property constitute the 'primary expectation' of the landowner that is affected by regulation." *Mayhew*, 964 S.W.2d at 936 (emphasis added). But according to Hallco, the Court "obviously meant that courts should look to existing land use restrictions applicable to the property when determining whether a regulation interferes with reasonable investment backed expectations."

Hallco also contends the court of appeals erred in affirming summary judgment on its as-applied Fifth Amendment takings claim. Hallco claims it followed the appropriate procedure to secure federal review of that claim by expressly reserving it in its petition, *Guetersloh,* 930 S.W.2d at 289–90, and the court of appeals incorrectly reasoned that the reservation was ineffective because Hallco did not reserve its federal claim in *Hallco I*. According to Hallco, it is litigating its as-applied challenge for the first time. Hallco claims the as-applied challenge was not ripe when *Hallco I* was litigated because no particularized application of the ordinance to Hallco's property had been made. Hallco contends the County's position now, that res judicata bars its claim, is entirely inconsistent with its position in the prior federal suit that the County's claim was not ripe under *Williamson County*'s final-decision requirement. Because the trial court would not have had subject-matter jurisdiction over the claim, Hallco argues, it cannot be barred by res judicata, and for similar reasons the County's affirmative defenses of collateral estoppel, laches, and limitations must fail. Finally, Hallco contends the court of appeals erred in affirming summary judgment because by denying Hallco a variance from the ordinance, the County imposed a substantial public burden on Hallco which, in all fairness and justice, should be borne by the public as a whole. Hallco contends that it "was singled out by the Commissioners' Court to bear the entire cost of the county's choice to remain free of landfills . . . ." Hallco claims that it presented unrefuted summary-judgment proof that the ordinance decreased the value of its property by ninety-nine percent and it had a distinct investment-

backed expectation that it would be able to use its property to operate a solid-waste-disposal facility when it received its permit from the Commission.

The County responds that it acted well within its police power by passing and enforcing the ordinance to protect the County's main source of drinking water. According to the County, it was entitled to explore its options to protect its citizens by first participating in the Commission permitting process before enacting the ordinance, and its ordinance is presumptively valid. Moreover, the County asserts, Hallco had no property interest in disposing of solid waste on its property because it never had a right to such a use; state law prohibits the disposal of solid waste without a permit, and Hallco cannot assert an investment-backed expectation on the speculative premise that it *might* obtain a permit. If that were the case, the County argues, then every property owner within three miles of Choke Canyon Reservoir would have a similar takings claim. But even if Hallco had a cognizable property interest, the County claims, the ordinance was not an unreasonable interference. Government is not required to ensure that a landowner can make the most profitable use of its property, and the County presented summary-judgment proof that other reasonably profitable uses of the property are available to Hallco. In any event, the County argues, res judicata bars all of Hallco's claims because the elements of Hallco's "facial" and "as-applied" claims are the same and were fully adjudicated in *Hallco I*. The ordinance created a prohibition, not a regulation, the County argues, and Hallco's submission of a variance changed nothing. The County maintains that under Hallco's theory, Hallco could revive an already adjudicated claim any number of times simply by submitting additional variance requests.

III. Analysis

A. Res Judicata

We begin by considering the County's res-judicata argument because, if meritorious, it is dispositive of this appeal. The doctrine of res judicata, or claim preclusion, bars a second action by parties and their privies on matters actually litigated in a previous suit, as well as claims "'which, through the exercise of diligence, could have been litigated in a prior suit.'" *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 799 (Tex. 1992) (quoting *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 631 (Tex. 1992)). We apply the transactional approach to res judicata, which requires claims arising out of the same subject matter to be litigated in a single lawsuit. *Barr*, 837 S.W.2d at 631. The *res-judicata* doctrine "serves vital public interests" by promoting the finality of judgments. *San Remo Hotel, L.P. v. San Francisco*, 545 U.S. 323, 345 (2005). We have recognized that the doctrine prevents needless, repetitive litigation, *John G. and Marie Stella Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 288–89 (Tex. 2002) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)), and in doing so, "advance[s] the interest[s] of the litigants (who must pay for each suit), the courts (who must try each suit), and the public (who must provide jurors and administration for each suit)." *Schneider Nat'l Carriers, Inc.*, *v. Bates*, 147 S.W.3d 264, 278 (Tex. 2004).

Hallco contends res judicata does not apply because Hallco's claim in the previous suit was a facial constitutional challenge to the ordinance while this suit challenges the County's particular application of the ordinance to its property, and its as-applied takings claim was not ripe in *Hallco I* because it had not sought a variance from the ordinance. However, neither of these arguments circumvents res judicata's application in this case.

Hallco argues that its as-applied and facial takings claims are distinct and therefore the adjudication of one cannot bar assertion of the other. Whether or not a cognizable distinction may be drawn between Hallco's takings claims, of course, does not answer the question of whether res

judicata bars its as-applied challenge here. Certainly a contract claim is distinct from one based in tort, but if the claims arise out of the same subject matter and can be brought together they cannot be asserted separately. *See Getty*, 845 S.W.2d at 798. Hallco contends its as-applied takings claim was not ripe in *Hallco I* because it had not sought a variance, and the federal court dismissed its claim for that reason. Hallco mischaracterizes the federal court's decision, however. While the federal court noted that it was "arguable" whether Hallco's suit was ripe under *Williamson County*'s final-decision requirement, it plainly based its ruling on the ground that an inverse condemnation suit had not been concluded in state court. *Hallco Texas, Inc.*, 934 F. Supp. at 240 (citing *Williamson County*, 473 U.S. 172 (1985)). But that the as-applied challenge was not ripe for federal adjudication under *Williamson County* does not mean that it wasn't ripe for adjudication in the then-pending state action. The ripeness of the state claim cannot be measured by the ripeness of Hallco's federal claim since a federal claim is not ripe until state court proceedings have been concluded; if federal and state claims ripen at the same time, then neither could ever get started.

In determining whether Hallco's present as-applied challenge was ripe for adjudication in the prior litigation, it is helpful to examine the underpinnings of the ripeness requirement in takings litigation. In an as-applied challenge, requiring a claimant to pursue a variance or otherwise test the regulation's application in order to ripen the claim allows the factfinder to measure the extent of the regulation's economic impact so that the takings claim may be adequately assessed. In *Williamson County*, for example, the planning commission disapproved a developer's proposed plat for eight specific reasons, including density and grade problems, the length of two cul-de-sacs, the grade of certain roads, lack of fire protection, main-access road disrepair, and problems with minimum frontage. *Williamson County*, 473 U.S. at 181. The developer filed a takings suit claiming that it

could only build 67 units if it designed the development to meet the commission's objections, which was 409 fewer than the developer claimed it was entitled to build. *Id*. at 182. The planning commission's expert, though, testified that a 300-unit development could be designed that would overcome the commission's objections. *Id*. The Supreme Court concluded that the developer's takings claim was not ripe because, without further inquiry and the developer's pursuit of potential variances from the commission's specific objections, it was not possible to determine how the regulations would ultimately be applied, making it impossible to discern what the economic impact of the challenged action would be or the extent to which it would interfere with the developer's reasonable investment-backed expectations — two key inquiries in a regulatory-takings claim. *Id*. at 190–91.[5] Thus, assessment of the regulations' economic impact depended upon determining the optimum use that the commission would ultimately allow after considering the developer's proposals to meet the commission's concerns.

Unlike *Williamson County*, this is not a case in which a general zoning or land-use restriction was subject to discretionary application or variance. In such cases, the impact on a particular property may not be ripe until a variance is finally denied. *See, e.g., Williamson County*, 473 U.S. at 186; *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex. 1998). But this was no zoning ordinance; the ordinance here prohibited precisely the use Hallco intended to make of this property, and nothing in the ordinance suggested any exceptions would be made. Hallco's taking claim was ripe upon enactment because at that moment the "permissible uses of the property [were] known to a reasonable degree of certainty." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). The factors

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[5] The Court noted that the developer's expert witness who testified about the regulations' economic impact did not itemize the effect of each of the commission's eight objections, and thus concluded the jury was "unable to discern how a grant of a variance from any one of the regulations at issue would have affected the profitability of the development" or "whether [the developer] 'will be unable to derive economic benefit' from the land." *Id*. at 191.

necessary to assess the ordinance's economic impact and the reasonableness of Hallco's investment-backed expectations were fixed in the prior litigation, and Hallco has made no claim that those elements were impacted any differently by its variance request. The facts relevant to Hallco's present takings claim — the County ordinance's wholesale prohibition, the manner in which it would be applied, and the nature of the damage suffered — were all evident in the prior suit, and Hallco's requested variance proposed no new or different application. Although styled a "variance request," Hallco's request was nothing more than a demand for the County to reconsider what had been its position all along. Under these circumstances, Hallco's facial and as-applied challenges were the same regardless of how Hallco chose to frame its pleadings, and res judicata bars another bite at the apple.

B. Unappealed Prior Judgment

Moreover, the legal ground upon which the court of appeals resolved Hallco's prior takings claim would preclude both an as-applied and a facial takings challenge, yet Hallco chose not to appeal the *Hallco I* decision. Specifically, in *Hallco I* the court held that Hallco did not have a protected property interest in the disposal of solid waste and therefore there could be no taking as a matter of law. 1997 WL 184719 at *3. Whether or not the court of appeals was correct in deciding that Hallco had no compensable interest, that holding is dispositive and not subject to collateral attack; claim preclusion inheres regardless of whether the prior decision was correct. *Purcell v. Bellinger*, 940 S.W.2d 599, 602 (Tex. 1997). If Hallco wished to challenge the court of appeals' decision, it could have filed an appeal, which it chose not to do.

We have emphasized the strong policies discouraging *seriatim* litigation on several recent occasions. For example, we have rejected the notion that parties may elect whether to assert a

temporary or permanent nuisance, noting that "claimants cannot opt for an indefinite limitations period or a series of suits whenever they would prefer." *Schneider*, 147 S.W.3d at 281–82; *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 647 (Tex. 2000) (noting that single-action rule is a species of res judicata designed to "prevent[] vexatious and oppressive litigation"). In *Pustejovsky*, we declined to apply the single-action rule to a mesothelioma claimant who had earlier brought an action for asbestosis. 35 S.W.3d at 652. We noted that, while both asbestosis and mesothelioma result from asbestos exposure, they are distinct conditions. *Id.* We reasoned that the "transactional approach set out in *Barr* does not necessarily penalize a plaintiff for not bringing a claim arising out of the same facts that nonetheless could not have been litigated in the initial action." *Id.* at 651. Pustejovsky's mesothelioma claim was not barred because, as a practical matter, he could not have proven that he would get the disease to a reasonable medical probability in the previous action. *Id.* at 652. In contrast, the takings claim asserted in *Hallco I* sought compensation for the same injury asserted here, and the elements of both an as-applied and facial challenge were fixed and known in the prior litigation.

We are sympathetic to Hallco's contention that the County improperly singled it out to bear a public burden by acting to defeat its permit application through regulation rather than the permit process. 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. But even if a governmental entity may effect a taking by advancing an illegitimate purpose, as Hallco claims,[6] there was nothing to prevent Hallco from asserting in the

[6] We note that the United States Supreme Court recently held that whether a governmental action substantially advances a legitimate state interest is not an appropriate test to evaluate takings claims under the Fifth Amendment to the United States Constitution. *Lingle v. Chevrolet*, 544 U.S. 528, 532 (2005).

prior litigation that the County targeted its property unlawfully, and the final judgment in *Hallco I* bars that claim here.

For similar reasons, the *Hallco I* final judgment bars Hallco's claim under the Private Real Property Rights Preservation Act. TEX. GOV'T CODE § 2007.001–.045. The Act allows private real-property owners to sue political subdivisions for certain governmental actions that require compensation under the Fifth or Fourteenth Amendments to the United States Constitution or article I, sections 17 or 19 of the Texas Constitution. TEX. GOV'T CODE § 2007.021. Those actions include the adoption or enforcement "of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure." *Id.* at §§ 2007.003(a)(1), (4). The Act applies only to ordinances proposed on or after September 1, 1995, or to enforcement actions initiated on or after the same date. Private Real Property Rights Preservation Act, 74th Leg., R.S. ch. 517, § 6, 1995 Tex. Gen. Laws 3266, 3272. Because the County's ordinance was enacted before the Act's effective date, the statute can only apply if, as Hallco argues, the rejection of its variance request on September 13, 1999, constituted an enforcement action. But even if rejecting a variance comes within the statute's enforcement-action purview as Hallco claims, Hallco failed to assert its variance request in the prior litigation and cannot resurrect the Act's protections here.

IV. Fifth Amendment Taking Claim

Finally, Hallco claims it properly reserved its as-applied Fifth Amendment takings claim, which it may now assert. We disagree. As the United States Supreme Court has recently made clear, the final judgment in *Hallco I* also bars Hallco's Fifth Amendment takings claim. *See San Remo Hotel, L.P.*, 545 U.S. 323. In *San Remo Hotel,* owners of a hotel asserted a federal takings claim against the City and County of San Francisco after the California courts ruled against them on their

state constitutional takings claim. The Supreme Court held that the full-faith-and-credit statute, 28 U.S.C. § 1738, required the federal court to give preclusive effect to the California judgment. *Id.* at 347–48. Section 1738 requires the federal courts to give "the same full faith and credit [to judicial proceedings] as they have by law or usage in the" state courts, 28 U.S.C. § 1738, and "has long been understood to encompass the doctrines of res judicata . . . and collateral estoppel." *San Remo*, 545 U.S. at 336. In *San Remo Hotel*, the petitioners attempted to reserve their federal takings claim for resolution in federal court, just as Hallco attempted to do here. *Id.* at 337–42. The Court acknowledged that the petitioners could have reserved a federal claim that was distinct from an antecedent state action capable of mooting a federal issue under *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964). But the Court emphasized that "[t]he purpose of the *England* reservation is not to grant plaintiffs a second bite at the apple in their forum of choice." *Id.* at 346. Because the hotel owners had argued in state court that a development-fee ordinance on its face and as applied failed to substantially advance a legitimate governmental purpose and imposed an undue economic burden, they were not entitled to reserve their federal takings claim for adjudication in federal court. *Id.* at 341. The Court acknowledged that the petitioners' federal claims were not ripe until they sought relief under state law. *Id.* at 346. But, the Court said,

> [a]t base, petitioners claim amounts to little more than the concern that it is unfair to give preclusive effect to state-court proceedings that are not chosen, but are instead *required* in order to ripen federal takings claims. Whatever the merits of that concern may be, we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum.

Id. at 347. While *San Remo* concerned the application of collateral estoppel, rather than res judicata, nothing in the Court's opinion suggests that it would recognize an exception to the full-faith-and-credit statute when state law would apply res judicata or collateral estoppel principles to bar a second claim. To the contrary, the Supreme Court has broadly construed the statute to require "all federal

courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Because we hold that Hallco's as-applied challenge is barred, its Fifth Amendment claim is similarly barred and Hallco's reservation is immaterial. Accordingly, the court of appeals did not err in affirming summary judgment on Hallco's federal takings claim.

V. Conclusion

We affirm the court of appeals' judgment.

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Harriet O'Neill
Justice

OPINION DELIVERED: December 29, 2006