IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

HAL MCKINNEY, Individually and as Managing Member of Ardent 1, LLC, Plaintiff,	§	
v.	§	**CIVIL ACTION NO. W-15-CV-335**
CITY OF ROCKDALE, TEXAS, Defendant.	§	

ORDER

Plaintiff brings this action under the provisions of 42 U.S.C. § 1983, asserting that Defendant has passed an unconstitutional ordinance which prevents him from establishing drilling operations within its city limits. Defendant has moved for summary judgment. Although Plaintiff filed an initial response to the summary judgment motion, he was then granted two extensions to conduct discovery and provide any proof to dispute Defendant's summary judgment proof. Plaintiff's deadline has passed, and he has filed nothing additional in response to Defendant's motion.

Having considered the parties' briefs, summary judgment proof, and the applicable legal authority, the Court is persuaded Defendant's motion is meritorious and should be granted.

I. SUMMARY JUDGMENT

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A disputed material fact is genuine if the evidence is such that a jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). The initial burden to demonstrate the absence of a genuine issue concerning any material fact is on the moving party. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). Upon such a showing, the burden shifts to the non-moving party to establish that there is a genuine issue. *Id.* at 324. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. In the event the non-moving party fails to respond to a properly filed motion for summary judgment, the court is permitted to accept the movant's facts as undisputed. *Eversley v. Mbank Dallas*, 843 F.2d 172, 174 (5th Cir. 1988).

II. BACKGROUND

Many of the underlying facts are not in dispute and are outlined in Plaintiff's complaint. Plaintiff owns property and mineral leases within the city limits of the City of Rockdale. He has been attempting to establish drilling operations similar to other

operations which already exist within the city limits. Plaintiff made known his intention to sink stripper wells on his property to the Mayor, City Council and responsible city department heads. He had an expectation of gaining profit from the stripper well operation. Plaintiff asserts that he has been prevented from realizing the profit he intended due to a city ordinance regulating drilling within the city limits.[1] Plaintiff asserts that the City's actions constitute a taking without just compensation under the U.S. Constitution, the Texas Constitution and Bill of Rights, Section 43.002 of the Local Government Code, and Chapter 245 of the Local Government Code.

Plaintiff specifically identifies only one ordinance as legally infirm -- Ordinance No. 6.05.001 passed in 1997, which designated the entire city as a no-drilling zone. Plaintiff, however, contends that various other unidentified ordinances, rules, regulations and plans have been enacted and enforced since 2007, all of which impact Plaintiff's plans to drill on his property. Plaintiff notes that the city invoked a six-month moratorium on no new drilling, which was renewed every 6 months, in order to give the false impression that work was being done to revise the no-drilling ordinance.

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[1]Plaintiff's complaint appears to challenge only Ordinance No. 6.05.001, but further refers to other unidentified "ordinances, rules, regulations, and plans" enacted by the City since 2007. Plaintiff specifically notes, however, that he is not challenging the most recent regulation, Ordinance 2015-12-14 (7A). To the extent Defendant's motion requests dismissal or summary judgment under Ordinance 2015-12-14 (7A), it is denied as moot.

Plaintiff filed a notice with the Clerk of the City of Rockdale in October 2014 which outlined the damages he has suffered. Plaintiff contends that his property has been devalued in excess of 25% due to the City's ordinances, rules, regulations and plans, and that his reasonable expectation of earning revenue from the investment in his property and mineral interests has been diminished.

Plaintiff asserts that the City's actions constitute a taking without just compensation under the Federal and Texas constitutions, a violation of due process and equal protection, and a violation of various Texas statutes.

As previously noted, Plaintiff was given additional time to provide whatever summary judgment proof challenged the proof presented by Defendant. Plaintiff has filed nothing beyond his original response to Defendant's motion. As a result, the uncontroverted summary judgment proof presented by Defendant establishes the following:

The City of Rockdale is a home-rule municipality located in Milam County, Texas. Since at least 1948, the City has regulated the drilling of oil and gas wells within the city limits. *See* Ex. A.1. In 1957, the City revised the ordinance regulation the drilling of oil and gas well. Defendant's Exhibit A.2. The 1957

> The City of Rockdale is a home-rule municipality located in Milam County, Texas. Since at least 1948, the City has regulated the drilling of oil and gas wells within the city limits. *See* Ex. A.1. In 1957, the City revised the ordinance regulating the drilling of oil and gas wells. *See* Ex. A.2. The 1957 ordinance prohibited, among other things, wells within 150 feet of an adjacent lot or land owner absent a special permit from the Texas Railroad Commission. The 1957 ordinance also prohibited the drilling of a well within 100 feet of any building without the consent of the owner of such building.

The City relies on subsurface water wells for its municipal water supply. In 1990, over concerns for the protection of the City's water supply, the City began to work on a new wellhead protection ordinance regulating the drilling of wells within the City limits. In August of 1990, an extensive report titled "City of Rockdale (A Public Water Supply Protection Strategy)" was prepared by a geologist from the Texas Water Commission and an engineer from the Texas Department of Health. *See* Ex. A.3. The report inventoried potential sources of ground water contamination, including oil and gas activities. The report includes the following findings:

> Although the [Railroad Commission of Texas] prohibits oil and gas operators from causing or allowing the pollution of surface or subsurface water in the state, incidents of accidental flow line breaks, tank leaks or overflows, spills by salt water haulers and other similar problems are not completely unavoidable because of mechanical or electrical failures. Sixteen (16) active or inactive oil wells and one oilfield-related, above-ground storage facility were inventoried within the wellhead protection areas (Appendix C). *Id.* at 5–6.

Also in 1990, an inventory of the City's Wellhead Protection Areas was completed by the Texas Natural Resource Conservation Commission. *See* Ex. A.4. The inventory included active and inactive oil wells within the wellhead protection areas.

In January of 1991, the City passed its Wellhead Protection Ordinance. *See* Ex. A.5. The stated purpose of the ordinance was to prevent the pollution of the City's water supply and to promote the health, safety, morals, and general welfare of the community and the safe, orderly, and healthful development of the City. *See id.* While the preamble to the ordinance addresses water wells specifically, the actual language of the ordinance makes clear that "the provisions of this article shall apply to *all* wells or other openings greater than 10(feet) in depth." *Id.* § 6 (emphasis added). The 1991 Ordinance required, among other things, a permit from the City to construct such a well or opening.

On November 21, 1996 the City passed an ordinance adopting and enacting a new code of ordinances. *See* Ex. A.6. The 1957 ordinance regulating oil and gas wells was re-codified as §§ 4.104–4.108 and the 1991 Wellhead Protection Ordinance was re-codified as §§ 4.201–4.231 of the new code. *Id.*

On December 28, 2001, the City passed an amendment to § 4.206 of the Wellhead Protection Ordinance. *See* Ex. A.7. In this amendment, the

following language was added to the 1991 Ordinance: "No person shall drill a well within the City limits. **Drilling for minerals shall be strictly prohibited**." (emphasis added). The amendment further provided that:

> Section 4.206 of the Rockdale Code of Ordinances is hereby amended in its entirety and all ordinances or parts thereof conflicting or inconsistent with the provisions of this ordinances as adopted and amended herein, are hereby amended to the extent of such conflict. In the event of a conflict or inconsistency between this ordinance and any other code or ordinance of the city, the terms and provisions of this ordinance shall govern.

By this language, the 2001 amendment effectively repealed the 1957 ordinance providing for permits to drill oil and gas wells, as well as any other portion of the Wellhead Protection Ordinance that might have ostensibly allowed for permits for new oil and gas wells. In 2012, the Rockdale Code of Ordinances was again reorganized. The Wellhead Protection Ordinance was moved to §§ 6.05.001–6.05.031 and the 1957 drilling ordinance was formally removed from the Code. *See* Ex. A.8.[1]

On November 10th, 2008, after receiving inquiries on oil and gas leasing within the City, the City Council passed a temporary moratorium on the issuance of permits authorizing the drilling of oil and gas wells within the City. *See* Ex. A.9. The moratorium was subsequently extended by the City Council several times. *See id.* The moratoriums simply served to further emphasize the absolute ban on drilling for minerals within the city limits as contained in § 6.05.006 (formerly § 4.206) of the City's code of ordinances.

In 2015, partly in response to HB 40 pending in the Texas legislature, the City began working on developing a new ordinance regulating the drilling of new oil and gas wells within the city limits. A citizen's task force was created by the City Council as part of the City's development of the new ordinance. The new ordinance, titled "Above ground Regulation of Surface Activity Related to Drilling and Production," was passed by the City Council on December 14, 2015, with an effective date of December 24, 2015. *See*

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[1]Plaintiffs' pleadings refer to an Ordinance No. 6.05.001 that was passed in 1997. It is assumed for purposes of this Motion that Plaintiff is referring to the Wellhead Protection Ordinance that was originally passed in 1991, re-codified in 1996, amended in 2001, and re-codified again in 2012 as 6.05.001, et seq. An "Exhibit A", while referred to in Plaintiffs' pleadings, was not attached to the Original Complaint. A document labeled "Exhibit A" was produced by Plaintiffs in response to the City's discovery requests (*see* Ex. D.1 to this Motion) and is in fact the 1991 Wellhead Protection Ordinance, including the 2001 amendments.

> Ex. A.10. The new ordinance requires any person wanting to engage in and operate in oil or gas production activities to apply for and obtain a Surface Permit from the City. *Id.* § 4.06.005(a). Applications for proposed drill sites that are 300 feet or less from buildings and parks shall be rejected. *Id.* § 4.06.007(b). Applications for drill sites more than 300 feet from such areas may be granted by the City Inspector if other requirements of the ordinance are met. *Id.* The ordinance provides an appeal process to the City Council if a permit application is rejected. *Id.* §§ 4.06.007(e), 4.06.007(c), and 4.06.020. The ordinance further provides that any person that believes action taken pursuant to the new ordinance would legally constitute a taking of property without just compensation must file an application with the City Council to request a takings determination. *Id.* § 4.06.021. The City Council then has the authority to grant the relief requested or otherwise attempt to cure the action causing the takings, if it chooses. *Id.*

Defendant's Motion for Summary Judgment, pp. 2-6.

It is clear that the most recent Ordinance is not the Ordinance Plaintiff is challenging, but rather one that has effectively been repealed.

III. DISCUSSION

Defendant argues that Plaintiff's claims are barred by limitations, specifically those related to a "takings" under the U.S. Constitution and the Texas constitution. Because Congress has not adopted a statute of limitations for actions brought under 42 U.S.C. § 1983, the limitations period is determined by reference to the appropriate state statute of limitations. *Bd. of Regents of the Univ. of N.Y. v. Tomanio*, 446 U.S. 478, 483-484, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1990). While state law determines the appropriate limitations period, which is two years in Texas, federal law controls when a § 1983 claim accrues. *Harris v. Hegman*, 198 F.3d 153,

156-57 (5th Cir. 1997); *Moore v. McDonald*, 30 F.3d 616, 620 (5th Cir. 1994); Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a).

In a "takings" case, a claim accrues, or is ripe, when the plaintiff establishes the requirements found in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). *See Severance v. Patterson*, 566 F.3d 490, 496 (5th Cir. 2009). First, the appropriate government agency must have reached a final decision regarding the application of the allegedly unconstitutional regulations to the property at issue. *Williamson County*, 473 U.S. at 186. Second, the plaintiff must "seek compensation through the procedures the State has provided for doing so." *Id.* at 194. If a state offers recovery for an unconstitutional takings through inverse condemnation proceedings, as does Texas, then "the plaintiff must first use that procedure before coming to a federal court." *Nashville Texas, Inc. v. City of Burleson, Texas*, 2011 WL 4435317 (N.D.Tex. Sept. 23, 2011). See Williamson County, 473 U.S. at 195 ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.").

Plaintiff in this case has no federal cause of action because he has not filed a state court case for inverse condemnation and received a final ruling. Assuming, however, that Plaintiff has adequately addressed the inverse condemnation proceeding by filing such a claim in this lawsuit, then his claim would be without merit

because the Ordinance of which he complains was passed in 1997. He did not pursue his inverse condemnation proceeding until November 19, 2015 when he filed this action. This is more than eight years after the 10-year limitations period for such claims had passed. It would certainly violate judicial economy if Plaintiff were to return to state court to present an inverse condemnation claim which was barred.

Plaintiff has additionally framed his claims to present violations of "equal protection"' and "due process." As all of Plaintiff's claims arise from the same facts, they would likewise be barred by limitations.

Plaintiff makes no claim that he has been treated differently than any other group by the passage of the Ordinance. Nor does he identify himself as a member of a suspect or quasi-suspect class to which a heightened scrutiny would apply. Therefore, as with his due process claim, the test would be whether there was a rational relationship between the passage of the Ordinance and a legitimate governmental objective. *Texas Manufactured Hous. Ass'n v. City of Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996), cert. Denied, 521 U.S. 1112, 117 S.Ct. 2497, 138 L.Ed.2d 1003 (1997). In this case, the legitimate governmental objective at issue was the protection of local ground water. Such an undertaking has been identified as a legitimate government interest. *See City of Houston v. Trail Enterprises, Inc.*, 377 S.W.3d 873, 878 (Tex.App.–Houston [14th Dist.] 2012, *rehearing en banc denied* Oct. 2, 2012, *review denied* Oct. 18, 2013, *rehearing of petition for review denied*

Feb. 14, 2014 and *cert. denied*, 136 S.Ct. 76 (Oct. 6, 2014)). *See* Defendant's Exhibit A.3 for specific findings.

To the extent Plaintiff has raised a separate procedural due process claim, it is likewise barred because it involves a legislative act. "When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process – the legislative process." *Cnty. Line Joint Venture v. Grand Prairie*, 839 F.2d 1142, 1144 (5th Cir.), *cert. denied*, 486 U.S. 890, 109 S.Ct. 223, 102 L.Ed.2d 214 (1988). The challenges to such laws must be based on their substantive compatibility.

Finally, Plaintiff has failed to present sufficient facts to establish violations of Texas statutes. There is no violation of the Texas Private Real Property Preservations Act as it does not apply to actions by a municipality except for those which have effect only in the extraterritorial jurisdiction of the municipality or when the municipality enacts or enforces and ordinance that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality. Tex. Gov. Code § 2007.003. The Ordinance at issue in this case applies only to drilling within the city limits. The act further provides that suit must be filed no later than the 180th day after the date the land owner knew or should have known that the governmental action restricted or limited the owner's right in the property. Plaintiff's complaint indicates that he has known of the City's refusal to allow drilling for at least nine years.

Section 43.002 of the Texas Local Government Code also does not apply to the facts of the case because Plaintiff presents nothing to indicate that the property at issue was annexed by the City subsequent to his acquisition of it or that the City attempted to prohibit a continuing use of the property after annexation. Also, Chapter 211 of the Texas Local Government Code is inapplicable because the ordinances at issue in this case are not zoning ordinances. Finally, Chapter 245 of the Texas Local Government Code does not apply because Plaintiff has never applied for a permit from the City. Chapter 245 only applies to approval, disapproval, or conditional approval of an application for a permit. Accordingly, it is

ORDERED that the Defendant's Motion for Summary Judgment is **GRANTED**. It is further

ORDERED that any additional motions not previously ruled upon by the Court are **DENIED**.

SIGNED this 13 day of June, 2016.

WALTER S. SMITH, JR.
United States District Judge

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JUDGMENT

In accordance with the Court's Order granting Defendant's Motion for Summary Judgment, the Court enters its Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff **TAKE NOTHING** in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any relief not specifically granted in this Judgment is **DENIED**.

SIGNED this 13th day of June, 2016.

WALTER S. SMITH, JR.
United States District Judge