

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

RICHARD CLIFTON,	:	Case No. 10-1196
	:	
Plaintiff/Appellant,	:	On Appeal from the Clinton
	:	County Court of Appeals
vs.	:	Twelfth Appellate District
	:	
VILLAGE OF BLANCHESTER,	:	
	:	
Defendant/Appellee.	:	

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**APPELLEE VILLAGE OF BLANCHESTER'S MEMORANDUM IN OPPOSITION TO  
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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## I. INTRODUCTION

The primary issue raised by this appeal – whether a nonresident contiguous property owner has standing to pursue his claim against an adjacent political subdivision in an action seeking to receive compensation for its decision to rezone property within its own jurisdictional boundaries – does not implicate a substantial constitutional question nor does it represent a matter of public or great general interest. A secondary issue – whether, assuming standing, a diminution in value of adjacent real property to which the rezoning was not directed, sufficiently demonstrates a partial taking – likewise does not raise a substantial constitutional question nor involve a matter of public or great general interest. Quite the contrary, allowing jurisdiction of this case would be against the public interest. As the Court of Appeals states:

\* \* \* we find that any decision conferring standing on Clifton, a nonresident property owner seeking to recover from a neighboring political subdivision following its decision to rezone property, would invariably require similarly situated municipalities to endure the costly burden of defending against an infinite number of claims arising from nonresidents sitting just outside their jurisdictional boundaries. While a bright-line rule may not be necessary to eliminate these concerns, we are simply unwilling to trudge down such a slippery slope to open the floodgates on the surge of litigation.<sup>1</sup>

## II. STATEMENT OF THE FACTS AND CASE

Appellant is the owner of real estate located outside the Village of Blanchester, Ohio. Appellant is not a resident of Blanchester. Adjacent to appellant's property is J & M Precision Machining, which is within the Village of Blanchester. In 1997, appellant sold 2.87 acres to J & M, which acreage was adjacent to appellant's remaining property. In 2002, the Village of Blanchester rezoned the J&M property. None of appellant's real estate was zoned or rezoned by

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<sup>1</sup>*Clifton v. Village of Blanchester*, 12<sup>th</sup> Dist. CA2009-07-009, ¶29.

the Village of Blanchester.

Appellant claims that as a result of the rezoning of the property upon which J & M Precision Machining is located, his adjacent property has been reduced in value for purposes of developing or selling residential lots. It is undisputed that appellant has not been deprived of all economic use of his land as a result of the rezoning of J & M. Appellant has been able to use his property for his economic benefit despite the rezoning by the Village of Blanchester. In fact, appellant has utilized his 97 acres of farm land adjacent to the J&M property every year since 1993. As recently as 2006, appellant grew soybeans on these 97 acres and showed a profit of \$6,000. Appellant has averaged a profit of \$4,000 - \$5,000 per year from his farming operation on his property adjacent to J & M Precision Machining. The 97 acres which appellant is presently utilizing as an active farm could be sold by him for residential lots.

The trial court granted the Motion for Summary Judgment of the Village of Blanchester on the primary basis that the appellant landowner lacked standing to bring the action. It found: 1) appellant's property was not located in the Village of Blanchester; 2) appellant was not a resident of the Village of Blanchester; 3) none of appellant's real estate had been zoned or rezoned by the Village of Blanchester; and, 4) appellant's expectation regarding the use of unowned, adjacent property is not a property right. The trial court also pointed out that there was no precedent in Ohio law that would give appellant a right to seek damages based upon the rezoning of adjacent property.

Although the trial court's determination that the appellant lacked standing rendered the issue of a partial taking moot, because the Appellate Court requested the trial court address that issue, the trial court performed a *Penn Central*<sup>2</sup> analysis. The trial court noted that in *Penn Central*, unlike in

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<sup>2</sup>*Penn Central v. New York City* (1978), 438 U.S. 104, 98 S.Ct. 2646

the appellant's case, there had been deliberate and direct action taken against the landowner. The New York City Landmarks Commission refused to approve the plaintiff's construction of a 50-story office tower above plaintiff's property, Grand Central Station. On the other hand, the Village of Blancheater rezoned adjacent land and placed no restrictions on appellant's use of his land.

The Court of Appeals affirmed the trial court's granting of appellee's Motion for Summary Judgment. It found that a nonresident contiguous property owner does not have standing to bring an action against an adjacent political subdivision seeking compensation for a rezoning of property located solely within its jurisdictional boundaries. With respect to the lack of standing, the Court of Appeals noted:

It is undisputed that Blancheater's decision to rezone the J & M property did not constitute a physical invasion of Clifton's property, nor did it interfere with the use of his property. In fact, by merely rezoning property within its own jurisdiction boundaries, Blancheater did not place *any* limitation on Clifton's ability to continue farming the property or to sell it for residential purposes. As a result, because Blancheater's decision to rezone the J & M property did not hinder Clifton's use of his own property in any way, we find Clifton has not alleged such a personal stake in the outcome of the controversy that would entitle him to further pursue his claim.<sup>3</sup>

Similar to the lower court, the Court of Appeals also performed a *Penn Central* analysis despite finding the appellant lacked standing. The Court of Appeals held:

\* \* \* we conclude, as a matter of law, that even if we were to find he had standing to pursue his claim, Blancheater's acts of rezoning the J & M property did not amount to a partial taking requiring Clifton to receive just compensation. In this case, Clifton merely alleged that the rezoning of the J & M property caused his property to suffer a significant diminution in value, and, as noted above, "diminution in a property's value, however serious, is insufficient to demonstrate a taking." *Concrete Pipe*, 508 U.S. 602 at 604; *Penn Central*, 438 U.S.

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<sup>3</sup>*Clifton*, ¶27.

at 131. Therefore, because Blanchester's decision to rezone the J & M property did not amount to a partial taking of Clifton's property, the trial court did not err in granting summary judgment in its favor.<sup>4</sup>

### III. ARGUMENT IN OPPOSITION TO JURISDICTION

#### Proposition of Law No. 1:

A non-resident contiguous property owner has standing to litigate a partial regulatory "taking" claim pursuant to *Penn Central Transportation Co. v. New York City*, (1978) 438 U.S. 104, against an adjacent political subdivision, when the political subdivision rezones property within in its jurisdictional boundaries, which substantially decreases the value and interferes with the investment backed expectations of Appellant's property.

#### **a. Appellant does not have standing.**

Appellant has the burden at the outset to show he has standing. "It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123, 469. Deciding whether the rezoning of another's property could effect a "partial taking" of a neighbor (appellant) is secondary to the issue of standing. Appellant did not provide the trial or appellate court with even one Ohio case on point on this crucial legal issue. As the trial court stated: "Plaintiff has identified no precedent in Ohio case law that would give Mr. Clifton a right to seek damages based upon the rezoning of adjacent property."

Appellant mistakenly asserts that *Penn Central* gives him standing. Appellant essentially claims that since he presented evidence that the rezoning of the property at J&M Precision Machining reduced the value of his property, he therefore has standing. Appellant is putting the cart before the horse. In *Penn Central*, the landmarks preservation law in question was enforced

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<sup>4</sup>*Clifton*, ¶42.

directly against the plaintiff, the owner of Grand Central Terminal. Standing was not in dispute in *Penn Central*. It did not involve an adjacent property owner.

It should also be noted that Ohio courts of appeal are not at odds with each other on the issue of standing under the particular facts in this matter.

**b. There is no constitutional issue.**

There is also no constitutional issue, substantial or otherwise, involved in this case. Again, appellant attempts to boot-strap a claim. Appellant presumes he has standing and he has suffered a “partial taking” of his property. Based upon that loss, he claims he has been deprived of his constitutional rights to just compensation.

There are two types of regulatory actions that are considered to be per se takings for Fifth Amendment purposes. *Lingle v. Chevron* (2005) 554 U.S. 528, 125 S.Ct. 2074. See also, *State ex rel. Shelly Materials, Inc. v. Clark Cty Bd. of Commrs.*, 115 Ohio St. 3d 337, 2007 - Ohio - 5022, ¶18. The first type of governmental action causes the owner to suffer a permanent physical invasion of his property. See, *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), 458 U.S. 419, 435-440, 102 S.Ct.3164. The second type of governmental action completely deprives the owner of all economically beneficial use of his property. See, *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 1019, 112 S.Ct. 2886. Neither of these types of governmental actions pertain to the facts in this case. There was no physical invasion and appellant continues to have economic benefit from his property. The third type of regulatory action which may cause a *Penn Central* “partial taking,” involves situations where there is no physical invasion or the regulation does not deprive the property of 100% of its economically beneficial use.

Although the appellant’s lack of standing rendered the issue of a potential partial taking

moot, both the trial court and appellate court nonetheless performed a *Penn Central* analysis. Those analyses were adequately performed and do not need to be repeated by this Honorable Court.

Proposition of Law No. 2:

A claim of partial regulatory “taking” pursuant to *Penn Central* does not fail as a matter of law where the claim is based upon substantial loss in value to property and interference with investment backed expectations of Appellant even though the regulatory action does not deny the Appellant of all economically viable use of his property

**a. A *Penn Central* analysis has been adequately performed and does not need to be repeated.**

Appellant apparently believes that merely because he alleges a zoning regulation has had an adverse economic impact on his property, he is entitled to standing and his day in court to assert a *Penn Central* “partial taking.” As set forth above, appellant does not have standing and the *Penn Central* analysis has been adequately performed. Thus, there is no public or great general interest which requires this Court to accept jurisdiction of this appeal.

**b. Appellant’s property still has economically beneficial uses, and appellant’s expectations of using the property as farm land or residential lots are still available.**

Previous decisions by this Court make it clear that appellant has no viable claim, even if he had standing. In the case of *Goldberg Cos., Inc. v. Richmond Hts. City Counsel* (1998), 81 Ohio St. 3d 207, 690 N.E. 2d 510, this Court stated:

... In order for a land owner to prove a taking, he or she must prove that the application of the ordinance has infringed upon the land owner’s rights to the point that there is no economically viable use of the land and, consequently, a taking has occurred for which he or she is entitled to compensation.

At page 210.

In the more recent Ohio Supreme Court case of *Shemo v. City of Mayfield Hts.* (2002), 95

Ohio St. 3d 59, 765 N.E. 2d 345, this Court stated:

A compensable taking can occur either if the application of the zoning ordinance to the particular property is constitutionally invalid, i.e., it does not substantially advance legitimate state interest, or denies the land owner all economically viable use of the land.

In the case at bar, appellant believes the value of his farm land for residential use has diminished because of the rezoning, but admits his property can still be used for residential purposes. Apparently, in *Shemo*, there was evidence that the zoning eliminated the potential of residential use. Still, this Court found that did not necessarily mean the land had no economically viable use. This Court stated:

Although in *Shemo 1* we concluded that relators introduced competent, credible evidence supporting the declaration that the property was not suitable for residential use, that does not necessarily mean that no economically viable use remained upon the application of the unconstitutional zoning classifications. And even though relators' evidence in this mandamus action states that the U-(1) and U-(2)-A residential zoning deprived them of the "the use of [their] Property," it does not specify that it deprived them of *all economically viable use* of their property. (Emphases added.) Relators therefore did not establish the second prong of the *Agins* test.

*Supra* at 65.

The evidence in this case is uncontroverted that despite the rezoning of the J&M property, appellant's adjacent land has economically viable uses. It has provided appellant income on the average of \$4,000 - \$5,000 per year since 2002 as farm land, and appellant believes he could sell his property for residential lots.

Appellant argues that his claim be evaluated pursuant to the standards set forth in *Penn Central*. This U.S. Supreme Court case is distinguishable from the case at bar. Unlike the New York City Landmark Law in *Penn Central*, which specifically restricted the use of designated

historical landmarks such as Grand Central Terminal, the Village of Blanchester did not put any restriction on the use of appellant's land or take any deliberate action restricting appellant's use of his property. In short, the Village of Blanchester took no action directed at appellant's property. The zoning requirements of Blanchester do not prevent appellant from using his property for farming or for residential development. These were appellant's expectations.

In *Lingle*, Chevron Oil challenged a Hawaii statute which put a cap on rent oil companies could charge service stations, ostensibly to control gasoline prices. Unlike appellant or his property, the legislation was directed in large part at Chevron, the largest oil company in Hawaii at that time. The U.S. Supreme Court held that the "substantially advance[s]" test is a due process test and not a valid takings test. In the case at bar, the constitutionality, and therefore due process, of the rezoning is the Law of the Case. Interestingly, the Twelfth Appellate District Court recently held in *City of Carlisle v. Martz Concrete Co.*, 2007 WL 2410692 (Ohio App. 12 Dist.), 2007 - Ohio - 4362, that in light of the Ohio Supreme Court's decision in *Jaylin Investments Inc. v. Village of Morelandhills*, (2006), 107 Ohio St. 3d 339, 2006 - Ohio - 4, it presumes "that the Ohio Supreme Court continues to adhere to the *Agins* "substantially advance[s]" test for analyzing land-use regulations" since *Goldberg* was cited in *Jaylin* after the date of the *Lingle* decision.

*Carlisle* at ¶ 52.

In *Carlisle*, the City Council adopted a property maintenance code for the municipality. Martz was charged with violations of that code and he was assessed a daily fine until he complied with the code. Appellant claims a trial court must make an evaluation of whether the rezoning "has interfered with distinct investment-backed expectations." *Lingle* at 540 citing *Penn Central*. But, this Twelfth District Court stated in *Carlisle*:

In examining this case in light of the *Penn Central* factors, the ordinance also does not constitute a taking. The nature of the regulation is not a physical invasion of the appellant's property. Also, in looking at the interference with the property owner's investment-backed expectations, the property code does not affect appellant's ability to use the property as a concrete business or gravel pit."

*Carlisle*, at ¶54.

Similarly, despite the rezoning of his neighbor's property, appellant has been able to use his property profitably as farm land or he could sell this land as single family residential lots.

Finally, this Court held in the case *Shelly Materials*, 115 Ohio St. 3d 337, 2007 - Ohio - 5022:

Because the County Zoning Appeals' Board's denial of the conditional-use permit did not deprive *Shelly* of all economically viable use of its property, a compensable taking did not occur.

*Supra* p. 346.

This Court, therefore, still employs the standard of deprivation of all economically viable use of property. That did not occur with respect to appellant's property.

Stretching a potential *Penn Central* "partial taking" claim to include adjacent land owners will create new, costly and unduly burdensome requirements for every zoning entity before it passes new zoning legislation. Before zoning property, zoning entities will be required to evaluate the investment backed expectations of all neighboring landowners and businesses, even those outside its jurisdictional limits. Zoning entities will then need to determine the impact of each rezoning legislation upon the value of landowners and businesses in the immediate, and perhaps not so immediate, vicinity. Such court-imposed requirements will not only be costly and time-consuming, but will probably open up the floodgates to new litigation in every part of the State of Ohio. This would be against the public interest.

#### IV. CONCLUSION

For the forgoing reasons, Defendant-Appellee Village of Blanchester respectfully requests that this Court refuse to accept jurisdiction over the issues raised by Plaintiff-Appellant Richard Clifton in this appeal.

Respectfully submitted,



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#### V. CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum of Defendant - Appellee, Village of Blanchester, was sent via regular U.S. Mail on this 6<sup>th</sup> day of August, 2010 to:

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