

ORIGINAL

IN THE SUPREME COURT OF OHIO

MATTHEW E. MOORE, et al. : Case No. 2010- 1363
Plaintiffs-Appellants :
v. : On Appeal from the Butler County Court of
CITY OF MIDDLETOWN, OHIO : Appeals, Twelfth Appellate District
Defendant-Appellee :
: Court of Appeals No. CA 2009-08-205

**APPELLEE CITY OF MIDDLETOWN'S MEMORANDUM IN OPPOSITION
TO APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION**

Jay C. Bennett (0009822)
Oxford Professional Building
5995 Fairfield Road, Suite #5
Oxford, Ohio 45056
Tel: 513/523-4104
Fax: 513/523-1525
Email: jcblaw24@yahoo.com
*Attorney for Plaintiffs-Appellants,
Matthew E. Moore and Lori A. Moore*

Robert J. Gehring (0019329)
Brian E. Hurley (0007827)
Crabbe Brown & James LLP
30 Garfield Place, Suite 740
Cincinnati, Ohio 45202
Tel: 513/784-1525
Fax: 513/784-1250
Email: RGehring@CBJLawyers.com
BHurley@CBJLawyers.com
*Attorney for Defendant-Appellee,
City of Middletown, Ohio*

Leslie S. Landen, Law Director (0017064)
Sara E. Mills, Asst. Law Director (0073295)
City of Middletown
One Donham Plaza
Middletown, Ohio 45042
Tel: 513/425-7805
Fax: 513/435-7780
Email: lesl@cityofmiddletown.org
saram@cityofmiddletown.org
*Attorneys for Defendant-Appellee,
City of Middletown, Ohio*

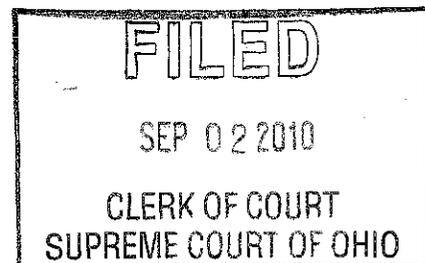


TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT IN OPPOSITION TO JURISDICTION	1
II. STATEMENT OF THE CASE AND FACTS	1
III. APPELLEE’S POSITION ON APPELLANTS’ PROPOSITION OF LAW NO. 1	2
<u>Appellants’ Proposition of Law No. 1:</u>	2
<p>A nonresident contiguous property owner has standing to challenge rezoning and setback legislation enacted by the adjacent political subdivision that directly, substantially and adversely affects their property.</p>	
A. Appellants Do Not Have Standing.	2
IV. APPELLEE’S POSITION ON APPELLANTS’ PROPOSITION OF LAW NO. 2	4
<u>Appellants’ Proposition of Law No. 2:</u>	4
<p>The Appellate Court failed to properly interpret and apply the doctrine of partial regulatory Takings and the remedy of inverse condemnation in its decision to delay standing to Appellants.</p>	
A. In order to constitute a compensable taking, a political subdivision’s actions must constitute a <i>per se</i> or regulatory taking under <i>Penn Central Trans. Co. v. New York City</i> . ¹ There was no <i>per se</i> or regulatory taking of Appellants’ property by the City. Appellants’ claims that they suffered a diminution in value of their property does not give rise to a compensable taking	4
V. APPELLEE’S POSITION ON APPELLANTS’ PROPOSITION OF LAW NO. 3	8
<u>Appellants’ Proposition of Law No. 3:</u>	8
<p>The Appellate Court erroneously found that Appellant’ complaint contained unsupported conclusions insufficient to withstand a motion to dismiss</p>	

¹*Penn Central Trans. Co. v. New York City* (1978), 438 U.S. 104, 98 S.Ct. 246.

A. The Trial Court and the Court of Appeals properly held that the Appellants had failed to state a claim upon which relief could be granted.	8
VI. CONCLUSION	9
CERTIFICATE OF SERVICE	10

I. STATEMENT IN OPPOSITION TO JURISDICTION

Two issues are raised by this Appeal.

1. Whether a nonresident property owner has standing to pursue a claim against an adjacent political subdivision, when the political subdivision has done no more than rezone the parcel of land within its municipal boundaries.

2. Whether a property owner may claim a “taking”, when there has been no “*per se*” or regulatory taking of property by a political subdivision.

The Appellants’ appeal to this Court does not raise a substantial constitutional question or involve a matter of public or great general interest. Other than this case and one other decided by the Twelfth District² there are no reported cases in Ohio in which a property owner in an adjacent political subdivision has brought an action for zoning that takes place solely within the boundaries of the political subdivision. There is no substantial constitutional question involved and Appellants’ constitutional rights have not been violated. Further, the case does involve the matter of public or great general interest. The case law as applied to the facts of this case is well established.

II. STATEMENT OF THE CASE AND FACTS

The Appellants Matthew E. Moore and Lori A. Moore owned real estate in the City of Monroe, Ohio. They allege in their complaint that their property is adjacent to the parcel of property wholly located in the City of Middletown known as the Martin-Bake property. In 2008, the City of Middletown rezoned the Martin-Bake property, which consisted of a 157 acre parcel. Middletown ordinance No. 02008-64 rezoned a portion of the Martin-Bake Property from a D1 zone (residential) to I-2 (industrial). Significantly, another portion of the Martin-Bake property had previously been zoned industrial and the City ordinance attacked by the Appellants rezoned the balance of the Martin-

²*Clifton v. Village of Blanchester* (May 25, 2010) 12th Dist. No. CA2009-07-009, 2010-Ohio-2309, appeal pending, Ohio Supreme Court No. 10-1196.

Bake property. The second ordinance attacked by the Appellants, No. 02008-63, is a text amendment to the City's zoning code. That ordinance clarified the setback requirements for manufacturing and processing uses within industrial zones in the City. The text amendment was not specific to the Martin-Bake property, but was generally applicable to all industrial zones in the City of Middletown and merely clarified the setback requirements.

The *Moore* case was consolidated with other actions brought by Plaintiffs, Betty Anne Metzcar, Robert W. Cowman and Carol Anne Cowman. The City of Middletown filed a Motion to Dismiss as to all Plaintiffs and the Trial Court granted the City's motion. The Trial Court, in its judgment in favor of the City, found that while the Plaintiffs had standing, the City was entitled to judgment as a matter of law as the Plaintiffs had failed to state a claim under Civil Rule 12(B)(6).

The Appellants timely appealed to the Twelfth District. After briefing and an oral argument, the Court of Appeals requested supplemental briefs on the issue of whether the Appellants had standing. The Court of Appeals, in affirming the Trial Court's judgment, held that the Appellants lacked standing and that even if they had standing, Appellants had failed to state a claim under Civ. R. 12(B)(6).

III. APPELLEE'S POSITION ON APPELLANTS' PROPOSITION OF LAW NO. 1

Appellants' Proposition of Law No. 1:

A nonresident contiguous property owner has standing to challenge rezoning and setback legislation enacted by the adjacent political subdivision that directly, substantially and adversely affects their property.

A. Appellants do not have standing.

Appellants have the burden at the outset to show they have 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.”³ The Court of Appeals properly found that the Appellants did not have standing. The appellate court relied on well established Ohio precedent that requires the court to “look to the substantive law creating the right being sued upon to see if the action has been instituted by the party possessing the substantive right to relief.”⁴ The Court noted that there were no other Ohio cases cited by the Appellants that recognized a contiguous land owner’s right to challenge zoning that occurred in another political subdivision, when that zoning did not constitute either a *per se* or regulatory case.

The Appellants essentially rely on two lines of authority supporting their contention that they possess standing. The first is a Second District case, *Joseph Airport Toyota, Inc. v. City of Vandalia*.⁵ However, *Joseph Airport Toyota* is not on point. In that case, the plaintiff alleged that its business was harmed because of the zoning of contiguous property that occurred within the City’s limits. The *Joseph Airport* decision provides no analysis of the substantive law, which in this case involves whether there has even been an allegation of a “taking”.

The other line of authority relied on by the Appellants is case law from other jurisdictions. However, the cases cited by the Appellants are distinguishable. In *Clifton*, the appellant cited the same cases from other jurisdictions that the *Moore* Appellants’ cite in their brief to this Court. In rejecting *Clifton*’s argument that the it should rely on cases from other jurisdictions, the Court stated:

³*State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1998), 86 Ohio St.3d 451, 469, 715 N.E.2d 1062.

⁴*Moore* at ¶ 6, quoting *Shealy v. Campbell* (1985), 20 Ohio St. 3d 23, 25.

⁵(March 1, 2002), 2nd District No. 18904, 2002-Ohio-928

“Although these cases are certainly informative, we note that none of these cases specifically dealt with the issue before this court; namely whether a nonresident contiguous property owner has standing to bring an action against an adjacent political subdivision seeking compensation for rezoning property located solely within its own jurisdictional boundaries.”⁶

Thus, there is no constitutional issue or issue of great public importance involved in the standing issues presented by this case. The Appellants have not established that their rights have been affected merely because Middletown rezoned property that was entirely within its municipal boundaries. As there are only two appellate level cases involving the standing issues presented here, the case is not one of great public importance.

IV. APPELLEE’S POSITION ON APPELLANTS’ PROPOSITION OF LAW NO. 2

Appellants’ Proposition of Law No. 2:

The Appellate Court failed to properly interpret and apply the doctrine of partial regulatory takings and the remedy of inverse condemnation in its decision to delay standing to Appellants.

- A. In order to constitute a compensable taking, a political subdivision’s actions must constitute a *per se* or regulatory taking under *Penn Central Trans. Co. v. New York City*.⁷ There was no *per se* or regulatory taking of Appellants’ property by the City. Appellants’ claims that they suffered a diminution in value of their property does not give rise to a compensable taking.**

The Appellants in their second cause of action alleged that Middletown’s re-zoning of the Martin-Bake property amounted to a compensable governmental “taking” of their adjacent private property. They alleged no more than a loss of their “investment-backed expectations.”⁸ They did not

⁶*Clifton* at ¶ 25, citing *Creskill Borough v. Dumont Borough* (1953), 15 N.J. 238; *Koppel v. City of Fairway* (1962), 189 Kan. 710; *Scott v. City of Indian Wells* (1972), 6 Cal. 3d 541.

⁷*Penn Central Trans. Co. v. New York City* (1978), 438 U.S. 104, 98 S.Ct. 246.

⁸Complaint ¶¶ 15, 16.

allege that they have been deprived of all viable economic use of their properties, nor did they allege that Middletown's re-zoning of the Martin-Bake property has been applied to their properties. In fact, they do not allege that Middletown has taken any regulatory action as to their properties located in Monroe.

Within the land use context, there are two types of *per se* takings. The first is a direct encroachment on the land "which subjects it to a public use that excludes or restricts dominion and control of the owner over it." In the traditional eminent domain situation, the government's action physically seizes or exclusively appropriates a landowner's property for a public purpose and, therefore, it is clear that the govern's appropriation of the landowner's property constitutes a compensable "taking" within the meaning of the United States and Ohio Constitutions.⁹

The second type of *per se* taking is when there has been a "regulatory taking." In some instances, the government's action does not directly appropriate or invade a landowner's property. Rather the government's intrusion on a landowner's property rights occurs by regulation of the property. For example, if a municipality zones a particular parcel so as to preclude certain uses of a property, the landowner may allege that there has been a "regulatory" taking that deprives him of all economic use of the property.¹⁰

Thus, in order to state a claim under a *per se* taking theory, a plaintiff must allege that there has been either a physical invasion of his property or a regulation depriving him of all economic viable use. Here no claim was stated by the Appellants for a *per se* taking. The City did not encroach on their properties nor attempt to regulate their properties.

⁹*State ex rel. Shelly Materials, Inc. v. Clark County Bd. of Commrs.*, 115 Ohio St. 3d. 337, 341, 875 N.E.2d 59, 2007-Ohio-5022, ¶¶ 17-18.

¹⁰*Id.*

The Appellants alleged that they were deprived of their “investment backed expectations” on account of Middletown’s re-zoning of the Martin-Bake property. The “investment-backed expectations” language of the Complaint is apparently derived from the Supreme Court’s decision in *Penn Central Trans. Co. v. New York City*. In *Penn Central*, the owner of real estate within New York City’s boundaries, asserted that a taking had occurred when the City enacted a historic landmark ordinance that Penn Central claimed affected its development rights. The Supreme Court discussed the possibility that a taking could occur if there was interference with a plaintiff’s distinct investment-backed expectations, and articulated a balancing test to determine if a compensable taking has occurred. The Court found that there was no “taking” of Penn Central’s property as the restrictions that were imposed on Penn Central’s property were substantially related to the promotion of general welfare, and not only permitted reasonable beneficial use of the landmark site, but also afforded Penn Central the opportunity to develop the property in the future.¹¹

Under *Penn Central*, in determining whether governmental action amounts to a taking the court must consider (1) the character of the government action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. The ultimate purpose of the *Penn Central* balancing test is to identify “regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”¹²

This Court has relied on the *Penn Central* analysis in recent cases where landowners have

¹¹*Penn Central*, at 438 U.S.138.

¹²*Lingle v. Chevron* (2005), 544 U.S. 528, 539, 125 S.Ct. 2074.

alleged a partial taking. In *Gilmour*,¹³ the plaintiff owned properties in a commercial zone in the City of Mayfield Heights. Mayfield Heights re-zoned the property “residential,” thus depriving the plaintiff of the ability to develop the property. Because the plaintiff in *Gilmour* had a “distinct investment-backed expectation” that it could to develop its property, the Court found it could proceed under a *Penn Central* takings theory.¹⁴ Thus, the distinct investment-backed expectation of the plaintiff in *Gilmour* was its expectation that it would be able to develop the property as “commercial.”

In *Shelly*, the plaintiff alleged a regulatory taking when it was denied a conditional use permit to mine sand and gravel on its property. The Court affirmed the board of zoning appeals denial of the permit as there was “no undue burden placed” on the plaintiff’s property.¹⁵

Here, both the Trial Court and the Court of Appeals applied the *Penn Central* test to find that there was no action by the City that affected the Appellants’ property so as to entitle them to compensation. The Court of Appeals noted that, at best, the Appellants had claimed that their property had suffered a diminution in value. However, even if it is assumed that the Appellants suffered a diminution in value of their property due to Middletown’s decision to rezone the Martin-Bake property, the mere “diminution in a property’s value is insufficient to demonstrate a taking.”¹⁶ As stated by the Court of Appeals, “something more than loss of market value or loss of the

¹³*State ex rel. Gilmour Realty v. City of Mayfield Heights*, 119 Ohio St. 3d 11, 891 N.E.2d 320, 2008-Ohio-3181.

¹⁴*Id.* at ¶ 16,

¹⁵*Shelly, supra* at ¶ 40.

¹⁶*Moore* at ¶ 23, citing *Concrete Pipe and Products of Ca., Inc. v. Constr. Laborers Pension Trust* (1993), 508 U.S. 602, 604, 113 S.Ct. 2264; *Penn Central.*, at 438 U.S.131; *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 47 S.Ct. 114 (75 percent diminution in value caused by zoning not a taking); *Hadacheck v. Sebastian* (1915), 239 U.S. 394, 36 S.Ct. 143 (87-1/2 percent diminution in value not a taking).

comfortable enjoyment of the property is needed to constitute a taking.”¹⁷

There is no Constitutional issue or matter of great public interest implicated by the Appellants’ Second Proposition of Law. The courts below, relying on well established precedent, analyzed Appellants’ claims and properly found they had not stated a claim as there was no taking of their property.

V. APPELLEE’S POSITION ON APPELLANTS’ PROPOSITION OF LAW NO. 3

Appellants’ Proposition of Law Number 3:

The Appellate Court erroneously found that Appellants Complaint contained unsupported conclusions insufficient to withstand a motion to dismiss.

A. The Trial Court and the Court of Appeals properly held that the Appellants had failed to state a claim upon which relief could be granted.

The Court of Appeals, as did the Trial Court, found that the Appellants had failed to state a claim. It is well established that ordinances are presumed to be constitutional. The Complaint provided no factual support for the Appellants’ allegations that the ordinances passed by Middletown were not for the benefit of the health, safety or welfare of the City. The Court of Appeals found it “clear from the four corners of their complaint that the ordinances were not arbitrary, capricious or unreasonable.”¹⁸

Finally, the Court of Appeals found that no claim had been stated by the Appellants’ request for a writ of *mandamus* compelling the City to appropriate their property. Even though not directly discussed by the Appellants in their Memorandum in Support of Jurisdiction, both the Trial Court and

¹⁷Moore at ¶ 23, quoting *BSW Dev. Group v. Dayton* (1998), 83 Ohio St.3d 338, 344, 699 N.E.2d 1271; *Sullivan v. Hamilton City Bd. of Health*, 155 Ohio App.3d 609, 2003-Ohio-6916, ¶ 36.

¹⁸Moore at ¶ 19.

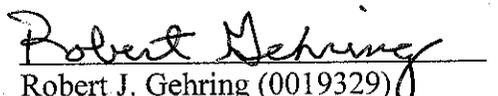
the Court of Appeals properly relied on this Court's decision in *Britt v. City of Columbus*,¹⁹ which unequivocally held that a political subdivision may not appropriate property outside its boundaries.

VI. CONCLUSION

Stretching a potential *Penn Central* "partial taking" claim to include adjacent landowners will create new, costly and unduly burdensome requirements for every political subdivision before it passes new zoning legislation. Zoning authorities will be unwilling or unable to act on zoning requests as it is impossible to determine which property owners will claim an adverse economic impact because of a zoning decision. If the political subdivision refuses to act on an application for zoning or rezoning, it is subject to suit by a zoning applicant. If it does act on a zoning request, other property owners can file suit and claim a diminution in value of their properties.

The Court should not accept jurisdiction of the appeal. There is no substantial constitutional question involved. The Appellants have not shown that their property rights have in any respect been violated. The case does not involve a matter of public or great general interest. There are only two cases in Ohio that even address the types of claims that Appellants present here. The Court of Appeals decision was correctly decided and based on well established precedent.

Respectfully submitted,


Robert J. Gehring (0019329)
Brian E. Hurley (0007827)
Crabbe Brown & James LLP
30 Garfield Place, Suite 740
Cincinnati, Ohio 45202
Tel: 513/784-1525
Fax: 513/785-1250
Email: Rgehring@CBJLawyers.com
Bhurley@CBJLawyers.com
Attorney for Defendant-Appellee
City of Middletown, Ohio

¹⁹(1974), 38 Ohio St. 2d 1, 309 N.E.2d 412, ¶ 1 of the *syllabus*.



Leslie S. Landen, Law Director (0017064)
Sara E. Mills, Asst. Law Director (0073295)

City of Middletown
One Donham Plaza
Middletown, Ohio 45042

Tel: 513/425-7805

Fax: 513/435-7780

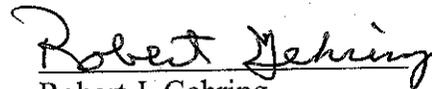
Email: lesl@cityofmiddletown.org

saram@cityofmiddletown.org

*Attorneys for Defendant-Appellee,
City of Middletown, Ohio*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Opposition To Appellants' Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail, postage prepared, to counsel for Plaintiffs, Jay C. Bennett, Oxford Professional Building, 5995 Fairfield Road, Suite #5, Oxford, Ohio, this 2nd day of September, 2010.



Robert J. Gehring

Attorney for Defendant-Appellee