

ORIGINAL

IN THE SUPREME COURT OF OHIO

RICHARD CLIFTON,	:	On Appeal from the Clinton
	:	County Court of Appeals,
Plaintiff/Appellant,	:	Twelfth Appellate District
	:	
	:	Supreme Court
	:	Case No. 10-1196
vs.	:	
	:	Court of Appeals
	:	Case No. CA 2009-07-009
	:	
VILLAGE OF BLANCHESTER,	:	Trial Court
	:	Case No. CVH 2006 0231
Defendant/Appellee.	:	

MERIT BRIEF OF APPELLANT, RICHARD CLIFTON

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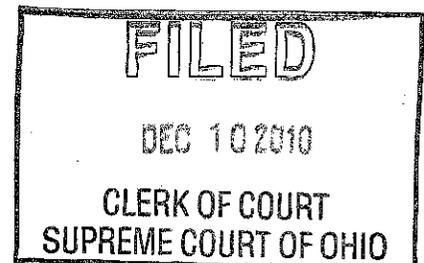


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STATEMENT OF THE CASE
PROCEDURAL POSTURE

On April 3, 2006, Appellant filed a complaint in the Clinton County Court of Common Pleas, alleging that the rezoning actions of Appellee constituted a compensable “taking” of Appellant’s property. (T.d. 1) On March 14, 2007, Appellant filed disclosure of expert witness with report of Garland Crawford. (T.d. 12) On March 22, 2007, Appellee filed its disclosure of expert Lance Brown. (T.d. 13) On April 18, 2007, Appellee filed a Motion for Summary Judgment. (T.d. 15) On April 18, 2007, Appellee also filed Affidavit of Lance Brown and the deposition of Appellant, Richard Clifton. (T.d. 16, 18) On May 16, 2007, Appellant filed a Response to Motion for Summary Judgment, which contained as attachment the Affidavit of Garland Crawford. (T.d. 19) On May 18, 2007, the Affidavit of Richard Clifton was filed with the Court. (T.d. 22) On May 30, 2007, Appellee filed a Reply to Appellant’s Response. (T.d. 23) On August 23, 2007, the Trial Court granted Appellee’s Motion for Summary Judgment, dismissing Appellant’s Complaint. (T.d. 24) On September 21, 2007, Appellant filed a Notice of Appeal with the Twelfth District Court of Appeals, Case No. CA2007-09-40. (T.d. 25) On September 2, 2008, the Twelfth District Court of Appeals affirmed the Trial Court’s granting of summary judgment in favor of Appellee insofar that the rezoning did not effect a total “taking” of Appellant’s property. The Appellate Court also reversed the Trial Court’s granting of summary judgment insofar as it failed to address the issue of whether the rezoning effected a partial “taking” of Appellant’s property under *Penn Central* and remanded the case to the Trial Court for the limited purpose of addressing that issue. (T.d. 26) On September 12, 2008, Appellee filed a Motion for Reconsideration with the Court of Appeals. On November 3, 2008,

the Appellate Court granted Appellee's Application for Reconsideration and modified its instructions on remand to the Trial Court as follows:

We reversed the grant of summary judgment insofar as it failed to address the issue of whether the rezoning effected a partial taking of Appellant's property under *Penn Central*, and remand the case for the purpose of addressing that issue and the issue of standing previously raised by the Village in its Motion for Summary Judgment. (T.d. 29A)

Subsequent to the remand, Appellee filed a Motion for Summary Judgment on May 1, 2009. (T.d. 32) Appellant filed a response to said Motion on May 29, 2009. (T.d. 34) On June 12, 2009, Appellee filed a Reply to Appellant's Response. (T.d. 35) On June 22, 2009, oral argument took place before the Trial Court regarding Appellee's Motion for Summary Judgment. (T.d. 31) On June 29, 2009, the Trial Court granted Appellee's Motion for Summary Judgment, dismissing Appellant's case with prejudice. (T.d. 36) On July 28, 2009, Appellant filed a Notice of Appeal with the Twelfth District Court of Appeals. (Case No. CA2009-07-09, T.d. 38) On May 25, 2010, the Twelfth District Court of Appeals, by way of judgment entry, affirmed the Trial Court's decision. (See Appendix) On July 8, 2010, Appellant filed a Notice of Appeal and Memorandum in Support of Jurisdiction with the Ohio Supreme Court. (See Appendix) On October 19, 2010, this Court accepted jurisdiction to hear this case.

STATEMENT OF FACTS

Pursuant to the Twelfth District Court of Appeals' Opinion dated September 2, 2008, the facts in the within cause are as follows:

“Appellant owns and resides on approximately 27 acres of real property located at the intersection of Collins-Riley Road and Middleboro Road in Blanchester, Ohio. In 1993, Appellant purchased approximately 99 acres of farmland along Middleboro Road. In 1997, he sold 2.87 acres of this farmland to the owners of J & M Precision Machining, Inc. The remaining 97 acres of Appellant’s farmland is adjacent to J & M on one side and 9 acres of land along Middleboro Road, which Appellant purchased around 1997, on the other side. In February, 2002, Appellee rezoned J & M’s property. The previous I-1 classification, restricted industrial, permitted industrial uses, which can be compatibly operated within, or in very close proximity to, residential areas. These establishments should be clean, quiet, void of such nuisance as odor, dust and smoke, operate primarily within enclosed structures, and generate little industrial traffic. The new I-2 classification, general industrial, permitted industrial uses generally requiring large sites in an extensive range of services and facilities, including adequate access to highway development and integrated transportation facilities. Industrial uses in this classification typically operate from enclosed structures and often maintain large open storage in service areas where part of the production process may take place. None of Appellant’s property was rezoned.”

Furthermore, Appellant submits at the time he purchased said property, it was his intent and plan to develop and subdivide the property into residential units. (Affidavit of Richard Clifton) Appellee’s rezoning of property adjacent to Appellant’s property to general industrial has substantially decreased the value of Appellant’s property, causing adverse economic impact upon Appellant and, as a practical matter, prohibited him from utilizing the property for residential purposes, as he intended. (Affidavit of Richard Clifton and Affidavit of Garland Crawford, attached to Appellant’s Response to Appellee’s Motion for Summary Judgment, May 16, 2007, T.d. 19)

ARGUMENT

Proposition of Law No. I: 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 its jurisdictional boundaries, where the regulation results in substantial adverse economic impact upon the claimant by substantially reducing property value and such regulation interferes with the investment backed expectations of the claimant with respect to his property.

In the case at bar, the Twelfth District Court of Appeals upheld the Trial Court's decision that Appellant herein did not have standing to pursue his partial regulatory taking claim against Appellee. The Court of Appeals concluded that Appellee's rezoning of contiguous property did not hinder Appellant's use of his property in any way and, therefore, he did not have standing to further pursue his claim. (Twelfth District Court of Appeals' Decision, May 24, 2010, P. 8)

This Court has defined standing as a party's right to make a legal claim or seek judicial enforcement of a duty or right. Ohio Pyro, Inc. v. Ohio Department of Commerce, (2007) 115 Ohio St.3d 375. A true party in interest is able to demonstrate an injury in fact, which requires a showing that the party has suffered, or will suffer, a specific injury. Bergman v. Monarch Construction Co., 12th Dist. 2009-Ohio-551. The question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy as to insure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. Ohio Pyro, Inc., Supra.

The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation. State ex rel. Gilbert v. City of Cincinnati, 2010-Ohio-1473; 125 Ohio St.3d 385; Fifth and Fourteenth Amendments to the United States Constitution; Section 19 Article 1, Ohio Constitution.

The United States Supreme Court in Lingle, Governor of Hawaii v. Chevron U.S.A., Inc., (2005) 544 U.S. 258, summarized the current state of the law with respect to the “takings clause” pursuant to the Fifth Amendment.

“Regulatory actions generally will be deemed per se takings for Fifth Amendment purposes:

- (1) Where government requires an owner to suffer a permanent physical invasion of her property, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, or
- (2) Where regulations completely deprive an owner of all economically beneficial use of her property, Lucas v. South Carolina Coastal Counsel, 505 U.S. 1003.

Outside these two categories..., regulatory takings challenges are governed by Penn Central.”

The Twelfth District Court of Appeals, in its Entry Granting Application for Reconsideration in this case, stated the following regarding a Penn Central analysis:

“A Penn Central analysis is appropriate where there is no physical invasion of the complainant’s property and the regulation deprives the property of less than one hundred percent of its economically beneficial use. The testimony in the present case indicates that, although Appellant admitted that he was still able to farm the land, he made only about \$5,000.00 annually from the farming operation. This amount may differ substantially from the profits Appellant might realize by developing the land for residential purposes, as he intended. Thus, this case was properly remanded to address the partial taking issue.” Clifton v. Village of Blanchester, Entry Granting Application for Reconsideration, P. 3.

Appellant submits that the findings by the Twelfth District Court of Appeals in its Entry Granting Application for Reconsideration illustrate that Appellant has the requisite personal stake in the outcome of the controversy that would confer upon him standing to proceed.

Appellant also takes exception with the Court of Appeals' conclusion that Appellee's rezoning of adjacent property did not hinder Appellant's use of his property in any way. Technically speaking, Appellant was and is permitted to utilize his property for farmland or residential purposes. However, as a practical matter, Appellee's rezoning of its adjacent property to general industrial precludes Appellant from utilizing his property for residential purpose consistent with his investment backed expectations. (See Affidavit of Richard Clifton and Garland Crawford.) Thus, in the context of standing, Appellant has demonstrated that the rezoning of adjacent property by Appellee has resulted in significant negative impact upon Appellant, and has interfered with Appellant's investment backed expectations regarding his property. Appellant submits, under the circumstances of this case, that he has standing to pursue his partial regulatory taking claim pursuant to *Penn Central* against Appellee.

In further support of its position that Appellant herein does not have standing, the Court of Appeals noted that Appellee did not rezone any of Appellant's property and, therefore, he did not have a right to seek damages, based upon the rezoning of adjacent property. (Court of Appeals' Decision, May 24, 2010, P. 8)

The Trial Court's conclusion, affirmed by the Court of Appeals, that a claimant has no standing unless his property is the direct subject of the regulation will lead to inequitable and illogical results whereas, here, the properties are located at a jurisdictional border. By way of example, if the Village of Blanchester zoned J & M's property to permit the construction of a nuclear power plant, and J & M constructed a nuclear power plant rendering Appellant's

property worthless, would Appellant have no recourse to assert that such government action effected a “taking” of his property? Under the Trial Court’s ruling, which was affirmed by the Court of Appeals, Appellant would have no recourse, because his property was not the direct subject of the zoning regulation regardless of the effect upon his property. If this were the case, then every state, county, township, city, or other municipal border would be exempt from any “takings” challenge to its regulatory action upon its borders. This is because the regulatory action would not be directed upon the property just outside of its border, but could affect such property to the extent that it constitutes a “taking”.

The Court of Appeals also stated that since Appellant’s property is outside Appellee’s jurisdictional boundaries, Appellee lacked the power of eminent domain to take Appellant’s property. The Court of Appeals concluded therefore, as a matter of law, no taking could occur and Appellant had no substantive right to the relief he sought, which results in no standing to sue. (Twelfth District Court of Appeals Opinion, May 24, 2010, P. 9)

Appellant agrees that Appellee’s powers of eminent domain can only be exercised within its territorial jurisdiction. However, this restriction would apply to affirmative “takings” by Appellee. For example, if Appellee were to use its powers of eminent domain to take a person’s house to build a road, that power could only be exercised within its territorial limits. However, this case is factually unique in that we have Appellee’s regulation at its jurisdictional border affecting Appellant’s property outside of its jurisdiction. Appellant submits that the above cited example is applicable here as well, to illustrate that it is the effect of the regulation upon property that constitutes the “taking” when the affected property cannot lawfully be the subject of the regulation.

The Court of Appeals also states, in support of its conclusion that Appellant has no standing, that if standing were conferred upon Appellant, similarly situated municipalities would have to endure the costly burden of defending infinite numbers of claims from non-residents just outside of their jurisdictional borders. The Court of Appeals stated it would not trudge down a slippery slope to open floodgates on the surge of litigation. (Twelfth District Court of Appeals Opinion, May 24, 2010, P. 9, 10) Appellant submits that the preservation and enforcement of Appellant's fundamental constitutional right to be compensated if a taking occurs, trumps judicial concern of an influx of litigation and such considerations should not close the courthouse doors to Appellant.

Finally, the unique factual circumstances of this case in the context of standing are of first impression in Ohio. The Court of Appeals' conclusion that Appellant herein did not have standing is contra to the weight of authority in other jurisdictions, as cited by the Court of Appeals in their own decision. (Twelfth District Court of Appeals Opinion, May 24, 2010, P. 5, 6, 7)

In his dissenting opinion, Judge Hendrickson stated:

“...the majority surveyed cases from outside the state of Ohio that are relevant to the case at bar. The common holding running through these cases is that non-resident property owners who clearly may be affected, have standing to contest a zoning decision made by a neighboring municipality. The majority distinguishes these cases on the basis that none contemplate the precise issue confronted by this Court, i.e., whether a non-resident contiguous property owner may pursue a takings claim against an adjacent political subdivision.” (Twelfth District Court of Appeals Opinion, May 24, 2010, P. 15)

Judge Hendrickson went on to write:

“Contrary to the majority opinion, I would find that a party in Clifton’s position has standing to pursue a takings claim. In my opinion, those cases cited by the majority finding in favor of standing suggest the more prudent approach. In view of the potential harm suffered by a contiguous non-resident property owner, I find it unjust to summarily deny such a party his day in court by relying upon invisible and somewhat arbitrary geographical limits.” (Twelfth District Court of Appeals Opinion, May 24, 2010, P. 15)

Appellant submits that, under the circumstances of this case, he has standing to pursue his partial regulatory taking claim, pursuant to Penn Central, against Appellee, and asks this Court to reverse the decision of the Twelfth District Court of Appeals denying Appellant standing to pursue his claims.

Proposition of Law No. II: A claim of partial regulatory “taking” pursuant to Penn Central does not fail as a matter of law where the claim is based upon significant negative economic impact upon the claimant through substantial loss in value to property and material interference with investment backed expectations of claimant, even though the regulatory action does not deny claimant of all economically viable use of his property.

The Twelfth District Court of Appeals, in its Entry Granting Application for Reconsideration at Page 3, in Clifton, I, Supra, stated as follows:

“A Penn Central analysis is appropriate where there is no physical invasion of the complainant’s property and the regulation deprives the property of less than one hundred percent of its economically beneficial use. The testimony in the present case indicates that, although Appellant admitted that he was still able to farm the land, he made only about \$5,000.00 annually

from the farming operation. This amount may differ substantially from the profits Appellant might realize by developing the land for residential purposes, as he intended. Thus, this case was properly remanded to address the partial taking issue.”

In *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, the Court set forth three distinct factors to determine whether a partial regulatory “taking” has occurred:

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. *Penn Central at 124.*

In upholding the Trial Court’s Decision, the Twelfth District Court of Appeals in *Clifton 2* held, as a matter of law, that Appellant’s claim fails because diminution in property value, however serious, is insufficient to demonstrate a “taking”. (Court of Appeals Decision, May 24, 2010, P. 14) The Court of Appeals conclusion, in *Clifton, 2*, is a departure from their analysis in *Clifton, 1*, and in conflict with this Court’s application of *Penn Central* in *ex rel. Gilbert, Supra*, where this Court found that a *Penn Central* “taking” may occur where the regulation does not deny the claimant of all economically viable use of his property. Here, the Court of Appeals, after ordering the Trial Court to employ a *Penn Central* analysis, failed to review the Trial Court’s decision utilizing the *Penn Central* analysis which it ordered.

Appellant submits that the evidence and arguments he has put forth regarding decrease of value of his property is to establish the first prong of the *Penn Central* analysis, being economic impact of the regulation on the claimant. Appellant also put forth evidence regarding the regulation’s interference with his distinct investment backed expectations regarding his property.

The Court of Appeals' conclusion that Appellant's claim fails as a matter of law is erroneous in that the Court of Appeals did not employ a *Penn Central* analysis to the facts of the case.

Furthermore, the Court of Appeals was reviewing the Trial Court's decision from a grant of summary judgment in favor of Appellee.

Ohio Civil Rule 56(C) provides that "summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, **that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.**"

"The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact as to an essential element of one or more of the non-moving parties' claims." "Once this burden has been satisfied, the non-moving party has the burden, as set forth in Civil Rule 56(E), to offer specific facts showing a genuine issue for trial." *Sobczak v. Sylvania*, 2007-Ohio-1045.

Civil Rule 56(E) does not specifically require more than the non-moving party's affidavit to show that there is a genuine issue for trial. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civil Rule 56(E)

The evidence before the Trial Court and Court of Appeals demonstrated material negative impact of the regulation upon Appellant, as well as material interference with his investment backed expectations.

With respect to the economic impact of the regulation upon Appellant, the only evidence Appellee has submitted is contained in the Affidavit of Lance Brown. Paragraph 6 of Lance Brown's Affidavit states that Appellant's property has economic value as a functioning farm and, even with the present zoning, Appellant's real estate could be developed into residential lots such as single family tracts. The Affidavit contains no opinion with respect to the value of residential lots before and after the rezoning by Appellee. The Affidavit of Garland Crawford, at Paragraphs 7, 8, 9 and 10, states that if Appellant's property were divided into two and five acre residential tracts, the two acre tracts would sell in a range from \$25,000.00 to \$45,000.00 and five acre tracts could sell from \$35,000.00 to \$90,000.00. Mr. Crawford concludes that the present zoning for J & M Precision Machining would negatively impact the value of Appellant's property for development into residential tracts and that the two and five acre tracts could not yield the low end range of value, as previously stated.

The estimate that the property makes \$4,000.00 to \$5,000.00 per year as a working farm may be in excess of the actual profits. (Deposition of Richard Clifton, P. 30-35) The uncontroverted evidence before the Court shows that Appellee's rezoning has had a catastrophic effect upon the value of Appellant's land were it to be utilized for residential purposes. The Affidavit of Appellant, at Paragraph 9, states that it was his intent and plan to develop and subdivide the property into residential units.

With respect to the third prong of the Penn Central analysis regarding the character of the governmental action, Appellant acknowledges that Appellee's regulation was not placed upon

Appellant's property. While Appellee's zoning regulation was not placed upon or directed at Appellant's property per se, it is the effect of the regulation upon Appellant's property which constitutes the partial taking.

When reviewing the record in the context and standards of summary judgment, Appellant submits that he has put forth sufficient facts showing there are genuine issues for trial regarding whether a partial regulatory taking pursuant to Penn Central has occurred.

CONCLUSION

This case presents unique factual and legal issues which are of first impression in Ohio. Appellant purchased property adjacent to Appellee with the intention of developing it into residential lots. Subsequent to this purchase, Appellee rezoned its adjacent property from light industrial to general industrial. The evidence put forth shows that Appellant has suffered real damage by the regulatory action of Appellee by having his property substantially devalued for its intended use. The Trial Court and Court of Appeals' conclusion that Appellant has no standing to pursue his claim of partial regulatory taking pursuant to Penn Central is an unjust and illogical conclusion. A jurisdictional boundary should not immunize a governmental entity when taking regulatory action within its boundaries that may constitute a taking to a bordering landowner. To close the courthouse doors to Appellant or anyone in his position while attempting to enforce a constitutional right, is an erroneous conclusion which must be reversed.

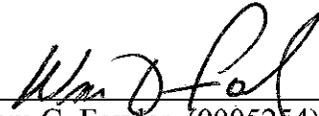
Furthermore, the Court of Appeals' conclusion that Appellant's claim fails as a matter of law was erroneous, as the Court of Appeals failed to employ a Penn Central analysis as it had directed the Trial Court to do, and as this Court has stated is appropriate in the context of a claim of partial regulatory taking. When viewed against the standards of Penn Central, and in the

context of summary judgment, Appellant put forth sufficient uncontroverted evidence to survive dismissal of his claims by way of summary judgment.

Appellant requests that this Court reverse the decision of the Court of Appeals in full and remand the case to the Trial Court so the matter can proceed to trial.

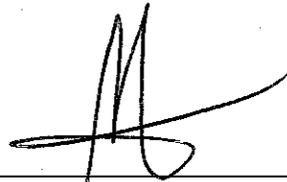
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon Lawrence E. Barbieri and Robert Hiller, Counsel for Appellee, 5300 Socialville-Foster Road, Ste. 200, Mason, OH 45040, this 10 day of December, 2010, by regular U.S. mail.



William G. Fowler #0005254
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APPENDIX

1. **Notice of Appeal, Richard Clifton v. Village of Blanchester, Case No. 10-1196 (dated July 8, 2010)**

2. **Richard Clifton v. Village of Blanchester,App. 4, 6, 7,
Case No. CA2009-07-009, Twelfth District 8, 9 & 10
Court of Appeals Decision, May 25, 2010**

3. **Richard Clifton v. Village of Blanchester
Twelfth District Court of Appeals Case.....App. 2, 5, 9
No. CA2007-09-040, Entry Granting
Application for Reconsideration**

4. **Richard Clifton v. Village of Blanchester
Twelfth District Court of Appeals Case.....App. 2, 3
No. CA2007-09-040, Decision**

5. **Richard Clifton v. Village of Blanchester
Clinton County Court of Common Pleas,
Case No. CVH20060231, Entry Granting
Summary Judgment**

6. **Fifth and Fourteenth Amendments to the.....App. 4
United States Constitution**

7. **Section 19 Article 1, Ohio Constitution.....App. 4**

APPENDIX 1

IN THE SUPREME COURT OF OHIO

RICHARD CLIFTON, : On Appeal from the Clinton
 : County Court of Appeals,
 Plaintiff/Appellant, : Twelfth Appellate District
 :
 : Supreme Court **10-1196**
 Case No. _____
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 vs. :
 : Court of Appeals
 : Case No. CA 2009-07-009
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 VILLAGE OF BLANCHESTER, : Trial Court
 : Case No. CVH 2006 0231
 Defendant/Appellee. :

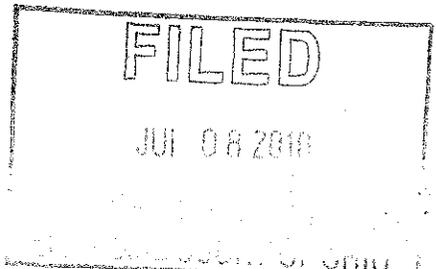
NOTICE OF APPEAL OF APPELLANT, RICHARD CLIFTON

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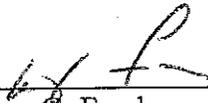
COUNSEL FOR APPELLEE, VILLAGE OF BLANCHESTER



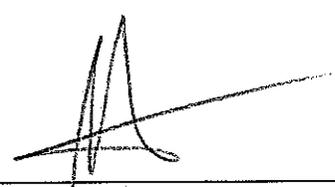
Plaintiff/Appellant, Richard Clifton, hereby gives notice of appeal to the Supreme Court of Ohio of the judgment of the Clinton County Court of Appeals, Twelfth Appellate District, entered in Court of Appeals Case Number CA 2009-07-009, on May 25, 2010.

This case raises a substantial constitutional question, involves legal issues of first impression in this state, and is one of public or great general interest.

FOWLER, DEMOS & STUEVE



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon Lawrence E. Barbieri and Robert Hiller, Counsel for Appellee, 5300 Socialville-Foster Road, Ste. 200, Mason, OH 45040, this 8th day of July, 2010, by regular U.S. mail.



William G. Fowler #0005254
Counsel for Appellant



Gregory J. Demos #0062819
Counsel for Appellant

APPENDIX 2

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLINTON COUNTY

FILED-CT. OF APPEALS

CLINTON COUNTY
CYNTHIA R. BAILEY, CLERK
2010 MAY 25 AM 9:24

RICHARD CLIFTON,
Plaintiff-Appellant,

CASE NO. CA 2009-02-009

JUDGMENT ENTRY

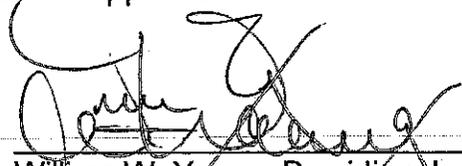
- vs -

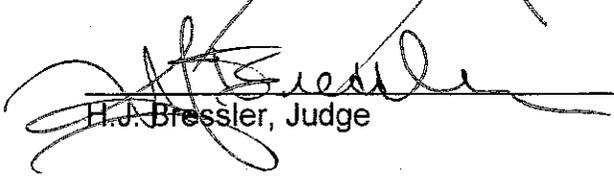
VILLAGE OF BLANCHESTER,
Defendant-Appellee.

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Clinton County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.


William W. Young, Presiding Judge


H.J. Bressler, Judge

(Concurs in Part/Dissents in Part)
Robert A. Hendrickson, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLINTON COUNTY

CLINTON COUNTY
CYNTHIA R. BAILEY, CLERK

2010 MAY 25 AM 9:24

FILED-CT. OF APPEALS

RICHARD CLIFTON,
Plaintiff-Appellant,

CASE NO. CA2009-07-009

- vs -

OPINION
5/24/2010

VILLAGE OF BLANCHESTER,
Defendant-Appellee.

CIVIL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CVH20060231

William G. Fowler, Gregory J. Demos, 12 West South Street, Lebanon, Ohio 45036-1708,
for plaintiff-appellant

Lawrence E. Barbieri, Robert S. Hiller, 5300 Socialville-Foster Road, Suite 200, Mason,
Ohio 45040, for defendant-appellee

YOUNG, P.J.

{¶1} Plaintiff-appellant, Richard Clifton, appeals from the Clinton County Court of Common Pleas decision granting summary judgment in favor of defendant-appellee, the village of Blanchester, upon remand from this court in a lawsuit involving a zoning dispute. For the reasons outlined below, we affirm.

{¶2} In 1967, Clifton purchased 42 acres of real property located at the intersection of Collins-Riley Road and Middleboro Road in Blanchester, Ohio. After a number of years, and after he sold off several smaller segments of his property, Clifton now owns and resides on approximately 27 acres of real property located at that intersection.

{¶3} In 1993, Clifton purchased an additional 99 acres of farmland adjacent to his property along Middleboro Road. Several years later, in 1997, Clifton sold 2.87 acres of this farmland to J & M Precision Machining, Inc. (J & M). The remaining 97 acres of Clifton's farmland runs adjacent to the property he previously sold to J & M.

{¶4} On February 28, 2002, Blanchester rezoned J & M's property from an I-1 classification (Restricted Industrial) to I-2 classification (General Industrial), which permitted J & M to begin running a larger operation. None of Clifton's property, all of which sits just outside Blanchester's jurisdictional boundaries, was zoned by the village.

{¶5} On April 3, 2006, Clifton filed a complaint alleging that Blanchester's decision to rezone J & M's property constituted a compensable "taking" of his adjacent property.¹ Blanchester subsequently filed a motion for summary judgment, which the trial court granted. Clifton then appealed, arguing that the trial court improperly awarded summary judgment in Blanchester's favor.

{¶6} On appeal, this court agreed with the trial court's decision finding the rezoning of J & M's property did not deprive Clifton of all economic use of his land. *Clifton v. Village of Blanchester*, Clinton App. No. CA2007-09-040, 2008-Ohio-4434, ¶12 (*Clifton* /). However, this court also found that the trial court's overall analysis was lacking because the court failed to address the possibility of a partial taking pursuant to *Penn*

1. Clifton filed his original complaint on March 29, 2002, alleging that Blanchester's rezoning of the J & M property was unconstitutional and that the rezoning constituted a "taking." The proceedings related to his March 2002 complaint eventually terminated and are not relevant to this appeal.

Central Transp. Co. v. City of New York (1978), 438 U.S. 104, 98 S.Ct. 2646. Id. at ¶13. This court, therefore, reversed the grant of summary judgment "insofar as it failed to address the issue of whether the rezoning effected a partial taking of [Clifton's] property under *Penn Central* * * *" and remanded the case for "the limited purpose of addressing that issue." Id. at ¶14.

{¶7} On September 12, 2008, Blanchester filed an application for reconsideration claiming, among other things, that the trial court failed to address the issue of standing, something that it had previously raised to the trial court and again to this court on appeal. Finding that it was "appropriate that the trial court consider the standing issue," this court granted Blanchester's application for reconsideration and modified the instructions upon remand as follows:

{¶8} "We reverse the grant of summary judgment insofar as it failed to address the issue of whether the rezoning affected a partial taking of appellant's property under *Penn Central*, and remand the case for the purpose of addressing that issue and the issue of standing previously raised by the village in its motion for summary judgment."

{¶9} On May 1, 2009, after the matter was remanded to the trial court, Blanchester filed a motion for summary judgment, which the trial court granted. In so holding, the trial court found that Clifton did not have standing to pursue his claim against Blanchester where it "did not rezone any of [his] property." In addition, after conducting a *Penn Central* analysis, the trial court found "no partial taking of [Clifton's] property requiring compensation by [Blanchester]."

{¶10} Clifton now appeals from the trial court's decision granting summary judgment in Blanchester's favor upon remand, raising two assignments of error.

{¶11} Assignment of Error No. 1:

{¶12} "THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT [CLIFTON] LACKED STANDING TO PURSUE HIS CLAIM OF A PARTIAL REGULATORY TAKING AGAINST [BLANCHESTER]."

{¶13} In his first assignment of error, Clifton argues that the trial court erred by finding he lacked standing to pursue his claim against Blanchester. We disagree.

{¶14} Generally, before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. *Ohio Contrs. Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 1994-Ohio-183; *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998-Ohio-275. "Standing" is defined as a "party's right to make a legal claim or seek judicial enforcement of a duty or right." *State ex re. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 124 Ohio St.3d 390, 2010-Ohio-169, ¶19, quoting Black's Law Dictionary (8th Ed.2004) 1442. "[T]he question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy * * * as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." (Internal citations and quotations omitted.) *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶27; *Brinkman v. Miami Univ.*, Butler App. No. CA2006-12-313, 2007-Ohio-4372, ¶30. To decide whether one has standing to pursue his claim, "courts must 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." *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 25. Whether undisputed facts confer standing to assert a claim involves a question of law that this court reviews de novo. *Cuyahoga Cty. Bd. of Commrs. v. State of Ohio*, 112 Ohio St.3d 59, 2006-Ohio-6499, ¶23.

{¶15} While the general principles regarding standing are well-established, this case presents the intriguing question of whether a nonresident contiguous property owner

has standing to bring an action against an adjacent political subdivision seeking compensation for a rezoning of property located solely within its jurisdictional boundaries. After thoroughly considering this issue of first impression, we find that such an owner does not have standing.

{¶16} Neither party provided this court with any relevant case law specifically addressing the issue at hand, nor did our research turn up any case law directly on point. However, while it is certainly a novel concept, a similar question has been addressed by several courts throughout the country. Therefore, we find a brief review of that case law is appropriate.

{¶17} In *Creskill Borough v. Dumont Borough* (1953), 15 N.J. 238, which has since been deemed the "leading case" regarding whether a nonresident has standing to contest an adjacent political subdivision's zoning decision, the New Jersey Supreme Court, addressing whether the trial court erred "in considering property in adjoining municipalities" as it relates to their zoning decisions,² stated the following:

{¶18} "At the very least [the municipality] owes a duty to hear any residents and taxpayers of adjoining municipalities who may be adversely affected by proposed zoning changes and to give as much consideration to their rights as they would to those of residents and taxpayers of [the municipality.] To do less would be to make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning." *Id.* at 247.

{¶19} From this decision, the following line of cases arose.

2. It should be noted that in *Creskill*, the New Jersey Supreme Court *did not* address whether "the individual plaintiffs who reside in other boroughs" were "proper parties" to the action. *Id.* at 245. Instead, the court determined that it was "unnecessary" because one of the parties "own[ed] property on Block 197, the very area affected by the amendatory ordinance." *Id.* In turn, based on this finding, the court concluded that it was "*immaterial* whether the * * * remaining individual plaintiffs have adequate status to challenge the ordinance * * *." (Emphasis added.) *Id.* Therefore, while we certainly understand the insight *Creskill* provides as to whether a municipality should *consider* the effect zoning changes may have on any outlying properties, including those beyond its jurisdictional boundaries, this court is reluctant to grant this decision any further significance.

{¶20} In *Koppel v. City of Fairway* (1962), 189 Kan. 710, the Supreme Court of Kansas was faced with the question of whether "only those persons within the city * * * may protest the change in the zoning ordinance * * *." In holding that nonresidents were also able to protest the change, the court stated the following:

{¶21} "[T]he city which sought to change a tract that bordered on the other city from residential zone to a retail business district classification * * * owed a duty to hear any resident of the adjoining city whose property fronted on such tract and who might be adversely affected by the proposed zoning change, and to give as much consideration to their rights as it would give to those of its own residents." *Id.* at paragraph one of the syllabus.

{¶22} The court then stated that the applicable statute "makes no requirement of residency or location of property" and "clearly appears * * * to protect all designated property affected, whether located within or without the city adopting the changed zoning ordinance." *Id.* at 713-714. In so holding, the court quoted heavily from the New Jersey Supreme Court's decision in *Creskill* and found that decision to be "analogous." *Id.* at 714.

{¶23} In addition, in *Scott v. City of Indian Wells* (1972), 6 Cal.3d 541, after first noting that "[w]hether a nonresident but obviously affected landowner has standing to contest a city's zoning * * * has not previously been settled in our state," the Supreme Court of California determined that "adjoining landowners who are not city residents * * * have standing to challenge zoning decisions of the city which affect their property." *Id.* at 547, 549. In reaching this conclusion, the court found that "[s]tates which have considered the issue have generally held that affected property owners or residents have standing to contest a municipality's zoning even though they are not residents of the municipality." *Id.* In so holding, the court cited to the "leading case" of *Creskill* and to the

Supreme Court of Kansas' decision in *Koppel*.

{¶24} While not directly citing to the New Jersey Supreme Court's decision in *Creskill*, other courts have also found contiguous nonresident property owners have standing to contest an adjacent municipality's zoning decision. See *Whittingham v. Village of Woodrige* (1969), 111 Ill. App.2d 147, 150-151 ("invisible corporate limit line" no bar to nonresident property owner to challenge zoning decision of neighboring political subdivision); *Dahman v. City of Ballwin* (Mo.App.1972), 483 S.W.2d 605, 609 ("existence of a corporate boundary line should not deny an adjacent landowner outside the city standing to challenge the validity of a proposed zoning classification"); *Const. Industry Assn. of Sonoma County v. City of Petaluma* (C.A.9, 1975), 522 F.2d 897, 905 (nonresident landowner had standing to challenge adjacent municipality's building plan); *Orange Fibre Mills, Inc. v. City of Middletown* (N.Y. Sp. Ct. 1978), 94 Misc.2d 233, 235 (applicable statute did not bar nonresident property owner located outside adjacent municipality from "seeking relief" as a result of its zoning decision); *Miller v. Upper Allen Twp. Zoning Hearing Bd.* (1987), 112 Pa.Cmwith. 274, 283 (nothing in municipality planning code "suggests that the protections and benefits of zoning are to be limited to residents or property owners within the municipality which enacted the ordinance"); *Neu v. Planning Bd. of the Twp. of Union* (2002), 352 N.J. Super. 544, 552 (nonresident property owners within "close proximity" to proposed major subdivision have a "sufficient stake to have standing to question [b]oard actions that might impact * * * their property").

{¶25} 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. Furthermore, even if these cases were directly on point, this

court is not bound to adhere to any of those decisions. See *State v. Steele*, Butler App. No. CA2003-11-276, 2005-Ohio-943, ¶42; *Walker v. Firelands Community Hosp.*, 170 Ohio App.3d 785, 2007-Ohio-871, ¶49; *Roemisch v. Mutual of Omaha Ins. Co.* (1974), 39 Ohio St.2d 119, 125. Therefore, although this court's holding may conflict with the prevailing view across the country, and while some may argue that our decision makes a "fetish out of invisible municipal boundary lines and a mockery of the principles of zoning," we affirm the trial court's decision finding Clifton, a nonresident contiguous property owner, did not have standing to pursue his claim against Blanchester, a neighboring political subdivision, seeking to receive compensation for its zoning decisions on property located solely within its jurisdictional boundaries.

{¶26} Turning to the facts of this case, the trial court, in its June 29, 2009 decision granting summary judgment in Blanchester's favor upon remand, determined that Clifton did not have standing to pursue his claim "[b]ecause the Village of Blanchester did not rezone any of [his] property * * *," and, consequently, that he did not have "a right to seek damages based upon the rezoning of adjacent property." After a thorough review of the record, we find the trial court's reasoning to be sound, and therefore, we affirm the trial court's decision.

{¶27} It is undisputed that Blanchester'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, Blanchester 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 Blanchester'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.

{¶28} Furthermore, within his cause of action, Clifton merely claims that he should be compensated by Blanchester for its partial regulatory taking via inverse condemnation. However, as the Ohio Supreme Court has previously stated, "the powers of local self-government, granted to a municipality by Section 3 of Article XVIII of the Ohio Constitution, do not include the power of eminent domain beyond the geographical limits of the municipality." *Britt v. City of Columbus* (1974), 38 Ohio St.2d 1, paragraph one of the syllabus; see, also, R.C. 163.63 ("any reference in the Revised Code to any authority to acquire real property by 'condemnation' or to take real property pursuant to the power of eminent domain is deemed to be an appropriation of real property pursuant to this chapter and any such taking or acquisition shall be made pursuant to this chapter"). In turn, because his property is located completely outside Blanchester's jurisdictional boundaries, the remedy Clifton seeks, which is essentially a claim for money damages resulting from an alleged appropriation by inverse condemnation, is unavailable as a matter of law.³ Therefore, since Clifton has no substantive right to the relief he sought to recover from Blanchester, we find he has no standing to sue.

{¶29} Moreover, while not dispositive of our decision in this matter, we find that any decision conferring standing to 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

3. Clifton's claim, when stripped down to its simplest form, is essentially a claim for money damages. In turn, because Clifton is seeking money damages from Blanchester, a political subdivision, we find that R.C. Chapter 2744, titled "Political Subdivision Tort Liability Act," may be implicated. However, since neither party addressed the effect, if any, that R.C. Chapter 2744 may have on this matter, we will not address that issue here.

open the floodgates on the surge of litigation.

{¶30} The dissent, while not explicit, essentially advocates for this court to create a new cause of action not previously available to nonresidents under R.C. Chapter 163. While we certainly understand the concerns the dissent raises, we must not overstep our own judicial limitations, but instead, adhere to the well-established principle that it is up to the Ohio Supreme Court or the General Assembly, and not the appellate courts, to create new causes of action. *Winkle v. Zettler Funeral Homes, Inc.*, 182 Ohio App.3d 195, 2009-Ohio-1724, ¶61. As noted previously, R.C. Chapter 163 simply does not allow for a municipality to appropriate property beyond its jurisdictional boundary. *Britt* at paragraph one of the syllabus; R.C. 163.63. Had the General Assembly intended to expand R.C. Chapter 163 to accommodate such action, and implicitly confer standing upon those affected nonresident property owners, it would have so provided. See, e.g., *Bricker v. Board of Educ. of Preble Shawnee Local School Dist.*, Preble App. No. CA2007-10-020, 2008-Ohio-4964, ¶16.

{¶31} In light of the foregoing, we affirm the trial court's decision finding Clifton, a nonresident contiguous property owner, did not have standing to pursue his claim against Blanchester, an adjacent political subdivision, in an action seeking to receive compensation for its decision to rezone property solely within its own jurisdictional boundaries. Accordingly, appellant's first assignment of error is overruled.

{¶32} Having found Clifton lacks standing to pursue his claim against Blanchester, we would ordinarily not address any remaining arguments. See, e.g., *Williams v. McFarland Properties, L.L.C.*, 177 Ohio App.3d 490, 2008-Ohio-3594, ¶29. However, in light of our instructions to the trial court upon remand, which explicitly stated that it was to "address the issue of whether the rezoning affected a partial taking of appellant's property under *Penn Central*," we find further discussion to be necessary and appropriate.

{¶33} Assignment of Error No. 2:

{¶34} "THE TRIAL COURT ERRED WHEN IT GRANTED [BLANCHESTER'S] MOTION FOR SUMMARY JUDGMENT."

{¶35} In his second assignment of error, Clifton argues that the trial court improperly granted summary judgment to Blanchester because he provided evidence "illustrating a substantial loss in the value of his property" after the J & M property was rezoned, thereby justifying his partial taking claim. We disagree.

{¶36} Summary judgment is a procedural device used to terminate litigation and avoid a formal trial when there are no issues in a case to try. *Forste v. Oakview Constr., Inc.*, Warren App. No. CA2009-05-054, 2009-Ohio-5516, ¶7. An appellate court's review of a summary judgment decision is de novo. *Creech v. Brock & Assoc. Constr.*, 183 Ohio App.3d 711, 2009-Ohio-3930, ¶9, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. In applying the de novo standard, a reviewing court is required to "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran*, 155 Ohio App.3d 713, 2004-Ohio-181, ¶9, quoting *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383. In turn, an appellate court must review a trial court's decision to grant or deny summary judgment independently, without any deference to the trial court's judgment. *Bravard*, citing *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 295.

{¶37} A trial court may grant summary judgment only when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The party moving for summary judgment

bears the burden of demonstrating no genuine issue of material fact exists. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107. The nonmoving party must then present evidence to show that there is some issue of material fact yet remaining for the trial court to resolve. *Id.* at 293. A material fact is one which would affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505. In deciding whether a genuine issue of material fact exists, the evidence must be construed in the nonmoving party's favor. *Walters v. Middletown Properties Co.*, Butler App. No. CA2001-10-249, 2002-Ohio-3730, ¶10.

{¶38} There are two types of regulatory actions that are considered to be "per se" takings for Fifth Amendment purposes. *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 538, 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 involves governmental regulations that cause an owner to suffer a permanent physical invasion of his property, while the second involves governmental regulations that completely deprive an owner of all economically beneficial use of his property. See, e.g., *Loretto v. Teleprompter Manhattan CA TV Corp.* (1982), 458 U.S. 419, 435-40, 102 S.Ct. 3164; *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 1019, 112 S.Ct. 2886.

{¶39} This court has already determined in *Clifton I* that Blanchester's decision to rezone the J & M property did not amount to a "per se" regulatory taking of Clifton's property under the Fifth and Fourteenth Amendments. See *Clifton I*, 2008-Ohio-4434 at ¶12; see, also, *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 538, 125 S.Ct.2074; *Shelly Materials*, 2007-Ohio-5022 at ¶18. Therefore, we will not address the "per se" regulatory takings in this opinion.

{¶40} However, as this court also discussed in *Clifton I*, apart from these two categories of "per se" regulatory takings, there is a third category for partial takings which

is governed by the United States Supreme Court's decision in *Penn Central*. Id. at ¶11. As recently stated by the Ohio Supreme Court, *Penn Central* "recognizes an ad hoc, factual inquiry that requires the examination of the following three factors to determine whether a regulatory taking occurred in cases in which there is no physical invasion and the regulation deprives the property of less than 100 percent of its economically viable use: (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." *State ex rel. Gilbert v. City of Cincinnati*, Slip Opinion No. 2010-Ohio-1473, ¶17, quoting *Shelly Materials* at ¶19; *State ex rel. Horvath v. State Teachers Retirement Bd.*, 83 Ohio St.3d 67, 71, 1998-Ohio-424.

{¶41} However, while *Penn Central* may require the examination of three factors to determine whether a regulatory taking occurred under certain circumstances, even assuming Clifton actually endured a "substantial loss" in the value of his property by Blanchester's decision to rezone the J & M property, long-standing precedent holds that the mere "diminution in a property's value, however serious, is insufficient to demonstrate a taking." *Concrete Pipe and Products of Ca., Inc. v. Constr. Laborers Pension Trust* (1993), 508 U.S. 602, 604, 113 S.Ct. 2264; *Penn Central*, 438 U.S. at 131, citing *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 47 S.Ct. 114 (75% diminution in value caused by zoning not a taking); *Hadacheck v. Sebastian* (1915), 239 U.S. 394, 36 S.Ct. 143 (87½% diminution in value not a taking). In fact, as stated by the Ohio Supreme Court, "something more than loss of market value or loss of the comfortable enjoyment of the property is needed to constitute a taking." *BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 344, 1998-Ohio-287; *Sullivan v. Hamilton Cty. Bd. of Health*, 155 Ohio App.3d 609, 2003-Ohio-6916, ¶36.

{¶42} Applying these principles, which we find to be appropriate, we conclude, as

a matter of law, that even if we were to find he had standing to pursue his claim, Blanchester'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. 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. Accordingly, Clifton's second assignment of error is overruled.

{¶43} Judgment affirmed.

BRESSLER, J., concurs.

HENDRICKSON, J., concurs in part and dissents in part.

HENDRICKSON, J., concurring in part and dissenting in part.

{¶44} I concur with the majority's disposition of the partial taking issue addressed under Clifton's second assignment of error. In addition to the reasoning espoused by the majority, I note that Clifton "invited" the industrial use which conflicted with his long-term investment plan of residential development when he sold a portion of his acreage to J & M Precision Machining. Any distinct investment-backed expectations Clifton may have had were impacted by his own decision to sell the land adjoining his prospective development to an industrial company. See *Penn Cent. Transp. Co. v. New York City* (1978), 438 U.S. 104, 124, 98 S.Ct. 2646.

{¶45} Where I diverge from the majority is on the standing issue raised under

Clifton's first assignment of error. The majority surveyed cases from outside the state of Ohio that are relevant to the case at bar. The common holding running through these cases is that nonresident property owners who clearly may be affected have standing to contest a zoning decision made by a neighboring municipality. The majority distinguishes these cases on the basis that none contemplate the precise issue confronted by this court, i.e., whether a nonresident contiguous property owner may pursue a takings claim against an adjacent political subdivision.

{¶46} In upholding the trial court's decision, the majority reasoned that Blanchester's rezoning of J & M's property from restricted to general industrial did not impede Clifton's use of his own property in any way. The majority concluded that Clifton failed to allege a sufficient personal stake in the outcome of the controversy so as to confer standing.

{¶47} Contrary to the majority opinion, I would find that a party in Clifton's position has standing to pursue a takings claim. In my opinion, those cases cited by the majority finding in favor of standing suggest the more prudent approach. In view of the potential harm suffered by a contiguous nonresident property owner, I find it unjust to summarily deny such a party his day in court by relying upon invisible and somewhat arbitrary geographical limits.

{¶48} Certainly, I do not advocate a bright-line rule conveying standing to *any* nonresident landowner who wishes to contest a zoning action taken by a neighboring political subdivision. Rather, zoning challenges posed by nonresidents must be addressed on a case-by-case basis. I agree with the majority that these challenges should be strictly limited to avoid opening the prodigious floodgates of litigation.

{¶49} A court scrutinizing whether a nonresident property owner has standing to pursue a claim against an adjoining political subdivision would be required to determine

whether the claimant "has alleged a personal stake in the outcome of the controversy * * *." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶27. In the present matter, this entails an examination of the substantive law creating the right being sued upon – takings jurisprudence – to see if Clifton's claim was indeed advanced by a party possessing a substantive right to relief. *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 25.

{¶50} Clifton arguably presented evidence that his property was impacted by Blanchester's rezoning of J & M's property and that the rezoning could have affected a partial regulatory taking. Admittedly, as I indicated in my concurrence, Clifton's takings claim is ultimately without merit. Nonetheless, I would rule that Clifton is still entitled to make his claim and have the trial court scrutinize the merits of his case. *Ohio Pyro* at ¶27.

{¶51} For these reasons, I respectfully dissent from the majority's analysis on the first assignment of error and would find that Clifton had standing to assert a takings claim as a result of Blanchester's rezoning of J & M's property.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

APPENDIX 3

IN THE COURT OF APPEALS FOR CLINTON COUNTY, OHIO

RICHARD CLIFTON, : CASE NO. CA2007-09-040
Appellant, : ENTRY GRANTING APPLICATION FOR
vs. : RECONSIDERATION
VILLAGE OF BLANCHESTER, :
Appellee. :

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H. CHAMBERLIN

The above cause is before the court pursuant to an application for reconsideration filed by counsel for appellee, Village of Blanchester, on September 12, 2008, and a memorandum in opposition filed by counsel for appellant, Richard Clifton, on September 22, 2008.

When reviewing an application for reconsideration, an appellate court determines whether the application calls the attention of the court to an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. *Grabill v. Worthington Industries, Inc.* (1993), 91 Ohio App.3d 469.

Appellant owns and resides on approximately 27 acres of real property located in Blanchester, Ohio. In 1993, appellant purchased approximately 99 acres of adjacent farmland. In 1997, he sold nearly three acres of this farmland to J & M Precision Machining, Inc. The remaining acres of farmland are adjacent to the property sold to J & M.

In February 2002, the Village of Blanchester rezoned J & M's property from I-1 (Restricted Industrial) to I-2 (General Industrial), which permitted J & M to run a larger operation. None of appellant's property was rezoned. Appellant then filed a complaint

in the Clinton County Court of Common Pleas alleging that the rezoning of J & M's property constituted a compensable taking of his property because it caused a reduction in the value of the property so substantial that it deprived him of economic use of the land. Appellant sought damages in excess of \$25,000. The village filed a motion for summary judgment, which was granted by the trial court.

On appeal, this court agreed with the trial court that the rezoning did not deprive appellant of all economic use of his land. However, we stated that the trial court's analysis fell short because it did not address the possibility of a partial taking pursuant to *Penn Central Transportation Co. v. New York City* (1978), 438 U.S. 104, 98 S.Ct. 2646. A *Penn Central* analysis is appropriate in cases where there is no physical invasion of the complainant's property and the regulation deprives the property owner of less than 100% of its economically beneficial use. This court therefore reversed the grant of summary judgment insofar as it failed to address the *Penn Central* partial taking issue and remanded the case to address that issue only.

In its application for reconsideration, the village argues that there cannot be a taking under Ohio law because the zoning ordinance is constitutionally valid. The village also asserts that the trial court implicitly considered *Penn Central* when it made its decision. Alternatively, the village argues that the *Penn Central* test is not appropriate in this case because the U.S. Supreme Court has stated that diminution in property value alone is not enough to establish taking. See, e.g., *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365.

This court does not agree that the trial court implicitly considered *Penn Central* by quoting a portion of the Ohio Supreme Court case *Shemo v. City of Mayfield*

Heights, 95 Ohio St.3d 59, 2002-Ohio-1627. The *Shemo* court held that where a regulation is found to be unconstitutional, the *Penn Central* analysis is unnecessary. In the present case, there is no finding that the zoning ordinance involved is unconstitutional.

A *Penn Central* analysis calls for the examination of three distinct factors to determine whether a partial regulatory taking has occurred: (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. *Penn Central* at 124. The trial court's analysis did not consider these factors, and granted summary judgment to the village solely upon finding that appellant's property "retains economic value."

A *Penn Central* analysis is appropriate where there is no physical invasion of the complainant's property and the regulation deprives the property of less than 100% of its economically beneficial use. The testimony in the present case indicates that although appellant admitted that he was still able to farm the land, he made only about \$5,000 annually from the farming operation. This amount may differ substantially from the profits appellant might realize by developing the land for residential purposes as he intended. Thus, this case was properly remanded to address the partial taking issue.

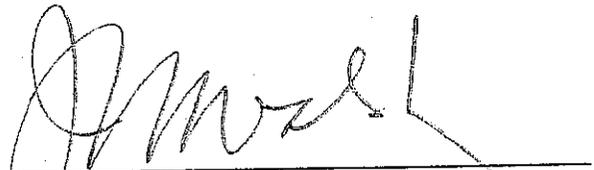
The village's final argument on reconsideration involves standing. This issue was raised by the village before the trial court, but was not addressed in the trial court's opinion. By not addressing the issue, the trial court implicitly decided that appellant had standing, a decision that was raised by the village defensively on appeal.

The standing issue was raised by the village in its motion for summary judgment before the trial court, and should have been addressed by the trial court prior to ruling on the merits of the motion. Instead, the motion was granted on its merits. Given that the trial court's decision has now been reversed in part and remanded, it is appropriate that the trial court consider the standing issue in addition to the issue of whether the rezoning effected a partial taking under *Penn Central*.

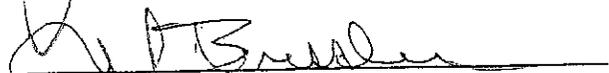
Accordingly, the application for reconsideration is GRANTED. Upon reconsideration, the instructions on remand are hereby modified to read as follows:

We reverse the grant of summary judgment insofar as it failed to address the issue of whether the rezoning affected a partial taking of appellant's property under *Penn Central*, and remand the case for the purpose of addressing that issue and the issue of standing previously raised by the village in its motion for summary judgment.

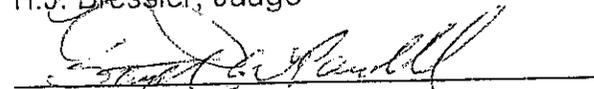
IT IS SO ORDERED.



James E. Walsh, Presiding Judge



H.J. Bressler, Judge



Stephen W. Powell, Judge

APPENDIX 4

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLINTON COUNTY

RICHARD CLIFTON,

Plaintiff-Appellant,

- VS -

VILLAGE OF BLANCHESTER,

Defendant-Appellee.

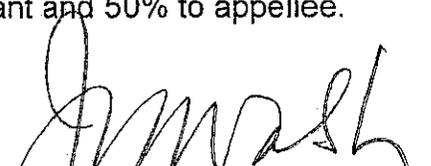
CASE NO. CA2007-09-040

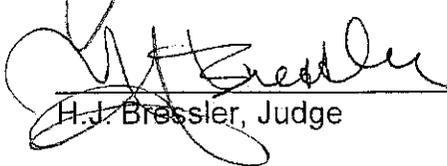
JUDGMENT ENTRY

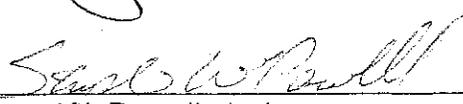
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed in part, reversed in part, and this cause is remanded to the trial court for further proceedings according to law and consistent with the Opinion filed the same date as this Judgment Entry.

It is further ordered that a mandate be sent to the Clinton County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed 50% to appellant and 50% to appellee.


James E. Walsh, Presiding Judge


H.J. Bressler, Judge


Stephen W. Powell, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLINTON COUNTY

RICHARD CLIFTON,

Plaintiff-Appellant,

- vs -

VILLAGE OF BLANCHESTER,

Defendant-Appellee.

CASE NO. CA2007-09-040

OPINION

9/2/2008

CIVIL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CVH 2006-0231

William G. Fowler, 12 West South Street, Lebanon, OH 45036, for plaintiff-appellant

Schroeder, Maundress, Barbieri & Powers, Lawrence E. Barbieri, Robert S. Hiller, 11935
Mason Road, Suite 110, Cincinnati, OH 45249, for defendant-appellee

POWELL, J.

{¶1} Plaintiff-appellant, Richard Clifton, appeals a decision of the Clinton County Court of Common Pleas granting summary judgment in favor of defendant-appellee, the village of Blanchester, in a zoning dispute. For the reasons that follow, we affirm in part, reverse in part, and remand.

{¶2} Appellant owns and resides on approximately 27 acres of real property located at the intersection of Collins-Riley Road and Middleboro Road in Blanchester, Ohio. In 1993,

appellant purchased approximately 99 acres of farmland along Middleboro Road. In 1997, he sold 2.87 acres of this farmland to the owners of J & M Precision Machining, Inc. ("J & M"). The remaining 97 acres of appellant's farmland is adjacent to J & M on one side and to nine acres of land along Middleboro Road which appellant purchased around 1997 on the other side.

{¶3} In February 2002, appellee rezoned J & M's property. The previous I-1 classification, Restricted Industrial, permitted "industrial uses, which can be compatibly operated within or in very close proximity to residential areas. These establishments should be clean; quiet, void of such nuisance as odor, dust and smoke; operate primarily within enclosed structures; and generate little industrial traffic." The new I-2 classification, General Industrial, permitted "industrial uses generally requiring large sites and extensive range of services and facilities, including adequate access to highway development and integrated transportation facilities. Industrial uses in this classification typically operate from enclosed structures and often maintain large open storage in service areas where part of the production process may take place." None of the property owned by appellant was rezoned.

{¶4} Relevant to this appeal,¹ appellant filed a complaint in the common pleas court on April 3, 2006. The complaint alleged that the rezoning of J & M's property constituted a compensable "taking" of appellant's property because it caused a reduction in the value of his property so substantial that it deprived him of economic use of the land. Appellant sought damages in excess of \$25,000. Appellee filed a motion for summary judgment, which the trial court granted. Appellant timely appeals, raising one assignment of error.

{¶5} Assignment of Error No. 1:

1. Appellant filed his original complaint in the common pleas court on March 29, 2002, alleging that the February 2002 zoning ordinance was unconstitutional and that the rezoning constituted a "taking." The proceedings related to that complaint eventually terminated and are not relevant to the present appeal.

{¶6} "THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

{¶7} Appellant argues that the trial court improperly awarded summary judgment to appellee because the rezoning of J & M's property substantially decreased the per acre value of appellant's property for the purpose of residential lot sales. Although appellant concedes that the land holds some economic value because he is still able to farm it, he urges that the difference in value and economic return between farming and the intended use of development is substantial and amounts to a regulatory taking.

{¶8} This court reviews a trial court's decision on summary judgment de novo. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper when (1) there are no genuine issues of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. Civ.R. 56(C). See, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶9} The "takings clause" of the Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. This clause applies to the individual states by virtue of the Fourteenth Amendment to the United States Constitution. *Chicago Burlington & Quincy RR. Co. v. Chicago* (1897), 166 U.S. 226, 233-34, 17 S.Ct. 581. See, also, Section 19, Article I, Ohio Constitution.

{¶10} There are two types of regulatory actions that are considered to be per se takings for Fifth Amendment purposes. *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 538, 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 involves governmental regulations that cause an owner to suffer a permanent physical invasion of his property. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), 458 U.S. 419, 435-40, 102 S.Ct.

3164. The second involves governmental regulations that completely deprive an owner of *all* economically beneficial use of his property, also known as a "categorical taking" or "total taking." See, e.g., *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 1019, 112 S.Ct. 2886.

{¶11} Apart from these two categories, there is a third category for partial takings which is governed by *Penn Cent. Transp. Co. v. New York City* (1978), 438 U.S. 104, 98 S.Ct. 2646. The *Penn Central* analysis is appropriate in cases where there is no physical invasion of the complainant's property and the regulation deprives the property of less than 100 percent of its economically beneficial use. *Shelly Materials* at ¶19. Under *Penn Central*, courts conduct an ad hoc examination of the following three factors to determine whether a partial regulatory taking has occurred: (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. *Penn Central* at 124. See, also, *State ex rel. Horvath v. State Teachers Retirement Bd.*, 83 Ohio St.3d 67, 71, 1998-Ohio-424.

{¶12} Regarding the first type of per se taking, a regulatory action that results in a permanent physical invasion, there were no allegations that Clifton suffered a physical invasion of his property. Regarding the second type of per se taking, a regulatory action that results in a total taking, the trial court granted summary judgment to appellee on the basis that there was no taking because the evidence established that appellant's property retained economic value. We agree with this conclusion and, in fact, appellant concedes that he still farms the land. At his deposition, appellant stated that he has farmed the land every year since he purchased it in 1993, and that he averages a profit of \$4,000 to \$5,000 per year from his farming operation. Such evidence clearly establishes that appellant's land was not rendered economically valueless by the rezoning of J & M's property.

{¶13} Nonetheless, we observe that the trial court's analysis fell short in that it did not address the partial taking issue raised by appellant's takings claim in his complaint and further specified in his response to appellee's motion for summary judgment. Appellant submits that he presented sufficient Civ.R. 56 evidence to establish that there is a genuine issue regarding whether the rezoning so impacted the value of his land as to constitute a partial taking. Appellant contends that the rezoning had a negative economic impact on his land in that it substantially reduced the value thereof. The rezoning, according to appellant, interfered with his original "investment-backed expectations" in the property, i.e., his intent to develop and subdivide his land for residential sale. The trial court failed to address these *Penn Central* partial takings factors.

{¶14} We affirm the trial court's grant of summary judgment in favor of appellee regarding the court's holding that the rezoning did not effect a total taking of appellant's property. We reverse the grant of summary judgment insofar as it failed to address the issue of whether the rezoning effected a partial taking of appellant's property under *Penn Central*, and remand the case for the limited purpose of addressing that issue.

{¶15} Appellant's first assignment of error is overruled in part and sustained in part.

{¶16} Judgment affirmed in part, reversed in part, and remanded.

WALSH, P.J. and BRESSLER, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

APPENDIX 5

IN THE COURT OF COMMON PLEAS

CLINTON COUNTY, OHIO

CLINTON COUNTY
CYNTHIA A. BAILEY, CLERK

2009 JUN 29 AM 0:52

CLERK-COMM. PLEAS

Richard Clifton,
Plaintiff

-vs.-

Village of Blanchester,
Defendant

CASE NO. CVH 2006 0231
JUDGMENT ENTRY
GRANTING SUMMARY JUDGMENT

This case is again before the Court for resolution of Defendant's May 1, 2009 Motion for Summary Judgment (Upon Remand by Court of Appeals). The instructions to this Court contained in the Appellate Court Entry Granting Application for Reconsideration were as follows:

"We reverse the grant of summary judgment insofar as it failed to address the issue of whether the rezoning affected a partial taking of appellant's property under *Penn Central*, and remand the case for the purpose of addressing that issue and the issue of standing previously raised by the village in its motion for summary judgment."

The Appellate Court did affirm portions of this Court's prior decision regarding the finding that there was no *per se* taking of the land belonging to Plaintiff Richard Clifton ("Mr. Clifton.") The Appellate Court agreed that Mr. Clifton's property suffered no physical invasion and with the finding there was evidence clearly establishing Mr. Clifton's land was not rendered economically valueless by the Village of Blanchester rezoning of his neighbor's land. Those issues are not a part of this decision. In this Decision, the Court directs its attention to responding to the mandate contained within the Appellate Court instructions.

This Court has considered all the parties' written arguments,¹ their June 22, 2009 oral arguments, and all proper Civ.R.56 evidence that has been filed in this case. Based upon consideration of the above, Defendant is granted summary judgment.

STANDING

Mr. Clifton owns real estate adjacent to property that was rezoned by the Village of Blanchester. Mr. Clifton's property is not located in the Village of Blanchester. Mr. Clifton is not a resident of the Village of Blanchester. None of Mr. Clifton's real estate has been zoned or rezoned by the Village of Blanchester. Yet despite these undisputed facts, Mr. Clifton alleges the rezoning of his neighbor's property by the Village of Blanchester amounts to a taking of his property. He alleges that the rezoning of the adjacent property reduced the value of his land causing him to suffer a partial economic loss.

Because the Village of Blanchester did not rezone any of Mr. Clifton's property, the court finds that Mr. Clifton does not have standing to file a claim against the Village of Blanchester for any devaluation his property may have suffered due to its rezoning of property adjacent to property owned by Mr. Clifton. The Court finds that Mr. Clifton's expectation regarding the use of unowned, adjacent property is not a property right. 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. Conversely, the Village of Blanchester has cited the Michigan case of *Fahome v. City of St. Clair Shores* 1998 WL 2016580 (Mich. App.) which held that a plaintiff cannot challenge the City's decision to grant rezoning to an adjacent land owner. The

¹Including the motion for summary judgment and briefs that were filed prior to the first appeal.

Michigan Court held the governmental action under that fact pattern is not specifically directed towards plaintiff's property and does not constitute a taking of plaintiff's property.

Defendant, also, cited the Michigan case of *Murphy v. City of Detroit* (1993) 2001 Mich. App. 54, 506 N.W. 2d 5. In that case the City of Detroit acquired properties surrounding Plaintiff's property for an urban renewal project. The city action resulted in the relocation of approximately 17,000 residents from the surrounding area and a 75% reduction in the volume of Plaintiffs' businesses. Plaintiffs, who were owners of a local supermarket and medical facility, brought an inverse condemnation action against the city.

In resolving the dispute, the trial Court held Defendants did not take anything that could be construed as Plaintiffs' property, even though the Court did not doubt that the value of Plaintiffs' property had been greatly diminished because of Defendants' actions. The Court found that Plaintiffs' expectations regarding the future use of the surrounding property were not "rights," and that Plaintiffs had no right to require that the surrounding property remain unchanged. The Michigan Appellate Court agreed with the trial Court holding that as a matter of law, Defendants did not take anything that could be construed as Plaintiffs' property.

Regarding the alleged "taking" of property rights the Appellate Court found:

Defendants did not take from plaintiff their right to possess their lands and buildings, and defendants took no deliberate action toward plaintiffs' property that deprived plaintiffs of their right to use their property as they saw fit. They did not take from plaintiffs their right to sell their land, lease it, or give it away. Plaintiffs may continue to operate their businesses on their land, or may use their land for any other purpose that is not a nuisance to others, subject only to reasonable government regulation. *McKendrick, Supra* at 137, 468 N.W. 2d 903. In short, defendants took no action directed at plaintiffs' property.

Though not controlling, the Court finds this legal analysis persuasive to the case at bar.

PENN CENTRAL² ANALYSIS

Given its conclusion that Plaintiff lacks standing to bring this action, the Court would not ordinarily address a *Penn. Central* analysis regarding whether a partial taking of Plaintiff's property occurred. But due to the remand instructions in this case, the Court will analyze this particular case in terms of *Penn. Central* considerations.

The Court first notes the *Penn. Central* facts are very different from this case. In *Penn. Central*, Defendant took deliberate action that affected Plaintiff's rights to develop its property. In that case, the New York City Landmarks Preservation Commission refused to approve plans for the construction of a 50-story office tower above Grand Central Terminal which was owned by the Plaintiff. The Terminal had been designated a landmark. Plaintiff claimed the application of the Landmarks Law (a land-use regulation) to its property resulted in a "taking" of its property and arbitrarily deprived it of property rights without due process. The U.S. Supreme Court analyzed whether Plaintiff, who was denied a right to develop its land as it wished, should be compensated for a partial taking.

The Landmark Law in the *Penn. Central* case directly impacted Plaintiff's property by regulating the use of Plaintiff's land. In the case at hand, the Village of Blanchester only rezoned the property adjacent to Mr. Clifton's property. The Village did not put any restriction on the use of Mr. Clifton's land or take any deliberate action restricting Mr. Clifton's use of his property. In short, the Village took no action directed at Mr. Clifton's property.

² *Penn. Central Transportation Co. v. New York City* (1978), 438 U.S. 104, 98 S. Ct. 2646.

Despite this finding that the *Penn Central* facts are very different from the case at hand, the Court will apply the *Penn Central* analysis to ensure compliance with Appellate Court instructions has occurred. In 2007, the Ohio Supreme Court recognized the "partial taking" jurisprudence set forth in *Penn Central*. In *State ex rel. Shelly Material, Inc. v. Clark Cty. Bd. of Cty. Commrs.*, 115 Ohio St.3d 337, 875 N.E.2d 59, 2007-Ohio-5022, the Court stated:

"The default standard of *Penn Cent.* with respect to "partial" regulatory taking demands an analysis different from the analysis for a total taking, because after the partial regulatory taking, the remaining property still has value. *Penn Cent.*, 438 U.S. at 129, 98 S.Ct. 2646, 57 L.Ed.2d 631. *Penn Cent.* recognizes an ad hoc, factual inquiry that requires the examination of the following three factors to determine whether a regulatory taking occurred in cases in which there is no physical invasion and the regulation deprives the property of less than 100 percent of its economically viable use: (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 124, 98 S.Ct. 2646, 57 L.Ed.2d 631. *Id.* at ¶ 19.

In applying the *Penn Central* analysis to this case, the Court finds as a matter of law there was no partial taking of Plaintiff's property requiring compensation by the Defendant. The Court finds the zoning requirements imposed by the Village of Blanchester do not interfere with Mr. Clifton's present use (farming) and do not prevent Mr. Clifton from realizing a reasonable return on his investment should he develop his land for residential use. The rezoning of adjacent land simply does not impose any drastic limitations on Mr. Clifton's ability to use or develop his land.

In considering the nature and character of the governmental action taken by the Village of Blanchester, the Court find the character of the governmental action mitigates against a finding of a partial taking. The governmental rezoning was only directed at property located adjacent to the property owned by Mr. Clifton. That action is substantially different from the

governmental actions / regulations analyzed in both the *Penn Central* and *Shelly* cases where the governmental actions / regulations were directed specifically at the Plaintiffs' property.

For all of the foregoing reason, the Court finds that as a matter of law the rezoning of land adjacent to Mr. Clifton's land does not amount to a partial taking under a *Penn Central* analysis.

Defendant is granted summary judgment and Plaintiff's Complaint is dismissed with prejudice.

Plaintiff shall pay the cost of this action.

Enter this 23rd day of June 2008.

Jw. Rudduck

John W. Rudduck, Judge

Journalized this 29th day of June, 2009.
Cindy Bailey, Clerk of Court

BY: Bobbie J. Thatcher
Deputy Clerk

APPENDIX 6

**Amendment 5 - Trial and Punishment, Compensation for Takings. Ratified
12/15/1791.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX 7

ARTICLE I: BILL OF RIGHTS

ing the place to be searched and the person and things to be seized.

(1851)

NO IMPRISONMENT FOR DEBT.

§15 No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

(1851)

REDRESS FOR INJURY; DUE PROCESS.

§16 All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(1851, am. 1912)

NO HEREDITARY PRIVILEGES.

§17 No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this State.

(1851)

SUSPENSION OF LAWS.

§18 No power of suspending laws shall ever be exercised, except by the General Assembly.

(1851)

EMINENT DOMAIN.

§19 Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

(1851)

DAMAGES FOR WRONGFUL DEATH.

§19a The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law.

(1912)

PROTECT PRIVATE PROPERTY RIGHTS IN GROUND WATER, LAKES AND OTHER WATERCOURSES.

§ 19b. (A) The protection of the rights of Ohio's property owners, the protection of Ohio's natural resources, and the maintenance of the stability of Ohio's economy require the recognition and protection of property interests in ground water, lakes, and watercourses.

(B) The preservation of private property interests recognized under divisions (C) and (D) of this section shall be held inviolate, but subservient to the public welfare as provided in Section 19 of Article I of the Constitution.

(C) A property owner has a property interest in the reasonable use of the ground water underlying the property owner's land.

(D) An owner of riparian land has a property interest in the reasonable use of the water in a lake or watercourse located on or flowing through the owner's riparian land.

(E) Ground water underlying privately owned land and nonnavigable waters located on or flowing through privately owned land shall not be held in trust by any governmental body. The state, and a political subdivision to the extent authorized by state law, may provide for the regulation of such waters. An owner of land voluntarily may convey to a governmental body the owner's property interest held in the ground water underlying the land or nonnavigable waters located on or flowing through the land.

(F) Nothing in this section affects the application of the public trust doctrine as it applies to Lake Erie or the navigable waters of the state.

(G) Nothing in Section 1e of Article II, Section 36 of Article II, Article VIII, Section 1 of Article X, Section 3 of Article XVIII, or Section 7 of Article XVIII of the Constitution shall impair or limit the rights established in this section.

(2008)

POWERS RESERVED TO THE PEOPLE.

§20 This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers, not herein delegated, remain with the people.

(1851)