

IN THE SUPREME COURT OF OHIO

RICHARD CLIFTON, : Case No. 10-1196
: :
Plaintiff/Appellant, : On Appeal from the Clinton
: County Court of Appeals
vs. : Twelfth Appellate District
: Case No. CA2009-07-009
VILLAGE OF BLANCHESTER, :
: :
Defendant/Appellee. :

MERIT BRIEF OF APPELLEE VILLAGE OF BLANCHESTER

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III. STATEMENT OF CASE

A. Procedural Posture

On March 29, 2002, Appellant, Richard Clifton (“Clifton”), filed a Complaint and Notice of Administrative Appeal with the Court of Common Pleas of Clinton County, Ohio, contesting Appellee Village of Blanchester’s, (“Blanchester”), rezoning of certain property in Clinton County adjacent to real estate owned by Clifton.

Blanchester answered and filed a Motion to Dismiss Clifton’s Administrative Appeal on April 29, 2002. On June 14, 2002, the trial court granted Blanchester’s Motion to Dismiss the Administrative Appeal.

On June 30, 2003, Clifton filed a Motion for Summary Judgment, requesting that the trial court issue judgment in his favor as to that count of his complaint requesting a declaratory judgment finding the zoning ordinance invalid. On or about September 30, 2003, Blanchester filed its Motion for Summary Judgment, requesting that the remaining counts of Clifton’s Complaint be dismissed, pursuant to Ohio Civil Rule 56. On June 9, 2003, the trial court issued its entry overruling Clifton’s Motion for Summary Judgment.

On October 29, 2004, the trial court issued its Entry re: Summary Judgment, granting judgment in favor of Blanchester on the issue of the constitutionality of the zoning ordinance, but denying the Motion as to the “taking” issue, the remaining cause of action.

Clifton filed a Notice of Appeal on November 28, 2005, as to the trial court’s judgments of June 9, 2003 and October 29, 2004. Clifton subsequently dismissed the appeal. On October 27, 2005, Clifton filed a voluntary dismissal of the remaining cause of action pursuant to Ohio Civil Rule 41(A)(1)(a).

This action was commenced by the filing of a Complaint by Clifton against Blanchester on April 3, 2006. (T.d. 1). Blanchester filed its Answer to the Complaint on April 28, 2006. (T.d. 4).

Discovery was begun and Blanchester filed a Motion for Summary Judgment on April 18, 2007. (T.d. 15). Summary Judgment was granted in favor of Blanchester on August 23, 2007. (T.d. 24). Clifton filed his Notice of Appeal on September 21, 2007. (T.d. 25).

The Court of Appeals issued its Opinion and Judgment Entry on September 2, 2008, affirming in part, reversing in part and remanding the case “to address the issue of whether the rezoning effected a partial taking of [Clifton’s] property under *Penn Central*.” Blanchester filed an Application for Reconsideration with this Court on September 12, 2008, re-asserting that Clifton lacked standing with respect to the zoning ordinance. On November 3, 2008, the Court of Appeals granted Blanchester’s Application for Reconsideration and its instructions to the trial court on remand were 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. . (See Appellant’s Appendix A-3, page 4.)

On May 1, 2009, Blanchester filed its Motion for Summary Judgment (Upon Remand By Court of Appeals). (T.d. 32). Clifton filed his Response on May 29, 2009, (T.d. 34) and Blanchester filed its Reply on June 12, 2009. (T.d. 35). Oral argument before the trial court was held and it filed its Entry Granting Summary Judgment to Defendant (Blanchester) on June 29, 2009. (T.d.37).

Clifton filed his Notice of Appeal on July 28, 2009. (T.d. 38). Oral argument before the Twelfth District Court of Appeals was held on April 19, 2010. On May 25, 2010, the Twelfth District Court of Appeals affirmed the Trial court’s decision. (See Appellant’s Appendix A-2.) On

July 8, 2010, Clifton filed a Notice of Appeal and Memorandum in Support of Jurisdiction with the Ohio Supreme Court. (See Appellant's Appendix A-1.) On August 9, 2010, Blanchester filed its Memorandum in Support of Jurisdiction with the Ohio Supreme Court. (See Appellee's Appendix A-1.) On October 19, 2010, this Court accepted jurisdiction to hear this case.

B. Statement of the Facts

The single most significant fact in this case is that Appellant Richard Clifton's property lies outside the jurisdictional boundaries of Appellee Village of Blanchester. This fact alone denies Clifton standing and distinguishes his case from *Penn Central*¹ to the extent that a partial taking analysis is unnecessary.

Clifton is the owner of real estate located at 10965 Collins-Riley Road, Blanchester, Ohio.² (T.d. 1- ¶ 1). Not all of Clifton's property was acquired at the same time by him. Clifton purchased the land upon which his residential home is located in 1967. He built his home in 1970. (Clifton Depo. T.d. 18 - p. 22). This residence sits on approximately 27 acres located at the intersection of Collins-Riley Road and Middleboro Road.

In 1993, Clifton purchased approximately 99 acres of farm land along Middleboro Road. (Clifton Depo. T.d. 18- p.23). In 1997, Clifton sold 2.87 acres with 50 feet of frontage on Middleboro Road to the owners of J&M Precision Machining, reducing the farm property to approximately 97 acres. (Clifton Depo. T.d. 18 - pp. 20-22). In approximately 1997, Clifton

¹*Penn Central v. New York City* (1978), 438 U.S. 104, 98 S.Ct. 2646.

²Part of Clifton's real estate is located in Clinton County and the other part is located on Warren County; however, none of his real estate is located in the Village of Blanchester. (Clifton Depo. T.d. 18 - p. 58).

purchased approximately 9 acres along Middleboro Road which is adjacent to the 27 acres where his house is located (Clifton Depo. T.d. 18- p. 9). The 97 acres of farm land along Middleboro Road is adjacent to his 9 acre real estate on one side and on the other side it is adjacent to the property upon which J&M Precision Machining is located at 1449 Middleboro Road, Blanchester, Clinton County, Ohio. (Clifton Depo. T.d. 18 - pp. 11, 17-18).

It is the J&M Precision Machining property at 1449 Middleboro Road which was rezoned by the Village of Blanchester on February 28, 2002. (T.d. 1- ¶3; Aff. of L. Brown T.d. 16- ¶ 5). None of Clifton's real estate has been zoned or rezoned by Blanchester. (Clifton Depo. T.d. 18- p.65; Appellant's Appendix A-3, Entry Granting Application for Reconsideration, page 1)

Clifton alleges that as a result of the rezoning of the property upon which J&M Precision Machining is located, his adjacent property has been reduced in value and he has suffered a loss of economic utilization. (T.d. 1- ¶¶ 7-8). It is Clifton's personal opinion that the rezoning by Blanchester of the J&M Precision Machining Property has reduced the potential value he could receive for residential lots if he decided to sell his adjacent farm land. (Clifton Depo. T.d. 18 - pp. 52). It is significant that Clifton has utilized the 97 acres of farm land adjacent to the J&M property every year since 1993. (Clifton Depo. T.d. 18 - p. 31). Clifton's deposition was taken in this case on April 11, 2007. (Clifton Depo. T.d. 18) At that time, as recently as 2006, Clifton grew soybeans on these 97 acres and showed a profit of \$6,000. (Clifton Depo. T.d. 18- pp. 26, 32). Clifton estimates he has averaged a profit of \$4,000 - \$5,000 per year from his farming operation on his property adjacent to J&M Precision Machining. (Clifton Depo. T.d. 18 - pp. 51-52)

The 97 acres which Clifton is presently utilizing as an active farm could be sold by plaintiff for residential lots. (Clifton Depo. T.d. 18 - p.51; Aff. of L. Brown T.d. 16- ¶ 6). Clifton ultimately

may give the 9 acre tract located in between his farm land and his residence to one of his grandchildren. (Clifton Depo. T.d. 18 - p. 66). Clifton is aware that the 31 ½ acres directly across Middleboro Road from his 97 acres has been surveyed and residential lots are for sale. (Clifton Depo. T.d. 18- pp. 58-61, Exhibit B, survey).

This Court of Appeals stated in its Entry Granting Application for Reconsideration that:
“On appeal, this court agreed with the trial court that the rezoning did not deprive appellant of all economic use of his land.” (Appellant’s Appendix A-3, page 2).

IV. ARGUMENT

Proposition of Law No. 1: A non-resident contiguous property owner has standing to litigate a partial regulatory taking claim pursuant to *Penn Central 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.

The lower courts in this case held that Clifton does not have standing. On remand, the trial court held:

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. (T.d. 36, Entry Granting Motion for Summary Judgment of Defendant, page 2, Appellant's Appendix A-5).

Likewise, the Twelfth District Court of Appeals held:

[W]e 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. (Opinion, Case No. CA2009-07-009, page 8, Appellant's Appendix A-2)

Clifton mistakenly asserts that *Penn Central*³ gives him standing because the court of appeals instructed the trial court on remand in its Entry Granting (Blanchester's) Application for Reconsideration to address the partial taking issue.⁴ But, the court of appeals actually remanded the

³*Penn Central v. New York City* (1978), 438 U.S. 104, 98 S.Ct. 2646.

⁴See Clifton's Merit Brief, page 6. "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."

case for two separate reasons. First, to address the issue of standing. Second, to address the partial taking issue. Without standing, the second issue is moot in this case. Merely requesting a *Penn Central* analysis on remand in no way implies, much less confirms, the court of appeals found Clifton had standing.

Both the trial court and the court of appeals appreciated one cannot put the cart (partial taking) before the horse (standing). The trial court stated:

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.

Similarly, the court of appeals stated:

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.

Clifton also mistakenly asserts that *Penn Central* gives him standing since he presented evidence that the rezoning of the property at J&M Precision Machining reduced the value of his property. Again, Clifton is putting the cart before the horse. In *Penn Central*, the landmarks preservation law in question was enforced directly against the plaintiff, the owner of Grand Central Terminal. The plaintiff in *Penn Central* was not a non-resident contiguous property owner. Furthermore, standing was not in dispute in *Penn Central*, and to claim standing for Clifton pursuant to that case is misplaced.

The court of appeals also denied Clifton standing in this case because he has no substantive right to money damages against Blanchester. The court of appeals stated:

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. Therefore, since Clifton has no substantive right to the relief he sought to recover from Blanchester, we find he has no standing to sue.⁵

Blanchester has not found any Ohio cases which would give Clifton a right to seek damages based upon the rezoning of adjacent property. Likewise, the trial and appellate courts did not cite any Ohio case which gave Clifton this right. The trial court pointed out that Clifton, who has the burden of establishing he has standing, did not provide the court with even one Ohio case on this crucial legal issue. The trial court stated: “Plaintiff has identified no precedent in Ohio case law that would give Mr. Clifton a right to seek damages based upon the rezoning of adjacent property.” (T.d. 36, Entry, page 2 , Appellant’s Appendix A-5). However, the trial court did find persuasive two cases from Michigan.

In the case of *Fahoome v. City of St. Clair Shores* (1998 WL 2016580 (Mich App.)

⁵Opinion, Case No. CA2009-07-009, page 9, Appellant’s Appendix A-2

(Appendix A-1), the Michigan court held:

Plaintiff can not challenge the City's decision to grant rezoning to an adjacent land owner because the decision is not specifically directed towards plaintiffs' property and thus does not constitute a taking of plaintiff's property.

That Michigan appellate court cited the case of *Murphy v. City of Detroit* (1993) 2001 Mich. App. 54, 506 N.W. 2d 5, (Appendix A-2). That court held:

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.

In the case at bar, it indisputable that Blanchester took no action directed at Clifton's property.

Nowhere in his Merit Brief does Clifton cite this court to an Ohio case which contradicts the holdings of those Michigan courts. Clearly, Clifton has the burden at the outset to show he has standing. "It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue."⁶ Deciding whether the rezoning of another's property could effect a "partial taking" of a neighbor (Clifton) is secondary to the issue of standing.

⁶*State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123, 469.

Proposition of Law No. 2: A claim of partial regulatory “taking” pursuant to *Penn Central* does not fail as a matter of law where the claim is based upon 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.

As mentioned above, a holding that Clifton does not have standing renders the claim of a partial taking moot. Nonetheless, even if Clifton has standing in this case, under a *Penn Central* analysis, he is not entitled to damages.

Penn Central is distinguishable from the case at bar. Unlike the New York City Landmark Law in *Penn Central*, which specifically restricted the use of designated historical landmarks such as Grand Central Terminal, as the trial court in the instant case correctly noted: “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.”⁷ The trial court further pointed out that the zoning requirements of Village do not prevent Clifton from using his property for farming or for residential development.⁸ These were Clifton’s expectations.

Existing Ohio law does not provide for damages in this case, in part, because the rezoning did not deprive Clifton of all economic use of his land. In the case of *Goldberg Cos., Inc. v. Richmond Hts. City Counsel* (1998), 81 Ohio St. 3d 207, 690 N.E. 2d 510, this Court stated:

. . . In order for a land owner to prove a taking, he or she must prove that the

⁷T.d.37, Entry Granting Summary Judgment to Defendant, page 4, Appellant’s Appendix A-5.

⁸T.d.37, Entry, page 5, Appellant’s Appendix A-5.

application of the ordinance has infringed upon the land owner's rights to the point that there is no economically viable use of the land and, consequently, a taking has occurred for which he or she is entitled to compensation. At page 210.

In the more recent case of *Shemo v. City of Mayfield Hts.* (2002), 95 Ohio St. 3d 59, 765 N.E.

2d 345, this Court stated:

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

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

Although in *Shemo 1* we concluded that relators introduced competent, credible evidence supporting the declaration that the property was not suitable for residential use, that does not necessary mean that no economically viable use remained upon the application of the unconstitutional zoning classifications. And even though relators' evidence in this mandamus action states that the U-(1) and U-(2)-A residential zoning deprived them of the "the use of [their] Property," it does not specify that it deprived them of *all economically viable use* of their property. (Emphases added.) Relators therefore did not establish the second prong of the *Agins* test. *Supra* at 65.

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

Clifton argues that his claim be evaluated pursuant to the standards set forth in *Lingle v. Chevron* (2005), 554 U.S. 528, 125 S.Ct. 2074, as well as, *Penn Central*. *Lingle* is distinguishable

from the case at bar.

In *Lingle*, Chevron Oil challenged a Hawaii statute which put a cap on rent oil companies could charge service stations, ostensibly to control gasoline prices. Unlike Clifton or his property, the legislation was directed in large part at Chevron, the largest oil company in Hawaii at that time. The U.S. Supreme Court held that the “substantially advance[s]” test is a due process test and not a valid takings test. In the case at bar, the constitutionality, and therefore due process, of the rezoning is the Law of the Case. Interestingly, the Twelfth Appellate District Court recently held in *City of Carlisle v. Martz Concrete Co.*, 2007 WL 2410692 (Ohio App. 12 Dist.), 2007 - Ohio - 4362 (Appendix A-3), that in light of the Ohio Supreme Court’s decision in *Jaylin Investments Inc. v. Village of Morelandhills*, (2006), 107 Ohio St. 3d 339, 2006 - Ohio - 4, it presumes “that the Ohio Supreme Court continues to adhere to the *Agins* “substantially advance[s]” test for analyzing land-use regulations” since *Goldberg* was cited in *Jaylin* after the date of the *Lingle* decision. *Carlisle* at ¶ 52.

In *Carlisle*, the City Council adopted a property maintenance code for the municipality. Martz was charged with violations of that code and he was assessed a daily fine until he complied with the code. Apparently, Clifton cites *Lingle* for the proposition that the trial court must make an evaluation of whether the rezoning “has interfered with distinct investment-backed expectations.”

Lingle at 540 citing *Penn Central*. But, the Twelfth District Court stated in *Carlisle*:

In examining this case in light of the *Penn Central* factors, the ordinance also does not constitute a taking. The nature of the regulation is not a physical invasion of the appellant’s property. Also, in looking at the interference with the property owner’s investment-backed expectations, the property code does not affect appellant’s ability to use the property as a concrete business or gravel pit.” *Carlisle* at ¶ 54.

Similarly, despite the rezoning of his neighbor’s property, Clifton has been able to use his property

profitably as farm land or he could sell this land as single family residential lots.

Finally, this Court held in the case *State ex rel. Shelly Materials, Inc. v. Clark Cty Bd. Of Commrs.*, 115 Ohio St. 3d 337, 2007 - Ohio - 5022:

Because the County Zoning Appeals' Board's denial of the conditional-use permit did not deprive *Shelly* of all economically viable use of its property, a compensable taking did not occur. *Supra* p. 346.

Ohio still employs the standard of deprivation of all economically viable use of property. That did not occur with respect to Clifton's property.

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

V. CONCLUSION

The trial court previously ruled that the rezoning of the J&M Property adjacent to Clifton's real estate was constitutional, which became the Law of the Case. Clifton has failed to bear his burden of showing he has standing in this case. Even if this court finds that Clifton has standing on the takings issue, Ohio law requires that Clifton prove the zoning ordinance has deprived him of any economically viable use of his real estate. The Twelfth District held in *Wilson v. Trustees of Union Township*, 1998 WL 744089 (Ohio App. 12 Dist.) (Appendix A-4) that "to prove that a property as zoned is not economically viable, the challenger must show that the permitted uses are not economically feasible, are highly improbable, or are practically impossible under the circumstances. * * * A land owner does not have a right to have his land zoned for its most advantageous economic use." *Supra* p. 4.

Again, even if Clifton meets his burden of showing he has standing in this case, as a mere neighbor of the property rezoned, his claim is distinguishable from a *Penn Central* "partial taking."

For the forgoing reasons, it is respectfully requested that this court affirm the holding of the Twelfth District Court of Appeal's decision in favor of Appellee, the Village of Blanchester.

Respectfully submitted,



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VI. CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of Defendant - Appellee, Village of Blanchester, was sent via regular U.S. Mail on this 27th day of December, 2010 to:

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VII. APPENDIX

- A-1 *Fahoome v. City of St. Clair Shores*
(1998 WL 2016580 (Mich App.))
- A-2 *Murphy v. City of Detroit* (1993) 2001 Mich. App. 54,
506 N.W. 2d 5
- A-3 *City of Carlisle v. Martz Concrete Co.*, 2007 WL 2410692
(Ohio App. 12 Dist.), 2007 -Ohio -362
- A-4 *Wilson v. Trustees of Union Township*, 1998 WL 744089
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 (Cite as: Not Reported in N.W.2d)

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Only the Westlaw citation is currently available.
 UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

Court of Appeals of Michigan.
 Anthony G. FAHOOME and Rosemary Fahoome,
 Plaintiffs-Appellants,
 v.
 CITY OF ST. CLAIR SHORES,
 Defendant-Appellee.
 No. 194020.

March 17, 1998.

Before: MCDONALD, P.J., and O'CONNELL and
 SMOLENSKI, JJ.

MEMORANDUM.

MCDONALD, OCONNELL and SMOLENSKI, JJ.
 *1 Plaintiffs appeal as of right from a circuit court
 order granting defendant's motion for summary
 disposition and dismissing plaintiffs' complaint,
 which alleged constitutional challenges to
 defendant's zoning decisions. We affirm.

Because the zoning decisions in question were
 made more than two years before plaintiffs
 commenced this action, the trial court dismissed
 plaintiffs' complaint as an untimely appeal pursuant
 to *Krohn v. Saginaw*, 175 Mich.App 193; 437
 NW2d 260 (1988). Plaintiffs contend that this
 ruling was erroneous because their complaint
 alleges an action for inverse condemnation and, to
 the extent the complaint is deficient, they should
 have been granted leave to amend. Even if the
 rationale underlying the trial court's ruling can be
 considered erroneous, it nevertheless reached the
 correct result.

Plaintiffs cannot challenge the city's decision to
 grant rezoning to an adjacent landowner because
 the decision is not specifically directed towards
 plaintiffs' property and thus does not constitute a

taking of plaintiffs' property. *Charles Murphy, MD,
 PC v. Detroit*, 201 Mich.App 54, 56-57; 506 NW2d
 5 (1993). To the extent a direct invasion of
 plaintiffs' property is unnecessary under the
 exception noted in *Spiek v. Dep't of Transportation*,
 ___ Mich. ___; ___ NW2d ___ (No. 104096,
 issued 1/21/98), here the interference with plaintiffs'
 property rights has been caused, not by the city's
 action in granting rezoning, but by the landowner's
 use of the adjacent property. Thus, a
 governmental taking is not involved. While
 plaintiffs are allowed to challenge the city's decision
 regarding rezoning of their own property, their
 claim is not ripe for judicial review because the
 decision to deny rezoning was not a final decision.
Paragon Properties Co v. Novi, 452 Mich. 568,
 580; 550 NW2d 772 (1996). Because the proposed
 amendment would not have cured either defect, the
 trial court did not abuse its discretion in denying
 plaintiffs' request for leave to amend. *Burse v.
 Wayne Co Medical Examiner*, 151 Mich.App 761,
 767; 391 NW2d 479 (1986).

Affirmed.

Mich.App.,1998.

Fahoome v. City of St. Clair Shores
 Not Reported in N.W.2d, 1998 WL 2016580
 (Mich.App.)

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Westlaw.

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C

Court of Appeals of Michigan.
 CHARLES MURPHY, M.D., P.C. and Americana
 Superfood, Inc., Americana Superfood # 1,
 Plaintiffs-Appellants,

v.

CITY OF DETROIT, a municipal corporation, and
 the Community and Economic Development
 Department, jointly and severally,
 Defendants-Appellees.
Docket Nos. 139145, 139147.

Submitted April 6, 1993, at Detroit.
 Decided Aug. 2, 1993, at 9:15 a.m.
 Released for Publication Oct. 19, 1993.

Owners of local supermarket and medical facility brought inverse condemnation action against city when city's acquisition of surrounding residential properties as part of urban renewal project resulted in relocation of approximately 17,000 residents from area and a 75% reduction in volume of their business. The Circuit Court, Wayne County, John A. Murphy, J., granted city's motion for summary judgment, and plaintiffs appealed. The Court of Appeals, Connor, J., held that city's acquisition of surrounding residences did not result in any "de facto taking" of any "property interest" of plaintiffs, such as might support inverse condemnation claim.

Affirmed.

West Headnotes

[1] Eminent Domain 148 ↻81.1

148 Eminent Domain
 148II Compensation
 148II(B) Taking or Injuring Property as
 Ground for Compensation
 148k81 Property and Rights Subject of
 Compensation
 148k81.1 k. In General. Most Cited

Cases

Private "property," such as may not be taken for public use without just compensation, embraces everything over which person may have right to exclusive control or dominion. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[2] Eminent Domain 148 ↻2.1

148 Eminent Domain
 148I Nature, Extent, and Delegation of Power
 148k2 What Constitutes a Taking; Police
 and Other Powers Distinguished
 148k2.1 k. In General. Most Cited Cases
 (Formerly 148k2(1))

"Taking" occurs, within meaning of inverse condemnation law, when government action has permanently deprived property owner of any possession or use of property. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[3] Eminent Domain 148 ↻2.1

148 Eminent Domain
 148I Nature, Extent, and Delegation of Power
 148k2 What Constitutes a Taking; Police
 and Other Powers Distinguished
 148k2.1 k. In General. Most Cited Cases
 (Formerly 148k2(1))

While there is no exact formula to establish a "de facto taking," there must be some action by government specifically directed toward plaintiff's property that has the effect of limiting plaintiff's use of property. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[4] Eminent Domain 148 ↻2.1

148 Eminent Domain
 148I Nature, Extent, and Delegation of Power
 148k2 What Constitutes a Taking; Police
 and Other Powers Distinguished
 148k2.1 k. In General. Most Cited Cases
 (Formerly 148k2(1))

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In deciding whether de facto taking has occurred, court must consider form, intensity and deliberateness of governmental actions directed at injured party's property. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

[5] Eminent Domain 148 ⇐2.10(2)

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.10 Zoning, Planning, or Land Use; Building Codes

148k2.10(2) k. Redevelopment. Most Cited Cases

(Formerly 148k2(1.1))

Eminent Domain 148 ⇐107

148 Eminent Domain

148II Compensation

148II(B) Taking or Injuring Property as Ground for Compensation

148k94 Elements of Compensation for Injuries to Property Not Taken

148k107 k. Interference with Trade or Business. Most Cited Cases

There was no "de facto taking" of any "property interest" held by owners of local supermarket and medical facility when city, as part of urban renewal project, acquired the more than 1,400 residences surrounding supermarket and health care facility, razed residences, and caused roughly 17,000 people to relocate from neighborhood; owners' expectation that neighborhood would remain a residential area in which their businesses could profitably operate was not "property interest," the loss of which could support inverse condemnation claim. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

**6 *55 Stone & Richardson, P.C. by Ralph H. Richardson, Detroit, for Charles Murphy, M.D., P.C. Donald Pailen, Corp. Counsel and Deborah Ross Adams, Asst. Corp. Counsel, Detroit, for defendants-appellees.

Before MARILYN J. KELLY, P.J., and

SHEPHERD and CONNOR, JJ.

CONNOR, Judge.

Plaintiffs filed inverse condemnation actions, claiming that defendants' conduct resulted in a de facto taking of their property without compensation. On defendants' motion for summary disposition brought pursuant to MCR 2.116(C)(10), the trial court ruled that there was no taking and dismissed plaintiffs' claims. Plaintiffs appeal as of right, and we affirm.

Plaintiffs own property and operate businesses on East Jefferson Avenue in Detroit. Defendants used their power of eminent domain to purchase large areas of land nearby for two urban renewal projects, and leveled the residential neighborhoods that had been located on the land. Each plaintiff's volume of business was reduced about seventy-five percent from what it was before defendants' action.

We agree with the trial court that there is no genuine question of material fact and that, as a matter of law, defendants did not take anything that could be construed as plaintiffs' property.

[1][2][3][4] Both our state and federal constitutions provide that private property may not be taken for public *56 use without just compensation. U.S. Const., Am. V; Const.1963, art. 10, § 2. "Property" embraces everything over which a person may have a right to exclusive control or dominion. *Rassner v. Federal Collateral Society, Inc.*, 299 Mich. 206, 213-214, 300 N.W. 45 (1941); **7*People v. McKendrick*, 188 Mich.App. 128, 136, 468 N.W.2d 903 (1991). A "taking" for purposes of inverse condemnation means that government action has permanently deprived the property owner of any possession or use of the property. *Jack Loeks Theatres, Inc. v. Kentwood*, 189 Mich.App. 603, 608, 474 N.W.2d 140 (1991), modified in part 439 Mich. 968, 483 N.W.2d 365 (1992).

While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property. "[T]he form, intensity, and deliberateness of the governmental actions toward the injured party's property must be examined." *In re Acquisition of Virginia Park*, 121 Mich.App.

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153, 160, 328 N.W.2d 602 (1982).

[5] Defendants did not take from plaintiffs 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.

We do not doubt that the value of plaintiffs' properties has greatly diminished because of defendants' actions. By removing 1,400 residences, housing*57 17,000 people, from the neighborhood immediately adjacent to plaintiffs' businesses, defendants have effectively eliminated most of plaintiffs' potential customers. What had once been prime locations for a medical center and a grocery store suddenly became unsuitable for those endeavors. Presumably, plaintiffs paid a premium for their property because of its proximity to a substantial base of potential customers. They assumed their customer base would remain constant because of their expectation that the land nearby would continue to be used in the future as it had been used in the past.

However, expectations are not rights. Despite plaintiffs' assumption that the adjacent properties would always be a residential community, they had no right to require that the property remain unchanged. The exclusive right to control the use of the land did not belong to plaintiffs, but to their neighbors who owned it. When defendants bought the neighbors' land, they bought the right to control the use of the land. Despite the diminution in value of plaintiffs' land and buildings, resulting from defendants' change in the way they used their land, defendants took no deliberate action directed toward plaintiffs' property rights that deprived plaintiffs of possession or use of their land or buildings.

Affirmed.

Mich.App., 1993.
 Charles Murphy M.D., P.C. v. City of Detroit
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H
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Twelfth District, Warren County.
City of CARLISLE, Plaintiff-Appellee,

v.

MARTZ CONCRETE CO., Defendant-Appellant.
No. CA2006-06-067.

Decided Aug. 27, 2007.

Criminal Appeal from Lebanon Municipal Court,
Case No. 06-02-CRB-0499B.

David A. Chicarelli, Franklin, OH, for plaintiff-appellee.

Thomas G. Eagle, Lebanon, OH, for defendant-appellant.

BRESSLER, P.J.

*1 {¶ 1} Defendant-appellant, Martz Concrete Co., appeals a conviction in the Franklin Municipal Court for four violations of the Carlisle property maintenance code. We affirm appellant's conviction, but reverse and remand for sentencing.

{¶ 2} Appellant has owned the property located at 350 East Central Avenue in Carlisle since 1929, using the property as a site for its concrete business. In 1997, the property was annexed into the city of Carlisle. Beginning in 1999, officials from the city of Carlisle entered into discussions with appellant requesting that appellant rehabilitate the property. In the discussions, the Carlisle officials requested that appellant remove old equipment, unlicensed vehicles, trash and other debris from the property; secure buildings and silos that are in disrepair; and mow the grass and weeds that are overgrown on the

property. However, no agreement was ever reached between appellant and the city.

{¶ 3} In 2001, the Carlisle City Council adopted a property maintenance code for the municipality. On March 4, 2004, the Carlisle zoning official sent a letter to Dale Martz, the vice president of appellant, notifying him that the property was in violation of the maintenance code. The letter alleged six separate violations of the code citing that the structures on the property were in disrepair; miscellaneous trash, junk, equipment parts, building materials, tires, drums, and carnival ride parts had accumulated on the property; weed and plant growth was not maintained; unlicensed motor vehicles and inoperable construction equipment were being stored on the property; and a number of semi trailers in a state of disrepair had accumulated. The letter instructed appellant to correct the violations within 30 days and advised appellant of the right to appeal.

{¶ 4} On January 31, 2006, Carlisle charged appellant with six violations of the property maintenance code and the case proceeded to a bench trial. On April 26, 2006, the trial court found appellant guilty of four violations, all minor misdemeanors. As punishment, the court assessed a fine of \$50 per day commencing May 31, 2006 and continuing until appellant brings the property into compliance. Appellant timely appeals, raising four assignments of error. For convenience, we will address appellant's assignments of error out of order.

{¶ 5} Assignment of Error No. 2:

{¶ 6} "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISMISS THE CASE."

{¶ 7} Appellant argues in his second assignment of error that the trial court erred in denying his motion to dismiss. In support of his argument, appellant presents nine distinct issues for this court's consideration.

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{¶ 8} We begin our analysis by recognizing the well-settled presumption that municipal ordinances are presumed to be constitutional. *Hudson v. Albrecht, Inc.* (1984), 9 Ohio St.3d 69, 71, 458 N.E.2d 852.

JURISDICTION

{¶ 9} Appellant first challenges jurisdiction, arguing that the ordinance was not properly enacted. Appellant contends that pursuant to R.C. 731.231, Carlisle was required to file a copy of the ordinance in the Warren County Law Library for the ordinance to be properly enacted. Appellant argues that no copy was filed in the law library, the ordinance was not properly published and, due to the defective enactment, there is no jurisdiction.

*2 {¶ 10} Appellant relies on R.C. 731.231, which states in pertinent part, “The legislative authority of a municipality may adopt * * * any code prepared and promulgated by a public or private organization which publishes a model or standard code, including but not limited to codes and regulations pertaining to * * * building code * * *. The publication required by sections 731.21 to 731.25 * * * shall state that a complete copy of such code is * * * on file in the law library of the county or counties in which the municipality is located and that said clerk has copies available for distribution to the public at cost.”

{¶ 11} Appellant also cites *Tirpack v. Maro* (1967), 9 Ohio App.2d 76, 222 N.E.2d 830. In *Tirpack*, the Seventh District Court of Appeals held that a non-charter municipality's zoning ordinance was invalid because the municipality failed to include a copy of the zoning map when the ordinance was published in violation of the publication provisions of the Ohio Revised Code. *Id.* at 82, 222 N.E.2d 830.

{¶ 12} Appellant's reliance on R.C. 731.231 and *Tirpack* is misplaced. R.C. 701.05 provides that “[m]unicipal corporations operating under a charter which provides for or authorizes a method of pro-

cedure in the passage and publication of legislation * * * differing from the method prescribed by general law, may pass and publish such legislation * * * under the general law or in accordance with the procedure provided for or authorized by its charter.”

{¶ 13} Carlisle is a municipality operating under a charter with procedures for the enactment and adoption of legislation. Section 5.06 of the charter states, “[t]he Council may adopt model or standard codes prepared and published by any public or private agency by reference to the date and source of the code without reproducing it at length in the ordinance or resolution. However, if the Council desires to modify, add to, or eliminate from any such code any section or part thereof, such addition, modification, or omission shall be clearly stated in the ordinance or resolution. In all such cases in which such a code shall be adopted by reference, *publication of the code at length, by the Municipality, shall not be required.* However, at least one copy of all such codes, including all amendments thereto, *shall be kept in the office of the Clerk of Council* for consultation by interested persons during regular office hours and additional copies shall be for sale, when available, at cost, by the Clerk of Council.” (Emphasis added.)

{¶ 14} Due to its adoption of a charter, Carlisle need not follow the statutory procedures required of noncharter municipalities to pass and publish legislation, including the “law library publication” provision in R.C. 731.231. Carlisle's charter provides for an alternate publication requirement,^{FN1} and appellant has provided no evidence that this procedure was not followed. Due to the presumption that municipal ordinances are constitutional, we find there is jurisdiction.

FN1. Requiring that a copy of the code must be kept in the Clerk of Council's office.

MENS REA

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*3 {¶ 15} Appellant next argues the complaints in this case were defective because no mens rea for violating the property maintenance code was alleged. Additionally, appellant claims that the applicable mens rea for the code is “recklessness,” relying on R.C. 2901.21(C).

{¶ 16} R.C. 2901.21(C) provides, “[w]hen the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.”

{¶ 17} “The legislature, in enacting laws in furtherance of the public health, safety and welfare, may impose strict liability for certain conduct, excluding from the statutory language elements of scienter or guilty knowledge.” *State v. Borges* (1983), 10 Ohio App.3d 158, 159-160, 460 N.E.2d 1147, citing *United States v. Balint* (1922), 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604.

{¶ 18} Appellant's argument is unpersuasive. A reading of the property maintenance code in this case plainly indicates that the intended mental state for each violation is strict liability. See *City of Mayfield Heights v. Barry*, Cuyahoga App. No. 82129, 2003-Ohio-4065.^{FN2} Property maintenance promotes the public health, safety and general welfare of the community because it advances the appearance of property in the community, protects real estate from impairment and destruction of value, and encourages economic and community development. *Village of Hudson v. Albrecht, Inc.* (1984), 9 Ohio St.3d 69, 458 N.E.2d 852. We find that the code in this case is strict liability and Carlisle was not required to allege a mens rea in the complaint nor prove a mens rea of “recklessness.”

FN2. In *City of Mayfield Heights v. Barry*, the Eighth District held that a city's land-

scaping ordinance, providing that a property owner was required to maintain properly landscaping and to cut or destroy any noxious weeds or vines from growing beyond eight inches, was a strict liability offense, such that proof of criminal intent was not required, even though the ordinance did not include the prefix “no person shall.” 2003-Ohio-4065 at ¶ 43.

PREEXISTING CONDITION/USE

{¶ 19} Appellant cites the fact that the use and condition of the property preexisted annexation into Carlisle and the enactment of the maintenance code. As a result, appellant argues the code cannot regulate preexisting use and condition of the property. Appellant argues the city's regulation of the preexisting use violates the Takings Clause of the United States Constitution.

{¶ 20} To support this proposition, appellant cites R.C. 713.15, which provides that “The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enacting a zoning ordinance or an amendment to the ordinance, may be continued, although such use does not conform with the provisions of such ordinance or amendment * * *.”

{¶ 21} Appellant also relies on *City of Akron v. Chapman* (1953), 160 Ohio St. 388, and its progeny. In *Chapman*, the defendant was cited for violation of a zoning ordinance for running a junkyard business, which preexisted the ordinance. *Id.* at 383. In *Chapman*, the Ohio Supreme Court held that the enforcement of the zoning ordinance against the preexisting, nonconforming use as a junkyard constituted an unconstitutional taking. *Id.* at paragraph 3 of the syllabus.

*4 {¶ 22} However the Ohio Supreme Court has held a municipality may abate preexisting, nonconforming uses of property if it constitutes a nuisance. *Northern Ohio Sign Contractors Association*

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v. *City of Lakewood* (1987), 32 Ohio St.3d 316, 320, 513 N.E.2d 324, citing, *C.D.S., Inc. v. Gates Mills* (1986), 26 Ohio St.3d 166, 497 N.E.2d 295. Where the existence of a danger to the public health, safety, morals or public welfare, has been demonstrated or a declaration of nuisance sufficient to support the exercise of the police power, a municipality may abate a preexisting, nonconforming use. *Id.*

{¶ 23} Clearly, Carlisle's purpose in enacting the property maintenance code was to abate and prevent dangerous conditions on properties.^{FN3} The maintenance code also seeks to abate nuisances within the municipality. Further, the Ohio Supreme Court has recognized that regulations for aesthetic concerns, coupled with a concern for the protection of property values and impairment, are a valid exercise of the municipal police power. *Village of Hudson v. Albrecht, Inc.* (1984), 9 Ohio St.3d 69, 73, 458 N.E.2d 852. This code was also enacted, as appellee mentions, for aesthetic concerns and to "prevent problems that negatively effect neighborhoods within the municipality and create a more livable community for the citizens."

FN3. {¶ a} The preamble of the Property Maintenance Code states:

{¶ b} "An ordinance establishing the minimum regulations governing the conditions and maintenance of all property, buildings and structures; by providing the standards for supplied utilities and facilities and other physical things and conditions essential to insure that structures are safe, sanitary and fit for occupation and use; and the condemnation of buildings and structures unfit for human occupancy and use and the demolition of such structures; known as the Property Maintenance Code.

{¶ c} "WHEREAS: the Municipal Council wishes to adopt a property maintenance code that assures proper building

practices and standards; and

{¶ d} "WHEREAS: the property maintenance code gives the zoning officer the ability to abate and prevent problems that negatively effect neighborhoods within the municipality and create a more livable community for the citizens."

{¶ 24} We also note that Carlisle is not depriving appellant's use of the property as a gravel pit or concrete business. Rather, Carlisle only seeks for appellant to clean up the property and remove the unsightly conditions on the property. The ordinance is a valid exercise of the police power to abate preexisting conditions and promote the health, safety and general welfare within the city

PREEMPTION

{¶ 25} Appellant argues that the Carlisle property maintenance code imposes more stringent standards and, as a result, conflicts with the Ohio Building Code in violation of Ohio law. Appellant contends that the Ohio Building Code preempts Carlisle from enacting the property maintenance code.

{¶ 26} State laws only preempt local laws to the extent that that are utterly inconsistent with local law, or when the legislature has expressed a clear intention to override local law. *Ohio Assn. of Private Detective Agencies, Inc. v. North Olmsted*, 65 Ohio St.3d 242, 244, 602 N.E.2d 1147, 1992-Ohio-65.

{¶ 27} R.C. 3781.10(A)(2) provides, "[t]he rules governing nonresidential buildings are the *lawful minimum requirements* specified for those buildings and industrialized units, except that no rule other than as provided in division (C) of section 3781.108 of the Revised Code that specifies a higher requirement than is imposed by any section of the Revised Code is enforceable." (Emphasis added.)

{¶ 28} Further, R.C. 3781.01(A) states, "[c]hapters 3781. and 3791. of the Revised Code do not prevent

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the legislative authority of a municipal corporation from making further and additional regulations, not in conflict with those chapters or with the rules the board of building standards adopts.”

*5 {¶ 29} The Ohio Revised Code clearly states that the Ohio Building Code sets forth only the minimum standards for building regulations and explicitly authorizes local municipalities to impose higher maintenance specifications.

{¶ 30} Appellant contends, though, that because R.C. 3781.10(A)(2) states that “except that no rule other than as provided in division (C) of section 3781.108 of the Revised Code that specifies a higher requirement than is imposed by any section of the Revised Code is enforceable,” Carlisle’s property maintenance ordinance is not authorized to enact higher standards.

{¶ 31} Clearly, the Revised Code authorizes municipalities to make additional or more stringent regulations to the Ohio building standards as long as there is no conflict. See *Clipson v. Ohio Dept. of Indus. Relations, Bd. of Bldg. Stds.* (1990), 69 Ohio App.3d 746, 591 N.E.2d 1260.^{FN4} In determining whether an ordinance is in conflict with the general laws of the state, the test is whether the ordinance permits or licenses that which the statute prohibits and vice versa. *Struthers v. Sokol* (1923), 108 Ohio St. 263, 269, 140 N.E. 519.

FN4. In *Clipson*, the Tenth District Court of Appeals held a municipal ordinance requiring sprinklers in all buildings with more than 7,500 square feet does not conflict with a state regulation requiring sprinklers in all buildings with more than 12,000 square feet since the rules and regulations of the building standards board are minimum standards, and municipal corporations are authorized to adopt their own ordinances. 69 Ohio App.3d at 752-753.

{¶ 32} In the case at bar, appellant cites no provision from the municipal property maintenance code

which is in conflict with the Ohio building standards. Rather, appellant simply argues that since the standards are more stringent, a conflict exists. However, the Revised Code clearly authorizes municipalities to make greater requirements than the minimum standards. Further, since the Revised Code states that the rules and regulations are minimum standards and that a municipal corporation is authorized to adopt its own ordinance, no conflict exists under the facts of this case. None of the property maintenance provisions are “utterly inconsistent” with the Ohio Building Code nor has the legislature clearly expressed an intention to override local law. In fact, the legislature has clearly expressed that local laws may make further and additional regulations

VAGUENESS

{¶ 33} Appellant argues the property maintenance code is void for vagueness because enforcement is dependent upon the subjective interpretation of the city inspectors. Additionally, appellant claims that the ordinance on its face, and as applied in this case, allows the inspectors to enforce it on an ad hoc basis.

{¶ 34} With respect to the “void for vagueness” doctrine, to pass constitutional scrutiny, an ordinance must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly,” as well as “provide explicit standards” to the individuals enforcing or applying them. *Grayned v. Rockford* (1972), 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222. It does not, however, require “statutes to be drafted with scientific precision. Nor does the doctrine require that every detail regarding the procedural enforcement of a statute be contained therein. Instead, it permits a statute’s certainty to be ascertained by application of commonly accepted tools of judicial construction, with courts indulging every reasonable interpretation in favor of finding the statute constitutional.” *Perez v. Cleveland*, 78 Ohio St.3d 376, 378-379, 678 N.E.2d 537,

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1997-Ohio-33.

*6 {¶ 35} When analyzing a statute under the void for vagueness doctrine, a three-part analysis must be applied. *State v. Collier* (1991), 62 Ohio St.3d 267, 269, 581 N.E.2d 552. First, the wording of the statute must provide fair warning to the ordinary citizen so that citizens may conform their behavior to the requirements of the statute. *Id.* at 270, 581 N.E.2d 552. Second, the wording of the statute must preclude arbitrary, capricious and discriminatory enforcement. *Id.* Finally, the wording of the statute should not unreasonably impinge or inhibit fundamental constitutionally protected freedoms. *Id.*

{¶ 36} Appellant's argument is unpersuasive. A reading of the ordinance demonstrates that it is not void for vagueness. Each provision of the ordinance notifies ordinary citizens what is prohibited.^{FN5} Further, these standards and definitions are sufficient to prevent inspectors from enforcing the provisions in an arbitrary, capricious or discriminatory manner. Finally, as we will discuss later in this opinion, the ordinance does not impinge on

FN5. {¶ a} In this case, appellant was charged with violating the following provisions of the maintenance code:

{¶ b} PM 304.1 General: “[t]he exterior of a structure shall be maintained in good repair, structurally sound and sanitary so as not to pose a threat to the public health, safety or welfare.”

{¶ c} PM 303.1 Sanitation: “[a]ll exterior property shall be maintained in a clean, safe, and sanitary condition. The occupant shall keep that part of the exterior property which such occupant occupies or controls in a clean and sanitary condition.”

{¶ d} PM 303.4 Weeds: “[a]ll premises and exterior property shall be maintained

free from weeds or plant growth in excess of 10 inches (254mm). All noxious weeds shall be prohibited. Weeds shall be defined as all grasses, annual plants and vegetation, other than trees or shrubs provided; however this term shall not include cultivated flowers and gardens.”

{¶ e} PM 303.8 Motor Vehicle: “[n]o motor vehicle shall be stored, kept, or parked outside on any property, unless there is displayed or mounted upon whatever license is required by Ohio law to permit that vehicle to be used on public streets. For the purpose of this section, the words “motor vehicle” shall have the same meaning as in the Uniform Traffic Laws of the State of Ohio. No such vehicle, while outside, shall be in a state of major disassembly, disrepair or in the process of being stripped or dismantled.”

{¶ 37} appellant's constitutional rights.

EQUAL PROTECTION

{¶ 38} Appellant argues that the property maintenance code violates equal protection because it creates nonuniform standards within the state of Ohio for the maintenance of real property.

{¶ 39} “The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Center* (1985), 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Id.* at 440. The general rule gives way to a higher level of scrutiny when the legislation creates a classification in-

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volving a fundamental right, suspect class ^{FN6} or quasi-suspect class.^{FN7} *Id.*

FN6. Suspect classes include race, alienage and national origin.

FN7. Quasi-suspect classes include gender and illegitimacy.

{¶ 40} In this case, appellant claims the ordinance is unconstitutional because it creates different property maintenance standards for Carlisle landowners as opposed to landowners in other Ohio municipalities. Such a classification is a nonsuspect class, subject only to rational basis scrutiny.

{¶ 41} The standard of analysis under the rationally related test is deferential. *Pennell v. City of San Jose* (1988), 485 U.S. 1, 14, 108 S.Ct. 849, 99 L.Ed.2d 1. Only if the Court can find no set of facts which could possibly support the distinction drawn by the state will it overturn state action. *McGowan v. Maryland* (1961), 366 U.S. 420, 426. "Further, the state need not prove that such a rational relationship exists; rather, the plaintiff must demonstrate that it is impossible for the state to show any reasonable basis for its action." *Operation Badlaw, Inc. v. Licking County General Health Dist. Bd. of Health* (S.D. Ohio 1992), 866 F.Supp. 1059, 1064, citing, *Zielasko v. State of Ohio* (C.A.6, 1989), 873 F.2d 957. "In applying the rational basis test, the burden falls upon the party challenging the state enactment to convince the court that its basis is irrational and not upon the state. If it is evident that the question is at least debatable, the attack must fail. Furthermore, the court need not determine what particular reasoning was actually used to justify the enactment, and may even hypothesize as to any possible legitimate state objectives which are promoted by the enactment." *Id.*

*7 {¶ 42} In briefing this issue, appellant advances no factual analysis or legal support to explain how the ordinance violates equal protection, rather appellant simply claims that it violates equal protection because it creates nonuniform standards. Addi-

tionally, there was no evidence presented to the trial court to demonstrate how the ordinance violates equal protection. Due to the appellant's failure to meet the burden of proof, appellant's argument must fail.

PROCEDURAL DUE PROCESS

{¶ 43} Appellant argues the city of Carlisle failed to comply with its procedures under the code and, as a result, violated procedural due process.

{¶ 44} Due process requires that an individual be given notice and an opportunity to be heard before being deprived of a significant property interest. *State v. Hayden*, 96 Ohio St.3d 211, 773 N.E.2d 502, 2002-Ohio-4169, ¶ 6.

{¶ 45} The record in this case demonstrates that appellant received proper notice. On March 4, 2004, the city of Carlisle sent written notice informing appellant that the property was not in compliance with the property maintenance code. The letter specified the exact sections of the code that were violated and listed specific violations on appellant's property. The letter also provided 30 days for appellant to correct the violations and notified appellant of his right to appeal as required by the ordinance. Further, discussions between appellant and the city about cleaning up the property were ongoing since 1999 and appellant has been on notice of the specific areas of disrepair since that time. We find no due process violation on these facts.

TAKING

{¶ 46} Appellant argues the property maintenance code constitutes an unconstitutional taking because it deprives appellant of the use and enjoyment of the property.

{¶ 47} The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation. Fifth and Fourteenth Amendments to the United States Con-

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stitution; Section 19, Article I, Ohio Constitution.

{¶ 48} In *Goldberg Cos., Inc. v. Richmond Hts. City Council*, 81 Ohio St.3d 207, 1998-Ohio-456, the Ohio Supreme Court adopted the United States Supreme Court's land-use regulation test from *Agins v. Tiburon* (1980), 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106. The *Agins* takings analysis provides that, "application of land-use regulations to a particular piece of property is a taking only 'if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land.'" *Goldberg*, 81 Ohio St.3d at 211, 690 N.E.2d 510.

{¶ 49} Further, the Ohio Supreme Court held that the *Agins* test is disjunctive and a taking can be shown by proving either prong. *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 63, 765 N.E.2d 345, 2002-Ohio-1627, modified on reconsideration of other grounds, 96 Ohio St.3d 379, 775 N.E.2d 493, 2002-Ohio-4905.

{¶ 50} However, in *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876, the United States Supreme Court overturned *Agins*, holding that the "substantially advance[s]" standard is not an appropriate test for determining whether a regulation effects a taking. *Id.* at 528. Instead, the court ruled that regulatory takings challenges are to be examined on a case by case basis using the factors set forth in *Penn Central Transp. Co. v. New York City* (1978), 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631. *Lingle*, 544 U.S. at 538 .

*8 {¶ 51} The *Penn Central* factors include: the expectations of the property owner; ^{FN8} the degree to which the regulation is designed to stop uses that cause substantial individualized harm, but are not common law nuisances; the degree to which the regulation enables the government to actually use the property for uniquely public functions; and the nature of the governmental interaction, i.e., whether it is a "physical invasion by the government" as compared to "when interference arises from some

public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124-128.

FN8. Referred by the United States Supreme Court as "the extent to which the regulation has interfered with distinct investment-backed expectations" of the property owner.

{¶ 52} We recognize, though, that the Ohio Supreme Court recently cited *Goldberg* in *Jaylin Investments, Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 839 N.E.2d 903, 2006-Ohio-4, ¶ 19, following the *Lingle* decision, holding that the court of appeals in that case was correct in its application of the *Goldberg/Agins* test. *Id.* at ¶ 22. Consequently, for this appeal, we presume that the Ohio Supreme Court continues to adhere to the *Agins* "substantially advance[s]" test for analyzing land-use regulations.

{¶ 53} Upon reviewing the case at bar, regardless of whether we apply the *Penn Central* or the *Goldberg/Agins* test, we find that the Carlisle ordinance does not constitute a taking. When examining the ordinance under the *Agins* "substantially advance[s]" test, having already demonstrated that the ordinance promotes a legitimate state interest, the ordinance also substantially advances that interest. The ordinance in this case is a comprehensive property maintenance scheme that addresses Carlisle's desire to have properly maintained property within the city limits and ensure that structures are safe, sanitary, and fit for occupation and use. Further, the code promotes aesthetics within the municipality and protects property values.

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

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Rather, the code requires appellant to maintain the property in a safe, sanitary and fit condition. In addition, requiring appellant to remove unlicensed vehicles, mow grasses and weeds, and rehabilitate or remove debilitated structures does not affect appellant's business enterprise.

SUBSTANTIVE DUE PROCESS

{¶ 55} Finally, appellant argues that the property maintenance code is a violation of substantive due process because the ordinance is not rationally related to any legitimate government purpose. Appellant claims the ordinance fails the level of scrutiny for zoning regulations articulated in *Village of Euclid v. Amber Realty Co.* (1926), 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, by arguing that it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."

*9 {¶ 56} Further, appellant claims that "[n]o one (so far) has in this case articulated any reason how it protects the health, safety, or welfare, of any person, to regulate unspecified degrees of 'disrepair' or 'unsightliness,' what a structure looks like, when it does not affect the performance or safety of the structure * * *."

{¶ 57} Having already identified the legitimate reasons for land-use regulations like the property maintenance code in this case and their relation to the health, safety, and welfare, we are not persuaded by appellant's argument.

{¶ 58} Appellant's second assignment of error is overruled.

{¶ 59} Assignment of Error No. 1:

{¶ 60} "THE TRIAL COURT ERRED IN NOT ADMITTING DEFENDANT'S EVIDENCE."

{¶ 61} In his first assignment of error, appellant contends that the trial court erred by not admitting several items of evidence into the record including

a copy of the ordinance, documentation of the property's annexation into the city of Carlisle, and testimony showing that a copy of the ordinance was not in the law library. Appellant argues that this evidence should have been admitted because it was relevant to the cause of action.

{¶ 62} The admission or exclusion of evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343. An appellate court will not interfere with a trial court's evidentiary ruling absent an abuse of discretion. *State v. Williams* (1982), 7 Ohio App.3d 160, 454 N.E.2d 1334, paragraph one of the syllabus. Abuse of discretion connotes more than an error of law or judgment and implies that the trial court's decision was arbitrary, unreasonable or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 63} The general rule of admissibility is that all relevant evidence is admissible while evidence which is not relevant is not admissible. Evid.R. 402. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401.

{¶ 64} Appellant first claims the trial court erred by refusing to admit a copy of the ordinance at issue in this case to show that the ordinance was not properly enacted. A review of the transcript, though, reveals that appellant's argument fails because the trial judge took judicial notice of the ordinance during trial.

{¶ 65} Second, appellant argues the trial court erred by refusing to admit documentation of the property's annexation to show the preexisting use. The trial court did not err by refusing to admit the document. First, the record clearly indicates, even without the document, that the property was annexed in 1997. Second, as examined above, regardless of whether the conditions on the property existed before annexation, the city may still abate the

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nonconforming use, even if it was preexisting.

*10 {¶ 66} Appellant claims the trial court erred by not admitting testimony of the Warren County law librarian to show the ordinance was not published in compliance with R.C. 731.231. At trial, appellant proffered the testimony of the Warren County law librarian, who testified that no copy of the ordinance was on file at the library. As discussed above, because Carlisle is a charter municipality with its own procedure for enactment and publication of ordinances, it is not required to follow the mandates of R.C. 731.231, requiring a copy of the ordinance to be on file in a law library. As a result, the trial court did not err in refusing to admit this testimony because the evidence is not relevant to the instant matter.

{¶ 67} Appellant's first assignment of error is overruled.

{¶ 68} Assignment of Error No. 3:

{¶ 69} "THE TRIAL COURT ERRED IN CONVICTING THE APPELLANT OF VIOLATING THE CARLISLE PROPERTY MAINTENANCE CODE."

{¶ 70} Appellant argues in his third assignment of error that his convictions not supported by sufficient evidence and were also against the manifest weight of the evidence. Specifically, appellant argues no evidence was presented that the trailers were in disrepair, the height of the grass was over 10-inches in length, the weeds were "noxious," or that the concrete structure was in disrepair.

{¶ 71} The Supreme Court of Ohio has held that "the legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 1997-Ohio-52. We will first address appellant's claim that her conviction is not supported by sufficient evidence.

{¶ 72} In reviewing the record for sufficiency, "the

relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. When deciding a sufficiency of the evidence issue, the reviewing court will not substitute its evaluation of witness credibility for that of the trier of fact. *State v. Benge*, 75 Ohio St.3d 136, 142, 661 N.E.2d 1019, 1996-Ohio-227. The state can use either direct or circumstantial evidence to prove the elements of a crime. *State v. Nicely* (1988), 39 Ohio St.3d 147, 151, 529 N.E.2d 1236. Furthermore, "circumstantial evidence and direct evidence inherently possess the same probative value." *Jenks*, paragraph one of the syllabus.

{¶ 73} A review of the evidence demonstrates that the state presented sufficient evidence to convict appellant of the four violations of the property maintenance code. At trial, the zoning official and building inspector testified regarding the disrepair of appellant's property. In addition, photographs were presented showing the overgrowth of grasses, the accumulation of several trailers, vehicles, parts, barrels, old machinery and tires, as well as deteriorating structures on the property.

*11 {¶ 74} When considering a manifest weight of the evidence challenge, an appellate court reviews the entire record, weighing the evidence and all reasonable inferences that can be drawn from it, and considers the credibility of witnesses, to determine whether in resolving conflicts in the evidence, "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

{¶ 75} After a thorough review of the record, con-

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sidering the evidence and reasonable inferences therefrom, we also conclude that the evidence supports the trial court's decision by the required degree of proof. Appellant's third assignment of error is overruled.

{¶ 76} Assignment of Error No. 4:

{¶ 77} "THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT."

{¶ 78} Appellant argues in his fourth assignment of error that the trial court erred in sentencing. Appellant claims that the fine in this case exceeds the maximum fine for a minor misdemeanor conviction. Further, appellant argues that he cannot be sentenced for continuing violations based on the subjective approval of a government official.

{¶ 79} The complaints in this case allege "that on or about Jan. 23, 2006 and continuing to this date, in the city of Carlisle, Warren County, Ohio, one Martz Concrete Co. did fail to maintain premises at 350 Central Ave. as follows:"

{¶ 80} Judgment entry in this case states, "[i]t is the order of the Court that a fine in the amount of \$50.00 per day shall be imposed, commencing May 31, 2006, for every day Defendant is in non-compliance of the provisions of the Carlisle Property Maintenance Code." The entry before this court only mentions Trial Case No. 06-02-CRB-0499(B), however, the trial court found appellant guilty of four counts in Case Nos. 06-02-CRB0499(A), (B), (C), and (D).

{¶ 81} R.C. 2929.31 authorizes an organization to be a fined up to \$1,000 for a minor misdemeanor conviction. The property maintenance code authorizes fines of \$50 to \$250 for each violation. Further, the maintenance code defines each day as a separate offense.

{¶ 82} A review of the judgment entry in this case reveals that the sentence is unclear and invalid. First, the judgment entry is ambiguous whether appellant was fined \$50 per day for each of the four

convictions or all convictions combined.

{¶ 83} Second, the trial court erred in sentencing appellant to indefinite, continuing convictions and fines. Carlisle's complaints sought to hold appellant accountable for the nonconforming activity beginning on January 23, 2006 and continuing thereafter. Appellant was found guilty of four violations on April 26, 2006, with each day constituting a separate offense.

*12 {¶ 84} Appellant was found guilty of violations from January 23 to April 26, yet the sentence in this case seeks to fine appellant beginning May 31, 2006, continuing indefinitely. The sentence imposed by the trial court is akin to a contempt finding, not a criminal conviction. Appellant may only be sentenced for violations for which it is convicted, not prospective convictions without a formal trial.

{¶ 85} On remand, appellant may be fined for an amount within the monetary limits of the revised and maintenance codes for each individual violation and per day as a separate offense, as permitted under the law.

{¶ 86} Additionally, appellant's argument regarding the continuing fines based on the subjective approval of a government official is moot.

{¶ 87} Appellant's fourth assignment of error is sustained.

{¶ 88} Appellant's conviction is affirmed, but the case is reversed as to sentencing only and remanded to the trial court for sentencing.

WALSH and POWELL, JJ., concur.

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CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Twelfth District, Clermont County.

Archie WILSON, Plaintiff-Appellant,

v.

TRUSTEES UNION TOWNSHIP, Clermont County, Ohio, Defendants-Appellees.

No. CA98-06-036.

Oct. 26, 1998.

Dinsmore & Shohl, LLP, Mark A. Vander Laan, 1900 Chemed Center, 255 E. Fifth Street, Cincinnati, Ohio 45202, for plaintiff-appellant,

Schroeder, Maundrell, Barbieri & Powers, Lawrence E. Barbieri, 11935 Mason Road, Suite 110, Cincinnati, Ohio 45249, for defendants-appellees.

OPINION

YOUNG, P.J.

*1 Appellant, Archie Wilson, appeals summary judgment in favor of appellees, Trustees of Union Township, Clermont County, Ohio, on appellant's complaint for declaratory judgment. The Clermont County Court of Common Pleas determined that appellant failed to set forth sufficient evidence demonstrating that a contested zoning ordinance was unconstitutional. We affirm the trial court's grant of summary judgment.

Appellant entered into an option contract to purchase approximately twenty-two acres of land located at Ogle Lane and Gardner Lane in Union

Township. The purchase was contingent upon zoning being changed from R-1 (residential single family) and A-1 (agricultural) to R-3 (planned multi-family residential). Appellant intended to build a condominium complex on the property. On October 4, 1996, appellant filed an application for a zoning amendment with the Union Township Zoning Commission. On December 10, 1996, the Union Township Trustees denied appellant's request. Appellant then brought a declaratory judgment action in the Clermont County Court of Common Pleas.

In his complaint, appellant claimed that the current zoning as applied to the property was unconstitutional and amounted to a constitutional taking. Appellees moved for summary judgment arguing that (1) the zoning ordinance advanced a legitimate state interest, (2) it did not deny appellant an economically viable use of the property, and (3) appellant lacked standing. In support of their motion, appellees attached the affidavit of the Union Township administrator, Kenneth Geis, several letters, and the minutes of the Board of Trustees meeting. On May 7, 1998, the trial court granted appellees' motion for summary judgment. Appellant appealed, arguing that the trial court erred by granting summary judgment. Under a single assignment of error, appellant presents four issues for review related to the zoning ordinance.

Civ.R. 56(C) states in part that summary judgment is appropriate where:

there is no genuine issue of any material fact and * * * the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears * * * that reasonable minds can 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 party seeking summary judgment must initially

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identify the elements of the nonmoving party's case upon which the moving party is entitled to judgment as a matter of law. *Rumpke Rd. Dev. Corp. v. Board of Trustees* (1996), 115 Ohio App.3d 17, 22, 684 N.E.2d 353, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. Once the moving party has satisfied this initial burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response * * * must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." Civ.R. 56(E). (Emphasis added.) We note that in reviewing an entry of summary judgment, an appellate court applies the same standard used by the trial court. *C.V. Perry & Co. v. Village of West Jefferson* (Mar. 25, 1996), Madison App. No. CA95-08-027, unreported, at 5, citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 586 N.E.2d 1121.

*2 In his first issue presented for review, appellant contends that summary judgment was improper because the trial court utilized the wrong legal test. The trial court followed the "conjunctive" test as presented by the Ohio Supreme Court in *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 638 N.E.2d 533. The "conjunctive" test requires any party challenging a zoning ordinance to prove, beyond fair debate,^{FN1} "both that the enactment deprives him or her of an economically viable use and that it fails to advance a legitimate governmental interest." *Rumpke* at 20, 684 N.E.2d 353, quoting *Gerijo*, syllabus. (Emphasis sic.) Until recently, the Ohio Supreme Court applied this conjunctive test even though it conflicted with United States Supreme Court's analysis in zoning cases.^{FN2} However, in *Goldberg Cos. Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, 690 N.E.2d 510, the Ohio Supreme Court resolved this conflict in Ohio law by recognizing that in recent cases, the court had "combined two different standards, one for challenging constitutionality and one for establishing a taking, and created a new one ap-

plicable to all zoning challenges, not just those alleging a taking." *Goldberg* at 212, 690 N.E.2d 510.

FN1. "There is little difference between the 'beyond fair debate' standard and the 'beyond a reasonable doubt' standard." *Cent. Motors Corp. v. City of Pepper Pike* (1995), 73 Ohio St.3d 581, 584, 653 N.E.2d 639, quoting *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19, 526 N.E.2d 1350.

FN2. *Agin v. Tiburon* (1980), 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106, and *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, both apply a "disjunctive" test when determining whether a zoning ordinance constitutes a Fifth Amendment taking.

Although *Goldberg* was decided several weeks prior to its decision, the trial court followed the precedent set by this district in *Rumpke* and analyzed this case using the conjunctive test. In its analysis, the trial court made thorough findings as to both the "economic viability" prong and the "legitimate interest" prong of the conjunctive test. After careful review, we find that the trial court's findings are appropriate and compelling when extracted from the conjunctive analysis and reapplied to this case in accordance with *Goldberg*. Accordingly, we find that the trial court's error was not prejudicial and that summary judgment for appellees was appropriate. Therefore, we find that appellant's first issue for review lacks merit.

We will consider appellant's second and third issues for review together because the Supreme Court's recent decision in *Goldberg* is dispositive of both. In his second issue for review, appellant contends that summary judgment was inappropriate because there remained a genuine issue of material fact as to whether appellant was denied a viable use of the property. In his third issue for review, appellant contends that the existing zoning ordinance was un-

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constitutional because it did not advance a legitimate government interest. In *Goldberg*, the court delineated two separate challenges to any given zoning ordinance. First, it may be alleged that an ordinance is unconstitutional as applied to a particular parcel of land. *Goldberg*, 81 Ohio St.3d at 210, 690 N.E.2d 510. Second, it may be alleged that the ordinance amounts to a constitutional taking of property. *Id.*^{FN3} Each of these challenges corresponds with the issues raised on appeal by appellant.

FN3. The Fifth Amendment provides in part "nor shall private property be taken for public use, without just compensation." This provision is made applicable to the states through the Fourteenth Amendment. *Chicago Burlington & Quincy Railroad Co. v. Chicago* (1897), 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979.

*3 The first type of challenge corresponds with appellant's third issue for review. When a challenge is asserted that an ordinance is unconstitutional as applied to a particular parcel of property, *Goldberg* states that "a zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community." *Id.* at 214, 690 N.E.2d 510.^{FN4}

FN4. The court reinstated the test from *Euclid Ohio v. Ambler Realty Co.* (1926), 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, for determining the constitutionality of a zoning ordinance.

Zoning ordinances are an exercise of the government's police power, and case law addressing governmental police power is well-established. The police power of the government simply "does not extend to arbitrary, capricious and unreasonable" actions. *Clifton Hills Realty Co. v. Cincinnati* (1938), 60 Ohio App. 443, 449, 21 N.E.2d 993. An ordinance which is enacted outside this permissible scope is unconstitutional because any ordinance

that bears no relation to valid police power violates the requirements of the due process of law. *White v. Cincinnati* (1956), 101 Ohio App. 160, 138 N.E.2d 412, syllabus.

Zoning ordinances enjoy a strong presumption of validity. *Cent. Motors Corp.*, 73 Ohio St.3d at 584, 653 N.E.2d 639, citing *Valley Auto Lease of Chagrin Falls, Inc. v. Auburn Twp. Bd. of Zoning Appeals* (1988), 38 Ohio St.3d 184, 185, 527 N.E.2d 825. Any party challenging the validity of a zoning ordinance bears, at all stages of the proceeding, the burden of demonstrating that the provision is unconstitutional. *Central Motors Corp.* at 584, 653 N.E.2d 639. Furthermore, the doctrine of separation of powers dictates that "[t]he legislative, not the judicial, authority is charged with the duty of determining the wisdom of zoning regulations." *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560, 197 N.E.2d 201. Thus, to prevail on his third issue for review, appellant must show, beyond fair debate, that the ordinance is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Goldberg* at 214, 690 N.E.2d 510.

The evidence provided by appellees in support of their motion stated that (1) current zoning limits growth in population and avoids putting further strain on public resources, (2) current zoning maintains traffic and infrastructure at current levels, (3) modified zoning could make the adjacent area less attractive to industrial developers, and (4) modified zoning would require more safety services, such as police and fire. Appellant conceded that some of these interests may be legitimate, but argued that current zoning did not advance these interests. Beyond this bare assertion, appellant presented no further evidence to support his claim.

*4 The trial court found that appellant had not met the burden placed on him under Civ.R. 56(E). We find that the trial court's granting of summary judgment on this issue was proper. Additionally, we find that appellant's assertion that the ordinance is unconstitutional as applied is unpersuasive, for we

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cannot say that the zoning ordinance is arbitrary or unreasonable, nor can we say that it bears no substantial relation to the public health, safety, morals, or general welfare of the community. Thus, we find that appellant's third issue for review lacks merit.

The second type of challenge discussed in *Goldberg*, that a zoning ordinance amounts to a taking, corresponds with appellant's second issue for review. In determining whether a taking has occurred, the *Goldberg* court reaffirmed use of the "disjunctive" test presented in *Agins*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106. *Agins* states that a zoning ordinance amounts to a taking if it "does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land." *Agins* at 260. (Emphasis added.) Thus, to prevail on his second issue for review, appellant must set forth specific facts to show that a factual issue remained for trial as to whether the ordinance advanced a legitimate government interest, or whether the ordinance denied an economically viable use of the land. *Id.*

Obviously, the first prong of the *Agins* test directly overlaps with the analysis for a claim that an ordinance is unconstitutional as applied and, as stated above, appellant failed to set forth sufficient evidence to establish his claim. Regarding the second prong of the *Agins* test, to prove that a property as zoned is not economically viable, the challenger must show that the permitted uses are not economically feasible, are highly improbable, or are practically impossible under the circumstances. *Holiday Homes, Inc. v. Miami Twp. Bd. of Trustees* (Oct. 19, 1992), Clermont App. Nos. CA91-11-096, CA91-11-097, unreported, at 7. A landowner does not have a right to have his land zoned for its most advantageous economic use. *Smythe v. Butler Township* (1993), 85 Ohio App.3d 616, at 621, 620 N.E.2d 901. Further, we have stated in prior cases that one who purchases property with knowledge of the current zoning restrictions may not challenge the constitutionality of the existing zoning regulation merely because he may lose a more generous

profit if a change in zoning is not made. *Holiday Homes* at 5. Similarly, one who purchases property in the hopes of gambling on securing a change in zoning has no right to complain if the legislative body declines to rezone the property for the gambling buyer's benefit. *Smythe* at 620, 620 N.E.2d 901.

*5 In granting the motion for summary judgment, the trial court noted that appellant's only evidence regarding economic viability was appellant's own affidavit which simply stated that the neighboring industrial area reduced the possibility of using the property as currently zoned, and that the property was marketed for sale for several years without success. Appellant offered no evidence regarding prices solicited for the property, the aggressiveness used in marketing, or any money that was currently being generated by the property. The trial court found that appellant had failed to meet the burden imposed upon him under Civ.R. 56(E). Having carefully reviewed the record, we find that appellant failed to set forth the required specific facts and that summary judgment was proper on this issue. Thus, we find that appellant's second issue for review lacks merit.

In his final issue for review, appellant contends that he had standing based upon his contingent interest in the property. Appellees contend that since appellant was not the present possessor of the property, he lacked standing. We find that appellant's contingent interest in the property was sufficient to give him standing on both his claim of unconstitutionality and his claim of a constitutional taking.

Appellees rely solely upon *Zetlig Land Dev. v. Cambridge Twp.* (1991), 75 Ohio App.3d 302, 599 N.E.2d 383. In *Zetlig*, the Eleventh District Court of Appeals stated that "only a person with a present possessory interest in a parcel of property, * * * may challenge the constitutionality of the existing zoning of that parcel." *Id.* at 305-06, 599 N.E.2d 383. However, the *Zetlig* court went on to find that standing was proper because the developer had retained a contingent interest in a portion of the prop-

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erty and was under authority granted by contract, much like the case here.

We also find this case similar to *Arlington Hts. v. Metro. Hous. Dev. Corp.* (1977), 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450, where a developer claimed that the zoning was unconstitutional as applied. Like this case, the developer entered a contract contingent upon securing alternate zoning. The United States Supreme Court stated that standing is a question of whether the party has "such a personal stake in the outcome of the controversy * * * to justify exercise of the court's remedial powers on his behalf." *Id.* at 261, quoting *Baker v. Carr* (1962), 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663. The party must show some form of injury, but the injury may be indirect. *Arlington Hts.* at 261.

The Supreme Court stated that the zoning plan of Arlington Heights stood as an absolute barrier to the developer's use of the property, and if the developer had received the injunctive relief he sought, that barrier would have been removed. Thus, the developer had standing. *Id.* Likewise, we find that appellant had standing to assert his first claim that the zoning was unconstitutional because he, like the developer in *Arlington Hts.*, had the "right to be free from arbitrary or irrational zoning actions." *Id.* at 263.

*6 We find that appellant also had sufficient standing to assert his taking claim. The purpose underlying the taking clause of the Fifth Amendment is to put the owner "in as good a position pecuniarily as if his property had not been taken." *United States v. 564.54 Acres of Land, Etc.* (1979), 441 U.S. 506, 510, 99 S.Ct. 1854, 1857, 60 L.Ed.2d 435, quoting *Olson v. United States* (1934), 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236. In a typical taking case, the government, exercising its power of eminent domain, must pay just compensation to the landowner as measured by the fair market value of the property at the time of the taking. *564.54 Acres of Land* at 511.

This case, however, bears more similarity to a

landowner's claim in inverse condemnation. The doctrine of inverse condemnation is predicated upon the idea that a taking may occur without the government instituting formal condemnation proceedings. *First English Evangelical Lutheran Church v. Los Angeles* (1987), 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250. Inverse condemnation allows the landowner to bring suit to determine if the government's action amounts to a taking. Then, "[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *Id.* at 321. See, also, *Willoughby Hills v. Corrigan* (1972), 29 Ohio St.2d 39, 50-51, 278 N.E.2d 658. Thus, if it had been determined that the ordinance amounted to a taking, Union Township would then have had the opportunity to cure the violation by amendment or withdrawal of the ordinance.

Based upon the foregoing, we find that appellant's contingent interest in the property was sufficient to give him standing to assert both his claim that the ordinance was unconstitutional as applied, and his claim that the ordinance amounted to a constitutional taking. We find this to be consistent with the rationale underlying the notion of compensation contained in the taking clause. Appellant's fourth issue therefore is well-taken.

In conclusion, after considering the facts of this case in light of *Goldberg*, we find that appellant had sufficient standing to bring these claims.^{FN5} However, we find that summary judgment was appropriate on both of appellant's claims.

FN5. We also find it significant that the definition for "Landowner" in the Union Township Zoning Resolution states that "[t]he holder of an option or a contract to purchase * * * shall be deemed to be a landowner for the purposes of this article."

Judgment affirmed.

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WALSH and POWELL, JJ., concur.

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