

ORIGINAL

In the
Supreme Court of Ohio

RICHARD CLIFTON, <i>et al</i> ,	:	Case No. 2010-1196
	:	
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Clinton County
	:	Court of Appeals,
VILLAGE OF BLANCHESTER, <i>et al</i> .,	:	Twelfth Appellate District
	:	
Defendant-Appellee.	:	Court of Appeals Case
	:	No. CA 2009-07-009

MERIT BRIEF OF *AMICUS CURIAE*
STATE OF OHIO
IN SUPPORT OF DEFENDANT-APPELLEE

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INTRODUCTION

This case presents two primary questions. First, does a property-owner have standing to bring a “regulatory taking” claim against a political subdivision that rezones property adjacent to his own when his property lies outside the political subdivision’s jurisdictional boundaries? Second, even if that property-owner has standing, does his claim fail as a matter of law, given that the claim is based on how the political subdivision regulated *someone else’s* property? The Twelfth District Court of Appeals rightly answered “no” to both questions, and this Court should affirm.

The Village of Blanchester rezoned property owned by J&M Precision Machining from an I-1 classification (Restricted Industrial) to an I-2 classification (General Industrial). Richard Clifton, who owns property next to J&M’s but outside the village limits, sued Blanchester and demanded damages, claiming that the rezoning decision was an improper regulatory taking.

Clifton’s novel claim fails on many levels. His complaint, as a threshold matter, fails to initiate a mandamus action—the only mechanism by which owners of private property alleging an involuntary taking can “compel public authorities to institute appropriation proceedings” to compensate those whose property it has taken. See *State ex rel. Gilbert v. City of Cincinnati*, 2010-Ohio-1473 ¶ 14 (quotation and citation omitted).

But even if his complaint sounded in mandamus, Clifton would still lack standing to seek the relief he requests. For Clifton to succeed on his claim, which boils down to a demand for money damages resulting from an alleged appropriation by inverse condemnation, the courts would have to order the village to initiate proceedings to appropriate his land—property that lies *outside* the village’s territory. See *Gilbert*, 2010-Ohio-1473 ¶ 14. The problem with that is, apart from a narrow exception for certain public utility takings, a municipal corporation’s power to appropriate ends at the municipal boundary. And what the Village has no power to do—

appropriate Clifton's property and compensate him for it—the courts have no power to mandate. See *State ex rel. Sawyer v. O'Connor* (1978), 54 Ohio St. 2d 380, 383. Clifton seeks a judgment that cannot be “carried into effect” and therefore lacks standing to pursue his claim. *Kincaid v. Erie Ins. Co.*, 2010-Ohio-6036 ¶ 10 (quotation and citation omitted).

And even if Clifton could prevail on standing, his claim would still fail as a matter of law because it has no basis in the law of regulatory takings. The concept of a regulatory taking is based on the judicial recognition that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, 2002-Ohio-6716 ¶ 34 (quotation and citation omitted). But Clifton's theory has nothing to do with regulation of *his* property: instead, he claims damages from the regulation (or, more accurately, the deregulation) of his neighbor's property. Because that novel proposition stands the law of regulatory takings on its head, the lower courts properly rejected it.

STATEMENT OF AMICUS INTEREST

The State of Ohio has a strong interest in seeing that the law of regulatory takings is properly applied, as many of the State's departments and agencies implement regulations or issue permits that affect how land may be used. To name only several examples, the Ohio Environmental Protection Agency regulates solid waste landfills and issues permits for them; the Department of Natural Resources has regulatory and permitting authority over surface mining; and the Department of Transportation regulates and issues permits for billboards.

STATEMENT OF THE CASE AND FACTS

Richard Clifton owns farmland just outside the jurisdictional boundary of Blanchester, Ohio. *Clifton v. Village of Blanchester* (12th Dist.) (“App. Op.”), 2010-Ohio-2309 ¶ 4. In 1997, Clifton sold 2.87 acres of his land to a company called J&M Precision Machining, Inc. App. Op. ¶ 3. This 2.87-acre tract is within the Village of Blanchester.

In February 2002, the Village rezoned the J&M property from an I-1 classification (Restricted Industrial) to an I-2 classification (General Industrial), which permitted J&M to expand its operation.¹ Clifton filed this lawsuit in April 2006, alleging that the Village's decision to rezone the J&M property amounted to a "taking" of his adjacent property, which he hoped to sell for residential purposes. App. Op. ¶¶ 5, 27.

The trial court initially analyzed Clifton's regulatory-takings claim using the "total taking" standard outlined in *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, and granted summary judgment to the Village, finding that the rezoning did not deprive Clifton of all economic use of his land. App. Op. ¶ 6. The appeals court agreed with this finding, but noted that the trial court failed to employ the balancing test described in *Penn Cent. Transp. Co. v. New York City* (1978), 438 U.S. 104, which is used to evaluate a claim of a partial regulatory taking. App. Op. ¶ 6. Reversing in part, the appeals court instructed the trial court to use the *Penn Central* test to evaluate Clifton's claim, and also to consider whether Clifton had standing to sue. App. Op. ¶ 8.

On remand, the trial court concluded that "Clifton did not have standing to pursue his claim against Blanchester where 'it did not rezone any of [his] property.'" App. Op. ¶ 9. It also concluded, after doing a *Penn Central* analysis, that there was no partial taking of Clifton's property requiring compensation by Blanchester. App. Op. ¶ 9.

The appeals court affirmed. On the standing issue, it noted that "because Blanchester's decision to rezone the J&M property did not hinder Clifton's use of his own property in any way, * * * Clifton has not alleged such a personal stake in the outcome of the controversy that would

¹ In March 2002 Clifton filed a complaint alleging that Blanchester's rezoning was unconstitutional and a "taking." The proceedings related to the 2002 complaint eventually terminated and were not relevant to the appeal in this case. App. Op. ¶ 5 n.1.

entitle him to further pursue his claim.” App. Op. ¶ 27. In addition, it determined that Clifton had “no substantive right to the relief he sought to recover from Blanchester,” and therefore no standing to sue, because his land is outside Blanchester’s jurisdictional boundaries and therefore beyond its power to appropriate. App. Op. ¶ 28. The appeals court further noted that a decision conferring standing on Clifton to seek compensation for the rezoning decision of a neighboring political subdivision would require Ohio’s local governments “to endure the costly burden of defending against an infinite number of claims arising from nonresidents sitting just outside their jurisdictional boundaries.” App. Op. ¶ 29.

Turning to the merits, the appeals court observed that, at best, Clifton had alleged that Blanchester’s decision to rezone the J&M property caused a diminution in the value of his property. App. Op. ¶ 42. But that allegation did not equate to a partial taking. App. Op. ¶¶ 41-42. As the appeals court reasoned, “‘mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.’” App. Op. ¶ 41, quoting *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust* (1993), 508 U.S. 602, 645. This Court accepted Clifton’s request for discretionary review. *10/31/2010 Case Announcements*, 2010-Ohio-4928.

ARGUMENT

Amicus Curiae State of Ohio’s Proposition of Law I:

A party lacks standing to sue for a claimed regulatory taking when the affected property is outside the jurisdiction of the regulating governmental entity.

The appeals court held that Richard Clifton had no standing to sue because the relief he sought was unavailable to him as a matter of law. App. Op. ¶ 28. That ruling is correct as both a matter of law and logic and should be affirmed.

A. A writ of mandamus directing an appropriation is the remedy for an involuntary taking by the government.

Under long-established Ohio law, the remedy for an involuntary governmental taking is a writ of mandamus ordering the government to appropriate the property in question. *State ex rel. BSW Dev. Group v. City of Dayton* (1998), 83 Ohio St. 3d 338, 341; *State ex rel. Schiederer v. Preston* (1960), 170 Ohio St. 542, 544. This rule holds true for both physical takings and “regulatory takings” such as the one claimed in this case. *State ex rel. Gilbert v. City of Cincinnati*, 2010-Ohio-1473 ¶¶ 14-23.

This rule dooms Clifton at the outset, as Clifton’s complaint does not sound in mandamus. But even if the Court were to construe it as a mandamus action, his claim would still fail for lack of standing.

B. Because Clifton’s property is outside the corporate limits of the Village of Blanchester, the village has no power to appropriate it.

A municipality has no power to appropriate property outside its corporate limits unless the land is taken for a municipal public utility. *Britt v. City of Columbus* (1974), 38 Ohio St. 2d 1, 6-9. That exception does not apply here, as Clifton has never alleged that the Village of Blanchester took his property for municipal public utility purposes. Since Clifton’s property is “outside Blanchester’s jurisdictional boundaries,” the appeals court properly held that what was effectively a request for a writ of mandamus directing an appropriation by the Village “is unavailable as a matter of law.” *Clifton*, 2010-Ohio-2309 ¶ 28, citing *Britt*, 38 Ohio St. 2d, syllabus ¶ 1.

C. Because the Village of Blanchester cannot appropriate Clifton’s property, he has no standing to seek a writ of mandamus directing it to do so.

Under Ohio law, standing depends in part on whether the judgment a party seeks ““ can be carried into effect.”” *Kincaid v. Erie Ins. Co.*, 2010-Ohio-6036 ¶ 10, quoting *Fortner v. Thomas*

(1970), 22 Ohio St. 2d 13, 14. In other words, the doctrine of standing requires a dispute to be presented “in a form historically viewed as capable of judicial resolution.” *Ohio Pyro, Inc. v. Ohio Dep’t of Commerce*, 115 Ohio St. 3d 375, 2007-Ohio-5024 ¶ 27, quoting *State ex rel. Dallman v. Franklin Cty. Ct. of Common Pleas* (1973), 35 Ohio St. 2d 176, 178-79.

Because the Village of Blanchester cannot appropriate property outside its corporate limits (except for municipal public utility purposes not at issue here), the appeals court ruled that Clifton had no standing to seek a writ of mandamus directing the village to appropriate his land. *Clifton*, 2010-Ohio-2309 ¶ 28. That reasoning is correct on two grounds.

First, a court cannot order a party to do something that is beyond the party’s power to do. *State ex rel. Sawyer v. O’Connor* (1978), 54 Ohio St. 2d 380, 383 (“Mandamus will not be ordered if the result is to mandate a vain act”).

Second, entitlement to mandamus depends on proof that the respondent had a clear legal duty to perform the act being mandated, and that duty cannot be created by a court. “It is axiomatic that in mandamus proceedings, the creation of the legal duty that a relator seeks to enforce is the distinct function of the *legislative branch of government*, and courts are not authorized to create the legal duty enforceable in mandamus.” *State ex rel. Pipoly v. State Teachers Ret. Sys.*, 95 Ohio St. 3d 327, 2002-Ohio-2219 ¶ 18 (emphasis in original).

If Blanchester had the power to regulate property outside its village limits, and used that power to regulate Clifton’s property in a way that damaged its value, then his argument for standing might be more persuasive. But that is not the case: the village’s taking and regulatory powers are coextensive, and they end at the village limits. Since Blanchester did not (and could not) regulate Clifton’s property, it does not (and cannot) have a clear legal duty to appropriate it.

D. A right to due process during rezoning of property in a neighboring political subdivision does not confer standing to seek compensation from the government for the rezoning decision or its consequences.

Ohio law generally requires notice and an opportunity to be heard in connection with municipal zoning decisions. R.C. 713.12; see generally *Morris v. Roseman* (1954), 162 Ohio St. 447, 451-52. Once a decision is made, an owner of adjacent property within the same political subdivision may be able to appeal it. *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals* (2001), 91 Ohio St. 3d 174, 177-79; *Schomaeker v. First Nat. Bank of Ottawa* (1981), 66 Ohio St. 2d 304, syll. 2. But whether someone who does not live or own property within the political subdivision is entitled to these same due process rights has not been decided by an Ohio court.

Some courts in other states, however, have held that a non-resident may have a right to be heard in a zoning matter. The New Jersey Supreme Court, for example, ruled that when a municipal government is deciding about the zoning of a highly built-up area it “owes a duty to hear any residents and taxpayers of adjoining municipalities who may be adversely affected by proposed zoning changes and to give as much consideration to their rights” as it would to its own inhabitants. *Borough of Cresskill v. Borough of Dumont* (N.J. 1954), 104 A. 2d 441, 445-46.

In *Cresskill*, the non-resident plaintiffs convinced the court to set aside an ordinance that “spot zoned” part of a residential neighborhood to allow construction of a shopping center. *Id.* at 442, 448. Likewise, in each of the other cases surveyed by the appeals court below, the remedy sought was a judgment invalidating the government’s zoning action: *Koppel v. City of Fairway* (Kan. 1962), 371 P. 2d 113, 115 (zoning amendment “was not legally enacted”); *Scott v. Indian Wells* (Cal. 1972), 492 P. 2d 1137, 1138 (declaratory judgment voiding the city’s grant of a conditional use permit); *Whittingham v. Woodridge* (Ill. App. 1969), 249 N.E. 2d 332, 332 (declaratory judgment finding unconstitutional an amendment to the zoning ordinance); *Dahman*

v. *Ballwin* (Mo. App. 1972), 483 S.W. 2d 605, 606 (declaratory judgment holding a zoning ordinance invalid); *Construction Indus. Ass'n. v. Petaluma* (9th Cir. 1975), 522 F. 2d 897, 900 (decision voiding certain aspects of a housing and zoning plan); *Orange Fibre Mills, Inc. v. Middletown* (N.Y. Sup. Ct. 1978), 404 N.Y.S. 2d 296, 297 (judgment declaring that an amendment to zoning law is void); *Miller v. Upper Allen Twp. Zoning Hearing Bd.* (Pa. Commw. Ct. 1987), 535 A. 2d 1195, 1196 (appeal of zoning board decision); *Neu v. Planning Bd. of Twp. of Union* (N.J. App. 2002), 800 A. 2d 908, 912 (writ seeking to have site plan approval declared null and void).

If a neighbor within the Village of Blanchester applied for rezoning to allow construction of a nuclear power plant—a specter raised in Clifton’s merit brief—then under *Cresskill* and similar cases he might have a right, like that of affected village residents, to notice and a hearing. And if Blanchester did not follow the correct procedures in reaching its zoning decision, or made a decision that was contrary to accepted zoning principles, then under *Cresskill* Clifton might have standing to seek a judgment to nullify it.

But *Cresskill* and the other cases do nothing to support the argument Clifton makes, because he is not seeking to overturn Blanchester’s zoning decision. Instead, he seeks *damages* from Blanchester for its decision allowing a neighboring property owner, J&M Precision Machining, to use its own property for a broader range of industrial purposes. This novel theory has no basis in the law of regulatory takings, and it would expose state and local governments to lawsuits for regulating land use *too little* as well as for regulating it *too much*, making zoning practically impossible.

And Clifton’s argument veers even further afield, because he seeks compensation for a claimed regulatory taking of property that Blanchester has no power to regulate, because it is

outside the village limits. Under Article XVIII, Section 3 of the Ohio Constitution, municipalities have authority to “adopt and enforce *within their limits* such local police, sanitary and other similar regulations, as are not in conflict with general laws.” (Emphasis added). Since municipal regulatory power stops at the corporate limits, any potential liability for a claimed regulatory taking—and any litigant’s claim to standing—must stop there as well.

This is not to say that Clifton has no remedy at all. If J&M’s industrial use of its property wrongfully interferes with Clifton’s enjoyment of his own property, he may have a nuisance claim against J&M for damages. *Banford v. Aldrich Chem. Co.*, 126 Ohio St. 3d 210, 2010-Ohio-2470 ¶¶ 17-32. But he has absolutely no claim against the Village of Blanchester.

In short, although governments may seek to modulate private land development through zoning, they are not insurers of property value as against the land-use decisions of other private property owners.

Amicus Curiae State of Ohio’s Proposition of Law II:

A governmental action is not a regulatory taking merely because it results in diminution of a property’s value, and a regulatory taking cannot result from government regulation of someone else’s property.

Because Clifton lacks standing to bring his claim, the Court should dispose of this case without reaching the merits. But even if this Court were to find that Clifton has standing (and it should not), Clifton’s claim fails as a matter of law, as the government regulation of an adjacent property does not amount to a regulatory taking of Clifton’s property.

A. Clifton’s allegation that Blanchester’s rezoning decision caused his property to lose value is not enough to state a claim for a regulatory taking.

The appeals court found that “Clifton merely alleged that the rezoning of the J&M property caused his property to suffer a significant diminution in value.” *Clifton*, 2010-Ohio-2309 ¶ 42. Clifton does not point to any allegation, other than a claimed diminution in value resulting from

a predicted loss of residential development potential, to bolster his claim that a regulatory taking occurred. (Appellant Br., pp. 10-13).

In its pioneering decision on regulatory takings, *Pennsylvania Coal Co. v. Mahon*, the U.S. Supreme Court explained that “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” (1922), 260 U.S. 393, 413 (1922). And its decisions since then “uniformly reject the proposition that diminution in property value, standing alone, can establish a ‘taking.’” *Penn Cent. Transp. Co. v. New York City* (1978), 438 U.S. 104, 131, citing *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365 (75% diminution in value caused by zoning law) and *Hadacheck v. Sebastian* (1915), 239 U.S. 394 (87% diminution).

This Court agrees that diminution in property value “is not itself a taking” because it does not satisfy “the degree of interference or injury required by Ohio law to establish a taking.” *State ex rel. Taylor v. Whitehead* (1982), 70 Ohio St. 2d 37, 39. Rather, “something more than loss of market value or loss of the comfortable enjoyment of the property is needed to constitute a taking.” *State ex rel. BSW Dev. Group v. City of Dayton* (1998), 83 Ohio St. 3d 338, 344 (internal citation omitted). Indeed, it was the need to define that “something more” that led the U.S. Supreme Court to formulate the *Penn Central* test for a partial regulatory taking, which this Court has adopted. *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, 2002-Ohio-6716, ¶ 34.

The *Taylor* decision is particularly instructive here, because it involved a similar dispute. A trucking business had moved into a rural area that was zoned by the township for agricultural use, and the Taylors sued to shut it down. *Taylor*, 70 Ohio St. 2d at 37. As a public utility, however, the trucking company was exempt from township zoning under the then-extant version of R.C. 519.21. *Id.* at 39. So the Taylors argued that the statute was “an unconstitutional taking,

without compensation, of neighboring property owners' right of enjoyment," alleging that their properties had declined in value because of the trucking business that the statute permitted. *Id.* at 38. But this Court held that the Taylors did not state a takings claim, for even if the plaintiffs could "prove that their properties decreased in value, diminution is not itself a taking." *Id.* at 39.

Clifton's failure to allege anything more than a diminution in value is no accident, because there is nothing more to allege. As Clifton concedes, the Village of Blanchester did not regulate his property. Apt. Br., 12-13. He can use it, develop it, or sell it as he chooses, and the village has no right or power to constrain his choice: all of which means that there was no regulatory taking for Clifton to allege.

B. A regulatory taking cannot result from government regulation (or deregulation) of someone else's property.

"The purpose of the Takings Clause is to prevent government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *R.T.G.*, 2002-Ohio-6716 ¶ 33, quoting *Armstrong v. United States* (1960), 364 U.S. 40, 49. In the context of regulatory takings, moreover, the U.S. Supreme Court and this Court have each "recognized that 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *Id.* ¶ 34, quoting *Pennsylvania Coal Co.*, 260 U.S. at 415.

In this case, however, Blanchester imposed no *public* burden on the use of Clifton's land, because it has not regulated his property in any way. Apt Br., 12-13. So Clifton's problem is not that governmental regulation of his property "goes too far." Rather, Clifton thinks that Blanchester's regulation of his neighbor's property *does not go far enough*, because it now allows general industrial use instead of restricting the property to light industrial use. *Id.* at 13. This theory is completely outside the established law of regulatory takings.

A property owner has no right to insist that the zoning of neighboring property remain the same. This Court made that point clear when the Taylors argued that they had a “right to the continuation of the higher zoning classification” of the neighboring trucking business’s property. *Taylor*, 70 Ohio St. 2d at 38. But the *Taylor* court flatly rejected that idea, holding that “landowners do not have a right to rely upon the continuation of a higher zoning classification for neighboring property so as to prevent adoption of a subsequent amendatory ordinance” changing that zoning. *Id.* at 40. Federal law holds the same. See, e.g., *L C & S, Inc. v. Warren Cty. Area Plan Comm’n* (7th Cir. 2001), 244 F. 3d 601, 605 (“an expectation of unchanged zoning law * * * is not a property right, or even reasonable”) (internal citation omitted).

Clifton’s claim, moreover, is not about something that the government has done to his property. He does not allege any governmental restriction of the use of his property that has effects which “are functionally comparable to government appropriation or invasion of private property,” even though that restriction is the touchstone of a regulatory-takings claim. *Lingle v. Chevron U.S.A. Inc.* (2005), 544 U.S. 528, 542.

The Iowa Supreme Court confronted a similar situation in *Harms v. City of Sibley*, where homeowners claimed that the rezoning of nearby property to allow the construction of a ready-mix concrete plant was a regulatory taking. 702 N.W. 2d 91 (Iowa 2005). The trial court found that the rezoning was a taking because it allowed the concrete plant “to create a nuisance, causing substantial damage to the Harms.” *Id.* at 95. But the Iowa Supreme Court disagreed, holding that *the city’s action* was not comparable to an appropriation or invasion of private property. *Id.* at 98-99. Instead, the actions of the owner of the rezoned property and the ready-mix plant operator produced the nuisance. Accordingly, the Iowa Supreme Court held that they, not the city, should pay for it. *Id.* at 101. That same reasoning applies to this case.

C. If the government were held liable for changes in property value caused by permitted private activity, land use regulation would become impossible.

As the U.S. Supreme Court cautioned in *Lingle*, a court trying to determine if a regulation has “gone too far” must bear in mind that “government regulation -- by definition -- involves the adjustment of rights for the public good.” 544 U.S. at 538 (quotation and citation omitted). And when that adjustment of competing interests happens, often someone is dissatisfied.

In *Harms*, for example, the city’s rezoning decision had to consider the rights of the owner of the land where the concrete plant was built as well as the interests of the plant’s neighbors. Had the city decided against rezoning the property, *that* decision might have resulted in a claim of regulatory taking, too. Mindful of that fact, the Iowa Supreme Court concluded: “If we were to hold the City responsible under the circumstances of this case, there would be no end to the potential for liability every time there was a zoning change.” *Harms*, 702 N.W. 2d at 101.

Conflicting land uses can occur any time property is newly developed or redeveloped. This case involves the new development of farm land on the edge of the Village of Blanchester. J&M has built up its property for industrial use, which conflicts with Clifton’s hope to develop his land residentially. App. Op. 2010-Ohio-2309 ¶¶ 3-4, 27. In the redevelopment setting, market forces make already-built property desirable for a different, more remunerative use. Depending on the circumstances, the local government might modify zoning to allow the different use or decide against it. Compare *Willott v. Village of Beachwood* (1964), 175 Ohio St. 557 (land rezoned from residential to shopping-center use) and *Leslie v. City of Toledo* (1981), 66 Ohio St. 2d 488 (requested rezoning from residential to commercial use denied). Either way, some property will benefit by the zoning decision and other property will not.

Making government liable for changes in property value resulting from private activity, as Clifton proposes here, would truly be a “no win” situation for the public. The J&M property

may be worth more because of the operational expansion allowed by rezoning, but that new value belongs to J&M, not to Blanchester. If the Clifton property loses value because of it, and Blanchester is made liable for that loss, then J&M would gain at the public's expense. Conversely, if the village had decided against rezoning the J&M property, that outcome might have preserved the residential development value of Clifton's property. But the preserved increment of value belongs to Clifton, not Blanchester. Yet it is Blanchester, not Clifton, who would be sued if J&M claimed that the decision to maintain more stringent land-use rules was a regulatory taking. Either way, the government would be expected to pay, and the resulting exposure to lawsuits would make any land use regulation a risky proposition.

One alternative would be for governments not to regulate land use at all. If the J&M property never had been zoned, then Blanchester could hardly be faulted for whatever J&M built there. But under Clifton's theory, once a local government zoned a property, it would be on the hook forever. A decision to eliminate existing zoning, in Clifton's view, would be just as much a regulatory taking as the decision to relax zoning from "light industrial" to "general industrial."

This paradox underscores a central fallacy of Clifton's argument, for government cannot cause a regulatory taking by *decreasing* the regulation of property. Conflicts between neighbors over how land is used are inevitable. Zoning and other forms of governmental permitting and regulation are efforts to ameliorate those conflicts in the public interest. But government is not at fault just because a regulatory scheme does not address every problem or perfectly resolve the ones it does address. As the U.S. Supreme Court pointed out, "The problems of government are practical ones and may justify, if they do not require, rough accommodations." *Dandridge v. Williams* (1970), 397 U.S. 471, 485, quoting *Metropolis Theatre Co. v. City of Chicago* (1913), 228 U.S. 61, 69. Clifton seeks, by an unprecedented extension of the concept of regulatory

taking, to impose liability on Blanchester for its accommodation of competing landowners' interests. The trial and appeals courts properly rejected that effort, and this Court should affirm their decisions.

CONCLUSION

For all the foregoing reasons, the decision of the appeals court should be affirmed.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief was served by U.S. mail this 10th day of January,

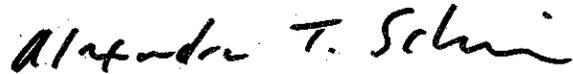
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