

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

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

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**REPLY BRIEF OF APPELLANT, RICHARD CLIFTON**

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## ARGUMENT

**Proposition of Law No. I: A non-resident contiguous property owner has standing to litigate a partial regulatory taking claim pursuant to Penn Central Transportation Co. v. New York City, (1978) 438 U.S. 104, against an adjacent political subdivision, when the political subdivision rezones property within its jurisdictional boundaries, where the regulation results in substantial adverse economic impact upon the claimant by substantially reducing property value and such regulation interferes with the investment backed expectations of the claimant with respect to his property.**

## STANDING

In its merit brief, Appellee (hereinafter referred to as Blanchester) argues that Appellant (hereinafter referred to as Clifton) mistakenly asserts that the Court of Appeals directive to conduct a Penn Central analysis confers upon him standing. (Appellee's Merit Brief, at P. 7) Blanchester claims that Clifton is putting the cart before the horse with respect to the issue of standing. Clifton submits that the evidence and arguments he has put forth regarding economic damage and interference with investment-backed expectation, serve as evidence to support both standing and his substantive claim under Penn Central. Under the particular facts of this case, evidence supporting the substantive claim also support standing.

Blanchester then argues that it has no authority to exercise its powers of eminent domain beyond its jurisdictional borders and, therefore, the relief Clifton seeks is unavailable as a matter of law. Thus, if Clifton has no substantive right to relief, he has no standing. (Appellee Merit Brief, at P. 8)

Clifton submits that the substantive right to relief was created by Penn Central's recognition of a partial regulatory taking. Furthermore, the restrictions on a municipality's powers of eminent domain beyond its jurisdictional limits specifically prohibits a municipality from physically invading property outside of its jurisdictional border. Britt v. City of Columbus (1974) 38 Ohio St.2d 1. However, the substantive claim created by Penn Central specifically states that such analysis is appropriate where there is no physical invasion of the complainant's property. Clifton submits that the above conclusion by the Court of Appeals and argument by Blanchester are not applicable to the unique factual circumstances of this case.

Recognizing there is no Ohio case on point regarding the unique issue presented before this Court, Blanchester cites two Michigan cases in support of its position that Clifton does not have standing.

Blanchester first cites the case of Fahoome v. City of St. Clair Shores (1998) WL2016580 Mich. App., (attached Appendix A-1, Appellee's merit brief.) Clifton submits the Fahoome case does not contain a factual recitation of which to compare to the case at bar and is of no assistance.

Blanchester then cites the case of Murphy v. City of Detroit (1993) 2001 Mich. App. 54, (attached Appellee's merit brief Appendix A-2.) The City of Detroit case does not appear to deal with a rezoning act by the government. Furthermore, neither of the Michigan cases cited mention Penn Central or employ a Penn Central analysis and neither case addresses the specific issue of standing. These cases conclude that the circumstances did not amount to a "de facto" taking.

Finally, Blanchester argues, as the Trial Court and Court of Appeals concluded, that since Blanchester did not rezone any of Clifton's property and took no action directed at Clifton's

property, he has no standing to pursue a *Penn Central* claim. This is the ultimate issue of the case that has not been decided by any Ohio court. In denying Clifton standing, the Twelfth District Court of Appeals acknowledged that its decision is contra to the weight of authority in other jurisdictions regarding similar issues. (*Twelfth District Court of Appeals' Opinion, May 24, 2010, Page 5, 6 & 7, attached Appellant's merit brief, Appendix 2*) In order to avoid the arbitrary application and enforcement of constitutional rights regarding "takings" jurisprudence, Clifton urges this Court to adopt the position held by Judge Hendrickson in his dissenting opinion when he stated:

"...the majority surveyed cases from outside the state of Ohio that are relevant to the case at bar. The common holding running through these cases is that non-resident property owners who clearly may be affected, have standing to contest a zoning decision made by a neighboring municipality. ...Contrary to the majority opinion, I would find that a party in Clifton's position has standing to pursue a takings claim. In my opinion, those cases cited by the majority finding in favor of standing suggest the more prudent approach. In view of the potential harm suffered by a contiguous non-resident property owner, I find it unjust to summarily deny such a party his day in court by relying upon invisible and somewhat arbitrary geographical limits." (*Twelfth District Court of Appeals' Opinion, May 24, 2010, Page 15, attached Appellant's merit brief, Appendix 2*)

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

## PENN CENTRAL ANALYSIS

Blanchester argues that *Penn Central* is factually distinguishable from the case at bar in that the regulatory action was placed upon claimant's property and specifically restricted the use of claimant's property. Blanchester further argues that its act of rezoning did not prevent Clifton from utilizing his property for farming or residential development. In *Penn Central*, the Court ultimately concluded that the regulatory action did not amount to a taking. However, the Court in *Penn Central* noted that, notwithstanding the interference with claimant's business operations and economic utilization of its property, they were still able to profit from use of their property and obtain a reasonable return on their investment.

In the case at bar, Clifton has put forth evidence to illustrate that the economic impact of the regulation is catastrophic, denying him a reasonable return on his investment.

Blanchester then argues that Ohio law does not provide for damages in this case because the rezoning did not deprive Clifton of all economically viable use of his land. This argument is misplaced, as the rule set forth in *Penn Central* and this Court's application of *Penn Central* in *State Ex Rel Gilbert v. City of Cincinnati* 2010-Ohio-1473; 125 Ohio St.3d 385, recognize a partial regulatory taking may occur where the regulation does not deny the claimant of all economically viable use of his property.

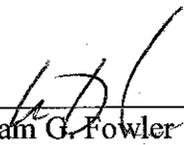
## CONCLUSION

Clifton urges this Court to permit him to have his day in court to pursue his partial regulatory taking claim against Blanchester pursuant to *Penn Central*. Clifton submits that he has

put forth sufficient evidence to withstand the Trial Court's dismissal of his claims on summary judgment and that the case be remanded to the Trial Court to proceed to trial on the merits.

Respectfully submitted,

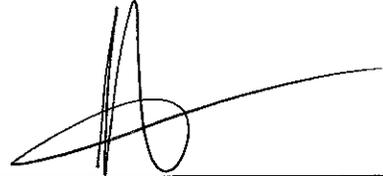
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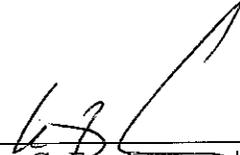


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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing has been served upon Lawrence E. Barbieri and Robert Hiller, Counsel for Appellee, 5300 Socialville-Foster Road, Ste. 200, Mason, OH 45040, this 13 day of January, 2011, by regular U.S. mail.

  
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