ORIGINAL

IN THE SUPREME COURT OF OHIO

MATTHEW E. MOORE and LORI A. MOORE,	:	Case No. 2010-1363
Appellants	:	
v.	:	On Appeal from the Butler County Court of Appeals, Twelfth Appellate District
CITY OF MIDDLETOWN, OHIO	:	
Appellee	:	

MERIT BRIEF OF APPELLANTS MATTHEW E. MOORE AND LORI A. MOORE

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STATEMENT OF FACTS

Appellants filed an action for declaratory judgment and verified petition for writ of mandamus naming as defendant Appellee City of Middletown challenging the constitutionality of two legislative enactments of Appellee. Appellee filed a motion to dismiss for failure to state a claim upon which relief can be granted. The trial court granted Appellee's motion from which Appellants appealed to the Ohio Twelfth District Court of Appeals, Butler County. Said appellate court affirmed the trial court's ruling in a split decision. Appellants filed a discretionary appeal with the Supreme Court of Ohio that was accepted for review.

Appellants are individuals who are the titleholders to real property located in the City of Monroe contiguous to certain parcels known as the Martin/Bake properties. Said Martin/Bake properties, though bordering and contiguous to Appellants' properties, are within the municipal boundaries of Middletown. On August 19, 2008 Appellee City of Middletown, rezoned 157 acres of said real property from a D-1 zoning classification (low density residential), the least intensive use designation found in the zoning ordinances of Middletown, to I-2 zoning classification (general industrial), the most intensive use designation found in Appellee's zoning ordinances. Also, on August 19, 2008 Appellee, City of Middletown, adopted a reinterpretation of the setback provision of the Middletown zoning code contained in codified ordinance section 1258.02 that requires a minimum 600 foot setback of industrial uses from D-1 residentially zoned property. The legislation exempted from the 600 foot setback requirement all uses ancillary and accessory to heavy industrial manufacturing such as the production of coke. Such "reinterpretation" was necessary for the rezoned tracts to provide enough land area to accommodate the construction and operation of a commercial coke plant contiguous to low density residential property. Appellee's enactment of the setback requirement revision allowed

Middletown to technically avoid violation of Middletown's Codified Ordinance 1258.02(b)(10) prohibiting the production of coal and coke products within 600 feet from any P or D district within the City.

Said rezoning and setback ordinances lack the support of any objective professional land use analysis of potential sites for said coke plant. Said rezoning and setback ordinances were enacted by Appellee City of Middletown for the express purpose of accommodating the construction of a coke plant to be operated by SunCoke Energy for the benefit AK Steel Corporation, a major employer in the City of Middletown. Appellee's agent, the Middletown Zoning Administrator, failed to analyze the disadvantages of the rezoning of said parcels in question as required by Middletown Codified Ordinance 1284.02(e). Such disadvantages left unexamined by said zoning administrator include but are not limited to said coke plant's close proximity to both a school and a nursing home, the serious pollution produced by such plant resulting in the substantial impairment of public health and safety of persons, the failure to utilize various brown fields sites in favor of rezoning a green field parcel as well as the drastic diminution in value of surrounding low intensity residentially zoned property.

Appellee CITY OF MIDDLETOWN's rezoning enactment was passed pursuant to a master plan that is defective, incomplete, and lacking objective, rational, well-reasoned locational policies and projections for industrial uses in the City of Middletown. Both the rezoning and setback enactments were passed as emergency measures. As a result of the aforesaid enactments, Appellants shall be exposed to a substantial public health hazard, the value of Appellants' property has been drastically diminished, as well as the Appellants' residential quality of life being seriously impaired.

ARGUMENT

PROPOSITION OF LAW:

A DISAFFECTED NONRESIDENT CONTIGUOUS PROPERTY OWNER HAS STANDING TO CHALLENGE REZONING AND SETBACK LEGISLATION ENACTED BY THE ADJACENT POLITICAL SUBDIVISION THAT DIRECTLY, SUBTANTIALLY, AND ADVERSELY AFFECTS SAID PROPERTY OWNERS' PROPERTY.

Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. *Ohio Contractors' Association v. Bicking 71 Ohio St.3d 318, 320; 1994 Ohio 183* Appellant has the initial burden of showing he has standing. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward 86 Ohio St.3d 451 1999-Ohio-123.* The question of standing depends upon whether the party has a personal stake in the outcome of the controversy... as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce 115 Ohio St.3d 375, 2007-Ohio-5024 ¶27.*

The appellate court majority in the instant case held that the in order to have standing to pursue the claims pleaded in Appellants' Complaint, the court was required to determine whether the action had been "instituted by the party possessing the substantive right to relief". *Shealy v. Campbell (1985) 20 Ohio St.3d 23, 25; 485 NE2d 701 (¶6).* The appellate court's majority ruling erroneously failed to recognize Appellants' standing to bring action in this case. The following are the issues and arguments that serve to urge this honorable court to reverse the majority's erroneous finding.

A. The existing case law of Ohio, though not directly on point, supports the liberal application of standing rules for those affected by a statute or ordinance.

Joseph Airport Toyota v. City of Vandalia, Case No. 18904 Ohio Second District Court of Appeals, Montgomery County (2002) 2002-Ohio-928 is the appellate court decision establishing that a contiguous property owner has standing to challenge a municipal ordinance that rezones an adjacent parcel of property that diminishes the value of the complainant's property. In *Joseph* both the rezoned property and the property adversely affected were located in the City of Vandalia. Similar to Appellants in the instant case, the appellant in *Joseph* filed a declaratory judgment action to challenge the constitutionality of the rezoning legislation as well as claiming that such legislation diminished the value of Joseph's property. Factually, the only difference between *Joseph* and instant case is that in the instant case, the common boundary line separating Appellants' property from the rezoned parcel is the municipal boundary separating Middletown from Monroe.

The decision in *Joseph* was based upon long standing precedent of liberal application of standing rules to cases involving adjacent landowners. *Clifton Hills Realty Co. v. Cincinnati (1938) 60 Ohio App. 443, 445; 21 NE2d 993, 995*. As cited in *Joseph*, this court has stated that "persons whose property rights are directly affected by a statute or ordinance are...entitled to obtain a declaratory judgment as to the validity of the statute or ordinance". *Joseph, supra* citing *Wilson v. Cincinnati (1960) 171 Ohio St. 104, 168 NE2d 147, 149* quoting *174 ALR 561, Section 8*. This court has also stated that an assertion that a party "is affected by, or materially interested in, a statute or ordinance, and that has a justiciable cause concerning such law is sufficient to confer standing". *Joseph, supra* citing *Pack v. Cleveland (1982) 1 Ohio St.3d 129, 131; 438 NE2d 434, 43*. Hence, the doctrine of liberally conferring standing as cited in *Joseph* has been long recognized in Ohio.

In an action that determined standing in terms of the complainant being an "aggrieved person" within the meaning of R.C. §519.15 this court found that certain risks inherent in the business of making fireworks created a "real and serious threat" to persons and property including property located across a highway from the offending property. *Midwest Fireworks Manufacturing Co. v. Deerfield Twp. Bd. of Zoning Appeals (2001) 91 Ohio St.3d 174.* Though said case was an administrative appeal, the Ohio Second District Court of Appeals found the *Midwest* decision "instructive" to its decision in *Joseph.* Given that the rezoned use created by the offending legislation in the instant case presents a serious degradation of health, value, and living conditions upon the property, Appellants are most certainly "aggrieved persons" deserving of standing.

This court has also dealt with questions of standing involving the right of one contiguous municipality to bring action against another based upon detrimental extraterritorial effects suffered by the complainant municipality as a result of the acts, legislative or otherwise, of the other. *City of Cleveland et al. v. City of Shaker Heights (1987) 30 Ohio St.3d 49; 507 NE2d 323.* This court conferred standing in said case on the basis that the extraterritorial effects upon the complainant municipality constituted a sufficient "personal stake in the outcome of the proceedings sufficient to afford standing to seek injunctive relief". *Id.* Though the instant case is one of first impression, the preceding Ohio case law forms a foundation for nonresident standing.

B. The near unanimous prevailing view of the state and federal courts of the United States is to confer standing upon nonresident contiguous property owners whose property is "affected" by the zoning enactments of the adjacent political subdivision.

Given the absence of Ohio case law directly on point, reference to applicable foreign jurisdiction decisions takes on somewhat greater significance. Though the majority in the instant case did not mention foreign or federal cases in its opinion, the majority in *Clifton v. Village of Blanchester 2010 Ohio 2309; 2010 Ohio App. LEXIS 1903* cited a number of such decisions, the holdings of which contradict their decision. That the majority in the instant case relied heavily upon the decision of the majority in *Clifton II* renders *Clifton's* treatment of such cases relevant.

In its decision in *Clifton II,* the appellate majority devoted a substantial portion of its opinion discussing the decisions of state jurisdictions across the country that have dealt with the foregoing issue. In their supplemental brief submitted to the appellate court, Appellants cite and discuss a number of on point and similar foreign state and federal cases[1]. T.d.CA17, p.1-7.[2] It is apparent from the issue similarity and number of cases that recognize nonresident standing, coupled with the absence of cases opposing the same, that nationwide judicial recognition of nonresident standing in land use cases is overwhelming.

In light of the absence of Ohio case law speaking to the issue of standing of contiguous nonresidents to contest zoning enactments of adjoining municipalities, Appellant submits that the following foreign state jurisdiction case law overwhelmingly supports the conferring of such standing. Such case law, as expressed by at least one federal circuit court of appeals and the supreme courts of six states, holds that persons claiming that their property is substantially,

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[1] *The Village of Barrington Hills v. The Village of Hoffman Estates 81 ILL.2d 392 410 NE2d 37 (1980), Koppel v. City of Fairway, 189 Kan. 710, 371 P.2d 113, 116 (1962), Smagula v. Town of Hooksett, 834 A.2d 333 (N.H. 2003), 149 N.H. 784, Scott v. City of Indian Wells, et al., 6 Cal.3d 541, 99 Cal.Rptr. 745, 492 P.2d 1137 (1972), Roosevelt v. Beau Monde Co. (1963) 152 Colo, 567, Board of County Commissioners v. City of Thornton, 629 P.2d 605 (Colo.1981) citing the appellate opinion in 42 Colo.App. 102, 595 P.2d 264 (Colo.App. 1979), Quinton v. Edison Park Development, 59 N.J. 571, 285 A.2d 5 (1971), Township of Rivervale et al. v. Town of Orangetown et al. 403 F.2d 684 (Second Cir. 1968) 34, Allen v. Coffel, 488 S.W.2d 671 (Mo App. 1972), Borough of Cresskill v. Borough of Dumont 15 NJ 238, 104 A.2d 441 (1954).*

[2] T.d.CA refers to the Transcript of Docket from the Court of Appeals

directly, and adversely affected by the zoning enactments of adjoining political subdivisions have standing to bring action despite the fact that they are not residents of these subdivisions. These courts have recognized the right of persons and municipalities to bring action against the adjoining political subdivisions upon the showing of a real interest in the subject matter of the controversy. *The Village of Barrington Hills v. The Village of Hoffman Estates 81 ILL.2d 392 410 NE2d 37 (1980).*

These cases also recognize the standing of adjoining municipalities in their corporate capacity. Loss of municipal tax revenues due to diminution in property values, as well as increases in municipal expenditures for additional police and sanitation personnel necessitated by, for example, a commercial rezoning of property contiguous to a municipal plaintiff, are issues that qualify such governmental bodies as "aggrieved parties" with standing to sue. The cases cited herein demonstrate that if standing is conferred upon governmental subdivisions in their corporate capacities, it is most surely conferred upon individuals and private entities that actually own the land adversely affected by the land use enactments of their contiguous neighbors.

The supreme courts of Kansas and New Hampshire have recognized the rights of nonresidents to challenge zoning and land use enactments by means of a statutory procedure. In *Koppel v. City of Fairway, 189 Kan. 710, 371 P.2d 113, 116 (1962)* the Kansas Supreme Court expanded to nonresidents the statutory right to object or to protest municipal zoning enactments. The Court overruled the City of Fairway's motion to dismiss nonresidents' declaratory judgment action. The Court found that the city's rezoning enactment "affected" the nonresidents' property thereby giving them a statutory right to challenge the zoning legislation.

In a similar case decided in 2003, the New Hampshire Supreme Court reversed the lower court's exclusion of nonresidents from a protest petition of zoning legislation passed by the town of Hooksett. The Court, in interpreting New Hampshire's statute held:

> "The standard for qualifying under the statute, thus, is ownership of abutting property, and not the right to vote in any particular municipality. Because the invisible boundary between Allenstown and Hooksett does not cause Hooksett's proposed change to affect the abutting Allenstown property owners any less than the abutters in Hooksett, it is logical that non-resident owners should share the same protection against 'unwanted or ill-considered changes in zoning ordinances' that residents have." *Smagula v. Town of Hooksett, 834 A.2d 333 (N.H. 2003), 149 N.H. 784.*

In its decision, the Supreme Court of New Hampshire rejected the trial court's ruling and the treatise[3] cited by said court, specifically relying upon the previously cited Kansas Supreme Court decision.

> "[The statute] makes no requirement of residency or location of property other than that it be frontage property to that property proposed to be altered or changed. It clearly appears that the legislative intent of the statute is to protect all designated property affected, whether located within or without the city adopting the changed zoning ordinance...[E]ven though two of the plaintiffs are located in an area just beyond [the town proposing the ordinance] they have...benefited from the past [149 N.H. 790] zoning ordinance and are now directly and harmfully affected by the rezoning ordinance. As property owners they are entitled to the enjoyment of their property." *Smagula v. Town of Hooksett, supra.*

In both of the foregoing statutory interpretation cases, the supreme courts of New Hampshire and Kansas refused to read into said statutes the added requirement of residency in order to confer standing. The overriding factor in conferring standing was, as it is in the instant case, the substantial, direct, and adverse effects of the legislation upon plaintiff's property.

The California Supreme Court reversed the dismissal of plaintiff's case on demurrer and specifically held that the nonresident adjoining landowners had standing to challenge zoning

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[3] *15 P. Loughlin, New Hampshire Practice. Land Use Planning and Zoning Section 5.11(2000).*

decisions of the city which affect their property. *Scott v. City of Indian Wells, et al., 6 Cal.3d 541, 99 Cal.Rptr. 745, 492 P.2d 1137 (1972).*

In the instant case, Appellees have argued in their Common Pleas Reply Memorandum (T.d.CP17)[4] that Appellants' claims should be dismissed since Appellants were afforded an opportunity to be heard during Middletown's deliberations regarding the legislation in question. The California Supreme Court makes clear that such an argument is without merit:

> "We are satisfied that the City of Indian Wells owes adjoining landowners who are not city residents a duty of notice to the extent given similarly situated city residents, a duty to hear their views, and a duty to consider the proposed development with respect to its effect on all neighboring property owners. *We are also satisfied that adjoining landowners that are not city residents may enforce these duties by appropriate legal proceedings and have standing to challenge zoning decisions of the city which affect their property.*" *Id.* (Emphasis added).

The California Supreme Court broadens its ruling on standing beyond its treatment of Indian Wells' failure to comply with the statutory notice requirements. The Court buttresses this ruling by citing a decision of the Colorado Supreme Court not relating to statutory interpretation:

> "In *Koppel v. City of Fairway (1962) 189 Kan. 710*, a Kansas statute gave landowners in the front and rear of the subject property the right to be heard. The Kansas Supreme Court interpreted the statute to apply to all affected property owners, not only to affected property owners who were also residents of the City of Fairway. The Colorado Supreme Court came to the same conclusion without benefit of statute, *Roosevelt v. Beau Monde Co.* (1963) *152 Colo, 567*, reasoning that the nonresident neighboring landowners would be just as affected by the zoning and otherwise had no way of having their interests represented." *Id.*

Eighteen years after *Roosevelt*, the Colorado Supreme Court took up an issue identical to one raised by Appellant in the instant case. The City of Thornton alleged that Adams County's comprehensive plan diminished the value of contiguous property located within the city.

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[4] T.d.CP refers to the Transcript of Docket from the Common Pleas Court

Despite the fact that the comprehensive plan was drawn by and for Adams County, its effect on the City of Thornton conferred standing upon the city.

The Colorado Supreme Court affirmed the decision of the Colorado Court of Appeals in *City of Thornton v. Board of County Commissioners*[5] which held that an owner of property adjacent to property being rezoned, but not within the territory of the zoning authority, has standing to challenge the rezoning. In support of its holding, the Colorado Court of Appeals cited the following authorities.

> *"Scott v. Indian Wells, 6 Cal.3d 541, 99 Cal.Rptr. 745, 492 P.2d 1137 (1972); Hamelin v. Zoning Board, 19 Conn.Sup. 445, 117 A.2d 86 (1955); Wittingham v. Woodridge, 111 Ill.App.2d 147, 249 N.E.2d 332 (1969); Koppel v. City of Fairway, 189 Kan. 710, 371 P.2d 113 (1962); Allen v. Coffel, 488 S.W.2d 671 (M.App.1972); Dahman v. Ballwin, 483 S.W.2d 605 (Mo.App.1972); Bagley v. County of Sarpy, 189 Neb. 393, 202 N.W.2d 841 (1972); Roselle Park v. Union, 113 N.J.Super. 87, 272 A.2d 762 (1970); Borough of Creskill v. Borough of Dumont, 28 N.J.Super 26, 100 A.2d 182 (1953), aff'd 15 N.J. 238, 104 A.2d 441; Weinberg v. Clarkstown, 78 Misc.2d 464, 357 N.Y.S.2d 332 (1973). But see Arlington Heights v. Cook County, 133 Ill.App.2d 673, 273 N.E.2d 706 (1971); Mt. Prospect v. Cook County, 113 Ill.App.2d 336, 252 N.E.2d 106 (1969); Cablevision-Division of Sammons Communications Inc. v. Zoning Hearing Board, 13 Pa.Cmwlth. 232, 320 A.2d 388 (1974).* See also *Annot., 69 A.L.R.3d 805 and Annot., 49 A.L.R.3d 1126*

One of the allegations of Appellant's complaint in the instant case is that the Middletown comprehensive plan diminishes the value of Appellants' property. It is apparent from the authority cited by the Colorado Court of Appeals and affirmed by the Colorado Supreme Court that nonresident persons and entities have standing to challenge a comprehensive plan of another political subdivision that adversely affects the property of such contiguous nonresidents.

The other legislative action challenged by Appellants in the instant case is Appellee's "reinterpretation" of the 600 foot setback/buffer requirement separating high intensity industrial

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[5] *Board of County Commissioners v. City of Thornton, 629 P.2d 605 (Colo.1981)* citing the appellate opinion in *42 Colo.App. 102, 595 P.2d 264 (Colo.App. 1979).*

uses from low intensity residential uses in the City of Middletown. The Supreme Court of New Jersey dealt with a similar issue in *Quinton v. Edison Park Development, 59 N.J. 571, 285 A.2d 5 (1971).*

The New Jersey Supreme Court conferred standing upon nonresidents that were denied a 100 foot buffer provided by Edison Township to its own residents, which was made part of a rezoning of property in Edison Township. The court quoted language used by former New Jersey Supreme Court Chief Justice Vanderbilt to explain its rejection of municipal boundaries as the limiting factor in the conferring of standing.

> "...effective development of the region cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on considerations of geography, of commerce, or of politics that are no longer significant with respect to zoning."

Although the Missouri Supreme Court has not yet spoken directly regarding nonresident standing in zoning matters, Missouri's courts of appeals have been articulate in their holdings relating to this issue. *Turner v. City of Independence 186 S.W. 3d 786 (Mo.App. W.D. 2006)*, a 2006 appellate decision, stated as follows:

> "To show standing in a zoning decision, a plaintiff must establish either that a statute confers him or her with standing or that the decision adversely affects more distinctly and directly his or her interest than it affects the general public's interest. *Turner v. City of Independence 186 S.W. 3d 786 (Mo.App. W.D. 2006).*

Turner cites a long standing appellate decision that assiduously sets forth Missouri's treatment of this issue. The appellate court in *Allen v. Coffel, 488 S.W.2d 671 (Mo App. 1972)* expanded the conferring of standing upon nonresident parties challenging zoning enactments, equating such party complainants as "parties aggrieved", deemphasizing the form of remedy and the forum to which the complaint is brought. The court in *Allen* held:

> "(A)ny person who can show that the existence or enforcement of a zoning restriction adversely affects, or will adversely affect, a property interest vested in him or that the grant of a permit to another or rezoning of another's land will similarly affect him, has the requisite justiciable interest in the controversy, and is a proper party plaintiff. In this aspect, the right of a litigant to sue for declaratory judgment or for an injunction is based upon the same criteria as are determinative of the status of a petitioner as a 'party aggrieved' to bring certiorari to review the determination of a board of appeals or adjustment. The difference, if any, relates only to the forum and the form of remedy. *Rathkopf, The Law of Zoning and Planning, Chapter 36, Sec.1. Id.*

The court also alleviated the need of proof of special damage to assert the invalidity of an ordinance or the right of review of an administrative decision affecting the property in question:

> "And it is now well established that an adjoining, confronting or nearby property owner has standing, without further proof of special damage, to assert the invalidity of an ordinance or the right for review of an administrative decision affecting the property in question." *Id.*

Every foreign jurisdiction case cited within this brief has cited, as authority, the seminal case of *Borough of Cresskill v. Borough of Dumont 15 NJ 238, 104 A.2d 441 (1954).* This widely quoted portion of the now famous dicta written by New Jersey Supreme Court Chief Justice Vanderbilt in his opinion reads as follows:

> "At the very least Dumont owes a duty to hear any residents and taxpayers of adjoining municipalities who may be adversely affected by proposed zoning changes and to give as much consideration to their rights as they would to those of the residents and taxpayers of Dumont. To do less would make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning." *Cresskill, Id.*

In *Ohio Planning and Zoning Law*, Meck & Perlman, *Creskill* is prominently mentioned in the section dealing with standing of nonresidents.

> "**§ 14:6 Standing – Nonresidents**
>
> In theory, governments and landowners who are not residents of a community should have standing to contest zoning regulations that may have an effect on their territory or property, especially if the land is adjacent to the community doing the zoning. This is because zoning has to be both

> comprehensive and rational, and land use impacts of zoning ordinances do not stop at governmental boundary lines. Surprisingly, there are few cases in the United States that have considered this question directly. The leading case is *Borough of Cresskill v. Borough of Dumont* (New Jersey) and it upholds the viewpoint just expressed".

Although this issue has not been addressed by Ohio courts and has been ruled on in only a number of courts in the United States, the consensus of decisions is virtually unanimous. Contiguous nonresidents have standing to challenge the zoning enactments of adjacent governments as long as the complainants can show that said zoning legislation has directly, substantially and adversely affected their property. In the instant case, there have been facts and allegations pleaded in Appellants' Complaint of such adverse effects. Appellants respectfully submit that they have standing to pursue the instant action.

Some of the foreign case law cited addressed the specific land use issues presented in the instant case, i.e. rezoning pursuant to an incoherent comprehensive plan, drastic limitation of mandatory buffering setbacks, and the efficacy of declaratory relief as an appropriate remedy. See *Board of County Commissioners v. City of Thornton, supra* citing the appellate opinion in *42 Colo.App. 102, 595 P.2d 264 (Colo.App. 1979)* and *Quinton v. Edison Park Development, supra.*

There are two major themes that appear in these foreign decisions as well as those discussed in *Clifton II.* First, is that standing is conferred upon those property owners whose property is "directly, substantially, and adversely affected" by the offending legislation. Middletown has argued, without supporting authority, that Appellants have no standing since the offending legislation was not "directed" toward Appellants' property.

In the trial court's decision the court alludes to Appellee's argument that since the legislation "is not directed to Appellants' property" the effect of such legislation does not amount to a taking. Such argument is not consistent with the case law. In *Joseph Airport Toyota, supra,*

for example, the appellate court ruled that contiguous property owners have standing to challenge zoning ordinances that "affect" their property. As in the instant case, the zoning legislation challenged in *Joseph* was not "directed to" Joseph's property, rather it rezoned the property of Joseph's contiguous neighbor.

There is no requirement that legislation be intentionally "directed" toward the claimant's property to create a takings cause of action. The fact that one's property has been "affected" by legislation confers standing, regardless of the property to which the legislation is "directed". More importantly, Appellants can present evidence that demonstrates the ordinance's effects constitute a "substantial and unreasonable interference with their property rights". *State ex rel. OTR v. Columbus, (1996) 76 Ohio St.3d 203, 206; 1996 Ohio 411.*

Legislation that adversely affects property owners, while containing legislative intent, is legally bereft of legislative motive. Middletown cannot lawfully avoid liability for the deleterious effects upon, nor the undue burdening of, Appellants' property simply because it didn't mean to do so.

Second, there is a recurring theme evident in the foregoing case law referring to the "invisible corporate boundary line" or similar concept. This issue is discussed with regard to the arbitrary nature of such boundaries and their lack of relevance to the effects of the offending legislation upon nonresident contiguous property.

There are two cases that speak to the standing of contiguous nonresidents challenging the land use enactments of political subdivisions of an adjoining state. In *Abel v. Zoning Commission of the Town of New Canaan et al., No. SC 18333, SC 18418 Supreme Court of Connecticut, July 13, 2010*, the Connecticut Supreme Court held that land use legislation that affected "any person", as described in the statute, applied even to those residents of the adjoining

state who lived within a hundred feet of the land regulated by such legislation. This expansive interpretation of Connecticut's standing legislation held that "any person aggrieved by any decision of a board may appeal to a superior court". *Id.*

More pertinent to the instant case is a federal circuit court of appeals decision that conferred standing upon a New Jersey town to bring action against a contiguous New York municipality. In *Township of River Vale v. Town of Orangetown 403F.2d 684 (2nd Circuit, 1968) 34* the United States Second District Circuit Court of Appeals found that a New Jersey town had standing to pursue a substantive due process challenge of the New York municipality's zoning legislation that allegedly diminished the value of the New Jersey land. The court found that the New Jersey town, "Like any other corporation, is a 'person' within the meaning of the Fourteenth Amendment and is entitled to its protection". The circuit court held:

> "The equal protection clause of the Fourteenth Amendment is confined to persons within the jurisdiction of the enacting state; the due process clause is not so confined". *Id.*

The claims of Appellants in the instant case are due process claims which, arguably, enjoy greater protection under the Ohio Constitution than under the United States Constitution. *City of Norwood v. Horney 110 Ohio St.3d 353, 2006 Ohio 3799, ¶5-9.*

Despite this plethora of foreign and federal authority supporting the standing of contiguous nonresidents the majority fails to comment upon, or even acknowledge what is described by the *Clifton II* majority as the "prevailing view across the country". *Clifton II, ¶25.* Though not in any way binding upon the Court, the near unanimity of these preceding foreign decisions identify a cognizable, consistent body of authority that the Court may consider in its analysis of the instant case.

C. The Appellate Court erred in ruling that Appellants had no substantive right to relief as a matter of law.

The appellate majority ruled that Appellants had no substantive right to relief as a matter of law and therefore, no standing to sue. The majority's ruling is in error based, in part, upon their failure to differentiate the remedy of inverse condemnation from the statutory procedure of eminent domain.

The majority ruled that the inverse condemnation is unavailable as a matter of law, (*Moore, Opinion ¶12, 26*) basing this conclusion upon the fact that the "Landowners' property is located wholly outside of Middletown's jurisdictional boundaries..." *Id, ¶26.* To support such conclusion the majority relies upon a portion of this Court's decision in *Britt v. City of Columbus (1974) 38 Ohio St.2d 1; 309 NE2d 412* that states:

> "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". *Id.*

This excerpt does not comprise the holding of *Britt* nor is it pertinent to the issue at hand.

The remedy of inverse condemnation is not a function of the statutory power and procedure of eminent domain. Eminent domain is the purposeful acquisition of an interest in private property for public use or public purpose pursuant to R.C. Title 163. Inverse condemnation, on the other hand, does not involve governmental bodies taking title to real property or acquiring property rights from private owners for benefit of the public. The remedy is merely the means to allow aggrieved parties to obtain redress for an involuntary taking of property rights that has already occurred.

The majority contradicts its well reasoned comparison of eminent domain and inverse condemnation stated in *Wilson v. Trustees of Union Township, Case No. CA98-06-036 Court of*

Appeals of Ohio, Twelfth Appellate District, Clermont County 1998 Ohio App. LEXIS 5025. In that case, the Twelfth District stated:

> "In a typical taking case, the government, exercising its power of eminent domain, must pay just compensation to the land owner as measured by the fair market value of the property at the time of the taking. This case, however, bears more similarity to a landowner's claim of 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 US 304, 107 S.Ct. 2378.* Inverse condemnation allows the landowner to bring suit to determine if the government's action amounts to a taking". *(Emphasis added).*

Inverse condemnation is a short hand description of the manner in which a landowner recovers just compensation for the taking of his property when condemnation proceedings have not been instituted. *City of Cincinnati v. Chavez Properties (1990) 117 OApp.3d 269; 690 NE2d 561* quoting *United States v. Clarke (1980) 445 US 253, 100 S.Ct. 1127.* "The term "regulatory taking" refers to situations in which the government exercises its "police powers" to restrict the use of land or other forms of property. This is often accomplished through implementation of land use planning, zoning, and building codes. In contrast, a governmental entity exercises its eminent domain power...where it takes unto itself private resources and uses them for the common good." *Id.*

In the instant case as well as in *Clifton II,* there were no formal condemnation proceedings instituted. Hence, Appellants' inverse condemnation remedy, unlike the eminent domain proceedings, is not subject to, nor limited by, the jurisdictional boundaries referred to in *Britt*. Further, the majority's reference to Ohio Revised Code Section 163.63, *(Moore, Opinion ¶26)* is inapplicable to both *Clifton II* and the instant case. Neither Middletown nor Blanchester exercised any "authority to acquire (the affected) real property by condemnation...", nor did they "take real property pursuant to a power of eminent domain...". *O.R.C. §163.63.*

Contrary to the majority's ruling, the issue is not whether Middletown lacks the authority to appropriate private property outside its jurisdictional boundaries: they have already done so. The issue is whether Appellants must now be compensated for such action. The constitutions of Ohio and the United States command such compensation. *Fifth Amendment, United States Constitution; Section 19, Article I, Ohio Constitution.*

The result of this misapplication of *Britt* and the erroneous invoking of the statutory eminent domain procedure by the majority is the subject of some pointed criticism by the dissent:

> "The majority construes this statement from *Britt* and RC 163.63 to mean that, regardless of how a political subdivision regulates property within its boundaries, the regulation can have no effect upon property outside the subdivision. The majority principally submits that a city can do whatever it pleases with regard to property within its own boundaries, yet neighboring property will never be affected. This is neither the proper context of the statement offered from Britt nor the holding of the *Britt* decision....*Britt* stands for the proposition that a political subdivision cannot attempt to appropriate property outside its geographical boundaries, not that a regulation of property within the subdivision's boundaries can have no effect on neighboring land nor effectuate a taking of neighboring property...To conclude that a zoning regulation cannot affect adjacent land simply because it exists on the other side of an invisible boundary line, like the majorities in *Clifton II*[6] and the instant matter advocate, is quite novel." *Moore Opinion ¶46.*

In light of the foregoing dichotomy between the power and procedure of eminent domain and the remedy of inverse condemnation, the powers of local self government granted to municipalities by Section 3 Article XVIII of the Ohio Constitution do not limit a property owner's access to the remedy of inverse condemnation to redress a taking that occurs beyond the territorial boundaries of the offending political subdivision. Regardless of the extraterritorial

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[6] *Clifton v. Village of Blanchester 2010 Ohio 2309; 2010 Ohio App. LEXIS 1903*

nature of the taking, Appellants' remedy sounding in inverse condemnation is not excluded as a matter of law.

D. The effects of the land use legislation enacted by Appellee City of Middletown constitutes a partial regulatory taking of Appellants' property.

The majority's holding that Appellants failed to demonstrate a substantive right to relief and therefore, have no standing, compels the following discussion of Appellants partial regulatory taking cause.

The effects of Middletown's land use enactments upon Appellants' property constituted, inter alia, a partial regulatory taking. The appellate majority affirmed the trial court's dismissal of such takings claim. The sole ground stated in the appellate majority's decision indicated that Appellants' allegation of diminution of value as a measure of damage was insufficient, as a matter of law, to demonstrate a taking. Such ruling is in error.

In order to establish a taking, a land owner must demonstrate a substantial or unreasonable interference with a property right. Such an interference may include the deprivation of an intangible interest in the premises. *State ex rel. OTR v. Columbus, supra.* This Court has also held that;

> "any substantial interference with elemental rights growing out of ownership of private property is considered a taking." *Smith v. Erie Railroad Co. (1938) 134 Ohio St. 135, 136; 16 NE2d 310.*

In their decision, the appellate majority recognizes the three varieties of takings, acknowledging this court's recognition of partial regulatory takings of less than 100% of the economically viable use of the property under *Penn Central Transportation Company v. City of New York*[7] *State ex rel. Gilbert v. Cincinnati 2010 Ohio 1473* quoting *Shelley Materials v.*

[7] *Penn Central Transportation Company v. New York (1978) 438 US 104, 98 S.Ct. 2646.*

Clark County Board of Commissions (2007) 115 Ohio St.3d 337; 2007 Ohio 5022, ¶22. After identifying such partial takings and enunciating *Penn Central's* three part, ad hoc factual inquiry as the test of "whether a regulatory taking occurred," (*Moore Opinion,* ¶*22*) the majority ignores the factual inquiry, summarily dismissing said cause of action as a matter of law.

The cases cited in the majority's opinion lack the pertinence and authority upon which to base a dismissal of such cause as a matter of law. The majority cites *Concrete Pipe and Products of California, Inc. v. Construction Laborers' Pension Trust (1993) 508 US 602, 604; 113 S.Ct. 2264* as authority. Said case is not controlling for two reasons. First, it is easily distinguished since it does not deal with police power but rather, an ERISA dispute involving withdrawals from a pension plan. Second, the appellate majority states that "*the mere* diminution in a property's value, however serious, is insufficient to demonstrate a taking." (Emphasis added). This quote indicates that the majority considered the diminution in value referenced in *Concrete Pipe* to be the <u>only</u> measure of damages in that case. Diminution of value is only a portion of Appellants' damage in the instant case. The holding in *Concrete Pipe* has no relevance to Appellants' second cause sounding in partial regulatory taking.

BSW Development Group v. Dayton 83 Ohio St.3d 338, 344; 1998 Ohio 287 cited by the majority, is a land use case regarding the denial of a demolition permit by an administrative body guided by its own decision criteria. In *BSW* this court held that plaintiff suffered no taking since it was not deprived of <u>all</u> economically viable uses of the property by such denial. This would suggest that *BSW* is a categorical takings case with a different decision criteria, distinguishing it from the instant case.

The cases cited by the majority characterize Appellants' claim as one wherein the diminution of value of property is the singular measure of damages. Diminution of value is but

one measure of the damages sustained by Appellants given the residential nature and zoning of their property. Of the property rights and interests, financial and nonfinancial, which are put in jeopardy by the offending legislation, the nonfinancial interests are more precious and arguably deserve greater protection to preserve the inviolable status of property protected by Section 19 of Article I of the Ohio Constitution.

The dissent commented on the conceptual weakness of the majority's dismissal of Appellants' takings claim based solely upon the diminution in value damage element of their claim.

> "Why should the noneconomic, 'non-investment-backed' aspects of property ownership be inferior, or not even considered in the context of *Penn Central*, when evaluating an alleged partial taking of residential property? Further, why should a government regulation be allowed to intrude upon, or extinguish, these interests without recourse?" *Moore Opinion ¶73*

The dissent further asserts that Section 19, Article I of the Ohio Constitution affords greater protection of private property rights to citizens of Ohio than do the provisions of the Fifth and Fourteenth Amendments of the United States Constitution as applied in *Penn Central* Such heightened protection is urged in *Norwood v. Horney, supra.*

Given the intensive and noxious nature of the use for which the zoning legislation was specifically enacted by Middletown, the partial regulatory taking suffered by Appellants is egregious well beyond the certainty of the drastic diminution in value that will result therefrom. The multifaceted character of the damages, pecuniary and otherwise, resulting from Middletown's enactments renders the majority's finding erroneous that Appellants failed to plead a justiciable cause sounding in partial regulatory taking as a matter of law.

Unlike *Clifton II,* upon which the majority here so heavily relies, Appellants' complaint is, first and foremost, an action for declaratory relief. As this Court held in *State ex rel. Gilmour*

Realty, Inc. v. Mayfield Heights, et al. 119 Ohio St.3d 11, 2008 Ohio 3181 an action for declaratory relief may not be a complete remedy, thereby requiring a claim for regulatory taking.

Given the merit of Appellants taking cause of action and the applicability of the inverse condemnation remedy asserted, Appellants are entitled to pursue a writ of mandamus to compel Appellee to compensate them for a partial regulatory taking. This court has recognized that mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged. *State ex rel. Gilmour Realty, Inc. v. Mayfield Heights, et al. 119 Ohio St.3d 11, 2008 Ohio 3181* citing *State ex rel. Shemo v. Mayfield Heights (2002) 95 Ohio St.3d 59, 63 2002 Ohio 1627.* Appellants are entitled to pursue their petition in mandamus set out in their third cause of action of their complaint to redress the takings claim contained in their second cause which constitutes a substantive right to relief.

E. The effects of legislation enacted by the City of Middletown deprived Appellants of property rights without substantive due process of law.

In further argument against the majority holding that Appellants have no substantive right to relief it is apparent that the majority erred in affirming the dismissal of Appellants' substantive due process claim as a matter of law.

The test of substantive due process challenges of zoning ordinances recognized by this Court is enunciated in *Goldberg Companies, Inc. v. City of Richmond Heights (1998) 81 Ohio St.3d 207; 690 NE2d 510.* In *Goldberg*, this court reestablished the *Euclid v. Ambler Realty*[8] standard as the "appropriate standard applicable to constitutional challenges of zoning". *Goldberg, Id.* citing *Euclid v. Amber Realty.* Appellants challenged the constitutionality of the

[8] *Euclid v. Amber Realty 272 US 365; 47 S.Ct. 114.*

aforesaid legislation as it applied to their property. Such "as applied" challenge questions the constitutional validity of the ordinance only as it applies to, or affects a particular parcel of property. *Jaylin Investments, Inc. v. Moreland Hills 107 Ohio St.3d 339, 2006 Ohio 4.*

The appellate majority affirmed the dismissal of Appellants' substantive due process claim as a matter of law despite the fact that Appellants had pleaded in their first cause of action that the legislation in question had no substantial relation to, nor substantially advanced, the public health, safety and welfare of Middletown. The effect of such legislation upon Appellants' property violated the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section 16 of the Ohio Constitution.

The appellate majority affirmed the dismissal of said cause of action based upon an allegation contained in Appellants' Complaint. The majority quotes paragraph 8 of Appellants' Complaint in acknowledging that the ordinances passed were:

> "enacted by Defendant/Respondent City of Middletown for the express purpose of accommodating the construction of a coke plant to be operated by SunCoke Energy for the benefit of AK Steel Corporation, a major employer in the City of Middletown." *Moore Opinion ¶19.*

Thus, the appellate majority ruled that said allegation, in and of itself, renders the ordinances <u>not</u> arbitrary, <u>not</u> capricious action, nor unreasonable thereby. The majority's interpretation of what constitutes arbitrary and capricious, as applied to the Appellants' property, is erroneous. It is true that an economic benefit reaped by a property owner that is incidental to a rezoning of property is not, in and of itself, arbitrary. However, using the police power to exclusively confer such benefit upon a single property owner, is arbitrary per se.

Zoning is principally about separating and buffering intensive uses of land from non-intensive uses. The allegations contained in Appellants' Complaint clearly allege that well

recognized fundamental zoning principles were discarded for the sake of parochial economic benefit.

Middletown's "reinterpretation" of a 600 foot setback ordinance strikes at the essence of zoning. This setback, originally enacted to separate and buffer industrial uses from residential uses, was redefined and substantially limited so as to allow the coke plant to fit upon the rezoned premises. Absent Middletown's "reinterpretation," of this setback the rezoned tract is too small for the project.

Likewise, a rezoning plan that placed the most intensive industrial use contiguous to the least intensive residential use, flies in the face of accepted zoning principles and practice. Appellee's defense, that a 2005 revision of their comprehensive plan authorizes such a locational configuration of industrial use is ineffectual. Appellant's Complaint alleges that such comprehensive plan is, itself, an ill conceived contrivance that fails to integrate long standing, accepted land use locational policies.

The sole purpose for the offending legislation is the accommodation of "one of Middletown's most prominent employers". *Moore Opinion ¶19.* However, purposefully conferring an exclusive economic benefit upon one person or entity through zoning legislation is not tantamount to the lawful exercise, advancement, or pursuit of a valid police power.

Section 19, Article I of the Ohio Constitution states "Private property shall ever be held to be inviolate, but subservient to the public welfare." *Section 19, Article I, Ohio Constitution.* In aggregating the foregoing provision with Section I, Article I, this Court stated:

> "Ohio has always considered the right of property to be a fundamental right. There can be no doubt that the bundle of venerable rights associated with the property is strongly protected in the Ohio Constitution and must be trod upon lightly no matter how great the weight of other forces." *Norwood v. Horney, supra.*

In Ohio, the police power is not plenary...it may only be exercised to interfere with fundamental rights when necessary to protect the public. *Palmer v. Tingle (1896) 55 Ohio St.423; 45 NE 313.* This analysis has two components: (1) an application of law must be absolutely necessary to achieve the desired result; and (2) an application of law must be for the welfare *of the general public.* (Emphasis added). Such are the parameters and limitations of the lawful exercise of the police power.

The appellate majority's ground for dismissing Appellants' substantive due process claim is antithetical to the aforementioned limitations upon the police power. Promoting and providing through the police power for the construction of a coke plant for the benefit of a major employer in the City of Middletown is not tantamount to the protection of a fundamental right for the "welfare of the general public". There is no land use purpose or policy substantially advancing public health, safety and welfare accomplished by the enactment of the Middletown legislation. This legislation was specifically enacted for the coke plant project to provide an exclusive economic benefit to AK Steel. The enactment of zoning legislation to provide an exclusive economic benefit to one citizen, whether corporate or private, is arbitrary per se.

While acknowledging that this case is not an example of spot zoning, the rezoning of a single tract for the exclusive economic benefit of a single owner, comes close. The instant case involves a parcel that is "singled out for discriminatory or different treatment from that accorded surrounding land which is similar in character". *Willott v. Beechwood (1964) 175 Ohio St. 557; 197 NE2d 201.* The Martin/Bake property is pristine green field, just like the contiguous tracts which contain a nursing home, elementary school, and Appellants' residential tract. Though the tract in question may not be an example of spot zoning per se, rezoning for the exclusive economic benefit of a single property owner does not rescue such enactment from the ranks of

the arbitrary, capricious, and unreasonable, as held by the majority. Rather, such enactments represent a perversion of the police power by reason of their failure to protect everyone else.

These zoning enactments are arbitrary and capricious and deprive Appellants of property rights without due process of law that entitle Appellants to a substantive right to relief, thereby conferring standing upon them.

CONCLUSION

The majority's dismissal of all of Appellants' causes of actions as a matter of law is error. At the heart of its erroneous ruling, is the court's failure to differentiate between the statutory proceeding of eminent domain and the remedy of inverse condemnation. At the point where land use legislation directly, adversely and substantially affects a nonresident's property, a justiciable cause of action exists. It exists regardless of the existence of an invisible boundary that has no practical effect upon, nor relevance to, the affected party. Once the taking or substantive due process violation has occurred, the salient questions are; what is the nature of such deleterious effects; and is the injury suffered compensable. As suggested by the dissent in *Clifton II*, such analysis must be conducted on a case by case basis.

Once the direct, substantial, and adverse effect upon one's property has manifested itself, the property owner has suffered an injury in fact. Said owner has a personal stake in the controversy that will require him to demonstrate that "(the owner) has suffered or will suffer a specific injury traceable to the challenged action that is likely to be redressed if the court invalidates the action or inaction". *Moore Opinion ¶48.*

In the instant case, the majority denied Appellants' standing erroneously ruling that Appellants could prove no set of facts that, when taken as true pursuant to Ohio Civil Rule 12(B)(6), could formulate a justiciable cause of action. However, by virtue of their ability to

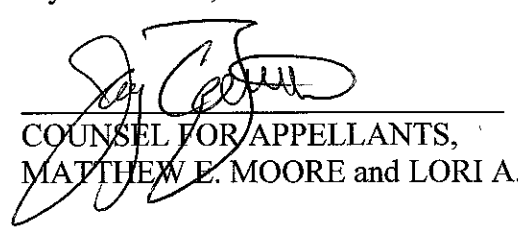
allege a prima facie case in all three causes of action Appellants have demonstrated that they are entitled to a substantive right to relief in each instance.

If the decision of the majority is permitted to stand, Appellants will be deprived of their sole remedy to seek redress; either in the form of a declaratory judgment finding the Appellee's legislation unconstitutional, or in the alternative, seeking just compensation for a partial regulatory taking, should the enactment be found constitutional.

The prevailing national view in both state and federal courts favor a case by case analysis of the actual effects of land use legislation upon nonresident contiguous property owners. The heightened protection of private property rights afforded to Ohio residents under the Ohio Constitution would seem particularly applicable to contiguous nonresident Ohio property owners. Given this admirable heritage and tradition of the inviolability of Ohio property rights, the adoption of the prevailing national view of nonresident standing is necessary and just.

Appellants respectfully request that this Court reverse the ruling of the appellate court majority and remand the action to the Butler County Common Pleas Court, conferring standing upon Appellants to seek a remedy in the trial court.

Respectfully submitted,
Jay C. Bennett, Counsel of Record



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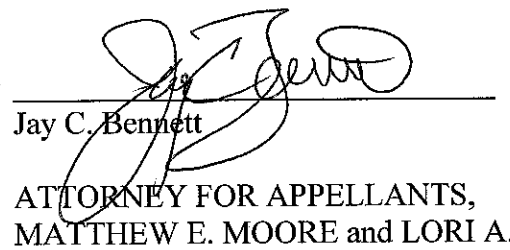
Certificate of Service

I certify that a copy of this Merit Brief was sent by ordinary U.S. mail and email to counsel of record for Appelle, Robert Gehring, Crabbe Brown & James LLP, 30 Garfield Place, Suite 740, Cincinnati, Ohio 45202, this 7th day of March, 2011.



Jay C. Bennett

ATTORNEY FOR APPELLANTS,
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IN THE SUPREME COURT OF OHIO

MATTHEW E. MOORE and LORI A. MOORE,	:	ON APPEAL FROM THE BUTLER COUNTY COURT OF APPEALS,
Plaintiffs-Appellants,	:	TWELFTH APPELLATE DISTRICT
v.	:	COURT OF APPEALS CASE NO. : CA 2009-08-205
CITY OF MIDDLETOWN, OHIO	:	TRIAL COURT
Defendant-Appellee	:	CASE NO.: CV 08-09-4191

10-1363

NOTICE OF APPEAL OF APPELLANTS MATTHEW E. MOORE AND LORI A. MOORE

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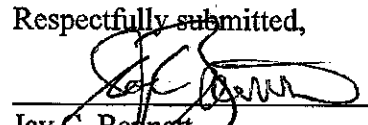
SUPREME COURT OF OHIO

Notice of Appeal of Appellants Matthew E. Moore and Lori A. Moore

Appellants Matthew E. Moore and Lori A. Moore give notice of appeal to the Supreme Court of Ohio from the judgment of the Butler County Court of Appeals, Twelfth Appellate district, entered in Court of Appeals case No. CA 2009-08-205 on June 28, 2010.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



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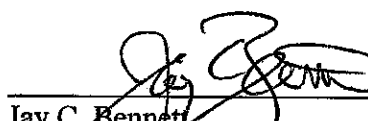
Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellees, Robert J. Gehring and Brian E. Hurley, Crabbe Brown & James LLP. 30 Garfield Place, Suite 740, Cincinnati, OH 45202 and Leslie S. Landen, Law Director and Sara R. Mills, Assistant Law Director, City of Middletown, One Donham Place, Middletown, OH 45042.



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MATTHEW E. MOORE AND
LORI A. MOORE

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IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

MATTHEW E. MOORE, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2009-08-205
	:	JUDGMENT ENTRY
- vs -	:	
CITY OF MIDDLETOWN, et al.,	:	
Defendants-Appellees.	:	

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

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

Costs to be taxed to appellants.

H.J. Bressler, Presiding Judge

Stephen W. Powell, Judge

(Dissents)
Robert P. Ringland, Judge

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

MATTHEW E. MOORE, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2009-08-205
	:	OPINION
- vs -		6/28/2010
	:	
CITY OF MIDDLETOWN, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-09-4191

Jay C. Bennett, Oxford Professional Bldg., 5995 Fairfield Road, Suite 5, Oxford, Ohio 45056, for plaintiffs-appellants, Matthew E. and Lori A. Moore

Leslie S. Landen, Middletown City Law Director, Sara E. Mills, One Donham Plaza, Middletown, Ohio 45042 and Crabbe Brown & James LLP, Robert J. Gehring, Brian E. Hurley, 30 Garfield Place, Suite 740, Cincinnati, Ohio 45202, for defendant-appellee, city of Middletown

BRESSLER, P.J.

{¶1} Plaintiffs-appellants, Lori and Matthew Moore, Carol and Robert Cowman, and Bette Anne Metzcar, collectively Landowners, appeal from the decision of the Butler County Court of Common Pleas dismissing their complaint against the city of Middletown in a lawsuit involving a zoning dispute. For the reasons outlined below, we affirm.

{¶2} Landowners own real property located within the city of Monroe that runs

adjacent and contiguous to property known as the Martin-Bake Property located within the city of Middletown. Landowners are not residents of Middletown.

{¶3} On August 19, 2008, Middletown passed Ordinance No. 02008-64 that rezoned 157 acres of the Martin-Bake property from a D-1 residential zone (Low Density Dwelling) to an I-2 industrial zone (General Industrial). Middletown also passed Ordinance No. 02008-63 that revised a set back provision for industrial activities found within its zoning code from 600 feet to zero feet. Together, these ordinances cleared the way for the construction of a coke plant operated by SunCoke Energy for the benefit of AK Steel, one of Middletown's more prominent employers.

{¶4} Following these enactments, Landowners filed an action for declaratory judgment challenging the constitutionality of the two ordinances and petitioned for a writ of mandamus seeking to compel Middletown "to institute appropriation proceedings pursuant to Ohio Revised Code Title 163." Middletown filed a motion to dismiss arguing that Landowners complaint should be dismissed pursuant to Civ.R. 12(B)(6). After accepting briefs and hearing oral arguments, the trial court granted Middletown's motion.

{¶5} Landowners timely appealed from the trial court's decision to dismiss their complaint, raising one assignment of error. However, after hearing oral arguments, this court asked the parties to provide supplemental briefs addressing the issue of whether Landowners had standing to pursue their claim against Middletown. Therefore, since this court specifically asked the parties to brief the issue of whether Landowners lacked standing to bring their claim, we find an initial review of whether Landowners have standing is appropriate.[1]

1. Landowners do not challenge that the methods used by Middletown to enact the disputed zoning ordinances were unlawful. Therefore, we will not address whether Landowners have standing in regards to that issue within this opinion.

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

{¶7} In its "Decision and Entry Granting Motion to Dismiss of Defendant," the trial court determined that R.C. 2721.03 "*confers standing* on 'any person... whose rights, statutes, or other legal relations are affected...by... a municipal ordinance' to file a declaratory action challenging the validity of the ordinance."[2] (Emphasis added.) However,

2. **{¶a}** R.C. 2721.03, which is titled "Construction and Validity of Instrument," states:

{¶b} "Subject to division (B) of section 2721.02 of the Revised Code, any person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal

in *Holcomb v. Schlichter* (1986), 34 Ohio App.3d 161, 164, this court found R.C. 2721.03 merely "represent[ed] [a] legislative [grant] of jurisdiction to Ohio courts under certain circumstances to hear and decide declaratory judgment actions. That declaratory relief is an available remedy is a separate question from one's standing to file such an action." See, e.g., *Wilmington City School Dist. Bd. of Edn. v. Clinton Cty. Bd. of Commrs.* (2000), 141 Ohio App.3d 232, 238; see, also, *Aarti Hospitality, LLC v. City of Grover City* (S.D.Ohio 2007), 486 F.Supp.2d 696, 700 (R.C. 2721.03 is "simply a mechanism through which an appropriate plaintiff may proceed, but the statute does not create the appropriate plaintiff"). In turn, based on our review of the applicable case law, we find it clear that this court does not interpret R.C. 2721.03 as *conferring standing* upon Landowners, but instead, treats the statute as simply a "legislative [grant] of jurisdiction to Ohio courts under certain circumstances to hear and decide declaratory judgment actions." *Holcomb* at 164. Therefore, we find the trial court's decision finding standing was *conferred* upon Landowners by R.C. 2721.03 was in error.

{¶8} Recently, in *Clifton v. Village of Blanchester*, Butler App. No. CA2009-07-009, 2010-Ohio-2309 (*Clifton II*), this court addressed the similar issue of whether a "nonresident contiguous property owner has standing to bring an action against an adjacent political subdivision seeking compensation for rezoning property located solely within its jurisdictional boundaries." Id. at ¶15. In finding that the nonresident contiguous property owner did not have standing to pursue his claim against the neighboring political subdivision, this court stated the following:

{¶9} "It is undisputed that Blanchester's decision to rezone the J & M property did

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relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it."

not constitute a physical invasion of Clifton's property, nor did it interfere with the use of his property. In fact, by merely rezoning property within its own jurisdictional boundaries, Blanchester did not place *any* limitation on Clifton's ability to continue farming the property or to sell it for residential purposes. Therefore, because Blanchester's decision to rezone the J & M property did not hinder Clifton's use of his own property in any way, we find that Clifton did not allege such a personal stake in the outcome of the controversy that would entitle him to further pursue his claim against Blanchester." (Emphasis sic.) *Clifton II*, 2010-Ohio-2309 at ¶27.

{¶10} This court continued by stating, in pertinent part, the following:

{¶11} "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.' * * * 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 due to an alleged appropriation of his property by inverse condemnation, is unavailable as a matter of law. Therefore, since Clifton has no substantive right to the relief he seeks from Blanchester, he has no standing to sue." (Internal citations and footnote omitted.) Id. at ¶28.

{¶12} After a thorough review of the record, we find our recent decision in *Clifton II* to be equally applicable to the case at bar. Just as in *Clifton II*, Middletown's decision to rezone the Martin-Bake property did not constitute a physical invasion of Landowners' property, nor did it interfere in any way with their ability to use their property. Id. at ¶27. In turn, because Landowners' property is located wholly outside of Middletown's jurisdictional boundaries, the

remedy they seek, which is essentially a claim for money damages due to an alleged appropriation of their property by inverse condemnation, is unavailable as a matter of law. Id. at ¶28. Therefore, just as this court found in *Clifton II*, we find Landowners' do not have standing to pursue their claim against Middletown. Id. at ¶27, 28, 31.

{¶13} Having already determined Landowners lacked standing to pursue their claim against Middletown, we would ordinarily not address any remaining arguments. However, under the unique facts and circumstances of this case, we find further discussion of Landowners' assignment of error to be necessary.

{¶14} "THE TRIAL COURT ERRED IN DISMISSING [LANDOWNERS'] COMPLAINT AS A MATTER OF LAW PURSUANT TO OHIO CIVIL RULE 12(B)(6)."

{¶15} In their sole assignment of error, Landowners assert that the trial court erred by dismissing their complaint pursuant to Civ.R. 12(B)(6) because, according to them, each of their three causes of action state a claim for which relief can be granted. We disagree.

{¶16} Civ.R. 12(B)(6) authorizes the dismissal of a complaint if it "fails to state a claim upon which relief can be granted." *Smith v. Village of Waynesville,* Warren App. No. CA2007-03-039, 2008-Ohio-522, ¶6. In order to prevail on a Civ.R. 12(B)(6) motion, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling relief." *DeMell v. The Cleveland Clinic Found.*, Cuyahoga App. No. 88505, 2007-Ohio-2924, ¶7. In turn, "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145. A trial court's order granting a motion to dismiss pursuant to Civ.R. 12(B)(6) is subject to de novo review. *Sparks v. Bowling*, Butler App. No. CA2009-02-065, 2009-Ohio-5071, ¶10; *Knoop v. Orthopaedic Consultants of Cincinnati, Inc*, Clermont App. No. CA2007-10-101, 2008-Ohio-3892, ¶8.

I. First Cause of Action

{¶17} In their first cause of action, Landowners claim that the Middletown ordinances are unconstitutional as applied to their property because the ordinances are arbitrary, unreasonable, capricious, and not related to the political subdivision's police powers. We disagree.

{¶18} A zoning ordinance 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."[3] *Goldberg Cos., Inc. v. Council of the City of Richmond Heights*, 81 Ohio St.3d 207, 1998-Ohio-456, syllabus. In order to prevail on a challenge to the constitutionality of a zoning ordinance, the challenger "must prove unconstitutionality beyond fair debate." *Miller v. Preble Cty. Bd. of Commrs.*, Preble App. No. CA2007-04-008, 2008-Ohio-2108, ¶13, quoting *Goldberg* at 209. In an "as-applied" challenge, such as the case here, "the landowner questions the validity of the ordinance only as it applies to a particular parcel of property. If the ordinance is unconstitutional as applied under those limited circumstances, it nevertheless will continue to be enforced in all other instances." *Jaylin Investments, Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, ¶11-12.

{¶19} While Landowners claim their complaint adequately sets forth facts supporting their claim that the ordinances are unconstitutional, their complaint explicitly states that the ordinances were passed "for the express purpose of accommodating the construction of a coke plant to be operated by SunCoke Energy for the benefit [of] AK Steel Corporation, a major employer in the City of Middletown." As a result, given Landowners' admission

3. Middletown asserts that *Goldberg* does not contain the appropriate standard because the Ohio Supreme Court relied on *Agins v. Tibruron* (1980), 447 U.S. 255, 100 S.Ct. 2138, which has since been overruled. *Lingle v. Chevron* (2005), 544 U.S. 528, 125 S.Ct. 2074. However, while *Agins* may have been overruled, the Ohio Supreme Court has not revisited its holding in *Goldberg*, and the general principles regarding the constitutionality of zoning ordinances do not hinge upon whether such ordinances constitute a taking.

that the ordinances were passed for the benefit of one of Middletown's most prominent employers, we find it clear from the four corners of their complaint that the ordinances were not arbitrary, capricious, or unreasonable. *DeMarco, Inc. v. Johns-Manville Corp.*, Franklin App. No. 05AP-445, 2006-Ohio-3587, ¶16. In turn, because Landowners' complaint simply makes a broad allegation that Middletown's zoning decisions were unconstitutional, and because unsupported conclusions in a complaint are insufficient to withstand a motion to dismiss, Landowners' complaint failed to state a claim for which relief could be granted. *Swint v. Auld*, Hamilton App. No. C-080067, 2009-Ohio-6799, ¶3. Therefore, the trial court did not err in dismissing Landowners' first cause of action.

II. Second Cause of Action

{¶20} In their second cause of action, Landowners claim that the rezoning of the Martin-Bake property constitutes a partial regulatory taking, and therefore, because the trial court determined that a partial regulatory taking could not have occurred, the court erred by granting Middletown's motion to dismiss. We disagree.

{¶21} There are two types of regulatory actions that are considered to be "per se" takings for Fifth Amendment purposes. *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 538, 125 S.Ct.2074; see, also, *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 2007-Ohio-5022, ¶18. The first involves governmental regulations that cause an owner to suffer a permanent physical invasion of his property, while the second involves governmental regulations that completely deprive an owner of *all* economically beneficial use of his property. See, e.g., *Loretto v. Teleprompter Manhattan CA TV Corp.* (1982), 458 U.S. 419, 435-40, 102 S.Ct. 3164; *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 1019, 112 S.Ct. 2886.

{¶22} However, apart from these two categories of "per se" regulatory takings, there is a third category for partial takings which is governed by the United States Supreme Court's

decision in *Penn Central Transp. Co. v. City of New York* (1978), 438 U.S. 104, 98 S.Ct. 2646. As recently stated by the Ohio Supreme Court, *Penn Central* "recognizes an ad hoc, factual inquiry that requires the examination of the following three factors to determine whether a regulatory taking occurred in cases in which there is no physical invasion and the regulation deprives the property of less than 100 percent of its economically viable use: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action." *State ex rel. Gilbert v. City of Cincinnati*, Slip Opinion No. 2010-Ohio-1473, ¶17, quoting *Shelly Materials* at ¶19; *State ex rel. Horvath v. State Teachers Retirement Bd.*, 83 Ohio St.3d 67, 71, 1998-Ohio-424.

{¶23} With these principles in mind, and while *Penn Central* may require the examination of three factors to determine whether a regulatory taking occurred under certain circumstances, even assuming Landowners actually endured a "drastic diminution in value" of their property due to Middletown's decision to rezone the Martin-Bake property, long-standing precedent holds that the mere "diminution in a property's value, however serious, is insufficient to demonstrate a taking." *Concrete Pipe and Products of Ca., Inc. v. Constr. Laborers Pension Trust* (1993), 508 U.S. 602, 604, 113 S.Ct. 2264; *Penn Cent.*, 438 U.S. 104 at 131, citing *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 47 S.Ct. 114 (75 percent diminution in value caused by zoning not a taking); *Hadacheck v. Sebastian* (1915), 239 U.S. 394, 36 S.Ct. 143 (87½ percent diminution in value not a taking). In fact, as stated by the Ohio Supreme Court, "something more than loss of market value or loss of the comfortable enjoyment of the property is needed to constitute a taking." *BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 344, 1998-Ohio-287; *Sullivan v. Hamilton Cty. Bd. of Health*, 155 Ohio App.3d 609, 2003-Ohio-6916, ¶36.

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

matter of law, that even if we were to find standing to pursue this claim, Middletown's acts of rezoning the Martin-Bake property did not amount to a partial taking requiring Landowners to receive just compensation. See, e.g., *Clifton II*, 2010-Ohio-2309 at ¶42. In this case, Landowners essentially allege that the rezoning of the Martin-Bake property caused their property to suffer a "drastic diminution in value," and, as noted above, "diminution in a property's value, however serious, is insufficient to demonstrate a taking." *Concrete Pipe*, 508 U.S. 602 at 604; *Penn Cent.*, 438 U.S. 104 at 131. Therefore, because Middletown's decision to rezone the Martin-Bake property did not amount to a partial taking of Landowners' property, the trial court did not err in dismissing their second cause of action.

III. Third Cause of Action

{¶25} In their third cause of action, Landowners claim that they are entitled to pursue a writ of mandamus forcing Middletown, the neighboring political subdivision, to compensate them for a partial regulatory taking via inverse condemnation pursuant to R.C. Chapter 163. We disagree.

{¶26} 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. In turn, while Landowners argue that *Britt* does not apply because "the sole remedy available to [them] has nothing to do with the power of eminent domain," according to 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 a 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." See *Clifton II*, 2010-Ohio-2309 at ¶28. As a result, even though Landowners cite multiple cases where mandamus may have been

the proper remedy, none of those plaintiffs sought compensation for an alleged inverse condemnation from a municipality in which they were not a resident. Therefore, as the remedy Landowners seek is unavailable as a matter of law, we find the trial court did not err in dismissing their third cause of action.

{¶27} Despite its enlightening discussion regarding the history of takings jurisprudence, the dissent, just as the dissent in *Clifton II*, is advocating for this court to create a new cause of action not previously available to nonresidents under R.C. Chapter 163. Under Ohio law, "a property owner's remedy for an alleged 'taking' of private property by a public authority is to bring a mandamus action to compel the authority to institute appropriation proceedings." *Hatfield v. Wray* (2000), 140 Ohio App.3d 623, 627; *State ex rel. Shemo v. City of Mayfield Heights*, 95 Ohio St.3d 59, 63, 2002-Ohio-1627. However, as noted by this court's recent decision in *Clifton II*, "R.C. Chapter 163 simply does not allow for a municipality to appropriate property beyond its jurisdictional boundary." Id., 2010-Ohio-2309 at ¶30, citing *Britt*, 38 Ohio St.2d at paragraph one of the syllabus.

{¶28} In addition, while recognizing mandamus as an appropriate remedy for an alleged taking, the dissent also asserts that a direct cause of action exists under these circumstances. However, neither the Ohio Supreme Court nor the Ohio General Assembly has recognized such a claim. Therefore, although Landowners and the dissent have presented well-reasoned and compelling arguments, we must apply the law as it exists in this state and not overstep our own judicial boundaries. See *Winkle v. Zettler Funeral Homes, Inc.*, 182 Ohio App.3d 195, 2009-Ohio-1724, ¶61; see, also, *Erwin v. Bryan*, Slip Opinion No. 2010-Ohio-2202, ¶4; *State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, Slip Opinion No. 2010-Ohio-2430, ¶26.

{¶29} In light of the foregoing, we find that even if Landowners had standing to pursue their claims against Middletown, the trial court did not err by dismissing their complaint

pursuant to Civ.R. 12(B)(6) for they failed to state a claim upon which relief could be granted. Accordingly, appellant's sole assignment of error is overruled.

{¶30} Judgment affirmed.

POWELL, J., concurs.

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

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

{¶31} For the reasons outlined below, I respectfully dissent. I concur with the majority that the Landowners in this case cannot support a claim for challenging the constitutionality of the Middletown ordinance. However, I disagree with the majority's conclusion denying standing and the trial court's decision to dismiss the partial takings claim in counts two and three of the Landowners' complaint.

{¶32} Protection of private property rights is a core value encompassed in both the United States and Ohio Constitutional systems. See the Fifth Amendment to the United States Constitution; Sections 1 and 19, Article I, Ohio Constitution. See, also, Treanor, Supreme Neglect of Text and History (2009), 107 Mich.L.Rev. 1059, 1059.

{¶33} In *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393, 416, 43 S.Ct. 158, Justice Oliver Wendell Holmes, speaking for the court, warned that the courts in takings cases were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

{¶34} Private property owners have been subjected to eroding protection of their rights over the ensuing years. See Kanner, Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York (2005), 13 Wm.& Mary

Bill Rts.J. 679; Richard A. Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property*, 44 (Oxford Univ.Press 2008); Orme, Kelo v. New London: An Opportunity Lost to Rehabilitate the Takings Clause, 6 Nev.L.J. 272, 276-279.[4] This erosion most recently culminated with the United States Supreme Court decision in *Kelo v. City of New London, Connecticut* (2005), 545 U.S. 469, 125 S.Ct. 2655.[5]

{¶35} In a sharply divided decision, the majority concluded that the redevelopment plan of the city of New London fell within the Takings Clause. Id. at 478. The court found that, although the city was not planning to open the condemned land for use by the general public, the private economic development satisfied the "public use" requirement of the United States Constitution because the development resulted in a public benefit. Id. Justice Stevens concluded his opinion noting that "[i]ndeed, many States already impose 'public use' requirements that are stricter than the federal baseline." Id. at 489.

{¶36} Justice O'Connor, in dissent, urged that the majority effectively "delete[d] the words 'for pubic use' from the Takings Clause of the Fifth Amendment." Id. at 494. Justice Thomas went further, agreeing with Justice O'Connor, but also arguing that the court should reconsider its entire body of Takings Clause jurisprudence to allow the government to "take

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4. One scholar has described the difficulties private property owners face in takings cases as follows, "[l]iberal judges don't believe in private property rights, [while] conservative judges don't believe in making the government pay. So between them you have a hard row to hoe." Kanner at 722, quoting the late Detroit condemnation lawyer Bert Burgoyne.

5. Following decades of economic decline, New London was designated as a "distressed community" by a Connecticut agency. Id. at 473. These conditions prompted state and local officials to target the Fort Trumbull area of New London for economic revitalization. Id. Additionally, Pfizer, Inc., an international pharmaceutical company announced that it planned to develop a $300 million research facility adjacent to the Fort Trumbull area. To capitalize on the arrival of the Pfizer facility, a private nonprofit entity developed an integrated development plan, which was approved by the city. Id. at 474. The plan covered approximately 90 acres designated for different development projects including a waterfront hotel and conference center, a marina, a public walkway along the waterfront, an urban neighborhood, 90,000 square feet of research space, and 140,000 square feet of parking and retail space. Id. Although the nonprofit organization successfully obtained most of the 90-acre real estate, a few property owners refused to sell. Id. at 475. As a result, the nonprofit initiated condemnation proceedings to obtain the parcels owned by the holdouts under authority of the city's ordinance procedure to create municipal development projects. Id. The landowners sought declaratory and injunctive relief from the condemnation actions. Id.

property only if the government owns, or the public has legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever." Id. at 508.

{¶37} *Kelo* resulted in a public uproar and the Supreme Court was roundly criticized for straying from the intended purpose of protecting individual property owners from eminent domain and inverse condemnation abuse. See Comment, Is This the Start of a Silent Spring? Kelo v. City of New London's Effect on Environmental Reforms, 56 Cath.U.L.Rev. 1107. In direct reaction to *Kelo*, the Ohio Legislature passed a moratorium on any takings for economic development until December 31, 2006. See S.B. 167, 126th Gen.Assemb. (2005). The legislature stated that taking for economic development directly violates Sections 1 and 19 of Article I of the Ohio Constitution and a moratorium was necessary to protect "the rights of Ohio citizens to maintain property as inviolate." Id. See, also, 56 Cath.U.L.Rev. at 1123-1125.

{¶38} Shortly after *Kelo*, the Ohio Supreme Court reviewed a similar development scheme under the Ohio Constitution in *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799. The *Norwood* court found that the Ohio Constitution contains greater protection of private property rights than the United States Constitution. Id. at ¶5-9. Specifically, the court held that "although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement." Id. at paragraph one of the syllabus. "Though the Ohio Constitution may bestow on the sovereign a magnificent power to take private property against the will of the individual who owns it, it also confers an 'inviolable' right of property on the people. When the state elects to take private property without the owner's consent, simple justice requires that the state proceed with due concern for the venerable rights it is preempting." Id. at ¶68.

{¶39} "The sovereign's right to take property may be conferred by the legislature on

municipalities, which enjoy broad discretion in determining whether a proposed taking serves the public. But it is for the courts to ensure that the legislature's exercise of power is not beyond the scope of its authority, and that the power is not abused by irregular or oppressive use, or use in bad faith. * * * And when the authority is delegated to another, the courts must ensure that the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner." (Internal citations omitted.) Id. at ¶70.

Inverse Condemnation

{¶40} The landowners in the instant matter assert a claim for inverse condemnation, arguing that the zoning ordinance in this case resulted in a partial nonphysical taking of their property.

{¶41} "Inverse condemnation" refers to a manner in which the government does not formally exercise its power of eminent domain when it probably should as a consequence of its "taking" or intentional "damaging" of one's property by a public work or the enactment of some regulation or restriction. Montague, Inversely Yours: Substantive issues in Inverse Condemnation (2006), SL049 ALI-ABA 623; see, also, *United States v. Clark* (1980), 445 U.S. 253, 257, 100 S.Ct. 1127; and *Agins v. City of Tiburon* (1980), 447 U.S. 255, 100 S.Ct. 2138. "In inverse condemnation cases, the property owner is the moving party claiming an act of the sovereign has damaged his property to the extent of an actual taking entitling him to compensation." Id. at fn 1.

{¶42} The majority's decision in the instant matter, combined with this court's recent decision in *Clifton v. Village of Blanchester*, Clinton App. No. CA2009-07-009, 2010-Ohio-2309, ("*Clifton II*") continues the trend of weakening private property rights by the courts.

a. Standing

{¶43} First, I disagree with the majority's conclusion that the property owners in this

case lack standing. As primary support for this conclusion, the majority relies upon *Clifton II*. *Clifton II* involved a nonresident contiguous property owner's takings action against a neighboring political subdivision. Id. at ¶15. In addressing the standing issue, the majority in *Clifton II* first reviewed the litany of persuasive authority from other states conferring standing on disaffected contiguous nonresident landowners. In each case, the foreign court concluded that standing exists for the nonresident landowners. See id. at ¶16-24. Yet, the *Clifton II* majority and the majority in this case summarily reject the prevailing national view. Id. at ¶25.

{¶44} In a well-reasoned dissent, Judge Hendrickson urged that the prevailing national view was the proper, more prudent approach. Id. at ¶47. Judge Hendrickson suggested that a nonresident landowner's action contesting a zoning ordinance of a neighboring political subdivision should be addressed on a case-by-case basis. Id. at ¶48. I agree. Specifically, if a landowner can sufficiently demonstrate that the neighboring political subdivision's zoning ordinance constitutes a taking by either physical or inverse means, the landowner is entitled to just compensation. Id. at ¶49.

{¶45} In support of its decision for denying standing on the landowners' partial takings claim, the majority in the instant matter and *Clifton II* offer the Ohio Supreme Court's statement in *Britt v. City of Columbus* (1974), 38 Ohio St.2d 1, paragraph one of the syllabus, that "[t]he powers of local self-government, granted to a municipality by Section 3 of Article XVII of the Ohio Constitution, do not include the power of eminent domain beyond the geographical limits of the municipality." See, also R.C. 163.63.

{¶46} The majority construes this statement from *Britt* and R.C. 163.63 to mean that, regardless of how a political subdivision regulates property within its boundaries, the regulation can have no effect upon property outside the subdivision. The majority principally submits that a city can do whatever it pleases with regard to property within its own

boundaries, yet neighboring property will never be affected. This is neither the proper context of the statement offered from *Britt* nor the holding of the *Britt* decision. To the contrary, in *Britt* the city of Columbus wished to extend its sewer lines past city limits through unincorporated lands along the Scioto River into the village of Dublin for the purpose of selling excess sewer services to nonresidents. Id. at 2. To effectuate the project, Columbus sought to appropriate lands along the river, outside the municipality, to construct the extended sewer line. Id. Relying upon its previous decision in *Beachwood v. Bd. of Elections* (1958), 167 Ohio St. 369, the Ohio Supreme Court concluded that Columbus' actions were unconstitutional and not within a political subdivision's power of eminent domain. Id. at 9. *Britt* stands for the proposition that a political subdivision cannot attempt to appropriate property outside its geographical boundaries, not that a regulation of property within the subdivision's boundaries can have no effect on neighboring land or effectuate a taking of neighboring property. Id. at paragraphs one and three of the syllabus. Additionally, *Britt* does not discuss standing, nor does it involve damages in an inverse condemnation or mandamus action. To conclude that a zoning regulation cannot affect adjacent land simply because it exists on the other side of an invisible boundary line, like the majorities in *Clifton II* and the instant matter advocate, is quite novel.

{¶47} "The essence of the doctrine of standing is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317, 321, quoting *Baker v. Carr* (1962), 369 U.S. 186, 204, 82 S.Ct. 691, 703. More simply, "[t]he common-law doctrine of standing to sue involves a determination of whether a party has a sufficient stake in the outcome of a justiciable controversy to obtain a judicial resolution of that controversy." *State ex rel. Consumers*

League of Ohio v. Ratchford (1982), 8 Ohio App.3d 420, 424.

{¶48} A person has standing to sue only if he or she can demonstrate injury in fact, which requires showing that he or she has suffered or will suffer a specific, judicially redressible injury as a result of the challenged action. *Eng. Technicians Assn., Inc. v. Ohio Dept. of Transp.* (1991), 72 Ohio App.3d 106, 110-111. In order to demonstrate an injury in fact, a party must be able to demonstrate that it has suffered or will suffer a specific injury traceable to the challenged action that is likely to be redressed if the court invalidates the action or inaction. *In re Estate of York* (1991), 133 Ohio App.3d 234, 241. In addition, a party must demonstrate that the interest he or she seeks to protect "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *State ex rel. Dayton Newspapers v. Phillips* (1976) 46 Ohio St.2d 457, 459, quoting *Data Processing Serv. v. Camp* (1970), 397 U.S. 150, 153, 90 S.Ct. 827.

{¶49} The Landowners in this case have clearly alleged an injury in fact. Few things are more personal than harming an individual's property rights as recognized by the Takings Clauses of the United States and Ohio Constitutions. Through a zoning regulation, Middletown authorized the construction of a large SunCoke plant adjacent to Landowners' residences. Such property regulations can negatively impact neighboring property, even if the property falls outside the political subdivision's geographical limits. See *Borough of Creskill v. Borough of Dumont* (1953), 15 N.J. 238, 247; *Koppel v. City of Fairway* (1962), 189 Kan. 710, 714; *Wittingham v. Village of Woodridge* (1969), 111 Ill. App.2d 147, 150-151; *Scott v. City of Indian Wells* (1972), 6 Cal.3d 541, 547;*Allen v. Coffel* (Mo.App.1972), 488 S.W.2d 671, 674; *Bagley v. Sarpy Cty.* (1972), 189 Neb. 393, 395; *Const. Industry Assn. of Sonoma Cty. v. City of Petaluma* (C.A.9, 1975), 522 F.2d 897, 905; *Orange Fibre Mills, Inc. v. City of Middletown* (N.Y.Sup.1978), 94 Misc.2d 233, 235; *Miller v. Upper Allen Twp. Zoning Hearing Bd.* (1987), 112 Pa.Cmwlth. 274, 283. The Landowners' claim may or may not be

successful, but to deny them a forum outright at this stage of the proceedings is improper.

{¶50} *Clifton II* and the instant decision, concluding that a contiguous nonresident landowner never has standing to pursue a takings claim, create a troublesome, sweeping precedent. For example, a municipality could authorize or develop a noxious use, such as a waste treatment plant or landfill, along its border. It would be difficult to argue that the governmental action in such instances would not extend beyond its borders or severely impact adjacent nonresidential landowners. Yet, under the *Clifton II* precedent, those landowners would have no form of redress due to a lack of standing.

{¶51} The majority in *Clifton II* and the majority in the instant matter argue that, by urging for standing, the dissents are essentially advocating for the court to create a new cause of action. Id. at ¶30. Similarly, the majority in this case takes issue with the trial court's conclusion that R.C. 2721.03 "confers standing" on the Landowners. As discussed above, the majorities cites *Britt*, an inapplicable case that does not involve issues of standing, inverse condemnation or mandamus, as support for this conclusion. Neither the Landowners nor the dissents are asking the court to create a new cause of action under R.C. Chapter 163, nor is R.C. 2721.03 even applicable to the case at bar. A cause of action exists through implication of the Constitutional Takings Clauses. The United States and Ohio Supreme Courts have routinely recognized inverse condemnation actions by aggrieved parties. See *Clark*, 445 U.S. at 257; *Agins*, 447 U.S. 255, at fn. 2; *State ex rel. Duncan v. Middlefield*, 120 Ohio St.3d 313, 2008-Ohio-6200, ¶16. See, also, *State ex rel. Sinay v. Sodders*, 80 Ohio St.3d 224, 226 1997-Ohio-244 (nonresident of municipality has standing to seek mandamus to compel municipality to perform public duties if they will be "directly benefited or injured by a judgment in the case"). The Landowners in this case have demonstrated an injury in fact, if not in theory, and satisfy standing requirements to assert a constitutionally protected partial takings claim through inverse condemnation.

{¶52} I recognize that the Ohio Supreme Court has stated, "[m]andamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of property is alleged." *State ex rel. Shemo v. City of Mayfield Heights*, 95 Ohio St.3d 59, 63, 2002-Ohio-1627. By making mandamus the sole method of relief, I submit that the Ohio Supreme Court is improperly limiting constitutional causes of action. Under the United States Constitution, federal courts acknowledge that aggrieved landowners can pursue claims for declaratory judgment and "the more common inverse condemnation process." See *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Galarza* (C.A.1, 2007), 484 F.3d 1, fn. 20; *Coles v. Granville* (C.A.6, 2006), 448 F.3d 853, 861. Since the Ohio Constitution lends greater protection of private property rights than the United States Constitution, as discussed below, the Ohio Supreme Court should, at the very least, acknowledge these other forms of relief under the takings clause.

{¶53} As further rationale, the *Clifton II* majority concludes its analysis with the oft-cited notion that allowing such claims would result in unfettered litigation. Specifically, the majority states that allowing standing for nonresident landowners would subject political subdivisions to "endure the costly burden of defending against an infinite number of claims arising from nonresidents" thereby "open[ing] the floodgates on the surge of litigation."[6] Id. at ¶29.

{¶54} This policy consideration is miniscule in comparison to courts allowing municipalities to potentially trample upon fundamental, enumerated Constitutional rights by denying harmed property owners a forum for relief based upon arbitrary boundary lines. See *Clifton II* at ¶47 (Hendrickson, J., dissenting). From an equally hyperbolic perspective, by

6. I am unpersuaded by this policy rationale expressed by the *Clifton II* majority primarily because, if these types of suits were common, substantial case law would exist in this area and the issue of standing would have already been clearly settled in Ohio. As it stands, the standing issue appeared to be an issue of first impression in Ohio in *Clifton II* and the instant matter.

denying nonresident standing as the majority advocates, a political subdivision could line its borders with destructive, noxious uses without fear of liability to contiguous nonresident landowners.

{¶55} Neither the United States Constitution nor the Ohio Constitution provide that an aggrieved property owner is entitled to just compensation for a taking only if he or she lives within the confines of the political subdivision. Actions of political subdivisions can cause irreparable harm to property not within their geographical boundaries. Therefore, I would find that Landowners in this case have standing to pursue their partial takings and damage claim.

b. Takings Under the United States Constitution

{¶56} In this case, the Landowners allege a nonphysical partial taking of their property due to Middletown's zoning ordinance. Regulatory takings law under the United States Constitution as it currently stands has been described as a "confused muddle, intractable, as an ambiguous area in which the United States Supreme Court complicates its own jurisprudence with each new decision, and as an area in which the Court [refuses] to 'revisit its regulatory takings precedent in order to clarify the current standard.'" Note, Taking the Courts: A Brief History of Takings Jurisprudence and the Relationship Between State, Federal, and the United States Supreme Courts, 35 Hastings Const.L.Q. 897, 897.

{¶57} After the collapse of the Articles of Confederation, the authors of the United States Constitution recognized the need for a stronger central government. Orme, Kelo v. New London: An Opportunity Lost to Rehabilitate the Takings Clause, 6 Nev.L.J. 272, 275. To restrain the newly created central government from infringing upon state and individual rights, the founders included a Bill of Rights. Id. To protect individual property rights, the founders prohibited "private property [from being] taken for public use without just compensation." Fifth Amendment to the United States Constitution. Initially, the Supreme Court narrowly construed the takings clause, adopting a strong position to curb the "despotic

power" of eminent domain. *Vanhorne's Lessee v. Dorance* (1795), 2 U.S. 304, 311. Following the Civil War and ratification of the Fourteenth Amendment, the court showed this zealous support of individual property rights by making the Fifth Amendment the first portion of the Bill of Rights to be incorporated against the states. Id., citing *Chicago B & Q.R. Co. v. City of Chicago* (1897), 166 U.S. 226, 17 S.Ct. 581. However, this zealous protection of private property rights under the Takings Clause began to gradually erode. In the early years of American independence, there were few condemnations or examples of the government using its eminent domain power. *Kanner* at 708. Initially, the only industry the government and judiciary favored in invoking the power of eminent domain were railroad companies because they were perceived as a harbinger of progress and prosperity, and necessary for construction of a public highway. *Kanner* at 708-709.

{¶58} Then, in *Head v. Amoskeag Manufacturing Co.* (1885), 113 U.S. 9, 5 S.Ct. 441, the Supreme Court reviewed the constitutionality of the Mill Acts. The Mill Acts were statutes that allowed mill owners to flood neighboring lands in order to power their mills. Id. at 11. The Court held that this was a valid taking under the Takings Clause because the mills were open for public use, benefitted the public, and served as a public utility. Id. at 18-19. However, in addition to public mills, the court also approved takings by private mills operated purely for the benefit of the private owners. Id. at 9.

{¶59} Over the ensuing years, the erosion continued as "the Supreme Court abandoned the strong version of the takings clause championed by the framers of the Fifth Amendment in favor of a much weaker version of the clause advocated by early twentieth-century Progressives and supporters of the New Deal." *Treanor* at 1062. Latter twentieth-century takings jurisprudence has been characterized by restriction of property rights and redevelopment of deteriorated areas. Cohen, Eminent Domain After Kelo .v City of New London: An Argument for Banning Economic Development Takings, 29 Harv.J.L. &

Pub.Policy 491, 510-511. See *Berman v. Parker* (1954), 348 U.S. 26, 75 S.Ct. 28 (taking of department store in blighted area of Washington, D.C. for redevelopment by private agency for private use was for "public purpose"); and *Hawaii Housing Auth. v. Midkiff* (1984) 467 U.S. 229, 104 S.Ct. 2321 (Hawaii land reform plan found constitutional).

{¶60} In 1978, the United States Supreme Court examined the constitutional protection afforded to partial regulatory takings in *Penn Central Transp. Co. v. City of New York* (1978), 438 U.S. 104, 98 S.Ct. 2646. *Penn Central* involved New York City's Landmark Preservation Act, which prevented owners of certain historically-designated landmarks from "destroying or fundamentally altering their character" and required the owners to keep the exterior features "in good repair." Id. at 109 and 111. If the property owner wished to alter the structure, he or she was required to seek approval by the commission. Id. at 111. The owners of New York's Grand Central Terminal wished to construct a 50-story office building above the current structure, which was denied by the commission. Id. at 116. The property owners sued, arguing that the regulation preventing alteration constituted a taking. Id. at 119.

{¶61} In concluding that the regulation did not constitute a partial regulatory taking, the Supreme Court announced a three-factor test for reviewing partial takings claims under the United States Constitution. Id. at 138. To determine whether a taking has occurred, the Supreme Court instructed courts to examine: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with the owner's distinct investment-backed expectations; and (3) the character of the governmental action. Id. at 124.

{¶62} Like much of the United States Supreme Court's regulatory takings jurisprudence, *Penn Central* has been routinely criticized by both judges and scholars for deviating from the intended purpose of the takings clause and creating a vague,

unpredictable standard subject to the whims and personal values of the reviewing judges. Kanner, 13 Wm.& Mary Bill Rts.J. at 734 ("the *Penn Central* test * * * is so vague and indeterminate that it invites unprincipled, subjective decision making by the courts. The three-factor test does not provide any clear direction of how to decide regulatory takings cases, inviting judges to decide based on their own personal values"). Notably, U.S. Circuit Judge James L. Oaks has stated, "[*Penn Central*] jurisprudence permits purely subjective results, with the conflicting precedents simply available as makeweights that may fit preexisting value judgments * * *." Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash.L.Rev. 583, 613.

{¶63} *Penn Central*'s focus upon "investment-backed expectations" has received significant criticism for its vagueness, which has led to conflicting results in the courts. *Kanner* at 734. Further, although the court identified the specific factors for review, it provided no guidance for how the facts should be applied or how much, if any, intrusion is allowed before a regulation is considered a compensable taking.

{¶64} Most recently, in 2005, the United States Supreme Court released two significant decisions relating to the takings clause and eminent domain; the aforementioned *Kelo v. City of New London* and *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 125 S.Ct. 2074. Before *Lingle*, the Supreme Court recognized two tests for attacking partial regulatory takings; the previously-discussed *Penn Central* standard and the "substantially advances" formula from *Agins v. City of Tiburon* (1980), 447 U.S. 255, 100 S.Ct. 2138. *Lingle* at 538 and 540. *Agins* provided that a landowner could facially challenge a zoning regulation under the standard that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." Id. at 540. In an effort to produce a "doctrinally coherent takings standard," the Court decided to abandon the *Agins* test, concluding that *Agins* derived from due process and "ha[d] no proper

place in * * * takings jurisprudence." Id. at 548. "The Supreme Court's decision in *Lingle* effectively sent the message that the federal courts would take an even more hands-off approach to regulatory takings." 35 Hastings Const.L.Q. at 914. Further, *Lingle* functionally broadened the regulatory power of the state and local authorities in land use cases since zoning ordinances are no longer subject to scrutiny under *Agins*. Id.

{¶65} However, states are not bound to follow the federal approach to takings jurisprudence, but may be more expansive in considering the rights of property owners. See *Kelo*, 545 U.S. at 489. In *Norwood*, the Ohio Supreme Court recognized this distinction by finding that the Ohio Constitution affords greater protection of individual property rights than the United States Constitution as interpreted by the U.S. Supreme Court.

c. Takings Under the Ohio Constitution

{¶66} Historically, the laws of Ohio were designed to ensure the right to own and protect property. Ohio's Constitution was significantly influenced by the Northwest Ordinance of 1787. Note, Not by the Hair of My Chinny Chin Chin: Ohio's Attempt to Combat the Big Bad Wolf of Blight, 2 Liberty U.L.Rev. 243, 263. In effect, the Northwest Ordinance was "much more stringent than what is found in the Takings Clause of the Fifth Amendment to the United States Constitution." Id. Accordingly, when attaining statehood in 1803, the framers of the Ohio Constitution were sure to include a rigid takings clause, which embodied the letter and spirit of the Northwest Ordinance that had served the territory well for its previous 16 years. Id. Ohio's first constitution contained two provisions relating to the protection of private property. Id. "All men * * * have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property." Section 1, Article VIII, Ohio Constitution (1802). The constitution also contained an eminent domain clause, providing "[p]rivate property ought and shall ever be held inviolate, but always subservient to the public welfare; provided a compensation in

money be made to the owner." Id. at Section 4.

{¶67} In 1850, a constitutional convention was held and a new constitution was proposed. 2 Liberty U.L.Rev. at 264. One of the faults of the 1802 constitution identified by the drafters was that the earlier clauses were deemed insufficient to properly protect the private property rights of landowners. Fischel, The Offer/Ask Disparity and Just Compensation for Takings: A Constitutional Choice Perspective, 15 International Rev.L. & Econ. 187, 197. As a result, in the revision, the drafters changed the placement and rewrote the property clauses, and strengthened the eminent domain clause. These protections were placed at the forefront of the constitution. 2 Liberty U.L.Rev. at 264. Section 1, Article I of the 1851 Constitution provides, "all men * * * have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property * * *."

{¶68} Further, the drafters reiterated the principle that private property in Ohio is inviolate and injected greater guidelines to ensure payment of just compensation in the event of a taking. Id. "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." Id. at Section 19, Article I, Ohio Constitution. This language evinces the fact that the 1851 framers recognized the importance of the Takings Clause and the inviolability of private property. 2 Liberty U.L.Rev. at 264. Further, the stringent guidelines for prepayment of compensation for a taking was a direct reaction to the business dealings of the railroads,

which had received great favor from the government. *Fischel* at 197. Before the 1851 Constitution, property would often be appropriated for railroad companies, but the compensation was often late or never paid, and sometimes judgment could not be enforced because the railroad company had gone bankrupt in the meantime. Id.

{¶69} These two provisions of the 1851 Ohio Constitution identify specific protections for private property in addition to the public use requirement. See Note, The Fifth Amendment's Takings Clause: Public Use and Private Use; Unfortunately, There is no Difference (2007), 40 Loy.L.A.L.Rev. 809, 848. With this heightened protection in mind, as recognized in *Norwood*, and the United State Supreme Court's diminishing protection of private property rights, I question whether *Penn Central* is a sufficient standard for analyzing partial takings under the Ohio Constitution.

{¶70} I recognize, however, that the Ohio Supreme Court has continued to apply *Penn Central* in recent Ohio regulatory takings cases. See *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 122 Ohio St.3d 260, 2009-Ohio-2871, ¶16; *State ex rel. Duncan v. Middlefield*, 120 Ohio St.3d 313, 2008-Ohio-6200, ¶17; *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 2007-Ohio-5022, ¶19. By applying *Penn Central*, the Ohio Supreme Court has adopted a narrow standard unrelated to the stronger protection of private property guaranteed by the Ohio Constitution. The Ohio Supreme Court has stated that "any substantial interference with the elemental rights growing out of ownership of private property is considered a taking." *Smith v. Erie RR. Co.* (1938), 134 Ohio St. 135, 142. Because the Ohio Constitution grants stronger rights to a property owner than the United States Constitution, *Penn Central* should not be controlling in evaluating a partial taking of property in Ohio.

{¶71} Moreover, these cases where the Ohio Supreme Court applied *Penn Central* involve purely business or investment interests where the *Penn Central* factors, although

insufficient to fully protect these interests, are somewhat applicable. In contrast, the *Penn Central* factors as they relate to this case, and other cases involving residential landowners, are extremely problematic since the factors bear little relation to residential ownership. *Kanner* at 769-770. As has been routinely criticized, *Penn Central*'s requirement that a court evaluate the landowner's "investment-backed expectations" bears little significance to residential homeownership and the resulting damage from governmental land-use regulation. Further, the Supreme Court has failed to identify what exactly is an "investment-backed expectation." This factor presupposes the existence of a would-be developer wishing to build on the subject land, but homeowners do not principally purchase their homes specifically for profit or to be sold for development. Id. This factor is neither an accurate nor complete picture of reality, especially in the context of residential property where individuals purchase and retain the property for reasons that are not investment-related. Id. By attempting to apply *Penn Central* to residential land, the court is essentially trying to fit square peg into round hole.

{¶72} Most residential landowners are not developers. Individuals purchase or acquire residences based upon a myriad of reasons. A homeowner could purchase property based upon the community school system, the character of the neighborhood, a safe environment for their children, the proximity to family members, or to live in a quiet neighborhood insulated from business or industry. Further, land can be acquired under many circumstances with no prior expectation: by inheritance, as compensation for services rendered, in a settlement of litigation, purchased at full market value or in foreclosure. The motivations, hopes, or plans are not always simply economic or investment based. Based upon the majority's ruling in this case, we shall never know what the "investment-backed expectations" of the Landowners are, if any.

{¶73} Yet, governmental interference or zoning regulations can greatly interfere with

these noninvestment related aspects of homeownership and, based upon the nature of the regulation, can severely affect residential property. Why should the noneconomic, non-"investment-backed" aspects of property ownership be inferior, or not even considered in the context of *Penn Central*, when evaluating an alleged partial taking of residential property? Further, why should a government regulation be allowed to intrude upon, or extinguish, these interests without recourse?

{¶74} Cleary, the economic impact of zoning regulations results in diminution of value. However, the United States Supreme Court has found that diminution of property value alone is insufficient to support a taking. *Euclid v. Amber Realty Co.* (1926), 272 U.S. 365, 384, 47 S.Ct. 114; *Concrete Pipe and Products of Ca., Inc. v. Constr. Laborers Pension Trust* (1993), 508 U.S. 602, 645, 113 S.Ct. 2264. Similarly, the Ohio Supreme Court has also noted diminution in value does not constitute a taking. *State ex rel. Taylor v. Whitehead, Zoning Inspector* (1982), 70 Ohio St.2d 37, 39, citing *Curtiss v. Cleveland* (1957), 166 Ohio St. 509, paragraph two of the syllabus ("there is no right to compensation either for a taking or diminution of value of or damage to property arising either from original zoning or from a rezoning or extension of a use district"). See, also, *State ex rel. BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 344, 1998-Ohio-287 ("something more than loss of market value or loss of the comfortable enjoyment of the property is needed to constitute a taking"). However, like the Ohio Supreme Court's application of *Penn Central*, this principle has only been applied in a business or investment property context, not to residential property rights. Further, the extent to which the regulation has interfered with the investment-backed expectations arguably goes to the diminution of the value of the house. In cases involving diminution of property value, courts cite this principle almost gratuitously. These holdings, often dicta noting that diminution of value is not a measure of damages, are like well-worn clichés that are repeated by the courts. But, like all clichés, these conclusions are generalities that often

do not apply, nor does the rationale always fit. Presumably this principle is based upon the theory that diminution of value is too insignificant to consider when assessing damages. While this may be true in the general context of business investments, diminution has a significant impact when residential property is involved.

{¶75} The Ohio Constitution clearly states that private property is "inviolate." The concept of inviolability is stronger than the generalized takings clause found in the United States Constitution. Other interests besides purely economic considerations should be subject to protection under the Ohio provision. I fail to see why a taking in the form of diminution of value is not a taking of substantial rights. An owner of property has lost part of the benefit of ownership, i.e., resale value of the home, and should be allowed to establish this matter after discovery and at trial. As a result, I urge that a cause of action for diminution of value in the residential context is not prevented under the Ohio Constitution.

{¶76} Additionally, Article I, Section I, providing that "all men * * * have certain inalienable rights, among which are * * * possessing * * * property," arguably creates a due process right subject to protection under the *Agins* test. Yet, the Ohio Supreme Court has appeared to follow the Supreme Court's abrogation of the *Agins* due process analysis. See *Gilmour Realty*, 2008-Ohio-3181 at ¶20. Like the principle that property in Ohio is inviolate, the Ohio Constitution contains additional protection not included United States Constitution, which should recognized by the Ohio Supreme Court.

d. Motion to Dismiss

{¶77} Finally, regardless of whether the court applies the *Penn Central* standard or an Ohio Constitutional standard, a Civ.R. 12(B)(6) motion for failure to state a claim is not the proper procedure for this court to render a judgment in the Landowners' partial takings case since a court is required to review these matters from a factual perspective on a case-by-

case basis. See *Penn Central*, 438 U.S. at 124. I believe that in granting the Civ.R. 12(B)(6), the trial court's analysis involved facts and matters outside "the four corners of the pleadings." *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 281, 1999-Ohio-264. For example, the court apparently used the *Penn Central* investment-backed expectation test. Assuming that this test applies, the court would have considered the expectations of the homeowners, which is not covered in the pleadings. In this case, the Landowners allege that their private residences have been detrimentally affected by the Middletown ordinance authorizing construction of the SunCoke plant. This allegation supports more than a mere diminution of value or reduction in fair market value and the Landowners should at least be able to pursue discovery and present their case. Under the current economic conditions, a residential property may be all that many individuals have. To dismiss such a matter solely on the pleadings is, I submit, a violation of the Ohio Constitution as well as the Ohio Civil Rules.

{¶78} In sum, I dissent because the Landowners have sufficiently alleged an injury in fact and have standing to sue. The Ohio Constitution affords greater protection of private property rights than the United States Constitution. *Penn Central* does not supply adequate protection to landowners under the Ohio Constitution and the factors do not apply to residential ownership. Additionally, I urge that diminution of property value resulting from governmental regulation is actionable in the residential context and that governmental regulation of property should be subject to due process scrutiny under the Ohio Constitution.

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

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BUTLER COUNTY
CLERK OF COURTS

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

MATTHEW E. MOORE, et al.	*	**Case Number: CV 2008 09 4191**
	*	
Plaintiffs	*	**Judge Michael Sage**
	*	
vs.	*	**DECISION AND ENTRY**
	*	**GRANTING MOTION TO**
CITY OF MIDDLETOWN	*	**DISMISS OF DEFENDANT**
	*	
Defendant	*	**FINAL APPEALABLE ORDER**
	*	
	*	

* * * * * * * * * * * * * * * * * * *

This matter comes before the Court on the motion to dismiss of Defendant, City of Middletown ("Defendant"), filed against Plaintiffs Matthew W. Moore, et al. ("Plaintiffs"). Defendant moves this Court to dismiss Plaintiffs' complaint pursuant to Civ. R. 12(B)(1) and Civ. R. 12(B)(6). For the reasons that follow, this Court finds Defendant's motion to dismiss well-taken.

Plaintiffs own real estate in the City of Monroe adjacent to property in the City of Middletown known as the Martin-Bake Property. On August 19, 2008, Defendant enacted two ordinances referenced in Plaintiffs' complaint. Ordinance No. 02008-64 rezoned 157 acres of the Martin-Bake property from a D-1 zoning classification (low density residential) to an I-2 zoning classification (general industrial). Ordinance No. 02008-63 enacted a revision of the set back provision of Defendant's zoning code.

Plaintiffs allege that they have suffered a loss of their investment-backed expectations as a result of Defendant's rezoning of the Martin-Bake Property. Plaintiffs

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also allege that the value of their property has been diminished. In addition, Plaintiffs claim that the ordinances were improperly passed as emergency ordinances.

Plaintiffs have asserted three causes of action. First, "the effect of [the rezoning] upon Plaintiffs' Relators' property" violates the due process and equal protection clauses of the Ohio and United States Constitutions. Second, Defendant's actions have deprived Plaintiffs of their property rights consistent "with their investment backed expectations." Finally, Plaintiff's third cause of action asserts that Plaintiffs have a right to receive compensation pursuant to R.C. Title 163.

Defendant argues that Plaintiffs complaint should be dismissed for the following reasons: (1) the Plaintiffs lack standing, (2) this Court does not have jurisdiction over the subject matter of the complaint, and (3) Plaintiffs have failed to state a claim upon which relief may be granted. After setting forth the applicable standards of review, this Court will address each of the parties' arguments in turn.

According to the Ohio Rules of Civil Procedure there are certain defenses that may be made by motion. Civ. R. 12(B). Civil Rule 12(B)(1) allows for a motion to dismiss based on the defense of lack of jurisdiction over the subject matter. After a party files a Civil Rule 12(B)(1) motion to dismiss, the trial court must determine whether the complaint contains allegations of a cause of action that the trial court has authority to decide. *Crestmost Cleveland Partnership v. Ohio Department of Health* (2000), 139 Ohio App.3d 928, 936, 746 N.E.2d 222, 227-228. Furthermore, the Ohio Supreme Court has noted that the "trial court is not confined to the allegations of the complaint when determining its subject-matter jurisdiction pursuant to a Civil Rule 12(B)(1) motion to

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dismiss, and may consider material pertinent to such inquiry. *Southgate Development Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211, 358 N.E.2d 526, paragraph one of the syllabus. This Court notes that it will take judicial notice of the location of the properties involved as agreed to by all parties during oral argument on June 18, 2009.

Civ.R. 12(B)(6) allows a motion to dismiss based on the defense of failure to state a claim upon which relief can be granted. A motion to dismiss pursuant to Civ.R. 12(B)(6) carries a heavy burden. This motion will only be granted when it appears "beyond doubt from the complaint that the Plaintiff can prove no set of facts entitling him to recovery." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77 at 80. The court must also "presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Company* (1988), 40 Ohio St.3d 190, at 192.

In resolving a Civ.R. 12(B)(6) motion to dismiss, the trial court may consider only the statements and facts contained in the pleadings and may not consider or rely on evidence outside the complaint. *Estate of Sherman v. Milhon* (1995), 104 Ohio App.3d. 614, 617, 662 N.E.2d 1098, 1100. When a motion to dismiss presents matters outside the pleadings, the trial court may either exclude the extraneous matter from its consideration or treat the motion as one for summary judgment and dispose of it pursuant to Civ.R.56. *Powell v. Vorys, Sater, Seymour & Pease* (1998), 131 Ohio App.3d 681, 723 N.E.2d 596.

With regard to Defendant's argument that Plaintiffs' lack standing, R.C. 2721.03 confers standing on "any person . . . whose rights, status, or other legal relations are

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affected . . . by . . . a municipal ordinance" to file a declaratory action challenging the validity of the ordinance. In addition, the terms of the R.C. 2721.03 set forth that its provisions "are remedial and shall be liberally construed and administered."

Plaintiffs allege that Defendant's rezoning of the Martin-Bake Property will cause Plaintiffs to suffer a loss of investment backed expectations. Defendant argues that because Plaintiffs' properties are located in the City of Monroe, not within the municipal boundaries of the City of Middletown, Plaintiffs do not have standing to challenge Defendant's enactments.

Defendant relies on *Driscoll v. Austin Town Association* (1975), 42 Ohio St.2d 263, 328 N.E.2d 263 for the proposition that surrounding property owners, such as Plaintiffs, do not have a legally protected interest that would confer standing to challenge the application of Defendant's ordinances to the Martin-Bake Property as constitutionally invalid. However, this Court does not find Defendant's argument persuasive.

The plaintiffs in *Driscoll* filed an injunction as a collateral attack on a declaratory judgment decree decided two years earlier. The Ohio Supreme Court held that surrounding property owners were not necessary parties to a declaratory judgment action challenging the constitutionality of a township zoning ordinance as it applied to a specific parcel of property. *Id.* Unlike the instant case, the plaintiffs in *Driscoll* were not alleging that they were adversely affected by the rezoning, but that the rezoning ordinance was void for failure to join the plaintiffs as necessary parties.

Defendant also cites *Karches v. City of Cincinnati* (1988), 38 Ohio St.3d 12, 526 N.E.2d 350 in support of its argument. Defendant argues that *Karches* requires a

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controversy arising out of the application of the zoning legislation to Plaintiffs' property rather than the Martin-Bake Property in order to confer standing to Plaintiffs. However, the Ohio Supreme Court was not addressing the issue of declaratory judgment. Rather, the Ohio Supreme Court explained the means of analysis for a R.C. 2506 administrative appeal. The holding in *Karches* states that a declaratory judgment action is ripe for review only after the court determines that an actual controversy exists. Therefore, Defendant's reliance in *Karches* is also misplaced. The Ohio Supreme Court in *Karches* examined the issue of ripeness, not standing.

In support of their argument, Plaintiffs cite *Joseph Airport Toyota, Inc. v. Vandalia*, 2nd Dist. No. 18904, 2002-Ohio-928. In *Joseph*, the plaintiff alleged that the ordinance rezoning the adjacent property reduced the value of its own property. *Id.* The court held that the trial court erred when it dismissed the plaintiff's complaint for lack of standing. Defendant distinguishes *Joseph* from the instant case because the plaintiff in *Joseph* owned property within the City of Vandalia, where the rezoning occurred. However, this Court does not find that a jurisdictional boundary extinguishes Plaintiffs' standing to bring the instant action.

In the present case, Plaintiffs have alleged a legally protected interest in the rezoning of the Martin-Bake property. "Persons whose property rights are directly affected by a statute or ordinance are . . . entitled to a declaratory determination as to the validity of the statute or ordinance." *Wilson v. Cincinnati* (1960), 171 Ohio St. 104, 108, 168 N.E.2d 147, 149, quoting 174 A.L.R. 561, Section 8. Therefore, because Plaintiffs have alleged that they are "affected by, or materially interested in, a statute or ordinance, and that [they

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have] a justiciable cause concerning such law" this Court should confer standing. *Pack v. Cleveland* (1982), 1 Ohio St.3d 129, 131, 438 N.E.2d 434, 437.

This Court will now address Defendant's second argument. Defendant argues that this Court does not have jurisdiction over Plaintiffs' first cause of action. In their first cause of action, Plaintiffs allege that Defendant's rezoning of the Martin-Bake Property is unconstitutional and has no relation to the health, safety and welfare of the City of Middletown.

This Court begins with the premise that all zoning ordinances are presumed constitutional. *Cent. Motors Corp. v. Pepper Pike* (1995), 73 Ohio St.3d 581, 583-584, 653 N.E.2d 639, 641-643. The party challenging an ordinance bears, at all stages of the proceedings, the burden of demonstrating that the provision is unconstitutional. *Ketchel v. Bainbridge Twp.* (1990), 52 Ohio St.3d 239, 557 N.E.2d 779. In order to invalidate a zoning ordinance on constitutional grounds, Plaintiffs must establish, beyond fair debate, that the zoning classification denies them an economically viable use of the zoned property and that the zoning classification fails to advance a legitimate governmental interest. *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 638 N.E.2d 533, syllabus. "A court may substitute its judgment for that of the local governing body only when a municipality exercises its zoning power in an arbitrary, confiscatory or unreasonable manner which violates constitutional guaranties." *Gerijo*, 70 Ohio St.3d at 226, 638 N.E.2d at 536. "[T]he court can not usurp the legislative function by substituting its judgment for that of the council. Municipal governing bodies are better qualified, because of their knowledge of the situation, to act upon these matters than are the courts. . . . The legislative, not the

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judicial, authority is charged with the duty of determining the wisdom of zoning regulations, and the judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is fairly debatable." *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560, 197 N.E.2d 201, 203-204.

In the instant case, Plaintiffs make a broad allegation that Defendant's zoning is unconstitutional as it has no relation to the health, safety or welfare of the City of Middletown. Defendant argues that Plaintiffs have not alleged any facts sufficient to overcome the strong presumption that Defendant's ordinances are constitutional. Moreover, Defendant argues that Plaintiffs cannot demonstrate an abuse of power because Defendant's decision was directed to the Martin-Bake property, not Plaintiffs' property. This Court finds Defendant's arguments persuasive. Plaintiffs have not alleged sufficient facts demonstrating that the Defendant's ordinances are unconstitutional. Therefore, Plaintiffs have failed to state a claim upon which relief may be granted under their first cause of action.

With respect to Plaintiffs' second cause of action, Defendant argues that Plaintiffs have failed to state a claim upon which relief can be granted because Plaintiffs have not alleged a compensable taking of their property. There are two types of regulatory actions that are considered per se takings for Fifth Amendment purposes. *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 538, 125 S.Ct. 2074. See, also, *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 2007-Ohio-5022, ¶ 18. The first type of per se taking involves governmental regulations that cause an owner to suffer a permanent physical invasion of his property. See, *Loretto v. Teleprompter*

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Manhattan CA TV Corp. (1982), 458 U.S. 419, 435-40, 102 S.Ct. 3164. The second type of per se taking involves governmental regulations that deprive the owner of all economically beneficial use of his property. See, *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 1019, 112 S.Ct. 2886.

The third type of takings analysis is for partial takings governed by *Penn Cent. Transp. Co. v. New York City* (1978), 438 U.S. 104, 98 S.Ct. 2646. The *Penn Central* analysis applies when there is no physical invasion of the plaintiff's property and the regulation deprives the property of less than 100 percent of its economically beneficial use. *Shelly Materials* at ¶ 19. Courts should consider the following three factors when determining whether a partial regulatory taking has occurred: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Penn Central* at 124.

Regarding the first type of per se taking, a regulatory action that results in a permanent physical invasion, Plaintiffs have not made any allegations that they suffered a physical invasion of their property. In addition, with regard to the second type of per se taking, Plaintiffs have not alleged that Defendant's regulation deprived them of all economic use of their property. Therefore, Plaintiffs have not stated a claim under the per se taking analysis.

However, this Court must still address the partial taking issue raised in Plaintiffs' second cause of action. Defendant argues that Plaintiffs' second cause of action fails to

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allege a claim upon which relief can be granted under *Penn Central*. Defendant cites to two Ohio Supreme Court decisions in support of its argument.

In *Shelly*, the property owner's mandamus claim was based on the assertion that an involuntary taking had occurred when the board of zoning appeals denied a conditional-use permit to mine sand and gravel. The Ohio Supreme Court upheld the appellate court's decision to deny the writ because there was "no undue burden" on the plaintiff's property. *Id.* at ¶ 40. The Court reasoned that because the county zoning board's denial of the conditional-use permit did not deny the plaintiff of all economically viable use of its property, a compensable taking did not occur. *Id.* at ¶ 41.

Defendant also cites the Ohio Supreme Court's discussion of *Penn Central* in *Gilmour Realty, Inc. v. City of Mayfield Heights*, 119 Ohio St.3d 11, 891 N.E.2d 320, 2008-Ohio-3181. In *Gilmour*, the plaintiff owned commercially zoned property in the City of Mayfield Heights. The City of Mayfield Heights planned to rezone plaintiff's property from commercial to residential. *Id.* at 13. The plaintiff alleged that the City of Mayfield Heights' plan to rezone the property constituted a taking because the rezoning denied plaintiff "'the economical[ly] viable use of the properties as [it] planned and interfered with [its] investment backed expectations.'" *Id.* Because the plaintiff had distinct investment-backed expectations to develop the property, the Court found that plaintiff court proceed under the analysis in *Penn Central*. *Id.* at 16.

Defendant argues that the facts of the instant case are similar to that of *Shelly* and distinguishable from the facts of *Gilmour*. The *Penn Central* analysis instructs this Court to first examine the character of the Defendant's action. As in *Shelly*, Defendant argues

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that the character of rezoning does not place any undue burden upon Plaintiffs' property. With regard to the economic effect of the regulation on the property, Defendant argues that the legislation is not directed to Plaintiffs' property. Therefore, Defendant argues, the zoning or property in another jurisdiction does not amount to a taking or a right to compensation. Finally, Defendant argues that Plaintiffs, as a matter of law, cannot allege that they have been deprived of their distinct investment backed expectations because the legislation does not interfere with the development or use of their properties.

In response, Plaintiffs argue that this Court must conduct a factual inquiry in order to determine whether a partial taking has occurred under *Penn Central*. However, Defendant argues that before a factual analysis as to whether the governmental regulation constitutes a taking, there must be regulation of the Plaintiffs' property. Defendant argues that, in the instant case, there is no regulation that burdens Plaintiffs' property because that property is outside the City of Middletown. This Court agrees with Defendant's arguments. Plaintiffs' second cause of action fails to state a claim upon which relief may be granted.

With regard to Plaintiffs' third cause of action, this Court has already found that Plaintiffs have failed to allege a taking. However, Defendant argues that even if Plaintiffs did allege a taking, the writ of mandamus sought by Plaintiffs is unavailable as a matter of law. Plaintiffs ask this Court for a writ of mandamus compelling Defendant to commence appropriation proceedings. To obtain issuance of a writ of mandamus, it must be shown that there is: (1) a clear legal right to the relief requested; (2) a clear legal duty on the part of the respondent to perform the official act requested; and (3) that the relator has no

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adequate remedy in the ordinary course of law. *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty.* (1990), 56 Ohio St.3d 33, 34, 564 N.E.2d 86.

Defendant argues that Plaintiffs have no right to a Writ of Mandamus because the City of Middletown may not appropriate property located outside its jurisdictional boundaries. Defendant argues that *Britt v. City of Columbus* (1974), 38 Ohio St.3d 1, 309 N.E.2d 412, is applicable to the instant case. In *Britt*, the Ohio Supreme Court held that 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. *Id.* at paragraph one of syllabus. However, Plaintiffs argue that *Britt* has no applicability to the instant case because there is a distinction between appropriation and inverse condemnation. Specifically, Plaintiffs state the Defendant mischaracterizes the remedy for regulatory takings as tantamount to eminent domain proceedings for the appropriation of property by the state. Nevertheless, Defendant argues that there is no distinction.

In the instant case, Plaintiffs request this Court to order Defendant to proceed with an appropriation action under Title 163 of the Ohio Revised Code, entitled "Appropriation of Property." Defendant states that the Code does not distinguish between "inverse condemnation" and "appropriation." R.C. 163.63 states:

> Any reference in the Revised Code to any authority to acquire real property by 'condemnation' or to take real property pursuant to a 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.

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Therefore, Defendant argues, under *Britt* Plaintiffs cannot compel Defendant to appropriate their properties because Defendant may not appropriate property outside its municipal jurisdiction. This Court agrees with Defendant's arguments and finds that Plaintiffs have failed to state a claim upon which relief may be granted under their third cause of action.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant's motion to dismiss pursuant to Civ.R. 12(B)(1) and (B)(6) is **GRANTED**.

This is a final appealable order. There is not just cause for delay.

SO ORDERED.

ENTER,

Michael J. Sage, Judge

Judge Michael J. Sage
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unconstitutional, the duty to pay a tax being a public duty and not a debt: In re Flynn, 23 NP(NS) 113, 31 OD 538.

27. (1940) Fines or penalties arising from a violation of the penal laws of the state are not debts within the meaning of this section, and imprisonment for failure to pay a fine is not an unconstitutional imprisonment for debt: 1940 OAG No.2424.

§ 16 Redress in courts.

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

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

(As amended September 3, 1912.)

Cross-References to Related Sections

Civil actions, RC § 2307.01 et seq.
Court of claims; state liability, RC § 2743.01 et seq.
Political subdivision tort liability, RC § 2744.01 et seq.

Comparative Legislation

Due process, U.S. Const. Amend. V; Amend. XIV

Text Discussion

Actions. 1 Anderson Fam. L. § 15.1 et seq
Immunities in general. Premises Liability § 10.18
State government liability. Premises Liability §§ 10.18-10.22
Suits against state. 2 McDermott § 25-11B

Research Aids

Due process:
O-Jur3d: Bus Rel § 896; Const L §§ 413, 447, 484, 498, 502, 524, 526, 630, 646, 649, 661; Contrib, Indem & Subrog § 83; Crim L § 10; Elect § 223; Foods § 51; Jud S § 9; Jury § 12
Am-Jur2d: Const L §§ 804-859
C.J.S.: Const L §§ 945-976

Enemy alien's right to sue in wartime:
O-Jur3d: War § 1
Am-Jur2d: Const L § 719
C.J.S.: Const L §§ 667, 703

Redress in courts:
O-Jur3d: Actions §§ 23, 33; Aliens §§ 5, 19; Arb & A § 16; Fam L §§ 837, 865; Gov Tort Liab § 1; Parties § 2; State § 187
Am-Jur2d: Const L §§ 526-532
C.J.S.: Const L §§ 946, 968

West Key No. Reference
Const Law 251, 251.5, 251.6

ALR

Contracting party's right of redress for fraud as affected by his own breach of the contract before discovering the fraud. 13 ALR2d 1248.
Immunity of public officials from personal liability in civil rights actions brought by public employees under 42 USCS § 1983. 63 ALRFed 744.
State or local governmental unit's liability for injury to private highway construction worker based on its own negligence. 29 ALR4th 1188.

Law Review

Can municipal immunity in Ohio be resurrected from the sewers after Haverlack v. Portage Homes, Inc.? Comment. 13 CapitalULRev 41 (1983).
Claims against the state of Ohio. Editorial Note. 36 CinLRev 239 (1967).
Defectively designed highways. Steven J. Erlsten. 16 ClevMarLR 264 (1967).
Exclusion of plaintiffs from the courtroom in personal injury actions: a matter of discretion or constitutional right? Allen P. Grunes. 38 CaseWResLRev 387 (1988).
Governmental immunity in Ohio: common law doctrine or constitutional prohibition. Note. 3 CapitalULRev 134 (1974).
How open is open? The development of the public access doctrine under state open court provisions. Comment. 60 CinLRev 1307 (1992).
A judicial Janus: *Meyer v. Nebraska* in historical perspective. William G. Ross. 57 CinLRev 125 (1988).
Municipal immunity in Ohio—how much wrong can a municipality do? Note. 15 ToledoLRev 1559 (1984).
The new breed of municipal dog control laws: are they constitutional? Comment. 53 CinLRev 1067 (1984).
Nishiyama v. Dickson County: the sixth circuit finds an exception to *Parratt v. Taylor* for deprivation of substantive due process rights. Note. 15 NoKyLRev 359 (1988).
Ohio sovereign immunity: long live the king. Comment. 28 OSLJ 75 (1967).
The Ohio sundry claims board. John P. Walsh. 9 OSLJ 437 (1948).
Parent-child tort immunity law in Ohio. Comment. 18 AkronLRev 667 (1985).
Peebles v. Clement: creditors' prejudgment remedies under attack in Ohio. Note. 10 CapitalULRev 397 (1980).
Sexual harassment in the workplace: a new frontier in the law of torts. James D. Dennis. 19 ONorthLRev 613 (1993).
Sovereign immunity abrogated in Ohio: Krause v. State. James B. Wilkens. 21 ClevStLRev 25 (1972).
Sovereign immunity — an argument con. Steven A. Sindell. 22 ClevStLRev 55 (1973).
Sovereign immunity — an argument pro. Robert F. Howarth, Jr. 22 ClevStLRev 48 (1973).
State constitutions' remedy guarantee provisions provide more than mere "lip service" to rendering justice. Comment. 16 ToledoLRev 585 (1985).
State liability for injuries inflicted by parolees. Comment. 56 CinLRev 615 (1987).
The unconstitutionality of sovereign immunity in Ohio—last stand for the illegitimate king. Commentary. 18 Toledo 77 (1986).

CASE NOTES AND OAG

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Alienation of affections, 86, 98
Amatory actions abolished, 18, 92
Child abuse, immunity of those reporting, 73
Collateral source rule, 5, 9.1
Commitment proceedings, 31, 55
County liability, 33, 46, 118
Deadman's statute, 101

villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

Amendments

(Adopted September 3, 1912.)

Section 2

Text of Section 2:

General and Additional Laws

General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

Amendments

(Adopted September 3, 1912.)

Section 3

Text of Section 3:

Powers

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Amendments

(Adopted September 3, 1912.)

giance or loyalty as in violation of privileges and immunities clause. 18 ALR2d 309.
Nomination, invalid special privilege as granted, and equal protection of law as violated, by delegation to private persons or organizations of power to appoint or nominate to public office. 97 ALR2d 378, 382.

§ 18 Suspension of laws.

No power of suspending laws shall ever be exercised, except by the general assembly.

Research Aids

Suspension of laws:
O-Jur3d: Const L § 303
Am-Jur2d: Const L §§ 98, 371, 407
C.J.S.: Const L § 3

West Key No. Reference
Const Law 1

CASE NOTES AND OAG

1. (1923) The amendment to the home-rule charter of the city of Cleveland, adopted in 1921, was not a suspension of law: Hile v. Cleveland, 107 OS 144, 141 NE 35.

2. (1914) The provisions of the civil service law (GC § 486-1 [RC § 124.01] et seq), authorizing the civil service commission under certain defined circumstances to omit competitive examinations are not repugnant to this section: Green v. Civil Service Comm., 90 OS 252, 107 NE 531.

3. (1873) The authority conferred upon commissioners of counties and trustees of townships to grant general and special permission for animals named to run at large, as conferred by § 2, of the act of April 13, 1865 (62 v 185; see GC § 5811 [RC § 951.04] et seq), was within the scope of legislative power, and does not conflict with this section: Fox v. Fox, 24 OS 335.

4. (1902) Provisions in local option statutes authorizing the residents of a district to determine for a limited period whether intoxicating liquors shall or shall not be sold in such district, and providing for another determination at the expiration of such period, do not violate this section: Lloyd v. Dollison, 3 CC(NS) 328, 13 CD 571.

5. (1927) Only the general assembly may exercise the power of suspending laws. The operation of a section of the General Code may be suspended by the terms of a provision properly included in an appropriation act during the life of such act, which cannot exceed two years: 1927 OAG p.718.

§ 19 Inviolability of private property.

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

Cross-References to Related Sections

Appropriation of property, RC § 163.01 et seq.
Eminent domain proceedings for registered land, RC § 5309.71 et seq.

Ohio Constitution

Appropriation of right of way by corporation, Ohio Const. art. XIII, § 5.

Comparative Legislation

U.S. Const., Amend. V
U.S. Const., Amend. XIV

Text Discussion

Appropriation of property. **2 Ohio Civ. Prac.** Ch. 21
Eminent domain generally. **2 McDermott** § 25-31A
Jurors. **5 Ohio Civ. Prac.** Ch. 176
Property rights. **1 Anderson Fam. L.** §§ 12.1–12.9
Sources of the right to trial by jury. **5 Ohio Civ. Prac.** § 174.02
Will, power to make as protected by the constitution. **1 Page on Wills** § 3.1 et seq
Will, power to revoke. **2 Page on Wills** § 21.1

Research Aids

Private property to be held inviolate:
O-Jur3d: Const L §§ 277, 426, 484, 485, 490, 491, 497–502, 504, 505; Em Dom §§ 2, 11, 13, 31, 36, 39, 40, 48, 101, 103, 105, 109, 113, 117, 121, 122, 135, 146, 186, 240, 255, 256, 260, 263, 275, 277, 278, 350, 359, 365, 378, 474; Highways §§ 77, 244, 250, 253, 262, 281, 282, 364, 502; Prop § 20; Sch §§ 32, 201; Spec A § 13; Tax § 1047; Water §§ 72, 332, 423, 536
Am-Jur2d: Const L §§ 580–586
C.J.S.: Const L § 228 et seq

West Key No. Reference
Const Law 92 et seq

ALR

Abutting owner's right to damages for limitation of access caused by conversion of conventional road into limited-access highway. 42 ALR3d 13.
Compensation for condemning public utility plant. 68 ALR2d 392.
Compensation for federal taking of private road or right of way for use as public road. 36 ALRFed 515.
Eminent domain: industrial park or similar development as public use justifying condemnation of private property. 62 ALR4th 1183.
Eminent domain: measure and elements of damages or compensation for condemnation of public transportation system. 35 ALR4th 1263.
Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of parent. 61 ALR4th 251.
Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of spouse. 61 ALR4th 309.
Excessiveness or adequacy of damages awarded for parents' noneconomic loss caused by personal injury or death of child. 61 ALR4th 413.
Measure and elements of damage for limitation of access caused by conversion of conventional road into limited-access highway. 42 ALR3d 148.
Method of determining rate of interest allowed on award to owner of property taken by United States in eminent domain proceeding. 56 ALRFed 477.

U.S. Constitution - Amendment 5

Amendment 5 - Trial and Punishment, Compensation for Takings

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

Notes for this amendment: Proposed 9/25/1789
Ratified 12/15/1791

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U.S. Constitution - Amendment 14

Amendment 14 - Citizenship Rights

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1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Notes for this amendment:
Proposed 6/13/1866
Ratified 7/9/1868
Note
History
Article 1, Section 2

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163.63 Condemnation - eminent domain.

Any reference in the Revised Code to any authority to acquire real property by "condemnation" or to take real property pursuant to a 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.

Effective Date: 2007 SB7 10-10-2007