

IN THE SUPREME COURT OF OHIO

MATTHEW E. MOORE, ET AL.)	Case No. 2010-1363
)	
Appellants)	On Appeal from the Butler
)	County Court of Appeals
v.)	Twelfth Appellate District
)	
CITY OF MIDDLETOWN, OHIO)	Court of Appeals Case
)	No. CA200908205
Appellee)	

**BRIEF OF *AMICUS CURIAE*
THE OHIO MUNICIPAL LEAGUE
IN SUPPORT OF DEFENDANT-APPELLEE
CITY OF MIDDLETOWN, OHIO**

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INTRODUCTION

The Ohio Municipal League (the "League") urges this Court to affirm the decision of the Twelfth District Court of Appeals, in *Matthew E. Moore v. City of Middletown*, 2010-Ohio-2962.

The most important fact in this case is not the fact that the Appellants' properties are not located in the City of Middletown. The most important fact in this case is that the City of Middletown did not pass legislation which regulated the Appellants' property. Consequently, Appellants do not have standing to challenge the constitutionality of the zoning actions which permitted another property owner to make an economically valuable use of its property.

The League also wishes to address the authority of a municipality to zone a property, and permit the use of the property by its owner, in a manner that provides economic development within the municipality. Given the economy of the country, generally, and the State of Ohio in particular, the application of zoning regulations in a manner which permit the growth of business and the employment of Ohioans absolutely advances the health, safety and welfare of the City and the region. To the extent the Appellants seek to control the reasonable use of someone else's property through a court action, and prevent an economically valuable use of such property, their case is meritless.

This Court is respectfully requested to affirm the decision of the Twelfth District that Appellants do not have standing to bring their action. It may be that the property owner's use of the property could someday cause harm to the Appellants and/or their property. This hypothetical case is not now before the court, and would not implicate the City in any event.

STATEMENT OF AMICUS INTEREST

The League is a non-profit Ohio corporation composed of a membership of more than 700 Ohio cities and villages. The League was incorporated as an Ohio non-profit corporation in

1952 by city and village officials who saw the need for a statewide association to serve the interests of Ohio municipal government. The League provides educational opportunities for municipal officials and advocates on behalf of Ohio's municipal corporations.

The League and its members have an interest in allowing property owners within a municipality to be permitted to use their properties unhindered by neighboring property owners who wish to seek compensation from the municipality for such rezoning decisions.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the Statement of the Case and the Statement of Facts contained within the Brief of the City of Middletown, Ohio.

ARGUMENT

Proposition of Law I: An owner of property that is contiguous to property that has been rezoned does not have standing to bring an action against a municipal corporation seeking compensation for the rezoning of property owned by someone else.

Standing

In order to seek relief from a court, a party must have standing. *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, ¶ 22, citing *Ohio Contrs. Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 1994-Ohio-183. To decide whether a party has standing the "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, 485 N.E.2d 701.

Because the City has not regulated Appellants property, the Appellants do not have standing to assert that the government regulation is unconstitutional, e.g. that it constitutes a taking of their property.

A Regulatory Taking Requires a Government Regulation of Property

A regulatory takings claim requires a government regulation of the property that is the subject of the takings claim. *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St.3d 385, 2010-Ohio-1473, 928 N.E.2d 706, ¶ 19 (citing *Neifert v. Dept. of the Environment* (2006), 395 Md. 486, 522, 910 A.2d 1100: “In order to make a successful claim under the Takings Clause, appellants must establish first that they possess a constitutionally protected property interest.”) While this interest “encompasses more than the physical object owned,” *Id.*, it cannot encompass an interest in the zoning regulations applicable to someone else’s property. The other property owner, the one who owns the property that is the subject of the regulation, has a right to use that property in any manner permitted by law.

The trial court agreed with the City’s argument that “there is no regulation that burdens [Appellants’] property because that property is outside the City of Middletown.” *Matthew E. Moore v. City of Middletown*, Court of Common Pleas, Butler County, Ohio, Case Number CV 2008 09 4191, page 10. The League respectfully suggests that the relevant point is not that the Appellants’ property is outside the City of Middletown; the relevant point is that Middletown’s regulations do not “burden” Appellants’ properties.

The Twelfth District concluded that the City’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.” *Moore* at ¶ 12. This is correct; there has been no taking of Appellants’ property.

A regulatory taking cannot occur in the absence of a regulation of a plaintiff’s property. Therefore, the trial court and the court of appeals correctly concluded that Appellants lack standing to bring a takings claim based upon the rezoning of their neighbor’s property.

Proposition of Law II: The police powers of a municipal corporation include the power to enact ordinances for the purpose of furthering economic development and job creation, and municipal legislation that accomplishes these objectives are not “arbitrary per se” because only one property is the object of a rezoning action.

Appellants assert that the zoning ordinance and setback ordinance enacted by the City “were passed for the benefit of one of Middletown’s most prominent employers.” *Moore* at ¶ 19. Appellants argue that “using the police power to exclusively confer such benefit upon a single property owner, is arbitrary per se.” *Merit Brief of Appellants Matthew E. Moore and Lori A. Moore*, page 23. As the Appellants’ premises are faulty, their argument must fail.

Article XVIII, Section 3, of the Ohio Constitution provides: “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.”

The Ohio Supreme Court has defined the police power as the right “to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires.” *Miami County v. City of Dayton* (1915), 92 Ohio St. 215, 223, 110 N.E. 726. The police power “is not static and must ever be exercised in the light of changing conditions and the public needs. It is not circumscribed by fixed limits, but is capable of development and modification within certain limits so that the powers of government control may be adequate to meet the changing social, economic, and political conditions.” *State ex rel. Eaton v. Price* (1957), 105 Ohio App.376, 388, 152 N.E.2d 776, quoting 10 Ohio Jurisprudence (2d), 416, Section 338.

The police power, therefore, includes the power to enact regulations furthering economic development and job creation. In this case, the police power involves allowing a property owner to make an economically viable use of its property.

Ordinances passed in furtherance of this power must be upheld “if they bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public, and are not arbitrary, discriminatory, capricious or unreasonable.” *State v. Thompkins* (1996), 75 Ohio St.3d 558, 560, 664 N.E.2d 926, citing *Cincinnati v. Correll* (1943), 141 Ohio St. 535, 539, 49 N.E.2d 412.

The question of whether an ordinance enacted in furtherance of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is arbitrary, discriminatory, capricious or unreasonable are questions, in the first instance, for the legislative body enacting the ordinance and within the discretion of such legislative body. Unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them. *Benjamin v. City of Columbus* (1957), 167 Ohio St. 103, 146 N.E.2d 854.

The ordinances enacted by the City 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.” *Moore* at ¶ 19. The trial court concluded that the Appellants failed to allege sufficient facts to overcome the strong presumption that the City’s ordinances are constitutional. *Matthew E. Moore v. City of Middletown*, Court of Common Pleas, Butler County, Ohio, Case Number CV 2008-09-4191, page 7. The Twelfth District agreed, concluding “that given Landowners’ admission that the ordinances were passed for the benefit of one of Middletown’s most prominent employers, we

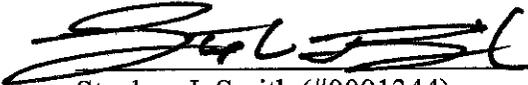
find it clear from the four corners of their complaint that the ordinances were not arbitrary, capricious, or unreasonable.” *Moore* at ¶ 19.

The City’s ordinances, contrary to Plaintiff’s allegations, benefited more than one single property owner. The ordinances benefited the individuals that will be employed at the coke plant, benefited the surrounding businesses that will experience increased activity and revenue from the individuals employed at the coke plant, and benefited the general public who will see increased tax revenues. If, however, the City’s ordinance, as Appellants allege, benefited only AK Steel Corporation, this does not make the ordinance arbitrary as the accommodation of a business is rationally and reasonably related to the City’s police powers.

CONCLUSION

Based upon the foregoing, the League respectfully requests this court to affirm the judgment of the Twelfth District Court of Appeals.

Respectfully submitted,



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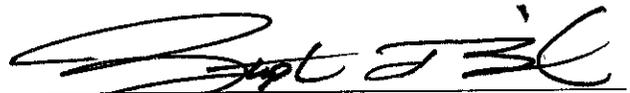
CERTIFICATE OF SERVICE

A copy of the within *Brief of Amicus Curiae The Ohio Municipal League in Support of Defendant-Appellee City of Middletown, Ohio* has been mailed by regular U.S. mail on the ____ day of April, 2011, to:

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