

ORIGINAL

IN THE SUPREME COURT OF OHIO

MATTHEW E. MOORE, et al. : Case No. 2010- 1363
: :
Appellants : :
v. : :
: :
CITY OF MIDDLETOWN, OHIO : :
: :
Appellee : :

MERIT BRIEF OF THE APPELLEE CITY OF MIDDLETOWN

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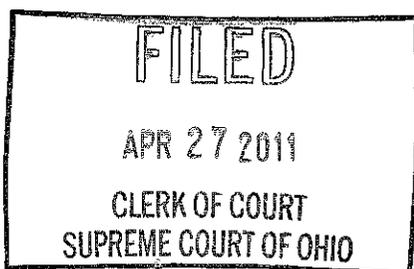


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I. COMBINED STATEMENT OF FACTS AND PROCEDURAL POSTURE

The Appellants Matthew E. Moore and Lori A. Moore own real estate in the City of Monroe, Ohio. They allege in their Complaint that their property is adjacent to a 157 acre parcel, wholly located in the City of Middletown, known as the Martin-Bake property.¹ Middletown Ordinance No. 02008-64² rezoned a portion of the Martin-Bake property from a D-1 zone (residential) to I-2 (industrial). Significantly, another portion of the Martin-Bake property had previously been zoned industrial and the City ordinance attacked by the Appellants rezoned the balance of the Martin-Bake property. The second ordinance attacked by the Appellants, No. 02008-63,³ is a text amendment to the City's zoning code. That ordinance clarified the setback requirements for manufacturing and processing uses within industrial zones in the City. The text amendment was not specific to the Martin-Bake property, but was generally applicable to all industrial zones in the City of Middletown and merely clarified the setback requirements.

The *Moore* case was later consolidated with other similar actions brought by Betty Anne Metzcar, Robert W. Cowman and Carol Anne Cowman. The City of Middletown filed Motions to Dismiss as to all Plaintiffs. The City requested that the trial court take judicial notice of the boundaries of the properties in question and supplied a map showing the and municipal boundaries.⁴

¹ These Appellants allege their property is immediately adjacent to the Martin-Bake property. However, their property is not immediately adjacent and is almost entirely surrounded by the property of Metzcar, who is not a party to this appeal. See, T.d. 40, Motion by Defendant City of Middletown Requesting Court to take Judicial Notice of Facts, Ex. A; Appx. No. 3, pgs 15-17.

² Appx. No. 1, pgs. 1-3.

³ Appx. No. 2, pgs 9-14.

⁴ T.d. 40, Appx. No. 3, pgs 15-17.

The trial court took judicial notice of boundaries.⁵ The trial court, in its judgment in favor of the City, found that while the Plaintiffs had standing, the City was entitled to judgment as a matter of law as the Plaintiffs had failed to state a claim under Civ. R. 12(B)(6).

The Moores and Metzcar timely appealed to the Twelfth District. After briefing and an oral argument, the Court of Appeals requested supplemental briefs on the issue of whether the Appellants had standing. The Court of Appeals, in affirming the trial court's judgment, held that the Appellants lacked standing and that even if they had standing, Appellants had failed to state a claim under Civ. R. 12(B)(6). Only the Moores are Appellants in this Appeal.

II. THE COMPLAINT

The Complaint generally alleged that the City of Middletown unlawfully rezoned the Martin-Bake property and unlawfully enacted the set-back provisions. The Appellants further alleged that the City's actions were arbitrary and that the ordinances were enacted "for the benefit of AK Steel Corporation, a major employer in the City of Middletown."⁶

Even though not alleged in the Complaint, it was later conceded by the Appellants that their property lies in the City of Monroe. The Martin-Bake property lies entirely within the City of Middletown. The boundary line of the south portion of the Martin-Bake property is the corporate boundary line between Monroe and Middletown.⁷

⁵ T.d. 45, Decision and entry, p. 3.

⁶ T.d. 4, Complaint ¶ 5-8.

⁷ T.d. 4, Complaint; T.d. 20, Defendant's Motion to Dismiss, Exs. 1-3; T.d. 40, Motion by Defendant City of Middletown Requesting Court to Take Judicial Notice of Facts, Ex. A; Appx. No. 3, pgs. 15-17.

The Appellants generally alleged a taking and asserted that the value of their property has been diminished and that they were deprived of their property rights without due process of law.⁸ They also alleged a loss of investment-backed expectations.⁹ In their first cause of action, they allege that the rezoning is arbitrary, unreasonable and unconstitutional and “that the effect of such action upon Plaintiffs/Relators property violates due process and equal protection clauses of the fourteenth amendment of the United States Constitution and Article I, Section 16 of the Ohio Constitution.¹⁰ In their second cause of action the Plaintiffs allege that the rezoning “constitutes a taking of Plaintiffs/Relator’s private property rights”¹¹ In their third cause of action, the Appellants allege that they have a clear right to receive compensation from the City for its unlawful taking and that the City “has a clear duty to commence appropriation proceedings pursuant to Ohio Revised Code Title 163.”¹²

III. ARGUMENT

A. Introduction

The Appellants’ sole proposition of law is directed to the issue of “standing” as are subsections “A,” “B” and “C” of their argument. In subsections “D” and “E” of their brief, they assert that the City of Middletown’s actions constituted a partial regulatory taking and deprived the Appellants of property rights without due process of law.

⁸ T.d. 4, Complaint, ¶¶ 15, 20.

⁹ T.d. 4, Complaint, ¶ 21.

¹⁰ T.d. 4, Complaint, ¶ 20.

¹¹ T.d. 4, Complaint, ¶ 21.

¹² T.d. 4, Complaint, ¶ 22.

The Appellee will address the various contentions raised in the Appellants' brief in the same order that they have been briefed by the Appellants.

B. The Appellants Lack Standing To Challenge The City Of Middletown's Ordinances As The Appellants' Property Is Outside The City And Has Not Legally Been Affected By The City's Legislation

The Appellants generally assert jurisdiction under Article 1, Section 19 of the Ohio Constitution and the Declaratory Judgment Act, R.C. §2721, *et seq.* They also assert that there has been a "taking" under Title 163 of the Ohio Revised Code entitling them to a *writ of mandamus*, compelling the City to appropriate their properties.¹³ The underlying bases for the Appellants' three causes of action are the allegations that there has been an effect on Appellants' properties,¹⁴ causing Appellants to suffer a loss of investment-backed expectations,¹⁵ and entitling them to a *writ of mandamus* compelling the City to appropriate their properties.¹⁶

In order to invoke a court's subject-matter jurisdiction, a party must have standing. Subject-matter jurisdiction "is a condition precedent to a court's ability to consider a case."¹⁷ If the party does not have standing, the court is without jurisdiction to consider the matter.¹⁸

Standing has been defined as "a party's right to make a legal claim or seek judicial

¹³ T.d. 4, Complaint, ¶¶ 3, 4.

¹⁴ T.d. 4, Complaint ¶ 20, First Cause of Action.

¹⁵ T.d. 4, Complaint ¶ 21, Second Cause of Action.

¹⁶ T.d. 4, Complaint ¶ 22, Third Cause of Action.

¹⁷ *Id.*

¹⁸ *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 298 N.E.2d 515.

enforcement of a duty or right.”¹⁹ Further, a plaintiff challenging municipal legislation must show that he is “within the purview of the ordinance or will be affected by its operation.”²⁰ A plaintiff must allege a “direct interest in the ordinance” such that his rights will be affected by its enforcement.²¹ In order to have standing, a challenging party must be able to “demonstrate that he ‘has suffered or will suffer a specific injury, that the injury is traceable to the challenged action, and that it is likely that the injury will be redressed by a favorable decision.’”²²

The Declaratory Judgment Act does not confer standing and is “simply a mechanism through which an appropriate plaintiff may proceed, but the statute does not create the appropriate plaintiff.”²³ As noted by the Court in *Aarti*, the availability of declaratory relief “is a separate question from one’s standing to file such an action.”²⁴

¹⁹ *Ohio Pyro, Inc. v. Ohio Dept. Of Commerce*, 115 Ohio St.3d 375, 875 N.E.2d 550, 2007-Ohio-5024, ¶ 27, quoting Black’s Law Dictionary (8th Ed. 2004).

²⁰ *Anderson v. Brown* (1968), 13 Ohio St.2d 53, 55, 233N.E.2d. 584, Syllabus 1.

²¹ *Id.*

²² *Wilmington City School Dist. Bd. of Edn. v. Bd. of Commissioners of Clinton County* (12th Dist. 2000), 141 Ohio App.3d 232, 238, 750 N.E.2d 1141, 1146, quoting *Eng. Technicians Assn. v. Ohio Dept. of Transportation* (1991), 72 Ohio App.3d 106, 110-111, 593 N.E.2d 472, 474-475.

²³ *Aarti Hospitality, LLC v. City of Grove City, Ohio* (S.D. Ohio, 2007), 486 F. Supp.2d 696, 700, citing *Walgash v. Bd. of Trustees of Monclova Township, Lucas County* (Mar. 20, 1981), 6th Dist. No. L-80-105, 1981 W.L. 5518 at *4.

²⁴ *Aarti at 700*, quoting *Holcomb v. Schlichter* (12th Dist. 1986), 34 Ohio App.3d 161, 164, 517 N.E.2d 1001, 1004-05.

Under the Declaratory Judgment Act,²⁵ a court may only determine “rights, status or other legal relations.”²⁶ Thus, if the Appellants’ rights are not the subject of the ordinance being challenged, the Appellants do not have standing to challenge the City’s enactments. Here, no rights of the Appellants have been affected by the enactment of the Middletown zoning ordinances as those ordinances do not in any respect burden Appellants’ property. The Appellants have no legally protected interest in the Martin-Bake property and no interest in the enforcement of the ordinances. Nor do the Appellants possess a property right so as to prevent Middletown from rezoning property within its borders.

This Court has held that “surrounding property owners” have no legal interest in the outcome of a declaratory judgment action challenging the constitutionality of zoning as applied to another parcel of real property.²⁷ The *Driscoll* court explained:

“[T]he surrounding property owners may have a practical interest in the outcome of a declaratory judgment action attacking the constitutionality of zoning as it applies to a specific parcel of property, but they have no legal interest in the outcome.”²⁸
(Emphasis supplied.)

The Moores have asserted they have a right to a judgment declaring Middletown’s ordinances to be unconstitutional. They generally allege that the “effect of such action upon Plaintiff/Relator’s property violates” the United States and Ohio’s constitutions.²⁹ However, “[a] declaratory judgment

²⁵ R.C. § 2721.01, *et seq.*

²⁶ R.C. § 2721.02, .03.

²⁷ *Driscoll v. Austintown Associates* (1975), 42 Ohio St.2d 263, 273, 328 N.E.2d 395.

²⁸ *Id.* at 273.

²⁹ Complaint ¶ 20.

action lies when a party challenges a zoning ordinance as it applies to a specific parcel of property to proscribe the owner's proposed use of the property."³⁰ "The overall constitutionality of a zoning ordinance as applied to a particular parcel of property is the central question."³¹ Here, the Appellants have not alleged that the rezoning or set-back ordinances were directed to their property. Absent such an allegation, they lack standing to challenge Middletown's ordinances.

Under *Karches*, a court is to "view the constitutional issue only in light of the proposed specific use." The term "specific use" as discussed in *Karches* refers to the use by the property owner whose property is the subject of the regulation. Thus, under *Karches* there must be a controversy arising out of the application of the zoning to the Moore property. "A prerequisite to a determination that an actual controversy exists in a declaratory judgment action is a final decision concerning the application of the zoning regulation to the specific property in question."³²

Here, the City rezoned a parcel within its municipal limits, and that zoning was the same as other surrounding parcels.³³ Absent any allegation that the City's rezoning of the Martin-Bake property was directed to the Appellants' property, they lack standing to challenge the rezoning. Similarly, the set-back ordinance that they challenge was not directed to their property and indeed was not directed to any specific parcel of real estate. It was no more than a clarification of Middletown's set-back requirements that applied to all property zoned "industrial".

³⁰ *Karches v. City of Cincinnati* (1988), 38 Ohio St.3d 12, 16, 526 N.E.2d 1350.

³¹ *Id.*

³² *Id.*, Syllabus 2.

³³ T.d. 22, Defendant's Motion To Dismiss, Exs. 1-2; T.d.40, Motion by Defendants City of Middletown Requesting the Court to Take Judicial Notice of Facts, Ex. A; Appx. No. 3, pgs. 15-17.

The Appellants cite *Joseph Airport Toyota, Inc. v. Vandalia*³⁴ as authority for their standing argument. However, in *Joseph Airport Toyota*, the plaintiff who challenged the rezoning of another parcel by the City owned property in Vandalia. In *Joseph Airport Toyota*, the court's discussion of standing did not contain an articulation of what property right was being harmed by the rezoning of another property. The court appeared to accept the argument that a decrease in property value constituted a sufficient property right to provide standing to challenge the zoning of another's property. That view conflicts with *Penn Central* and decisions of this Court. As discussed by the Court of Appeals below, a diminution in value does not give rise to a taking.³⁵

Further, in *Joseph Airport Toyota*, there was no discussion of *Penn Central Transp Co. v. City of New York*.³⁶ When *Joseph Airport Toyota* was decided, this Court had not yet fully articulated its adoption of the partial takings analysis of *Penn Central* and later U.S. Supreme Court cases that explained *Penn Central*.³⁷ As stated by the Eleventh District, "[t]he existence of the three separate categories and the separate tests for determining if a taking has taken place, has recently

³⁴ (Mar. 1, 2002), 2nd Dist. No. 18904, 2002-Ohio-928.

³⁵ *Moore v. City of Middletown*, (June 28, 2010) 12th Dist. #20-CA-2009-08-205, 2010-Ohio-2962, ¶¶ 23-24; citing *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 (87 percent diminution in value not a taking); *BSW Dev. Group v. Dayton*, (1998), 83 Ohio. St.3d 338, 344, 699 N.E.2d 1271.

³⁶ *Penn Central Transp. Co. v. City of New York* (1978), 438 U.S. 104, 98 S.Ct. 2646.

³⁷ See, *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs*, 115 Ohio St.3d 337, 2007 Ohio 5022, *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 125 S.Ct. 2074.

been recognized by the Supreme Court of Ohio.”³⁸

The Appellants cite to this Court’s decision in *Midwest Fireworks*,³⁹ in which the plaintiff’s property was across the street from property for which a zoning certificate had been issued for a fireworks facility. This Court found that under the facts of the case, the plaintiff was a “person aggrieved” within the meaning of R.C. §519.15 and had standing to appeal the decision of the township granting the zoning certificate to Midwest Fireworks.⁴⁰ Thus, *Midwest Fireworks* is distinguishable as it dealt with standing in the context of an administrative appeal and as noted by the Court, the right to appeal an administrative decision “must be conferred by statute.”⁴¹

The Appellants have cited multiple cases from other jurisdictions, claiming that those cases provide authority for their standing argument. In *Clifton II*,⁴² the Court of Appeals distinguished those cases and found that “none of these cases specifically dealt with the issue before this court; namely whether a nonresident contiguous property owner has standing to bring an action against an adjacent political subdivision seeking compensation for rezoned property located solely within its own jurisdictional boundaries.”⁴³ For example, in *Board of County Commissioners v. City of*

³⁸ *State ex rel. Duncan v. Village of Middlefield* (April 18, 2008), Eleventh Dist. No. 2005-L-140, 2008-Ohio-1891, citing *State ex rel. Shelly*, supra.

³⁹ *Midwest Fireworks, Mfg. Co. v. Deerfield Township Bd. of Zoning Appeals* (2001), 91 Ohio St.3d 174, 179, 743 N.E.2d 894, 899.

⁴⁰ *Id.*

⁴¹ 91 Ohio St.3d at 177, 743 N.E.2d at 897.

⁴² *Clifton v. Blanchester*, (May 24, 2010) Twelfth Dist. No. CA 2009-07-009, 2010-Ohio-2309, ¶¶ 16-25.

⁴³ *Id.* at ¶ 25.

Thorton,⁴⁴ the court held that an adjacent city had standing to challenge the zoning action of a county. In *Scott v. City of Indian Wells*,⁴⁵ the issue was whether notice was required to be given to adjacent property owners, even if the adjacent property owners were nonresidents. The Court in *Scott* noted that “at the very least” the city owed a duty to hear any residents of adjoining municipalities who may be adversely affected by proposed zoning changes.⁴⁶

The Appellants rely on *Borough of Cresskill v. Borough of Dumont* which they contend is the lead case supporting their standing argument.⁴⁷ However, in *Borough of Cresskill*, the court held adjacent property owners were owed the right to be heard, and that right gave rise to their standing to sue.⁴⁸ Moreover, *Borough of Cresskill*, decided in 1954, obviously does not contain any discussion of more recent cases that control takings analyses. Here, the Appellants have not alleged that they were deprived of the opportunity to be heard. Indeed, they were provided notice of the zoning hearings and did participate in those hearings.⁴⁹

The arguments made by the Appellants primarily discuss the issue of standing in relation to the declaratory judgment claims. However, the Appellants also lack standing to bring an action in mandamus. In order to bring a mandamus action, there must be an allegation of a taking. The

⁴⁴ (Colo. S. Ct., 1981), 629 P.2d 605.

⁴⁵ (1972), 6 Cal.3d 541, 492 P.2d 1137.

⁴⁶ *Id.* at 547.

⁴⁷ *Borough of Cresskill v. Borough of Dumont* (1954), 15 N.J. 238, 104 A.2d 441.

⁴⁸ *Id.* at 15 N.J. 247-248.

⁴⁹ T.d. 22, Defendant’s Exhibits filed in support of Motion to Dismiss, Ex. 2, Appx. No. 1, pgs 6-8.

Complaint does not contain such an allegation as there has been no claim that the City's actions have interfered with the Appellants' use or ownership of their property. Accordingly, the Appellants lack standing to bring an action in mandamus.

For the reasons discussed above, the Court should affirm the Court of Appeals judgment as the Appellants lack standing.

C. The Lower Courts Did Not Err In Dismissing The Appellants' Complaint Pursuant To Civ. R. 12(B)(6) As The Appellants Failed To State A Claim Upon Which Relief Could Be Granted.

1. The Appellants Failed To State A Claim As The City of Middletown's Rezoning Ordinance Did Not Constitute A Taking.

a. A Political Subdivision's Rezoning Of A Parcel Entirely Within Its Boundaries Does Not Constitute A Taking Of Adjacent Property.

The Appellants contend that the Middletown ordinances constituted a partial regulatory taking of their property. Both the trial and appellate courts correctly found that there was no taking and both applied the appropriate "takings" analysis as set forth by the United State Supreme Court and this Court.

The Appellants assert that Middletown's rezoning of the Martin-Bake property amounted to a compensable governmental "taking" of their adjacent private property. They do not allege that they have been deprived of all viable economic use of their property, nor do they allege that Middletown's rezoning of the Martin-Bake property has been applied to their property. In fact, they do not allege that Middletown has taken any regulatory action as to their property located in Monroe.

Within the land use context, there are two types of "*per se*" takings. The first is a "direct encroachment on the land 'which subjects it to a public use that excludes or restricts dominion and

control of the owner over it.”⁵⁰ In the traditional eminent domain context, the government’s action physically seizes or exclusively appropriates a landowner’s property for a public purpose, therefore it is clear that the government’s appropriation of the landowner’s property constitutes a compensable “taking” within the meaning of the United States and Ohio Constitutions.⁵¹

In some instances, the government’s action does not directly appropriate or invade a landowner’s property. Rather, the government’s intrusion on a landowner’s property rights occurs by regulation of the property. For example, if a municipality zones a particular parcel so as to preclude certain uses of a property, the landowner may allege that there has been a “regulatory” taking that deprives him of all economic use of the property.⁵²

“Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property – however minor – it must be provided just compensation . . . A second categorical rule applies to regulations that completely deny an owner of ‘all economically beneficial use’ of her property.”⁵³ (Emphasis supplied.)

Thus, in order to state a claim under a *per se* taking theory, a plaintiff must allege that there has been either a physical invasion of his property or a regulation depriving him of all economic viable use. Here, no claim has been stated by the Appellants for a *per se* taking. The City has not

⁵⁰ *State ex rel. Reich v. City of Beachwood*, 158 Ohio App.3d. 588, 591, 820 N.E.2d 936, 2004-Ohio-5733, ¶ 14 (citations omitted); *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 538, 125 S.Ct. 2074.

⁵¹ *State ex rel. Shelly Materials, Inc. v. Clark County Bd. of Commsrs.*, 115 Ohio St.3d. 337, 341, 875 N.E.2d 59, 2007-Ohio-5022, ¶¶ 17-18.

⁵² *Id.*

⁵³ *Lingle* at 544 U.S. 538, citing *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 1014, 112 S.Ct. 2886.

encroached on their property nor attempted to regulate their property.

b. The Appellants Failed To State A Claim For The Alleged Diminution In Value Of Their Real Property Or For Loss Of Their Investment-Backed Expectations.

Outside of the two *per se* types of takings challenges, “regulatory takings” are governed by the standards set forth in *Penn Central*.⁵⁴ Here, the Appellants alleged that they were deprived of their “investment backed expectations” on account of Middletown’s rezoning of the Martin-Bake property. The “investment-backed expectations” language of their Complaint is apparently derived from the Supreme Court’s decision in *Penn Central*. In *Penn Central*, New York City enacted a historic landmarks law that placed restrictions on the development of historic landmarks and the plaintiff asserted that a taking had occurred as the law affected its development rights. The Supreme Court discussed the possibility that a taking could occur if there was interference with a plaintiff’s distinct investment-backed expectations, and articulated a balancing test to determine if a compensable taking has occurred. Applying that balancing test, the Court found that there was no “taking” as the restrictions that were imposed on Penn Central’s property were substantially related to the promotion of the general welfare, and not only permitted reasonable beneficial use of the landmark site, but also afforded Penn Central the opportunity to develop the property in the future.⁵⁵

In *Penn Central*, the Court established a three part test for courts to use to determine if a partial taking has occurred. In determining whether governmental action amounts to a taking under *Penn Central*, a court must consider: “(1) the character of the government action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with

⁵⁴ *Lingle, Id.*

⁵⁵ *Penn Central*, 438 U.S. at 138.

distinct, investment-backed expectations.”⁵⁶ The ultimate purpose of the *Penn Central* balancing test is to identify “regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”⁵⁷

More recently, this Court relied on the *Penn Central* analysis in *State ex rel. Gilmour Realty, Inc. v. City of Mayfield Heights*.⁵⁸ In *Gilmour*, the plaintiff owned properties in a commercial zone in the City of Mayfield Heights. Mayfield Heights rezoned the property “residential,” thus depriving the plaintiff the right to develop the property. In *Gilmour*, because the plaintiff had “a distinct investment-backed expectation” that it could to develop its property, the Court found it could proceed under a *Penn Central* takings theory.⁵⁹ The plaintiff’s distinct investment-backed expectation in *Gilmour* was its expectation that it would be able to develop the property as “commercial.”

In *Shelly*, the plaintiff alleged a regulatory taking when it was denied a conditional use permit to mine sand and gravel on its property. This Court affirmed the board of zoning appeals denial of the permit as there was “no undue burden placed” on the plaintiff’s property.⁶⁰ The Court in *Shelly* used the three part *Penn Central* inquiry to determine if a “partial taking” had occurred⁶¹ and in discussing the *Penn Central* analysis, the Court restated that in order to establish a regulatory taking

⁵⁶ *Penn Central*, 438 US. at 124.

⁵⁷ *Lingle*, 544 U.S. at 539.

⁵⁸ *State ex rel. Gilmour Realty, Inc. v. City of Mayfield Heights*, 119 Ohio St. 3d. 11, 891 N.E. 2d. 320, 2008-Ohio-3181.

⁵⁹ *Id.* at ¶ 16.

⁶⁰ *Shelly*, *supra* at ¶ 40.

⁶¹ *Shelly*, *supra* at ¶’s 18-20.

under United States and Ohio constitutions, the property owner must show that the regulation infringes “upon the landowner’s rights to the point that there is no economically viable use of the land”⁶²

Here, there is no change in the zoning of Appellants’ property as there was in *Gilmour* so as to constitute a partial taking. As in *Shelly*, there has been no burden placed on the Moore’s property. “The purpose of the takings clause is to ‘bar government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole.’”⁶³ Middletown has not forced the Moores to bear a public burden through legislation imposed by the City directed to their property and accordingly, there was no taking.

2. The Appellants Failed To State A Claim For A Violation Of Their Substantive Due Process Rights.

Under their Proposition of Law, Section “E,” the Appellants contend that the “effects of legislation” enacted by the City deprived the Appellants of their property rights without due process of law. Here, both the Court of Appeals and the Trial Court correctly found that the Complaint provided no more than unsupported conclusions that the zoning act was unconstitutional and thus those allegations were insufficient to withstand a Motion to Dismiss.⁶⁴

The City’s ordinances are presumed to be constitutional unless determined by a court to be

⁶² *Id.* at ¶ 21, quoting *State ex rel. BSW Dev. Group v. Dayton*, (1998), 83 Ohio St.3d 338, 343, 699 N.E.2d 1271, and *Goldberg Cos. Inc. v. City of Richmond Heights* (1998), 81 Ohio St.3d 207, 210, 690 N.E.2d 510.

⁶³ *Shelly* at ¶ 38, quoting *Armstrong v. United States* (1960), 364 U.S. 40, 49, 80 S.Ct. 1563.

⁶⁴ *Moore v. Middletown*, ¶ 19, citing *Swint v. Auld*, Hamilton App. No. C-080067, 2009-Ohio-6799, ¶ 3.

clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community.”⁶⁵ As stated by the Court in *Goldberg*, “a municipality or other zoning body is justified by its police powers to enact zoning for the public welfare and safety.”⁶⁶ The Court of Appeals found that the Appellants had admitted that the ordinances were for the public welfare as the Complaint alleged that the ordinances were passed for the benefit of a “major employer in the City of Middletown.”⁶⁷ The zoning ordinance itself states that the proposed zoning classification is consistent with the recommendations of the City’s master plan, that property located in the City adjacent to the Martin-Bake property is “currently zoned in part as I-2 and that the proposed zoning classification will increase the available land for industrial development in the City.”⁶⁸ Further, the ordinance states that passage of the ordinance would “permit the development of a proposed project on the property which would stabilize the security of over Two-Thousand jobs in the City and create new jobs in the City, thereby increasing the City’s tax base”⁶⁹

Certainly, the City’s concerns about economic development and protection of jobs in the City constitute the “public welfare.” The benefits of development on the Martin-Bake property would certainly accrue to the City and its citizens. There is nothing constitutionally impermissible in granting a zoning request to allow a property owner to use its property to its economic advantage. Moreover, when the proposed use of the property benefits the entire community by providing

⁶⁵ *Moore v. Middletown*, ¶ 18, quoting *Goldberg, supra*, syllabus.

⁶⁶ *Goldberg*, 81 Ohio St.3d at 213-214.

⁶⁷ *Moore v. Middletown*, ¶ 19.

⁶⁸ T.d. 22, Ex. 2; Appx. 1, pgs. 1-8.

⁶⁹ *Id.*

economic development and jobs, there can be no argument that such a zoning decision is not within the ambit of the City's general welfare.

As argued above, there is no question that the ordinances in question relate to the public welfare. Nonetheless, Appellants contend that the zoning resolution by the City of Middletown does not "substantially advance" legitimate interests of the City of Middletown. However, the "substantially advances" test is no longer appropriate in challenges to zoning where a taking is alleged. In *Goldberg*, this Court adopted the takings analysis enunciated in *Agins v. Tiburon*.⁷⁰ Under the *Agins* test, a party could establish a zoning-related taking on one of two grounds: (1) the zoning provision did not substantially advance a legitimate municipal health, safety or welfare interest, or (2) the zoning restriction deprived an owner of all economically viable use of the property.⁷¹ More recently, the United States Supreme Court in *Lingle v. Chevron* rejected the "substantially advances" standard and held that it is not an appropriate test to determine whether a regulation affects a taking, as it was an inquiry into due process.⁷²

Thus, there are multiple reasons why the Appellants have failed to state a claim for a violation of substantive due process. First, as found by the Court of Appeals, their Complaint contained no more than unsupported conclusions. Second, the City's ordinances were clearly in the interests of the general welfare of the City. Third, under current United States Supreme Court precedent, substantive due process theories are not available to the Appellants.

Because the Appellants cannot show there has been any adverse impact on their property,

⁷⁰ (1980), 447 U.S. 255, 100 S.Ct. 2138.

⁷¹ *Goldberg*, 81 Ohio St.3d at 210-211.

⁷² *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 540-542, 125 S.Ct. 2074.

they make unsupported factual arguments that the Martin-Bake property sits adjacent to or near a school and a nursing home. Such factual allegations are unsupported and irrelevant. In order to prevail on a due process claim, the Appellants, at a minimum, must be able to show that the application of the ordinances to their property is unconstitutional. This Court should not be misled by the Appellants attempt to change the legal analysis.

Zoning is characterized as a legislative function and such legislation is presumed to be constitutional.⁷³ It has long been established that a court will not substitute its judgment for that of the legislature.⁷⁴ The Appellants are in fact asking this Court to second guess the City's decision to rezone the Martin-Bake property. Separation of powers requires that the Court refrain from substituting its judgment for that of the City's legislators.

3. The Appellants Were Not Entitled To A Writ Of Mandamus.

Appellants sought a *writ of mandamus* compelling Middletown to commence appropriation proceedings with respect to their property located in the City of Monroe. The relief Appellants seek is unavailable as a matter of law. Before a court may grant a *writ of mandamus*, it must find that: (1) the relator has a clear legal right to the relief prayed for; (2) the respondent is under a clear legal duty to perform the requested act; and (3) the relator has no plain and adequate remedy at law.⁷⁵

This Court has held that the powers of local self-government do not include the power of eminent domain beyond the geographical limits of the municipality, except in certain statutorily

⁷³ *Tuber v. Perkins* (1966), 6 Ohio St.2d 155, 157, 216 N.E.2d 877.

⁷⁴ *Klein v. Leis* (2003), 99 Ohio St.3d 537, 541, 795 N.E.2d 633.

⁷⁵ *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, 451 N.E.2d 225, citing *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, 399 N.E.2d 66, ¶1 of Syllabus.

enumerated circumstances, none of which apply here.⁷⁶ The Appellants' property is located in Monroe, Ohio, outside the municipal boundaries of Middletown, and thus, outside the reach of Middletown's eminent domain powers. Further, Middletown's rezoning of the Martin-Bake property does not fall within any of the statutorily enumerated exceptions by which a municipality is permitted to appropriate property outside its boundaries.

The Appellants confusingly argue that they are not actually asking for a *writ of mandamus* under §163.63, instead they are claiming "inverse condemnation." An inverse condemnation claim asserts that a political subdivision has converted the plaintiff's real property to a governmental use, thus compelling the government to pay the fair market value for the property. "Inverse condemnation is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted."⁷⁷ Thus, §163.63 is the statutory mechanism for governments to obtain properties for governmental use, whether through direct condemnation proceedings or through "inverse condemnation."

The lower courts properly relied on §163.63 and *Britt v. City of Columbus*⁷⁸ in holding that the Appellants were not entitled to a writ. R.C. §163.63 unequivocally states that:

"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

⁷⁶ *Britt v. City of Columbus* (1974), 38 Ohio St.2d 1, 309 N.E.2d, 412, Syllabus 1.

⁷⁷ *City of Cincinnati v. Chavez Properties* (1996), 117 Ohio App.3d 269, 274, 690 N.E.2d 561, quoting *United States v. Clarke* (1980), 445 U.S. 253, 257, 100 S.Ct. 1127.

⁷⁸ (1974), 38 Ohio St.1, 309 N.E.2d 412, (Syllabus 1).

shall be made pursuant to this chapter.”

Thus, there are several reasons as to why the Appellants were not entitled to a *writ of mandamus*. First, they had no clear legal right to the relief prayed for. There was no taking of their property so as to entitle them to a *writ of mandamus* under §163.63. Second, the City of Middletown was not under a clear duty to begin appropriation proceedings as it had not done any act which amounted to an appropriation of the Appellants’ real estate. Finally, the City of Middletown cannot appropriate property in the City of Monroe. The powers of local self government do not include the power of eminent domain beyond the geographical limits of the municipality.⁷⁹

D. The Court Of Appeals Judgment Should Be Affirmed As It Followed Well Established Authority.

As noted by the Court of Appeals, there are only two cases in Ohio which deal with the claims made by the Appellants. The other case is *Clifton II* which is to be argued at the same time as this case. Despite the lack of any precedent, the Appellants are asking this Court to reverse the Court of Appeals and provide them with rights never before recognized in Ohio. However, if this Court were to reverse the Court of Appeals and permit the Appellants to proceed on any of their claims, the result may be chaos in land use law in Ohio, and as aptly stated by the Court of Appeals, “opening the floodgates on the surge of litigation”.⁸⁰

Under Appellants’ theories, zoning authorities must consider the possible effect on surrounding properties. Thus, zoning authorities would then be subject to suit for a zoning decision that may have some possible negative impact on surrounding property owners. It is impossible to

⁷⁹ *Britt*, at Syllabus 1.

⁸⁰ *Clifton II*, supra at ¶ 29.

determine how a particular development might impact surrounding property owners. The factors involved in property values are myriad and certainly not within the knowledge or control of any zoning authority. Zoning authorities would be reluctant to act on any zoning request if adjacent property owners have the right to receive compensation as a result of a zoning decision.

The decision by the Court of Appeals in this matter contains a lengthy dissent. The dissent argues that this Court should provide an entirely new cause of action for residential property owners who object to zoning decisions in other jurisdictions. Both the Appellants and the dissent cite to *City of Norwood v. Horney*⁸¹ and contend the Ohio Constitution provides greater protection for property owners in the takings context than does the Federal Constitution. However, their reliance on *Horney* is misplaced. In *Horney*, the City of Norwood appropriated property that was to be used for the benefit of a private development. The *Horney* Court recognized that the homeowners' rights prevailed only the City's rights to appropriate property for private development. Thus, the facts of the *Horney* are far removed from the facts in this case. Here, there has been no action whatsoever taken by the City of Middletown directed to the Appellants' properties.

The dissent asserts that residential property owners have some superior right that commercial property owners do not have and contends that within the residential context, a diminution in value should be a permissible basis to allege a taking. There is simply no basis in Ohio law to confer exceptional rights to residential property owners that other property owners may not have.

This Court should not accept the Appellants' or the dissent's arguments. The decisions of the United States Supreme Court and this Court have provided reasonable and consistent standards for determining when a taking has occurred. The Court of Appeals properly applied those precedents

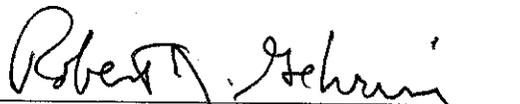
⁸¹ 110 Ohio St.3d 353, 853 N.E.2d 1115, 2006-Ohio-3799.

to affirm the trial court's judgment.

IV. CONCLUSION

The decision and judgment of the Court of Appeals should be affirmed. The Appellants lack standing to bring their action. They have failed to state a claim upon which relief can be granted.

Respectfully submitted,



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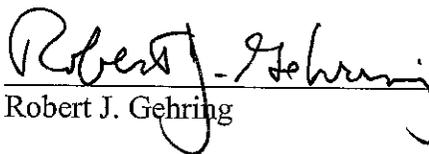
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Attorneys for Defendant-Appellee

City of Middletown, Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellee City of Middletown was sent by ordinary U.S. mail, postage prepaid, to counsel for Appellants, Jay C. Bennett, Oxford Professional Building, 5995 Fairfield Road, Suite #5, Oxford, Ohio, on this 26TH day of April, 2011.



Robert J. Gehring

IN THE SUPREME COURT OF OHIO

MATTHEW E. MOORE, et al. : Case No. 2010- 1363
:
Appellants :
v. :
:
CITY OF MIDDLETOWN, OHIO :
:
Appellee :

APPELLEE'S APPENDIX

1.	City of Middletown Ordinance No. 2008-64, (August 19, 2008)	<u>Page(s)</u> 1 - 8
2.	City of Middletown Ordinance No. 2008-63, (August 19, 2008)	9 -14
3.	Motion By The Defendant City of Middletown Requesting The Court To Take Judicial Notice Of Facts, (Ex. A, Attached), T.d.	15 - 17

ORDINANCE NO. O2008-64

AN ORDINANCE CHANGING THE ZONING CLASSIFICATION FOR A PARCEL OF LAND APPROXIMATELY 157 ACRES LOCATED ON THE EAST SIDE OF STATE ROUTE 4 APPROXIMATELY 1,500 FEET SOUTH OF OXFORD STATE ROAD TO I-2 (GENERAL INDUSTRIAL) DISTRICT, REPEALING ORDINANCE NO. O2008-39 AND DECLARING AN EMERGENCY.

WHEREAS, there is a parcel of property located adjacent to an existing I-2 zone on State Route 4, which is presently zoned D-1 (Low Density Dwelling); and,

WHEREAS, the City requested this reclassification to conform to the City Master Plan and permit uses consistent with the area east of the property, including but not limited to the construction and operation of a proposed coke-making facility; and,

WHEREAS, the City Planning Commission conducted a public hearing on July 9, 2008 after giving notice of the time and place of the hearing to all property owners within the same block and within two hundred feet of the boundaries of the subject property; and

WHEREAS, the City Planning Commission has recommended that the subject property be rezoned; and

WHEREAS, the City Council held a public hearing on August 19, 2008, notice of such public hearing having been given in the Middletown Journal at least thirty days prior to such hearing, and concurs in the recommendation of the City Planning Commission;

NOW THEREFORE, BE IT ORDAINED, by the City Council of the City of Middletown, Butler/Warren Counties, Ohio that:

Section 1

City Council makes the following legislative findings: a) the proposed zoning classification amendment is consistent with the recommendations in the City's Master Plan; b) certain real property located in the City adjacent to the land proposed to be rezoned is currently zoned in part as I-2 (General Industrial); and, c) the proposed zoning classification amendment will increase the available land for industrial development in the City, and more specifically is consistent with the proposed development of a coke-making facility on the site.

Section 2

The zoning classification for a one-hundred fifty-seven (157) acre, more or less, parcel of land, presently zoned D-1 (Low Density Dwelling) which is located on the east side of State Route 4 approximately 1,500 feet south of Oxford State Road is hereby changed to I-2 (General Industrial). The area to be rezoned includes the following parcel numbers: Q6542-084-000-024 (part), Q6542-084-000-023, Q6542-113-000-001, and Q6542-113-000-010, and is more particularly shown in Exhibit "A" which is attached hereto.

Section 3

Ordinance No. O2008-39, adopted May 6, 2008, is hereby repealed in its entirety.

Section 4

This ordinance is declared to be an emergency measure to make immediately available additional developable industrial land in the City, and necessary for the immediate preservation of the public health, safety and general welfare, to wit: to permit the development of a proposed project on the property which would stabilize the security of over two-thousand jobs in the City and create new jobs in the City, thereby increasing the City's tax base, to move forward on the developer's schedule, the delay of which would seriously impact the viability, cost and timing of the project, and shall take effect and be in force from and after its adoption.


Lawrence P. Mulligan, Jr., Mayor

Adopted: August 19, 2008

Attest: Christa Parr
Clerk of City Council

h/law/leg/0 Rezone Rt 4



July 14, 2008

PUBLIC HEARING

Dear Property Owner:

Pursuant to Chapter 1284.02 of the Codified Ordinances of the City, notice is hereby given that the Middletown City Council has under consideration the matter of re-zoning multiple parcels, totaling 157 acres, from D-1 - Low Density Dwelling, to I-2 - General Industrial. City Planning Commission has referred this matter to the City Council for public hearing and confirmation of its recommendation pursuant to the Zoning Ordinance. City Council will conduct a public hearing on this matter in the 6:30 P.M. Council meeting on Tuesday, August 19, 2008 in the Council Chamber on the Lower Level of the City Building, One Donham Plaza.

You may wish to be present at the hearing since this proposal may affect your property. Interested persons may appear and be heard at the public hearing.

Papers and detailed zoning descriptions pertaining to this matter are on file for public inspection in the Planning Department on the 4th floor of the City Building.

For disability accommodations, call 425-7831 or 425-7705 (TDD).

Betsy Parr
Clerk of the City Council

MAILING LIST FOR PROPERTY OWNERS WITHIN 200 FEET OF BAKE-MARTIN FARM INCLUDING OTHERS WHO REQUESTED NOTIFICATION 6-9-08

Amanda Baptist Church Inc
1430 Oxford State Rd
Middletown, OH 45044

Walter L. Bake
3353 Yankee Road
Middletown, OH 45044

Middletown City Schools
Superintendent, Dr. Steve Price
1515 Girard Avenue
Middletown, OH 45044

Clarence Bowman
2407 Pine Hill W Road
London, KY 40744

William J. Lewis
1408 Oxford State Road
Middletown, OH 45044

Edward L. McConnell
4714 Riviera Drive
Middletown, OH 45042

Bette Ann Metzcar
6032 Niederlander Ln
Middletown, OH 45044

Matthew E. Moore
6032 Niederlander Ln
Middletown, OH 45044

P.S. Properties
4161 Bonita Drive
Middletown, OH 45044

Raymond S. Palmer
4816 Holly Avenue
Middletown, OH 45044

Fred Baker
6151 Hankins Road
Middletown, OH 45044

Theodore B. Martin
P.O. Box 425
Walloon Lake, MI 49796

Robert Cowman
6960 Hamilton-Middletown Road
Middletown, OH 45044

Pilot Chemical Co
11756 Burke Street
Santa Fe Springs, CA 90670

Porter Advertising LLC
P.O. Box 1152
Richmond, IN 47375

Frank Schiavone
6978 Hamilton-Middletown Road
Middletown, OH 45044

David A Shaffer
7000 Hamilton-Middletown Road
Middletown, OH 45044

Walter E. Stamper
3615 S. Main. Street
Middletown, OH 45044

Martha Jane Zecher TR
6099 Niederlander Lane
Middletown, OH 45044

Andy Waldner
3642 S. Main Street
Middletown, OH 45055

Garden Manor Retirement Village
6898 Hamilton Middletown Rd.
Middletown, OH 45044

Lee Anne & Jerry Craft
3333 Carol Ann Lane
Middletown, OH 45044

Jay Hamilton, P.E.
District 8 Traffic Planning Engineer
Ohio Department of Transportation
505 S. St. Rt. 741
Lebanon, OH 45036

**Property Owners within 200 feet of
proposed zoning case**

Amanda Baptist Church Inc
1430 Oxford State Rd
Middletown, OH 45044

Walter L. Bake
3353 Yankee Road
Middletown, OH 45044

Board of Education
Attn: Frank Chapman
1515 Girard Avenue
Middletown, OH 45044

Amelia Becker
Yankee Road
Middletown, OH 45044

Clarence Bowman
2407 Pine Hill W Road
London, KY 40744

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Middletown, OH 45044

Andy Waldner
3642 S. Main Street
Middletown, OH 45055

ORDINANCE NO. 02008-63

AN ORDINANCE AMENDING THE CITY ZONING CODE, SPECIFICALLY CHAPTER 1258 OF THE CITY CODIFIED ORDINANCES REGARDING I-2 GENERAL INDUSTRIAL DISTRICT, AND DECLARING AN EMERGENCY.

WHEREAS, the City of Middletown filed an application to amend the text of Chapter 1258 of the Codified Ordinances to clarify its application to certain industrial operations; and

WHEREAS, The City Planning Commission conducted a public hearing on July 9, 2008 and recommended approval of a text amendment, which was slightly different from the text amendment proposed by the City in its application; and

WHEREAS, City Council held a public hearing on August 19, 2008 and wishes to amend the text amendment as recommended by Planning Commission to conform to the language submitted in the original application of the City, which such action has the concurrence of six members of City Council;

NOW THEREFORE, BE IT ORDAINED, by the City Council of the City of Middletown, Butler/Warren Counties, Ohio that:

Section 1

Chapter 1258 of the Codified Ordinances of the City is hereby amended to read, in full, as set forth in Exhibit "A", attached hereto and made a part hereof.

Section 2

This ordinance is declared to be an emergency measure necessary for the immediate preservation of the public health safety and general welfare, to wit: to permit prompt application of the clarification of Chapter 1258 to imminent developments in I-2 Districts in the city without delay in the schedules of such imminent developments or the possibility of an inconsistent application of Chapter 1258 to future industrial development, and shall take effect and be in force from and after its adoption.


Lawrence P. Malligan, Jr., Mayor

Adopted: August 19, 2008

Attest: Betty Parr
Clerk of City Council

EXHIBIT A

**CHAPTER 1258
I-2 General Industrial District**

1258.01	Intent.	1258.06	Height regulations.
1258.02	Principal uses permitted.	1258.07	Off-street parking and loading regulations.
1258.03	Accessory uses permitted.	1258.08	Lot area and yard requirements.
1258.04	Prohibited uses.		
1258.05	Required conditions.		

CROSS REFERENCES

- I-1 Industrial Park District- see P. & Z. Ch. 1256
- IPO Industrial Park Office District - see P. & Z. 1257
- Factors of annoyance- see P. & Z. 1274.02

1258.01 INTENT.

The I-2 District is intended to accommodate those industrial uses which cannot entirely eliminate certain objectionable features and influences, but which must, nevertheless, be accommodated within the urban area. (Ord. 4886. Passed 12-27-68.)

1258.02 PRINCIPAL USES PERMITTED.

No structure or land shall be used for any other than one or more of the following purposes:

- (a) I-1 Uses. Any use permitted and as regulated in an I-1 District except as hereinafter modified;
- (b) Manufacturing; or Processing. The manufacturing, compounding, processing, packaging or assembling of the following products:
 - (1) Appliances. Electric and gas appliances, fixtures and products;
 - (2) Basic metals production. The refining, smelting or reduction of raw materials for the production of metals, provided that any such uses are located at least 600 feet from any P or D District and at least 200 feet from any C District;
 - (3) Chemicals. The manufacturing of acid, asphalt, bleach, fertilizer, dye, helium, hydrogen, disinfectant, insecticide, lye, oxygen, plastics, poison of any kind, potash, radium, soda ash or caustic soda or similar chemical products, provided that any such uses are located at least 600 feet from any P or D District and at least 200 feet from any C District;
 - (4) Concrete products. The mixing, casting and curing of concrete, clay or terra cotta products;

- (5) Foundries. Including the casting, forging, annealing or plating of metals or metal products, provided that any such uses are located at least 600 feet from any P or D District and at least 200 feet from any C District;
 - (6) Ice. The manufacturing and storage of ice;
 - (7) Machinery. The assembly or production of machinery of a size exceeding normal home shop power tools;
 - (8) Metal product fabrication. The fabrication and assembly of products made from metal sheet or plate, wire, rolled shapes or extrusions;
 - (9) Paper production. The production of paper and paper products;
 - (10) Production from raw materials. Production of the following products from raw materials: asphalt, cement, charcoal and fuel briquettes, coal, coke and tar products, including gas manufacturing, fertilizers, gelatin, animal glue, turpentine, rubber and soaps, provided that any such uses are located at least 600 feet from any P or D District and at least 200 feet from any C District;
 - (11) Scrap metal processing. The pressing, reduction, baling or processing of scrap metals, but not including junk yards and auto wrecking or salvage operations, provided that any area used for materials storage or processing be enclosed by a solid wall or screened fence at least eight feet in height, and further provided that such use be located at least 300 feet distant from any P or D District; and
 - (12) Other uses. Other uses not specifically mentioned in this subsection when, in the opinion of the Planning Commission, such uses are of the same nature and intensity and not first permitted or prohibited in any other district.
- (c) Non-manufacturing. The following non-manufacturing uses shall be permitted:
- (1) Contractor's and equipment storage yards. Building materials storage, storage of rental equipment customarily used by contractors, lumber yards and similar establishments, provided that such uses are conducted either wholly within a completely enclosed building or buildings, except for the storage of vehicles or equipment, or within an area completely enclosed by a solid wall or screened fence not less than eight feet high;
 - (2) Coal and fuel. The storage and dispensing of coal and other fuel, provided that any area used for storage be enclosed by a solid wall or screened fence at least eight feet in height and properly maintained and kept in an acceptable condition;
 - (3) Exposed fuel storage tanks. The exposed tank storage of inflammable liquids, not to exceed 100,000 gallons per storage unit provided such storage units shall be at least 1,000 feet from any D District, and in compliance with existing safety regulations;
 - (4) Power generating station. Facilities for the generation and transmission of electrical power;
 - (5) Outdoor advertising. Advertising and signs as specified in Chapter 1272;
 - (6) Automobile wrecking and junk yards. The dismantling, wrecking and storage of motor vehicles and parts, and obsolete metal products, provided that open area in such use be enclosed by a solid fence or wall at least eight feet in height, properly maintained and kept in an acceptable condition, and further provided that any such use shall be located at least 300 feet from any P or D District; and

- (7) Other uses. Other uses not specifically mentioned in this subsection when, in the opinion of the Planning Commission, such uses are of the same nature and intensity and not first permitted or prohibited in any other district.
(Ord. 4886. Passed 12-27-68.)

(d) Setbacks for manufacturing and processing uses.

Notwithstanding any of the other provisions of this section 1258.02, all setbacks required in subsections (b)(2), (b)(3), (b)(5) and (b)(10) of this section 1258.02 shall not apply to the location of any equipment, facilities, structures, fixtures or improvements incidental or ancillary to the manufacturing, compounding, packaging, assembling or processing of the products referenced in such subsections, and shall apply only to equipment, facilities, structures, fixtures or improvements that are utilized for the purpose of directly manufacturing, compounding, packaging, assembling or processing the products referenced in such subsections. Without limiting the foregoing, equipment, facilities, structures, fixtures or improvements that are deemed to be incidental or ancillary to the manufacturing, compounding, packaging, assembling or processing of the products referenced in such subsections include any (i) road, (ii) storm water retention or detention pond, (iii) rail trackage, (iv) rail equipment (including, without limitation, any rail track turnaround, or rail loading and unloading equipment in respect of any of the products referenced in such subsections), (v) storage facility in respect of the products referenced in such subsections (including, without limitation, any storage silo or product piles), (vi) dispensing facility in respect of the products referenced in such subsections, (vii) conveyor system in respect of the products referenced in such subsections, (viii) crushing or pulverizing facilities or equipment in respect of the products referenced in such subsections, (ix) fencing, (x) berm, (xi) screen, (xii) buffer, or (xiii) parking areas.

1258.03 ACCESSORY USES PERMITTED.

Structures and uses customarily incidental to any of the permitted uses provided in this chapter, and occupying the same lot or tract shall be permitted including:

- (a) Retail Uses. Minor retail uses accessory to a principal permitted use, wholly enclosed in the structure housing such use, with no exterior advertising or public entrance; and
- (b) Administrative Offices. Offices for the administration and operation of the uses permitted in this chapter. (Ord. 4886. Passed 12-27-68.)

1258.04 PROHIBITED USES.

The following uses shall be prohibited:

- (a) Dwellings. Dwellings and residences of any kind including mobile homes, schools, hospitals and other institutions for human care, except where they are incidental or accessory to a principal permitted use; and

- (b) Retail Commercial. Retail business and commercial uses, personal services and professional offices, except as provided in Section 1258.03.
(Ord. 4886, Passed 12-27-68.)

1258.05 REQUIRED CONDITIONS.

All operations in this district shall meet the following requirements:

- (a) Plant Vehicle Storage. There shall be sufficient storage space on each plant site to accommodate all plant vehicles with no parking on-street or in any required front yard.
- (b) Enclosure. All business, service, repair, processing or display, if not conducted wholly within a completely enclosed building, shall be enclosed by a solid fence or wall at least eight feet in height where such use is adjacent to any D or P District.
- (c) Night Operation. No building customarily used for night operation shall have any opening other than stationary windows and required exits nearer than 200 feet to any D or P District.
- (d) Performance Standards. See the requirements of Chapter 1274.
(Ord. 4886, Passed 12-27-68.)

1258.06 HEIGHT REGULATIONS.

Within 200 feet of any D or P District, no structure shall exceed fifty feet in height. No structure otherwise shall exceed in height the distance measured to the nearest street or public right of way, except as modified in Section 1276.02.
(Ord. 4886, Passed 12-27-68.)

1258.06

I-2 General Industrial District

101

1258.07 OFF-STREET PARKING AND LOADING REGULATIONS.

Off-street parking and loading shall be provided as required in Chapter 1270.

(Ord. 4886. Passed 12-27-68.)

1258.08 LOT AREA AND YARD REQUIREMENTS.

The following minimum requirements shall apply:

I-2 General Industrial District

- (a) Lot area 5,000 sq ft.
- (b) Frontage 50 ft.
- (c) Front yard 20 ft. on primary thoroughfares; 10 ft. elsewhere.
- (d) Rear yard 25 ft. if adjacent to any D or P District; 15 ft. otherwise for utility easement.
- (e) Side yard 20 ft. if adjacent to any D or P District; 10 ft. otherwise for utility easement.

(Ord. 4886. Passed 12-27-68.)

FILED in Common Pleas Court
BUTLER COUNTY, OHIO

APR 07 2009

CINDY CARPENTER
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO**

MATTHEW E. MOORE, et al.	:	CASE NO. CV-2008-09-4191
	:	
Plaintiffs,	:	(Judge Michael J. Sage)
	:	
vs.	:	MOTION BY THE DEFENDANT
	:	CITY OF MIDDLETOWN
CITY OF MIDDLETOWN, OHIO	:	REQUESTING THE COURT TO TAKE
	:	JUDICIAL NOTICE OF FACTS
Defendant.	:	(EX. A - ATTACHED)
	:	

Now comes the City of Middletown and requests that the Court take judicial notice of property boundaries, City boundaries and zoning related to the matter currently pending before the Court.

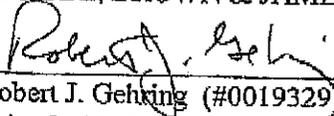
In this action, the Plaintiffs generally challenge the City of Middletown's zoning of certain property. In order to assist the Court, Defendant City of Middletown has prepared a map, which shows the parcels owned by the Plaintiffs and those properties' relationships to the property that was rezoned by the City of Middletown. In addition, the map provides the relevant municipal boundaries and surrounding zoning (Ex. A).

The Court is requested to take judicial notice of the map and its contents. It is the intention of the Defendant City of Middletown to provide a large version of the map at the hearing on the Defendant's Motion to Dismiss scheduled for April 3, 2009.

This request is made pursuant to Evidence Rule 201. Clearly, this type of information is subject to judicial notice as the property boundaries of the Plaintiffs' properties are well known as are the political subdivision boundaries and the zoning in those political subdivisions.

Respectfully submitted,

CRABBE, BROWN & JAMES, LLP



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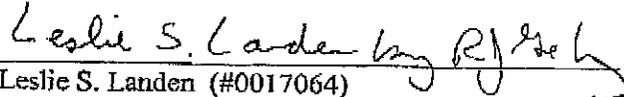
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CERTIFICATE OF SERVICE

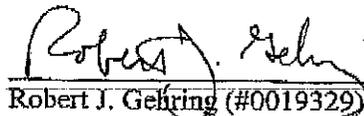
I hereby certify that a true and accurate copy of the foregoing was mailed, via regular U.S. Mail, postage prepaid, on this 15th day of April, 2009 to the following counsel of record:

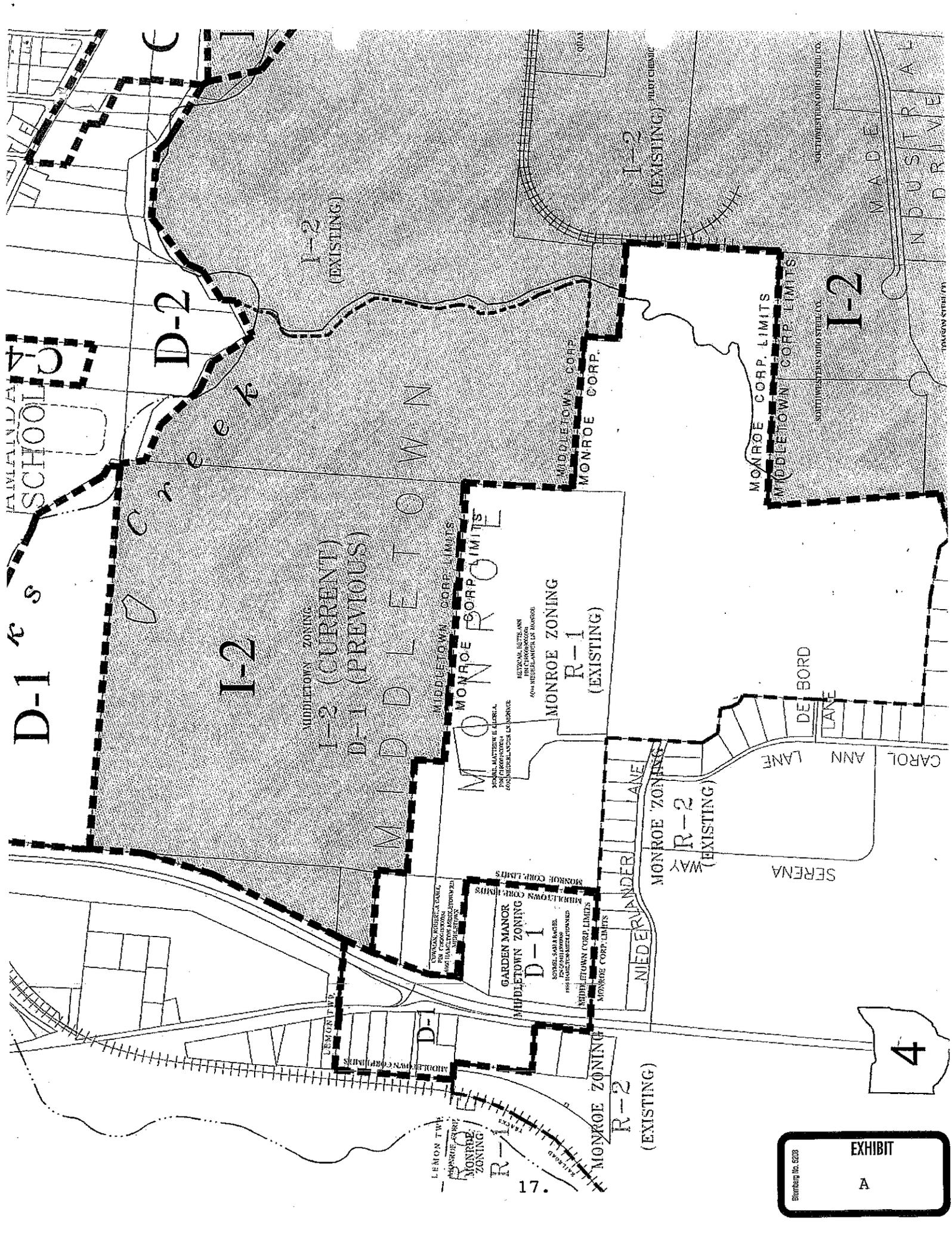
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MIDDLETOWN SCHOOLS

D-1

D-2

I-2

MIDDLETOWN ZONING
I-2 (CURRENT)
D-1 (PREVIOUS)

MIDDLETOWN

MONROE CORP. LIMITS

MONROE ZONING
R-1 (EXISTING)

GARDEN MANOR
MIDDLETOWN ZONING
D-1

MONROE ZONING
R-2 (EXISTING)

MONROE ZONING
R-2 (EXISTING)

I-2

4

Blumberg No. 5238
EXHIBIT
A