ORIGINAL

In the
# Supreme Court of Ohio

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| MATTHEW E. MOORE, *et al*, | : | Case No. 2010-1363 |
| Plaintiffs-Appellants, | : | On Appeal from the Butler County Court of Appeals, Twelfth Appellate District |
| v. | : | |
| CITY OF MIDDLETOWN, OHIO, *et al.*, | : | Court of Appeals Case No. CA 2009-08-205 |
| Defendant-Appellee. | : | |

## MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO IN SUPPORT OF NEITHER PARTY


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FILED
APR 27 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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## INTRODUCTION

Like *Clifton v. Blanchester,* Case No. 2010-1196, this case raises two key questions concerning who can bring a regulatory takings claim. First, does a property-owner have standing to bring a "regulatory taking" claim against a city that rezones property adjacent to his own when his property lies outside that city's jurisdictional boundaries? Second, even if that property-owner had standing to raise a regulatory taking claim, can that claim still survive, given that the claim is based on how the city regulated *someone else*'s property? The court below rightly answered "no" to both of those questions, and this Court should affirm those holdings for the reasons already set forth in the State's amicus brief in *Clifton.*

None of this leaves property owners without recourse to challenge zoning ordinances that affect their rights. If the City of Middletown did not follow the correct procedures in passing its zoning ordinances, or if the ordinances are contrary to law, then the Moores might have standing to seek a judgment voiding those ordinances. (And to the extent the Twelfth District's decision overreached in cutting off those potentially legitimate claims, it went too far.)

But just as in *Clifton*, the plaintiffs here seek more than the invalidation of the city's zoning ordinances. Instead, they allege a *regulatory takings* claim and seek *damages* from Middletown for its zoning decisions. That novel theory has no basis in the law of regulatory takings. The concept of a regulatory taking is based on the judicial recognition that "'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, 2002-Ohio-6716, ¶ 34 (quotation and citation omitted). But the Moores' regulatory takings theory has nothing to do with the regulation of *their* property: instead, they claim damages from the regulation of their neighbor's property—a property, moreover, situated in a different city. Because that novel proposition stands the law of regulatory takings on its head—and because neighboring property owners have other legal means

to block unlawful zoning decisions where they have appropriate standing—this Court should reject it.

In short, whatever remedies the Court reaffirms are available to neighboring property owners under these circumstances, the Court should make clear that a regulatory takings claim is *not* among them.

## STATEMENT OF AMICUS INTEREST

The State of Ohio has a strong interest in seeing that the law of regulatory takings is properly applied, as many of the State's departments and agencies implement regulations or issue permits that affect how land may be used.

To be sure, this case implicates issues in addition to the regulatory takings question. But because the State's interests are most directly affected by the regulatory takings question, the State confines its arguments to that issue.

## STATEMENT OF THE CASE AND FACTS

This dispute centers on a piece of land in the City of Middletown known as the Martin-Bake property. *Moore v. City of Middletown* (12th Dist.) ("App. Op."), 2010-Ohio-2962, ¶ 3. Through several ordinances, Middletown rezoned 157 acres of the Martin-Bake property from a low-density dwelling zone to a general industrial zone and reduced a set-back provision for industrial activities from 600 feet to zero. App. Op. at ¶ 3. As the appeals court explained, "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."[1] *Id.*

[1] The coke plant and a related electricity-producing cogeneration plant were the subjects of this Court's recent decision in *In re Application of Middletown Coke Co.*, 2010-Ohio-5725.

Appellants Lori and Matthew Moore own land adjacent to the Martin-Bake property, but in the neighboring City of Monroe. *Id.* at ¶ 2. After Middletown enacted the new zoning ordinances, the Moores sued, alleging, among other things, that Middletown's decision to rezone the Martin-Bake property amounted to a partial regulatory "taking" of their adjacent property, *id.* at ¶ 20, and they sought damages by pursuing a writ of mandamus to compel Middletown to appropriate their property. *Id.* at ¶ 25.

The trial court granted Middletown's motion to dismiss these claims and the Moores appealed. *Id.* at ¶¶ 4-5. After oral argument, the appeals court asked the parties to file supplemental briefs on the question of whether the Moores had standing to pursue their claim against Middletown (an issue the Moores had not previously raised because the trial court had decided it in their favor). *Id.* at ¶¶ 5, 7.

The appeals court determined that the Moores lacked standing for three reasons. First, the court held that the declaratory judgment statute, R.C. 2721.03, does not by itself confer standing on a litigant. *Id.* at ¶ 7. Second, the court determined that the Moores lacked standing because Middletown's decision to rezone the Martin-Bake property was not a physical invasion of the Moores' property, "nor did it interfere in any way with their ability to use their property." *Id.* at ¶ 12. Lastly, the court ruled that because the Moores' property sits outside Middletown's jurisdictional boundaries, the remedy in inverse condemnation cases—a writ of mandamus directing an appropriation—is "unavailable as a matter of law." *Id.* at ¶¶ 11-12 (following *Clifton v. Village of Blanchester*, (12th Dist.), 2010-Ohio-2309).

Despite finding that the Moores lacked standing, the appeals court also addressed the merits of their claims. The court first considered the Moores' claim that the zoning ordinances, as applied, were unconstitutional. *Id.* at ¶ 17. To succeed, the Moores would have to show that

the ordinances were "'clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community.'" *Id.* at ¶ 18 (quoting *Goldberg Cos. v. Council of the City of Richmond Heights* (1998), 81 Ohio St. 3d 207, syllabus). Because the Moores admitted that the ordinances were enacted to enable construction of a coke plant to benefit one of the largest employers in Middletown, the appeals court found it "clear from the four corners of their complaint that the ordinances were not arbitrary, capricious, or unreasonable." *Id.* at ¶ 19,

Next, the appeals court concluded that Middletown's decision to rezone the Martin-Bake parcel was not a partial regulatory taking of the Moores' property. The only effect the ordinances allegedly had on the Moores' property was a diminution in value, said the court. *Id.* at ¶¶ 23-24. But that is not enough to state a regulatory takings claim, because "'diminution in a property's value, however serious, is insufficient to demonstrate a taking.'" *Id.* at ¶ 24 (citing *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust* (1993), 508 U.S. 602, 645).

Finally, the appeals court noted that the remedy the Moores sought for the claimed taking—a writ of mandamus—would require Middletown to appropriate property situated in a different city, outside of its geographical limits. *Id.* at ¶¶ 25-26. That act, the appeals court explained, would exceed the city's powers. *Id.* at ¶ 26 (citing *Britt v. City of Columbus* (1974), 38 Ohio St. 2d 1, syllabus ¶ 1). Thus, the appeals court concluded that mandamus was unavailable to the Moores as a matter of law. *Id.*

This Court accepted the Moores' request for discretionary review and ordered the case to be argued on the same day as *Clifton v. Blanchester*, Case No. 2010-1196.

## ARGUMENT

***Amicus Curiae* State of Ohio's Proposition of Law I:**

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

The appeals court held that the Moores had no standing to sue for a regulatory taking because the relief they sought—a writ of mandamus directing the City of Middletown to appropriate property outside city limits—was unavailable to them as a matter of law. App. Op. ¶¶ 11-12. For the reasons explained in the State of Ohio's amicus brief in the companion case of *Clifton v. Blanchester*, Case No. 2010-1196, that ruling is correct as both a matter of law and logic and should be affirmed.

One additional point deserves mention here. The dissenting opinion below contends that this Court "improperly limit[s] constitutional causes of action" by "making mandamus the sole method of relief" for a regulatory takings claim. *Moore*, 2010-Ohio-2962 at ¶ 52 (Ringland, J., dissenting). That argument is misplaced. There is nothing procedurally wrong or limiting about requiring regulatory takings claims to be presented through mandamus—indeed, the dissent points to no defect in that process. Rather, the dissent seems to attack the regulatory-takings process for fear that there are no other remedies for government action that affects a neighboring property owner. That supposition, however, is wrong. As the State explained in its amicus brief in the *Clifton* case, and as this Court has recognized, non-resident neighboring property owners might have an array of bases for seeking declaratory relief to invalidate unlawful ordinances or zoning decisions. State's Amicus Br. at 7-9. See, e.g., *Shemo v. Mayfield Heights* (2000), 88 Ohio St. 3d 7, 9 (ordinance is voidable through a declaratory judgment action where plaintiff shows that ordinance was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare") (internal quotation and citation omitted).

A claimed diminution in property value, among other possible injuries, may trigger the neighboring property owner's standing to raise those claims. Neighboring property owners might also have an array of claims against their neighbor himself (for instance, claims for nuisance or trespass) if the newly-authorized use leads to such harms.

But absent government regulation of *their* property, the Moores have no basis for alleging a regulatory taking by a local government; and because the Moores' property is outside the boundaries of the City of Middletown, a court has no power to order Middletown to appropriate it.

***Amicus Curiae* State of Ohio's Proposition of Law II:**

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

Because the Moores lack standing to bring a regulatory takings claim, the Court should dispose of that claim without reaching the merits. But even if this Court were to find that the Moores have standing to bring a regulatory takings claim, the claim fails as a matter of law for the reasons set forth in the State's amicus brief in the *Clifton* case—namely, (1) the Moores' allegation that Middletown's rezoning decisions will cause their property to lose value is not enough to state a claim for a regulatory taking and (2) the government regulation of an adjacent property does not amount to a regulatory taking of the Moores' property.

A final point in the dissenting opinion from the court of appeals warrants comment. Although the dissenting opinion properly acknowledged that diminution in property value is not itself a taking under Ohio law, the dissent nonetheless asserts that it *should* be under the Ohio Constitution, which "states that private property is inviolate." App. Opp. ¶ 74. That view, however, misconstrues both the constitutional provision and the character of zoning law.

At the time of Ohio's constitutional convention in 1850-1851, there were no zoning laws. *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 386 (noting that zoning laws "began in this country about twenty-five years ago"). The common law did recognize that similar land uses tended to cluster together—with certain districts tending toward the residential and others toward manufacturing—but that grouping was a result of economic forces, not legal mandate. *Bell v. Pollak Steel Co.* (1917), 28 Ohio Dec. 50, 53-54. Indeed, up until the U.S. Supreme Court's 1926 decision in *Euclid v. Amber Realty Co.* (1926), 272 U.S. 365, many regarded the use of zoning ordinances that restricted industrial development in favor of the residential as an unconstitutional interference with private property rights. See *Ambler Realty Co. v. Euclid* (N.D. Ohio 1924), 297 F. 307, 313-16.

Zoning laws—government restrictions on land use—emerged around the beginning of the twentieth century. As this Court has long observed, a zoning ordinance is a limitation of property rights: "Zoning ordinances are in derogation of the common law. They deprive a property owner of uses of his land to which he would otherwise be entitled." *University Cir., Inc. v. Cleveland* (1978), 56 Ohio St. 2d 180, 184.

That legal history is important, because if Middletown had left the Martin-Bake property unzoned, its owners would have been *entitled* to build a coke plant there. Consequently, when Middletown rezoned the Martin-Bake property to allow the coke plant, it took nothing from the Moores. Rather, it restored to the Martin-Bake owners the right they would have had, but for the contrary zoning ordinance, to use their property for industrial purposes. That *de*regulation of the Martin-Bake property cannot be deemed a "regulatory taking"—let alone a regulatory taking of someone else's property.

More to the point, the dissent fails to account for the knotty reality that recognizing new and broader rights for neighbors, like the Moores, would come at the expense of the property rights of the Martin-Bake owners. In other words, trumpeting the inviolate nature of private property rights in situations like this one—where private property owners are pitted against one another—is a recipe for fruitless circularity.

Conflicts between the aims and desires of neighboring property owners are inevitable. Zoning laws are an effort to modulate those conflicts. But by enacting zoning laws, governments do not become guarantors of property values against changes caused by private development. This Court has long recognized that a property owner has no right to insist that the zoning of neighboring property remain the same: "[L]andowners do not have a right to rely upon the continuation of a higher zoning classification for neighboring property so as to prevent adoption of a subsequent amendatory ordinance" changing that zoning. *State ex rel. Taylor v. Whitehead* (1982), 70 Ohio St. 2d 37, 39. Federal law holds the same. See, e.g., *L C & S, Inc. v. Warren Cty. Area Plan Comm'n* (7th Cir. 2001), 244 F.3d 601, 605 ("an expectation of unchanged zoning law * * * is not a property right, or even reasonable") (internal citation omitted); *EJS Properties, LLC v. City of Toledo* (N.D. Ohio 2009), 651 F. Supp. 2d 743, 754 (A zoning action is a discretionary governmental decision, as to which a landowner "has no legitimate claim of entitlement . . . and therefore no property interest.").

The lower courts properly decided that the rezoning of one landowner's property cannot be a regulatory taking of property belonging to someone else. This Court should affirm those decisions.

## CONCLUSION

For the reasons discussed above and in the State's amicus brief in *Clifton*, this Court should hold that the Moores' regulatory takings claim fails.

Respectfully submitted,

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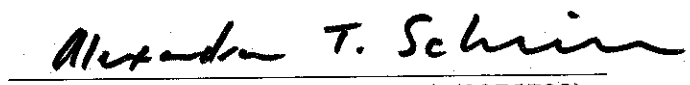

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