

ORIGINAL

IN THE SUPREME COURT OF OHIO

| | | |
|-------------------------------------|---|---|
| MATTHEW E. MOORE and LORI A. MOORE, | : | ON APPEAL FROM THE BUTLER COUNTY COURT OF APPEALS, TWELFTH APPELLATE DISTRICT |
| Plaintiffs-Appellants, | : | |
| 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 |

**REPLY BRIEF OF APPELLANTS,
MATTHEW E. MOORE AND LORI A. MOORE**

Jay C. Bennett (0009822)
 Oxford Professional Building
 5995 Fairfield Road, Suite #5
 Oxford, Ohio 45056
 Tel: 513.523.4104
 Fax: 513.523.1525
 Email: jcblaw24@yahoo.com
*Attorney for Plaintiffs-Appellants,
 Matthew E. Moore and Lori A. Moore*

Robert J. Gehring (0019329)
 Brian E. Hurley (0007827)
 Crabbe Brown & James LLP
 30 Garfield Place, Suite 740
 Cincinnati, Ohio 45202
 Tel: 513.784.1525
 Fax: 513.785.1250
 Email: RGehring@CBJLawyers.com
BHurley@CBJLawyers.com
*Attorney for Defendant-Appellee,
 City of Middletown, Ohio*

Leslie S. Landen, Law Director (0017064)
 Sara E. Mills, Asst. Law Director (0073295)
 City of Middletown
 One Donham Plaza
 Middletown, Ohio 45042
 Tel: 513.425.7805
 Fax: 513.425.7780
 Email: lesl@cityofmiddletown.org
saram@cityofmiddletown.org
*Attorneys for Defendant-Appellee,
 City of Middletown, Ohio*

FILED
 MAY 17 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

RECEIVED
 MAY 17 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES | iii |
| STATEMENT OF FACTS | 1 |
| ARGUMENT – APPELLANTS’ REPLY TO APPELLEE’S ARGUMENT | 1 |
| APPELLEE’S ARGUMENT B | |
| The Appellants Lack Standing to Challenge The City of Middletown’s Ordinances As The Appellants’ Property Is Outside The city And Has Not Been Affected By The City’s Legislation | 1 |
| APPELLEE’S ARGUMENT 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 | 4 |
| 1. The Appellants Failed To State A Claim As The City of Middletown’s Rezoning Ordinance Did Not Constitute A Taking | 4 |
| a. A Political Subdivision’s Rezoning of A Parcel Entirely Within Its Boundaries Does Not Constitute A Taking Of Adjacent Property | 5 |
| 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 Expectation | 5 |
| 2. The Appellants Failed To State A Claim For A Violation Of Their Substantive Due Process Rights | 7 |
| 3. The Appellants Were Not entitled To A Writ of Mandamus | 12 |
| D. The Court of Appeals Judgment Should Be Affirmed As The Court Followed Well Established Authority To Affirm The Trial Court’s Dismissal of Appellants’ Complaint. | 14 |

| | |
|------------------|----|
| CONCLUSION | 16 |
| PROOF OF SERVICE | 17 |

TABLE OF AUTHORITIES

Cases

| | |
|--|------------------|
| <i>Agins v. Tiburon</i> (1980) 447 US 255, 100 SCt. 2138 | 10 |
| <i>Allen v. Coffel</i> , 488 S.W.2d 671 (Mo App. 1972). | 1 |
| <i>Britt v. City of Columbus</i> (1974) 38 Ohio St.2d 1; 309 NE2d 412 | 12 |
| <i>City of Norwood v. Horney</i> 110 Ohio St.3d 353, 2006 Ohio 3799 | 14 |
| <i>City of Pepper Pike v. Landskroner</i> (1977) 53 Ohio App.2d 63, 3TINE2d 579 | 8 |
| <i>City of Youngstown v. Kahn Brothers Building Company</i> 112 Ohio St. 654 at 661 | 9 |
| <i>Clifton v. Village of Blanchester</i> 2010 Ohio 2309; 2010 Ohio App. LEXIS 1903 | 13, 14, 15 |
| <i>Concrete Pipe and Products of California, Inc. v. Construction Laborers' Pension Trust</i> (1993) 508 US 602, 604; 113 S.Ct. 2264 | 5 |
| <i>Driscoll v. Austintown Associates</i> (1975) 42 Ohio St.2d 263 328 NE2d 395 | 2 |
| <i>Euclid v. Ambler Realty</i> 272 US 365, 47 SCt. 114 | |
| <i>Goldberg Companies, Inc. v. City of Richmond Hts.</i> (1998) 81 Ohio St. 3d 207; 690 NE2d 510 | 5, 6, 11 |
| <i>Hausman v. Dayton</i> (1995) 73 Ohio St.3d 671; 653 NE2d 1190, 1995-Ohio-277 | 9, 11 |
| <i>Karches v. City of Cincinnati</i> (1988) 38 Ohio St. 3d 12; 526 NE2d 350 | 3 |
| <i>Kelo v. City of New London, Ct.</i> (2005) 545 US 469, 125 S.Ct. 2655, 162 L. Ed. 2 439 | 15 |
| <i>Lingle v. Chevron USA, Inc.</i> (2005) 544 US 528, 125 SCt. 2074 | 10, 11 |
| <i>Mitchell v. Lawson Milk Company</i> (1988) 40 Ohio St.3d 190, 192; 532 NE2d 753, 756 | 7 |
| <i>Moore v. Middletown, Twelfth District Court of Appeals</i> | 9, 14, 15 |
| <i>Olds v. Klotz</i> 91936) 131 Ohio St. 447; 3 NE2d 371, 373 | 10 |
| <i>Penn Central Transportation Co., v. New York City</i> (1978) 438 US 104, 124, 98 S.Ct. 2646. | 4, 6, 12, 13, 14 |

| | |
|---|--------------|
| <i>Pritz v. Messer</i> 112 Ohio St. 628; 149 NE2d 30 | 9 |
| <i>State ex rel. BSW Development Group v. Dayton</i> (1998) 83 Ohio St.3d 338; 699 NE2d 1271 | 5, 6 |
| <i>State ex rel. Gillmour Realty, Inc. v. Mayfield Heights, et al.</i> 119 Ohio St.3d 11, 2008 Ohio 3181 | 3, 6, 12, 13 |
| <i>State ex rel. Killeen Realty Co. v. City of East Cleveland</i> (1959) 169 Ohio St. 375; 160 NE2d 1 | 9 |
| <i>State ex rel. Shelly Materials, Inc. v. Clark County Board of Commissioners</i> 115 Ohio St.3d 337, 875 NE2d 59, 2007-Ohio-5022 | 5, 6 |
| <i>State ex rel. Shemo v. Mayfield Heights</i> (2002) 95 Ohio St.3d 59, 63; 2002 Ohio 1627 <i>Swint v. Auld, et al., Appeal No. C-08-0067, Court of Appeals of Ohio First Appellate District, Hamilton County</i> 2009 Ohio 6799 | 3, 12 7 |
| <i>Teegardin v. Foley</i> (1957) 166 Ohio St. 449; 143 NE2d 824 | 9 |
| Statutes | |
| Middletown Codified Ordinance 1258.02(b)(10) | 8 |
| Middletown Codified Ordinance 1284.02(E) | 8 |
| Rules | |
| Ohio Civil Rule 8 | 8 |
| Treatises | |
| Annot. 174 ALR 561, Section 8 | 2 |

STATEMENT OF FACTS

Appellants reiterate its Statement of Facts previously stated in its Merit Brief.

ARGUMENT

APPELLEE'S ARGUMENT B

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

Appellee argues that Appellants have no standing because “no rights of the Appellants have been *affected* by the enactment of the Middletown zoning ordinances...”. *Appellee's Merit Brief, page 6* (emphasis added). As outlined in Appellants' Merit Brief to this Court, Appellants' property rights have been substantially, adversely, and directly affected by the offending legislation. Appellants refer the Court to the body of Appellants' Argument paragraph B of their Merit Brief which contains a plethora of foreign cases and federal cases that completely refute Appellee's assertion that such “ordinances do not in any respect burden Appellants' property”. *Appellants' Merit Brief, page 6*.

Appellee's argument that Appellants have no standing because Appellants' property has not been “legally affected” has no merit. The foreign jurisdiction cases hold that zoning legislation that substantially and adversely affects such property creates real parties in interest possessing justiciable causes of action. *Allen v. Coffel, 488 S.W.2d 671 (Mo App. 1972)*. In *Allen*, nonresident parties were conferred standing as “parties aggrieved” having a legal interest in zoning legislation that affected their property. Hence, Appellee's argument that Appellants have no legally protected interest in the Martin/Bake property is erroneous to the extent that the rezoning of such property substantially and adversely affects Appellants' property.

Appellee has argued in the lower courts and now in this Court that Appellants have no standing since the offending legislation was not “directed” towards the Appellants’ property. Based upon the aforementioned authority, Appellants reiterate their argument that it is the property being “affected”, not that to which is the legislation is “directed” that is the basis for conferring standing to the owners of such property.

In the only Ohio case dealing with the standing of contiguous property owners, the legislation challenged in *Joseph Airport Toyota, Inc. v. Vandalia*¹ is not “directed to” Joseph’s property. Rather, it rezoned the property of Joseph’s contiguous neighbor, thereby adversely “affecting” Joseph. Despite considerable authority to the contrary, Appellee continues to argue, with no supporting authority, that legislation must be “directed to” a claimant’s property to confer standing. To avoid repetition, Appellants would refer the Court to pages 13 and 14 of Appellants’ Merit Brief for a fuller discussion of the “directed” versus “affected” dichotomy.

Appellee’s citing of *Driscoll v. Austintown Associates (1975) 42 Ohio St.2d 263 328 NE2d 395* as authority for the premise that surrounding property owners have no legal interest in the outcome of a declaratory judgment action is erroneous and was correctly rejected by the trial court in this case. *Trial Court’s Decision and Entry, page 4, Common Pleas, T.d. p.22.* The Plaintiffs in *Driscoll* were not alleging that they were adversely affected by the rezoning but that the rezoning ordinance was procedurally void for failure to join the Plaintiffs as “necessary parties” in a collateral attack upon a declaratory judgment. This Court held that said property owners were not necessary parties to the action. As a result, *Driscoll* has no application to the instant case.

¹ *Joseph Airport Toyota, Inc. v. Vandalia CA Case Number 18904 Ohio Second District Court of Appeals Montgomery County (2002) Ohio 928; 2002 Ohio App. LEXIS 843*

Appellee also cites *Karches v. City of Cincinnati* (1988) 38 Ohio St. 3d 12; 526 NE2d 350 as authority for the premise that “there must be a controversy arising out of the application of the zoning legislation to the Moore property.” *Appellee’s Merit Brief*, page 7. *Karches* has no application to the instant case in that it is a judicial ripeness case emanating from an ORC 2506 Administrative Appeal previously disregarded by the trial court in this case (*Trial court’s Decision and Entry*, p. 5, *Common Pleas T.d. 22*) and is wholly distinguishable from the instant case.

An examination of the record demonstrates that neither the trial court nor the appellate majority considered *Driscoll* or *Karches* in their respective decisions. Appellants would submit that neither case has application to the instant case.

In the final portion of its standing argument, Appellee claims that Appellants lack standing to bring action for a writ of mandamus as a primary remedy in the instant case. Appellee asserts that there has been no claim by Appellants that the City’s actions have interfered with Appellants use or ownership of their property. Both the factual and legal conclusions advanced by Appellee are unfounded. Given the merit of Appellants’ partial regulatory 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 rights 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 the third

cause of action of their complaint to address the partial regulatory takings claim that Appellee mistakenly argues does not exist.

APPELLEE'S ARGUMENT 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.**

This portion of Appellee's argument is devoted to the analysis of both types of "per se" takings, neither of which are alleged by Appellants.

- 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 Expectation.**

In its Merit Brief, Appellee argues, without authority, that Appellants failed to state a claim in partial regulatory taking. Appellee claims that the appellate court majority "applied the appropriate takings analysis as set forth by the United States Supreme Court and this Court." *Appellee's Merit Brief, page 11*. A careful reading of the appellate majority's opinion proves otherwise.

The appellate majority identifies the three types of takings including the elements of partial regulatory taking under *Penn Central Transportation Co., v. New York City (1978) 438 US 104, 124, 98 S.Ct. 2646*. Ironically, the majority then fails to apply the factual ad hoc three part inquiry required by *Penn Central* in a partial regulatory taking, dismissing Appellants' takings claim as a matter of law. The basis of the majority's holding is derived from a combination of an erroneous application of what appears to be a categorical takings standard

(*Moore*, ¶ 12) and a misapplication of the “diminution in value” element of Appellants’ damage claim. *Moore*, ¶ 23.

The majority’s reliance upon *BSW Development Group v. Dayton*² (a categorical takings case) and *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*³ (an ERISA case) led to its erroneous dismissal of Appellants’ partial regulatory takings claims. The majority’s characterization of diminution in value as Appellants’ sole measure of damage (“the mere diminution in a property’s value” (see *Moore*, ¶ 23) is erroneous given the substantial noneconomic damage that Appellants have suffered. As pointed out in the *Moore* dissent, this Court’s application of *Penn Central* is a principle that has only been applied in a business or investment property context, not to residential property rights. *Moore*, ¶ 74.

Appellee erroneously argues that in order to establish a regulatory taking under United States and Ohio Constitutions, the property owner must show that the regulation infringes “upon the land owners rights to the point that there is *no economically viable use of the land*”. (Emphasis added). *State ex rel. Shelly Materials, Inc. v. Clark County Board of Commissioners* 115 Ohio St.3d 337, 875 NE2d 59, 2007-Ohio-5022 citing *State ex rel. BSW Development Group v. Dayton* (1998) 83 Ohio St.3d 338; 699 NE2d 1271 and *Goldberg Companies, Inc. v. City of Richmond Hts.* (1998) 81 Ohio St. 3d 207; 690 NE2d 510. Appellee’s Merit Brief, page 15. Appellee’s reliance upon these cases is misplaced due to its complete misinterpretation of these rulings of this Court.

Shelly and *BSW* are cases in which the plaintiffs claimed regulatory takings that were total or categorical, not partial, as in the instant case. In both *Shelly* and *BSW* this Court held that

² *State ex rel. BSW Development Group v. Dayton* (1998) 83 Ohio St.3d 338; 699 NE2d 1271

³ *Concrete Pipe and Products of California, Inc. v. Construction Laborers’ Pension Trust* (1993) 508 US 602, 604; 113 S.Ct. 2264

there was no valid taking that emanated from the denial of a permit. Appellee's misinterpretation of this Court's ruling arises from the aforementioned "...no economically viable use of the land" phrase being taken out of context which results in a misrepresentation of this Court's holding.

The context of paragraph 21 of *Shelly* that is omitted by Appellee completely changes the import of this Court's ruling. Paragraph 21 of *Shelly* actually reads as follows.

"Correspondingly, in a case in which denial of a demolition permit was deemed not to be a taking, we observe that 'in order for the land owner to prove a regulatory taking, he or she must prove that the application of the ordinance has infringed upon the land owners' rights to the point that there is no economically viable use of the land and, consequently, a taking has occurred for which he or she is entitled to compensation'". *State ex rel. BSW Development Group v. Dayton* (1998) 83 Ohio St.3d 338; 699 NE2d 1271 quoting *Goldberg Companies, Inc. v. City of Richmond Heights* (1998) 81 Ohio St. 3d 207; 690 NE2d 510.

In light of the fact that the instant case is not a categorical regulatory taking nor involves a denial of a permit, (as in *Shelly* and *BSW*) Appellants are not required to demonstrate that the offending legislation has denied them all economically viable use of the land, as claimed by Appellee. In contrast, the partial regulatory taking claimed by Appellants in the instant case must be analyzed in light of the *Penn Central* three part ad hoc factual inquiry. An inquiry that has been recognized by this Court in *State ex. rel. Gilmour Realty, Inc. v. City of Mayfield Heights*, 2009 Ohio 29 citing *State ex rel. Shelly Materials, Inc. v. Clark County Board of Commissioners* 115 Ohio St.3d 337, 875 NE2d 59, 2007-Ohio-5022, but denied to Appellants by both the trial and appellate courts in this case.

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

Appellee asserts that Appellants' complaint provides no more than "unsupported conclusions" that the legislation failed to substantially advance public health, safety and welfare.

An examination of Appellants' complaint demonstrates, in the context of zoning and land use practice, that Appellee's assertion is erroneous.

The appellate majority cited *Swint v. Auld, et al.*, *Appeal No. C-08-0067, Court of Appeals of Ohio First Appellate District, Hamilton County 2009 Ohio 6799* as grounds to dismiss Appellants' complaint under Civil Rule 12(B)(6). Said case cites this Court in its holding in *Mitchell v. Lawson Milk Company*⁴ that the Court must presume that all factual allegations in the complaint are true and construe all reasonable inferences in the nonmovant's favor. To avoid the task of laboriously recounting all the substantive, factual allegations contained in Appellants' complaint, Appellants will highlight a few so as to refute Appellee's argument and the appellate majority's holding.

Paragraph 8 of Appellants' complaint alleges that the rezoning and setback ordinances enacted by Appellee defy any objective professional land use analysis. In the context of zoning and land use such allegation is factual. Paragraph 9 specifically alleges that Appellee's zoning director failed to analyze and report upon the substantial and obvious disadvantages of the enactments in question thereby violating Middletown Codified Ordinance 1284.02(E). The alleged violation of Appellee's own code cannot be considered to be anything but a factual allegation. Paragraph 10 alleges that the enactment fails to adhere to common accepted land use locational principles; another factual allegation supported by an example contained in paragraph 10. Paragraph 11 factually alleges that Appellee violated its own code again (Middletown Codified Ordinance 1258.02(b)(10)) in enacting the offending setback ordinance,. Paragraph 12 alleges that a health and environmental nuisance has been created by the legislation actions of Appellee. Paragraph 13 alleges that the rezoning enactment was enacted pursuant to a defective

⁴ *Mitchell v. Lawson Milk Company* (1988) 40 Ohio St.3d 190, 192; 532 NE2d 753, 756

master land use plan while making further factual allegations as to the reasons why such master plan is defective. Paragraphs 15 and 16 allege the nature of the damage and loss suffered by Appellants while paragraph 17 alleges a diminution in value that is ongoing.

It is obvious that there is no shortage of factual allegations contained in Appellants' complaint. As those allegations remain unsupported until evidence is presented to the trier of fact, Appellants' effort to vindicate their standing in this case is pursued for the purpose of presenting evidence to confirm such allegations. The appellate majority had insufficient grounds to rule, and Appellee cannot persuasively argue, that Appellants' complaint is factually insufficient warranting a 12(B)(6) dismissal. Put simply, Appellants have been harmed, they have made factual allegations within the context of the land use issues pleaded, and desire their day in court.

Appellee asserts a municipality's presumption of constitutionality in support of the offending legislation. While it is true that municipal ordinances are presumed to be constitutional, that presumption can be overcome by the presentation of evidence that immediately shifts the burden of proof to the government. *City of Pepper Pike v. Landskroner* (1977) 53 Ohio App.2d 63, 3TINE2d 579.

“A person wishing to attack an ordinance as unconstitutional has the burden of proof and may not rely on mere allegations or conclusions of the law that the ordinance is not based on health, safety, morals, or general welfare, but must introduce competent and relevant evidence to support his position. If he meets his burden and introduces sufficient evidence to overcome the presumption of validity and constitutionality, a municipality may not merely counter with its own legal conclusions but must also produce evidence to support the validity of the ordinance on the basis of health, safety, morals or general welfare or risk that its ordinance will be declared unconstitutional.”
Pepper Pike, Id.

So far, Appellants have been deprived of the opportunity to present evidence demonstrating that their “unsupported conclusions” are, in fact, meritorious. Hence, Appellee’s assessment of Appellants’ substantive due process claim is, if nothing else, premature.

Further, Appellee’s position that a zoning enactment that purposefully and specifically provides an exclusive benefit to a single corporate citizen is a proper use of its police power, is completely unsupported by case law. Appellee posits that Middletown’s legislation is constitutional, claiming that it exercised its police power to “enact zoning for the public welfare”. The only authority Appellee cites is the appellate court majority’s decision which stated that Appellants, “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’”⁵. The weight of case authority indicates otherwise.

A valid exercise of a municipality’s police power must be (among other things) impartial in its operation. *Hausman v. Dayton* (1995) 73 Ohio St.3d 671; 653 NE2d 1190, 1995-Ohio-277 citing *Teegardin v. Foley* (1957) 166 Ohio St. 449; 143 NE2d 824, ¶1 of the syllabus. Appellee’s police power was exercised in a manner that blatantly applied such power for the sole benefit of the City’s dominant employer. As expressed in the neutral amicus of the 1851 Center for Constitutional Law, (hereinafter referred to as the 1851 amicus), the police power is only properly exercised when there is an “essential public need for the exercise of the power in order to justify its use”. *State ex rel. Killeen Realty Co. v. City of East Cleveland* (1959) 169 Ohio St. 375; 160 NE2d 1 citing *Pritz v. Messer* 112 Ohio St. 628; 149 NE2d 30; *City of Youngstown v. Kahn Brothers Building Company* 112 Ohio St. 654 at 66 as cited on page 4 of the 1851 amicus brief. Said amicus emphasizes that enactments remain within the police power only when “the

⁵ *Moore v. Middletown, Twelfth District Court of Appeals Opinion* ¶19, T.d. page 21

relation to the public interest and the common good is substantial”. *Olds v. Klotz* 91936) 131 *Ohio St.* 447; 3 *NE2d* 371, 373 cited by the 1851 amicus brief, page 4. Appellee’s exercise of police power for the “public interest and common good” is severely lacking in the instant case.

Appellee contends that the enactments would “stabilize the security” of existing jobs in the City as well as create jobs in the City, thereby “increasing the City’s tax base” which, according to Appellee, “constitutes the ‘public welfare.’” *Appellee’s Merit Brief*, p.16. Such an argument turns the police power/substantive due process requirement on its head. Instead of legislation being enacted for the *general* health, safety and welfare of the community, with incidental benefits accruing to individual citizens, the opposite is true in the instant case. Here, the primary benefit is fully intended for, and bestowed upon, a single corporate citizen. The incidental benefit of employment “security stabilization” and the tangential benefit of increased municipal tax revenue are subordinate, secondary effects that may trickle down to the community. From this, Appellee contends that “There can be no argument that such legislation is not within the ambit of the City’s general welfare”. *Appellee’s Merit Brief*, p. 17. On the contrary, an examination of the specific provisions of the legislation and the circumstances related to its passage reveals that the ordinances enacted substantially advanced the welfare of one citizen thereby failing substantive due process.

Appellee erroneously argues that Appellants’ substantive due process arguments fail since “under current United States Supreme Court precedent, substantive due process theories are unavailable to the Appellants”. *Appellee’s Merit Brief*, p. 17. Appellee bases this erroneous assertion upon its mischaracterization of *Lingle v. Chevron USA, Inc.* (2005) 544 *US* 528, 125 *SCt.* 2074 which eliminated the “substantially advances” prong of the two part test for *takings* previously set out in *Agins v. Tiburon* (1980) 447 *US* 255, 100 *SCt.* 2138. As far back as 1998

this Court set out the correct dichotomy between cases that challenge the constitutionality of zoning enactments under a substantive due process claim and those that claim a taking. On page 22 of their Merit Brief, Appellants acknowledge this Court's re-establishment, in *Goldberg*⁶, of the *Euclid v. Ambler Realty*⁷ standard for substantive due process claims. Contrary to Appellee's argument, *Lingle's* rejection of the "substantially advances" test as a standard for takings has no application to Appellants' substantive due process claim.

To avoid violating substantive due process, legislative action must bear a real and substantial relation to the public health and welfare. *Hausman, supra*. As argued in the 1851 amicus, "purely private interest legislation does not protect the general welfare; it treats one group of people differently from another group because of a raw exercise of political power". *1851 amicus, page 5*. The legislation enacted here is a textbook example of private interest legislation.

The true test of public welfare is at odds with the Twelfth District majority's holding. Appellants submit that the appellate majority's holding contradicts not only the case law but also the essence and meaning of *public* welfare. The appellate majority erred grossly in dismissing Appellant's substantive due process claim.

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

Appellee erroneously argues that Appellants are not entitled to a writ of mandamus as a remedy to redress the partial regulatory taking suffered by Appellants. Such argument has no foundation in that Appellee confuses the statutory proceeding of eminent domain provided for in Ohio Revised Code Section 163.63 with the remedy of inverse condemnation.

⁶ *Goldberg Companies, Inc. v. City of Richmond Heights (1998) 81 Ohio St. 3d 207; 690 NE2d 510*

⁷ *Euclid v. Ambler Realty 272 US 365, 47 S.Ct. 114.*

The formal proceeding referred to by Appellee is the statutory mechanism used by governments to obtain private property for public use in the eminent domain process. In contrast, inverse condemnation does not involve governmental bodies taking title to real property or acquiring property rights from private owners for the benefit of the public. The remedy is merely a means to allow aggrieved parties to obtain redress for an involuntary taking of property rights that has already occurred. Hence, *Britt v. City of Columbus*⁸ and the territorial limitation of municipal boundaries argued by Appellee have no application whatsoever to the instant case. To avoid repetition, a full explanation of the difference between statutory eminent domain proceedings and inverse condemnation remedies for involuntary takings is provided on pages 16, 17 and 18 of Appellants' Merit Brief.

The availability of the inverse condemnation remedy is of great importance in the instant case. 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. Given the facts of the instant case, particularly Appellants' claim for partial regulatory taking under the *Penn Central* factual inquiry, this Court's latest ruling in *State ex. rel. Gilmour Realty v. Mayfield Heights*, is directly applicable. In this most recent *Gilmour* case, this Court remanded *Gilmour's* partial regulatory takings cause based upon rezoning to the lower court for the purpose of giving the parties "the opportunity to introduce evidence and argument on *Gilmour's* partial regulatory takings claim". In paragraph 16 of its Opinion, this Court stated the following:

⁸ *Britt v. City of Columbus* (1974) 38 Ohio St.2d 1; 309 NE2d 412

“For Gilmour’s attempt to establish the remaining requirements of a clear legal right and duty, the regulatory takings claim requires an examination of (1) the economic impact of the regulation on Gilmour, (2) the extent to which the regulation has interfered with the company’s distinct investment backed expectations, and (3) the character of the governmental action.” *Penn Central Transportation Co. v. New York City* (1978) 438 US 104, 124; 98 S.Ct. 2646.

This Court thus established the test for fulfilling the clear right and clear duty requirements of the mandamus in partial regulatory takings case ; namely, the introduction of evidence to fulfill the three part ad hoc factual inquiry pursuant to *Penn Central*. A further reading of the Court’s opinion reveals that the case turned on the *evidence* that demonstrated the rezoning in *Gilmour* had “little or no effect on *Gilmour* and did not substantially interfere with *Gilmour*’s distinct investment backed expectations”. *Id.* In the instant case, Appellants were given no such opportunity to present evidence of the elements of the *Penn Central* inquiry to fulfill the mandamus clear right/clear duty requirements. As a result, mandamus is the proper remedy that has been denied Appellants by the erroneous decision of the appellate majority.

APPELLEE’S ARGUMENT D

D. The Court of Appeals Judgment Should Be Affirmed As the Court Followed Well Established Authority To Affirm The Trial Court’s Dismissal of Appellants’ Complaint.

The words of the majority in *Clifton II*⁹ “...this court’s holding may conflict with the *prevailing view across the country...*” (Emphasis added) reminds us that the nearly unanimous authority of foreign case law holds that substantial affectation of property rights is adequate to confer standing. Throughout Appellee’s Merit Brief, Appellee refuses to acknowledge that zoning enactments that adversely, directly, and substantially affect adjacent property owners confers standing. It argues, in essence, that an arbitrary, invisible corporation line divests such

⁹ *Clifton v. Village of Blanchester* 2010 Ohio 2309; 2010 Ohio App. LEXIS 190

owners of all remedies. As with most of Appellee's arguments, no applicable authority is referenced nor cited to support the same.

Appellee suggests that conferring standing upon such property owners "may be chaos" in Ohio land use law, thereby opening the "floodgates of the surge of litigation". *Appellee's Merit Brief*, p. 20. Appellee warns of potential zoning litigation exposure for every "possible negative impact on surrounding owners" leading to a chilling effect on governmental consideration of zoning enactments. Such onerous predictions are overstated.

Appellants would suggest that more damage would ensue by allowing municipalities the ability to exercise unfettered discretion in placing their most noxious, caustic, and invasive uses on their borders, irrespective of the destructive effects upon nearby neighbors. The alarmist tenor of Appellee's argument is negated by the rejection of a bright line rule by the majority and dissent in *Clifton II* as well as the dissent in *Moore*. *Clifton II*, ¶29 and 48; *Moore*, ¶77. A case by case analysis by Ohio courts is appropriate to balance municipal legislative autonomy with the prevention of violation of nonresidents' property rights. Such a case by case analysis is already required under *Penn Central's* factual inquiry for substantial regulatory takings, which has been adopted by this Court.

Appellee erroneously contends that Appellants' reliance on *City of Norwood v. Horney*¹⁰ is misplaced since the property sought to be appropriated in *Horney* was to be used for private development. The principles of *Horney's* rejection of an appropriation of private property solely for economic benefit to the community are applicable to Middletown's legislative action in the instant case. The enactments in both cases, though passed for different stated goals, were similar in their import. Both used the power of government to legislatively affect private property,

¹⁰ *City of Norwood v. Horney* 110 Ohio St.3d 353, 2006 Ohio 3799

ostensibly for the economic benefit of the community. In *Horney*, such action was undertaken for “public use”; in *Moore*, it was for “public welfare”. This Court has held, that it has “never found economic benefits alone to be a sufficient public use for a valid taking.” *Moore* ¶38 citing *Horney, supra*.

In the instant case, Appellants argue that private benefit legislation does not fulfill the substantial advancement of “public welfare”. Rather, as *Kelo*’s¹¹ perversion of “public use” in the federal arena has been rejected by this Court in *Horney* in deference to the greater protection afforded private property rights under the Ohio Constitution, Appellants urge this Court to extend the same type of protection to property owners adversely, substantially and directly affected by private interest legislation disguised as “public welfare” land use legislation.

CONCLUSION

Amid the dire warnings contained in Argument D of Appellee’s Merit Brief is an assertion that should become part of municipal land use practice and procedure in Ohio. Appellee states, “Under Appellants’ theories, zoning authorities must consider the possible effect on surrounding properties.” *Appellee’s Merit Brief, p. 20*. On this point, the parties are in agreement. Appellants do not consider said maxim to be anathema to municipal government but rather, an encouragement for government to exercise responsible land use policy.

Appellants would agree with the *Clifton II* majority that Appellants’ position is the prevailing view of the rest of the country. Given the nature of land use litigation and the causes of action upon which it is based, adopting responsible land use policy would decrease government’s exposure litigation. If the specific land use policies and public interests that were

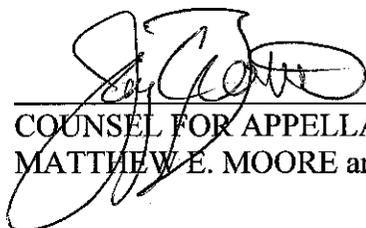
¹¹ *Kelo v. City of New London, Ct. (2005) 545 US 469, 125 S.Ct. 2655, 162 L. Ed. 2 439.*

being advanced or protected within proposed legislation were made part of the legislation itself (perhaps in the legislative purpose section), the result would be land use enactments with greater imperviousness to constitutional attack. Indeed, we have environmental impact statements required by law that seek to protect the public in that arena. Since locational policies, zoning impacts, and other resultant effects of zoning legislation are the heart and soul of land use legislation, more specific attention to such elements (including adjacent owner effects) would reduce, not increase land use litigation.

Middletown cannot demonstrate a land use rationale i.e. buffering, impacts, utilization of partially contaminated grounds, gray fields and brown fields, for the enactment of the two ordinances which are the subject matter of this case. From the content of the public hearings that were conducted with regard to the enactment of these ordinances, it is obvious that the legislation was purposefully and specifically crafted for one corporate citizen, to the exclusion of the claimed "public welfare". Appellants would urge this Court to affirm the widely held policy of considering the effects of land use legislation upon adjacent property owners.

Based upon the foregoing, Appellants' respectfully request that this Court reverse the decision of the Twelfth District Court of Appeals majority and to remand this cause back to the trial court for proceedings on the merits.

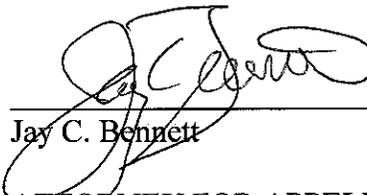
Respectfully submitted,
Jay C. Bennett, Counsel of Record



COUNSEL FOR APPELLANTS,
MATTHEW E. MOORE and LORI A. MOORE

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 Appellee, Robert Gehring, Crabbe Brown & James LLP, 30 Garfield Place, Suite 740, Cincinnati, Ohio 45202, this 17th day of May, 2011.



A handwritten signature in black ink, appearing to read 'Jay C. Bennett', is written over a horizontal line. The signature is stylized and cursive.

Jay C. Bennett

ATTORNEY FOR APPELLANTS,
MATTHEW E. MOORE and LORI A. MOORE