

IN THE SUPREME COURT OF OHIO

Willis and Annette Boice

Appellants,

Supreme Court Case No. 2012-0413

On Appeal from the Lucas County
Court of Appeals, Sixth Appellate District

Court of Appeals Case No. L-09-1253

v.

Village of Ottawa Hills, et al.

Appellees.

**MERIT BRIEF OF APPELLEES, THE VILLAGE
OF OTTAWA HILLS, ET AL.**

Sarah A. McHugh (0025170)
Emily C. Zillgitt (0085502)
Maloney, McHugh & Kolodgy, Ltd.
20 N. St. Clair Street
Toledo, Ohio 43604
Telephone: (419) 241-5175
Fax: (419) 725-2075
Attorneys for Appellees

Marvin A. Robon (0000664)
Larry E. Yunker II (0083536)
Barkan & Robon, Ltd.
1701 Woodlands Drive
Suite 100
Maumee, Ohio 43537
Telephone: (419) 897-6500
Fax: (419) 897-6200

Attorneys for Appellants

FILED
OCT 23 2012
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
OCT 23 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
ARGUMENT	7
Response to Proposition of Law #1: The denial of a variance or request for lot split by a municipal zoning commission is not a regulatory taking.	
A. Analysis of the <i>Penn Central</i> factors is required where a landowner has not been denied all economical use of his property.	7
1. Legal standard for cases alleging a regulatory taking of property.	7
2. Appellants failed to prove a regulatory taking pursuant to <i>Penn Central</i>	8
a. Appellants realized an increase in the appreciation of their property.	9
b. Appellants failed to establish that the ordinance interfered with any distinct, investment-backed expectations.	10
c. The ordinance is a legitimate government action that advances a valid and important government interest.	11
B. There can be no categorical taking of property where a landowner has not sustained a total loss of the value of his property.	12
1. Appellants did not allege a total taking until the case was remanded by the Sixth District.	12
2. Appellants have not been denied all economic value of their property.	13
3. Appellants' reliance on <i>Negin</i> is misplaced, as the Appellants owned the adjoining parcel of property.	14
Response to Proposition of Law #2: There is no vested right to a former zoning classification where the landowner has made no use of the property in accordance with the former zoning classification.	
A. Appellants have no vested right to sell Parcel 2 as a buildable lot.	18

1. To establish a vested right, a property owner must make a substantial, non-conforming use of the property.	18
2. The Village’s zoning code and the Ohio Revised Code require a substantial, non-conforming use.	20
B. Property owners do not have a vested right in a zoning classification remaining unchanged.	22
C. Ohio law has clear standards for asserting and establishing vested property rights.	23
CONCLUSION	25
CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

Cases:

<i>Abdalla Enterprises v. Liberty Twp. Bd. of Trustees</i> , 196 Ohio App.3d 204; 2011-Ohio-5085 (12 th Dist.)	19
<i>Boice v. Village of Ottawa Hills</i> , 6 th Dist. No. L-06-1208, 2007-Ohio-4471	4, 12
<i>Boice v. Village of Ottawa Hills</i> , 6 th Dist. No. L-09-1253, 2011-Ohio-5681	19, 24
<i>Browning-Ferris Indus. v. Guilford County Bd. of Adjustment</i> , 126 N.C. App. 168 (1997)	22
<i>BSW Dev. Group v. Dayton</i> , 83 Ohio St.3d 338, 344 (1998)	9
<i>City of Cleveland v. Abrams</i> , 8 th Dist. Nos. 89904 and 89929, 2008-Ohio-4589	21
<i>Concrete Pipe and Products of Ca., Inc. v. Constr. Laborers Pension Trust</i> , 508 U.S. 602 (1993)	9
<i>Cooley v. United States</i> , 324 F.3d 1297, 1305 (Fed. Cir. 2003)	13
<i>Cottone v. Zoning Hearing Bd.</i> , 954 A.2d 1271, 1277 (Pa. Commw. 2008)	16
<i>Curtiss v. City of Cleveland</i> , 166 Ohio St. 509, 520 (1957)	22
<i>Duncan v. Middlefield</i> , 23 Ohio St.3d 83 (1986)	12
<i>Euclid v. Ambler Realty Co.</i> , 272 U.S. 365 (1926)	9
<i>Friends of the Ridge v. Baltimore Gas and Electric Co.</i> , 352 Md. 645, 653; 724 A.2d 34 (1999)	16
<i>Gernatt Asphalt Prods. v. Town of Sardina</i> , 87 N.Y.2d 668, 664 N.E.2d 1226 (N.Y. 2006)	22
<i>Goldberg Cos. v. Council of Richmond Heights</i> , 81 Ohio St.3d 207 213 (1998)	4
<i>Hadacheck v. Sebastian</i> , 239 U.S. 394 (1915)	9
<i>Harden v. Ohio Atty. Gen.</i> , 101 Ohio St.3d 137, 2004-Ohio-382, 802 N.E.2d 1112	18
<i>Jacquelin v. Zoning Hearing Bd.</i> , 126 Pa. Commw. 20; 558 A.2d 189 (1989)	15
<i>Lingle v. Chevron U.S.A.</i> (2005) 544 U.S. 528	4, 8

<i>L.M. Everhart Constr., Inc. v. Jefferson County Planning Comm’n</i> , 2 F.3d 48 (4 th Cir. 1993)	23
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992)	12
<i>Negin v. Board of Bldg. & Zoning Appeals</i> , 69 Ohio St.2d 492 (1982)	14
<i>Penn Central Trans. v. New York City</i> (1978), 438 U.S. 104	4, 7, 8
<i>Sellers v. Bd. of Twp. Trs. of Union Twp.</i> , 5 th Dist. No. 2009 CA 00073 2010-Ohio-1138	19
<i>Smith v. Juillerat</i> , 161 Ohio St. 424 (1954)	19
<i>Somol v. Board of Adjustment of Borough of Morris Plains</i> , 277 N.J. Super. 220; 649 A.2d 422, (N.J. Super. Ct. Law Div. 1994)	16
<i>State ex re. Anderson v. Obetz</i> , 10 th Dist. No. 06AP-1030, 2008-Ohio-4064	8
<i>State ex rel. Duncan v. Middlefield</i> , 120 Ohio St.3d 313, 2008-Ohio-6200	12
<i>State ex rel. Jordan v. Indus. Comm. of Ohio</i> , 120 Ohio St.3d 412, 2008-Ohio-6137, 900 N.E.2d 150	18
<i>Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.</i> , 130 S. Ct. 2592 (2010)	18
<i>Tennessee Scrap Recyclers Ass’n v. Bredesen</i> , 556 F.3d 442, 456 (6 th Cir. 2009)	10, 11
<i>University Park v. Benners</i> , 485 S.W.2d 773, 778 (Tex. 1972)	22
<i>West Goshen Township v. Crater</i> , 114 Pa. Commw. 245; 538 A.2d 952 (1985)	15
<i>Young v. Avon Lake</i> , 9 th Dist. No. C.A. No. 09CA009665, 2010-Ohio-2943	24
 <u>Statutes:</u>	
R.C. 715.13	21
Village of Ottawa Hills Ordinance 78-5	21

STATEMENT OF FACTS

Annette Boice and her late husband, Willis Boice purchased two parcels of real property in the Village of Ottawa Hills in 1974 for \$174,000. (Tr. Vol 1. at 192). Their home was located on Parcel 1, at 2550 Westchester Road, and Parcel 2 was vacant undeveloped land located at 2570 Westchester Road. They installed a driveway over a portion of Parcel 2, and used the side yard as part of their residence. (Tr. Vol. 1 at 61).

As originally platted in 1926, Parcel 2 consisted of 46,000 square feet. (Tr. Vol. 1 at 24). The Plat was approved by the County engineer and each platted lot was per se a buildable lot. (Tr. Vol. 2 p. 53, 56, 57). In 1941, a home was built across the lot line between both platted lots. Thereafter, in 1974 the owner applied for a lot split to add a portion of Parcel 2 to Parcel 1 so that the home sat entirely on Parcel 1. The lot split enlarged the size of Parcel 1 to 56,000 square feet while it reduced Parcel 2 to 33,000 square feet. (Tr. Vol. 1 at 49, 86).

Both parcels of Appellants' property are located in the A-12 zoning district in the Village of Ottawa Hills. In 1978, the Village of Ottawa Hills amended its zoning requirements increasing the minimum lot size needed for a single-family residence. (Tr. Vo.1 at 58, Supp. 32-47). In the A-12 district, since 1978, the minimum square footage for a buildable lot has been 35,000 square feet in area and the maximum 70,000 square feet in area. (Supp. 34, 54). The Village subsequently amended its zoning code in 2002, however the minimum lot size of Appellants' district remained the same as it did Ordinance 78-5. Appellants are mistaken in their argument in their statement of facts, lots were neither platted nor accepted years after the 1978 amendment of the zoning ordinance.

In the A-12 district for lots with frontage of seventy feet or more, an aggregate side yard must be 50 percent of the building's width. (Supp. 54). The minimum side yard for one side

shall be 40 percent of the minimum side yard aggregate. (Supp. 54). Also since 1978, the minimum square footage for a buildable lot has been 35,000 square feet in area. (Tr. Vol. 1 at 58). The change in the 1978 zoning ordinance meant that although it was sufficient in 1974, since 1978, Parcel 2 has not been large enough to meet the requirements to build a home. (Tr. Vol. 1 at 84). The subject of this lawsuit is the ordinance the Village properly enacted in 1978, and the effect it had Appellants' property located at 2570 Westchester Road in the Village of Ottawa Hills.

The Boices enjoyed Parcel 2 as green space and for the beautiful views while raising a family, as well as for the circular driveway, which crossed a portion of the parcel. (Tr. Vol. 1 at 200). They never hired a contractor or engineer to pursue options to build a home on Parcel 2. (Tr. Vol. 1 at 199). They did not complain of the Parcel's status as an unbuildable lot until 2004 when they wished to sell the lot for the highest value. Contrary to Appellants' statement of facts, there is no evidence in the record that the lot was purchased as an investment.

The Boices moved out of the residence and offered the property for sale. The original listing price was \$899,999 in October of 2003, and included the total 2.07 acres, specifically mentioning a .76 acre vacant side lot. (Tr. Vol. 1 at 174). In August of 2004, the Boices reduced the list price to \$649,000 and reduced the lot size to 1.25 acres. (Tr. Vol. 1. at 175). The Boices agreed to sell the residence alone for the sale price of \$585,000. (Tr. Vol 1 at 175, 192). There was no evidence that the separate parcel was ever independently offered for sale.

Prior to selling Parcel 1, the Boices, recognizing Parcel 2 was not large enough to constitute a buildable lot, applied to the Village Zoning Commission for a variance from the 35,000 square foot lot minimum size. (Tr. Vol. 1 at 35). The average lot size for all lots in the vicinity was 40,029 square feet, compared to 33,105 square feet for the Boice parcel. (Supp. 27).

Concurrently, the Boices requested that the Zoning Commission approve a lot split, to allow a portion of the irregularly shaped Parcel 1 to become part of Parcel 2. (Tr. Vol. 1 at 35). Two lot splitting alternatives were presented, contained in Attachments numbered 2 and 3 submitted by Appellants' son, Peter Boice. (Supp. 19-22). Attachment 2 proposed leaving the western front lot line with a driveway on it "as is" and extending and enlarging the rear property line. (Supp. 21). Attachment 3 proposed reducing the front lot line and enlarging the rear lot line so that a smaller triangular piece of property at the front lot line would be surrendered and a larger triangular piece at the rear would be joined. (Supp. 22). Zac Isaac, a member of the Zoning Commission asked Peter Boice which of the lot split request he wished to proceed on and Mr. Boice identified Attachment 2 as the one he wished to present for consideration. (Supp. 30). He also indicated that he could move the driveway if necessary. (Supp. 30).

To reach a decision on the lot split request, the Commission reviewed Ordinance 94-10, which applies to granting ordinances on lot splits. Considering green space, population density, testimony of Appellants' neighbors, and aesthetics of the zoning district, the Village of Ottawa Hills Zoning Commission unanimously denied the motion to approve the lot split as proposed by Mr. Peter Boice. (Supp. 30).

After the denial, Mr. Isaac approached Mrs. Boice and Peter Boice and suggested they return to the commission with a blueprint that did not exceed the density footprint of the area, and accommodated the side yard requirements. (Tr. Vol. 2 at 39). The Boices never returned to the Zoning Commission to present alternatives to Attachment 2. In fact, it was several months *after* the Village's Zoning Commission denied their application for a variance that the Boices sold Parcel 1. (Tr. Vol. 1. at 112, 128-129). Thus, the Boices sold Parcel 1 with the knowledge that Parcel 2 was not a buildable lot. (Tr. Vol. 1. at 133, 165). This action by the Boices limited

the market for sale of the adjoining lot, since the sale of the residence was made voluntarily by the Boices, when they could have chosen to sell both parcels, or sought approval from the zoning commission on an alternative to Attachment 2.

The Boices filed an administrative appeal, pursuant to Chapters 2505 and 2506 of the Ohio Revised Code to the Lucas County Court of Common Pleas. (Supp. 1-7). The trial court determined that the Commission's decision was neither arbitrary, unreasonable, or capricious.¹

An appeal to the Sixth District Court of Appeals followed, which reversed the trial court, and remanded for a determination of whether a taking occurred under the framework of the U.S. Supreme Court's decisions in *Penn Central Trans. v. New York City* (1978), 438 U.S. 104 and *Lingle v. Chevron U.S.A.* (2005) 544 U.S. 528. See *Boice v. Village of Ottawa Hills*, 6th Dist. No. L-06-1208, 2007-Ohio-4471.

The case proceeded to trial on remand. At the trial, two experts testified as to the value of 2570 Westchester Road. Ken Wood, an appraiser with more than 20 years experience, testified on behalf of the Village of Ottawa Hills. (Tr. Vol. 2. at 116). Mr. Wood testified that he was retained to determine the market value of Appellants' Parcel 2 as both a buildable lot and unbuildable lot. (Tr. Vol. 2 at 188). To determine the value of Parcel 2, Wood testified that he considered comparable sales of unbuildable lots in the same A-12 zoning district as Appellants' parcel. (Tr. Vol. 2 at 121-123). He also considered comparable sales in zoning districts with reduced lot size requirements. (Tr. Vol. 2 at 123-124). Mr. Wood also calculated the rate of appreciation on the property, considering the values of the lot as buildable and unbuildable. (Tr. Vol. 2 at 129-131). He determined that Appellants realized a 17 percent increase in appreciation

¹ Six years after the denial of the variance, the Boices filed a complaint for writ of Mandamus to compel the Village to institute an appropriation action on August 17, 2010. The matter has been stayed pending resolution of this case.

from 1978 to 2009. (Tr. Vol. 2 at 129). Based on this data, Mr. Wood valued the Boice's second parcel of property, as an unbuildable lot, at \$105,000.00. (Tr. Vol. 2 at 130).

Appraiser Robert Domini testified that he appraised the value of Parcel 2 at \$38,000. The trial court heard the testimony of Mr. Domini over the Village's objection. The trial judge excluded the testimony of the first expert witness, Robert Keeseey, based on a letter to the expert in his file in which Appellants' counsel instructed Mr. Keeseey "We need you to indicate that the lot would have tremendous value if it was buildable and little or no value if it is not." (Tr. Vol. 1 at 120). Appellants' counsel stated that he always instructs his potential expert witness as to the opinion he would like them to render. (Tr. Vol. 1. at 121-122). Mr. Domini, admitting his valuation was weak because of lack of comparable sales, valued the property at \$38,000. (Tr. Vol. 2 at 92, 105). He testified that he had difficulty finding comparable sales, and placed the value of the property per acre at \$50,000, based solely on "guesswork." (Tr. Vol. 2 at 92). He stated that usually he renders an opinion that is much more certain. (Tr. Vol. 2 at 92). He considered only one comparable sale, from a different zoning district. (Tr. Vol. 2 at 102-103). He acknowledged that most of the neighboring lots exceeded one acre and that his appraisal from 2005 was not updated before testifying four years later at the 2009 trial. (Tr. Vol. 2 at 102, 103). He found it remarkable, but acknowledged that an unbuildable lot in the same zoning district sold for \$300,000 an acre. (Tr. Vol. 2 at 111). In spite of the weakness he conceded (Tr. Vol. 2 at 105), he still appraised the property value at \$38,000.

Devin Denner and his family reside at 2606 Westchester Road. (Tr. Vol. 2 at 73). Mr. Denner and his family relocated from St. Louis, Missouri, to the Village of Ottawa Hills, and they were attracted to the Village because of the quality of the environment, the quality of the schools, the park-like setting of the neighborhood, and the overall aesthetics of the Village. (Tr.

Vol. 2 at 75). Mr. Denner objected to the Boice's application for a variance at the meeting of the Zoning Commission because he believed building a house on that lot would lower the value of property in the area, and believed there should be consistency throughout the A-12 zoning district regarding minimum sizes for buildable lots. (Tr. Vol. 2 at 76- 77).

Village Manager Marc Thompson also testified but contrary to the Statement of Facts proffered by Appellants, he did not state that the parcel's only purpose was "to look at it." Thompson testified that a platted lot is buildable. (Tr. Vol. 1 at 84). When the lot line was moved, and no longer configured as a platted lot, it became a parcel subject to the requirements of the zoning code. (Tr. Vol. 1 at 84). The lot could be put to the same use as it has been for the last thirty years. (Tr. Vol. 1 at 94)

The trial court issued its findings of fact and conclusion of law on August 28, 2009, finding for the Village of Ottawa Hills, and holding no taking had occurred. Under the framework of *Penn Central*, the Boices had failed to carry their burden of proof, beyond a fair debate, of establishing 1) the detrimental economic impact of the regulation, 2) their distinct investment-back expectations for 2570 Westchester Road, and 3) the character of the government action. They failed to establish that the denial of a variance and the denial of a lot split under Village ordinances imposed a significant economic impact on Appellants. Rather, the evidence established Appellants actually realized an overall appreciation on the value of their property. Further, there was no evidence of any distinct, investment-backed expectations with respect to the property, as Annette Boice testified she only believed generally that the value of real estate increases over time. Finally, Appellants failed to establish any deficiencies in the character of the government action. Rather, the evidence established the ordinance serves

legitimate public interests, and does not in any way restrict ownership of the land or their ability to transfer title to the property.

Appellants appealed the decision to the Sixth District Court of Appeals, which affirmed the trial court's decision. This appeal followed.

ARGUMENT

Response to Proposition of Law #1: The denial of a variance or request for lot split by a municipal zoning commission is not a regulatory taking.

A municipality or other zoning body is justified by its police powers to enact zoning for the public welfare and safety. *Goldberg Cos. v. Council of Richmond Heights*, 81 Ohio St.3d 207, 213 (1998). The powers, while not unlimited, need only bear a rational relation to the health, safety, morals or general welfare. *Id.* at 213-214.

In this case, the Village of Ottawa Hills was justified by its police powers in enacting ordinance 78-5, for the public welfare and safety of the Village. Further, the Zoning Commission of the Village was justified in its decision to deny Appellants a variance from the requirements of ordinance 78-5, where the decision was made for the welfare and safety of the Village. There has been neither a partial or total taking of Appellants' Parcel 2 in the Village of Ottawa Hills.

A. Analysis of the *Penn Central* factors is required where a landowner has not been denied all economical use of his property.

1. Legal standard for cases alleging a regulatory taking of property.

In analyzing a Fifth Amendment takings case, the Ohio Supreme Court has adopted the standard set forth by the United States Supreme Court. That is, regulatory takings cases are governed by *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) and *Lingle v.*

Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005). See *State ex rel. Duncan v. Middlefield*, 120 Ohio St.3d 313, 2008-Ohio-6200 at ¶ 17.

In *Lingle*, the Supreme Court recognized that there are two narrow categories of regulatory actions that constitute “per se” takings. 544 U.S. at 538. The first occurs where there has been a regulatory action that results in a permanent physical invasion, and the second categorical rule applies to regulations that deprive an owner of “all economically beneficial use of her property.” *Id.* (emphasis in original). Outside of these two narrow categories, the proper analysis of whether a regulatory action constitutes a taking is pursuant to the *Penn Central* factors.

As such, *Lingle* dictates that courts consider: (1) whether the landowner has suffered a permanent physical invasion of his property, (2) whether the rezoning deprives the landowner of all economically beneficial use of his property, and (3) whether a less-than-all deprivation of economically beneficial use constitutes a taking under the *Penn Central* analysis. *Lingle*, 544 U.S. at 539-540, See also *State ex. rel. Anderson v. Obetz*, 10th Dist. No. 06AP-1030, 2008-Ohio-4064 at ¶ 13. The Appellants in this case did not suffer a permanent physical invasion, nor did the 1978 ordinance deprive Appellants of all beneficial use of their land. Thus, the proper analysis is under the framework of the *Penn Central* decision.

2. Appellants failed to prove a regulatory taking pursuant to *Penn Central*.

The *Penn Central* decision requires an analysis of three factors: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Penn Central*, 428 U.S. at 129. Here, the lower courts properly determined all factors weighed in favor of the Village.

a) Appellants realized an increase in the appreciation of their property.

The first consideration under *Penn Central* is the economic impact of the regulation on the landowners. It is well established law that the mere “diminution in a property’s value, however serious, is insufficient to demonstrate a taking.” *Concrete Pipe and Products of Ca., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 604 (1993). The Ohio Supreme Court has stated that, to constitute a taking, a plaintiff must establish something more than the loss of market value or the loss of comfortable enjoyment.” *BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 344 (1998).

In this case, Appellants failed to establish that they sustained anything more than the loss of market value or comfortable enjoyment of their property. (Tr. Vol. 2. at 129-130). At trial, the Village’s appraiser, Ken Wood, testified that the value of Appellants’ parcel as an unbuildable lot was \$105,000, while the value of the lot as buildable was \$190,000. The Village has acknowledged that the lot could be sold for a higher amount if it is buildable. However, mere diminution in property value is insufficient to satisfy the first element of the *Penn Central* test. For example, courts have found no detrimental economic impact where there has been as much as a 75 percent or 87 ½ percent reduction in the value of the property. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). Additionally, Appellants actually realized an overall appreciation with respect to the value of their second parcel of property. Mr. Wood testified at trial that Appellants realized a 17 percent increase in the value of their parcel of property. (Tr. Vol. 2 at 129).

With respect to the economic impact of the ordinance, Appellants established nothing more than a decrease in the market value of the property as an unbuildable lot. This is insufficient to establish a taking. Further, even if the market value of the property decreased,

Appellants realized an overall appreciation in the property. As such, Appellants failed to establish the first element under the *Penn Central* analysis.

b) Appellants failed to establish that the ordinance interfered with any distinct, investment-backed expectations.

Appellants also failed to establish they had any distinct investment-back expectations with respect to Parcel 2, and therefore Appellants failed to establish the second element of the *Penn Central* test.

This second prong of the *Penn Central* test is closely related to the first prong. *Tennessee Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 456 (6th Cir. 2009). To establish a distinct investment-backed expectation, the property owner must establish more than a unilateral investment expectation. *Id.* at 456-457. It is insufficient that the landowner lost an ability to exploit a property interest he previously thought was available for development. *Id.* at 457.

Here, Appellants have established nothing more than a unilateral expectation they would some day be able to sell Parcel 2 as a buildable lot. Annette Boice testified at trial that neither she nor her husband ever thought of Parcel 2 as an investment, but rather that she believed the value of real estate generally increases over time. (Tr. Vol. 1 at 202). Further, in their 30 years of ownership of the property, Appellants never hired a contractor or engineer to explore or consider opportunities to build on the parcel. (Tr. Vol. 1 at 199). Instead, Appellants enjoyed their lot as green space and for their driveway while they resided on the adjoining parcel. (Tr. Vol. 1 at 200).

Appellants' actions establish they had no investment-back expectations for the property. As such, Appellants failed to meet their burden of proof on the second *Penn Central* factor, and this Court should affirm the ruling of the lower courts.

c) The ordinance is a legitimate government action that advances a valid and important government interest.

Under the final element of the *Penn Central* analysis, a court must consider the character of the government action. In considering the character of the government action, courts consider factors such as whether the government regulation imposed some kind of physical restriction on the landowner's property or whether the regulation restricts the landowner's transfer of property. See *Tennessee Scrap Recyclers*, 556 F.3d at 457. Here, the 1978 Village zoning regulation imposes no physical restriction on Appellants nor does it restrict their right to transfer title to their property. Appellants' only argument is that upon transfer of title, they would receive less money for an unbuildable lot than they would for a buildable lot. The zoning ordinance also advances a legitimate public interest – it protects the health, welfare and safety of the Village by maintaining proper population density and controlling the area's green space. This third and final prong of the *Penn Central* test favors the Village of Ottawa Hills, and thus Appellants failed to meet their burden of proof on all three elements of the *Penn Central* case.

Citing every Ohio case involving a takings claim does not provide any guidance on the status of Ohio law, nor does it provide guidance on how this Court should decide this case. With each decision made in favor of the Village, Appellants have created a new legal theory in an attempt to obtain a different ruling. The wrangled procedural history of this case evidences this point. However, this Court has consistently recognized the validity of the *Penn Central* test where there has been a less than 100 percent deprivation of the economic use of property. As such, the Village respectfully requests this Court affirm the ruling of the lower courts, determining that Appellants failed to establish a regulatory taking.

B. There can be no categorical taking of property where a landowner has not sustained a total loss of the value of his property.

1. Appellants did not allege a total taking until the case was remanded by the Sixth District.

While Appellants would like to argue for an analysis of the case under the categorical standards set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the procedural history of this case is telling. In 2004, the Appellants initially applied for a variance or lot split to the Village's Zoning Commission. Appellants appealed to the Lucas County Court of Common Pleas. This Court has consistently held applicants for a variance to the standard set forth in *Duncan v. Middlefield*, 23 Ohio St.3d 83 (1986). Having failed to satisfy the *Duncan* standard at the administrative level, Appellants argued for the application of *Penn Central* in its first appeal to the Sixth District. The Sixth District remanded the matter for the trial court to analyze the case pursuant to the *Penn Central* standards.

Unsuccessful on the *Penn Central* analysis, Appellants alleged a total regulatory taking in its second appeal to the Sixth District. However, a thorough review of the record reveals that Appellants did not allege a total taking until after the case was remanded. In fact, this provided the basis for the reversal of the case by the Sixth District Court of Appeals in 2006. In *Boice I*, the Sixth District noted the trial court had analyzed the case under the *Lucas* standards. The court "found this to be in error because appellants have never alleged a total regulatory taking. Rather, the facts of the present case required an analysis under *Penn Central* and its progeny in that appellants essentially assert that the zoning ordinance interfered with distinct investment-backed expectations." *Boice v. Village of Ottawa Hills*, 6th Dist. No. L-06-1208, 2007-Ohio-4471 at ¶ 34.

The Supreme Court is not the place to advance arguments and legal theories not considered below. This Court should not review this case in the context of *Lucas*, as Appellants advanced this argument only after unsuccessful attempts to argue a regulatory taking under the standards governing an administrative appeal and pursuant the *Penn Central* standards.

2. Appellants have not been denied all economic value of their property.

A landowner has not established a categorical, total taking unless he establishes he sustained a *total* loss of the value of his property. *Lucas*, 505 U.S. at 1019-1020 n. 8 (emphasis added). Thus, for example, even where a landowner loses 98.8 percent of the value of his property due to a regulatory action, the proper analysis for a taking is pursuant to *Penn Central*, as the landowner has not sustained a total loss. *Cooley v. United States*, 324 F.3d 1297, 1305 (Fed. Cir. 2003).

Even by their own expert's opinion, Appellants have never been denied all economic value of Parcel 2. Appellants' expert testified at trial that as a non-buildable lot, Parcel 2 had a value of \$38,000. (Tr. Vol. 2 at 92, 105). The Village's expert, Ken Wood, who unlike Appellants' expert considered comparable lots, valued Parcel 2 at \$105,000 as a non-buildable lot. (Tr. Vol. 2 at 130). Mr. Wood also determined that Appellants realized a 17 percent increase in appreciation from 1978 to 2009. (Tr. Vol. 2 at 129). Both experts placed value on the property, even as an unbuildable lot. As such, Appellants failed to sustain their burden of proof that they sustained a total loss.

Appellants also cannot allege a total taking where they have not presented all available alternatives to the Village for approval or denial. At the hearing on the request for a variance, Peter Boice proceeded only on Attachment 2. (Supp. 30). After the commission's denial, Zoning Commission member Zac Isaac approached Mrs. Boice and Peter Boice and suggested

they return to the commission with a blueprint that did not exceed the density footprint of the area, and accommodated the side yard requirements. (Tr. Vol. 2 at 39). The Boices never returned to the Zoning Commission to present alternatives to Attachment 2. As Appellants have never requested or received a determination on any proposal other than Attachment 2, they cannot allege a total, categorical taking has occurred.

The *Lucas* decision created a categorical rule that applies only where a landowner has sustained a total loss in the value of his property. Appellants have not sustained a total loss, and therefore *Lucas* does not apply.

3. Appellants' reliance on *Negin* is misplaced, as the Appellants owned the adjoining parcel of property.

The case of *Negin v. Board of Bldg. & Zoning Appeals*, 69 Ohio St.2d 492 (1982), on which Appellants heavily rely and frequently cite, is inapposite to the case at bar. Appellants would like this Court to “expand upon” its ruling in *Negin*. However, the *Negin* case is irrelevant to the analysis of the takings issue before this Court. *Negin* involved an outdated legal standard for regulatory takings, and further, the facts are distinguishable on key points.

As this Court is aware, *Negin* involved a landowner who inherited a substandard lot from his father, which had always been held in single and separate ownership, but did not meet the city's minimum lot size requirements. Because the property remained as originally platted and was held in single and separate ownership, the court determined that a nonconforming use could be continued. *Negin*, 69 Ohio St.2d at 496.

The case, decided long before *Lingle*, involved an analysis of a takings issue under a now outdated legal standard. In the *Negin* case, this Court determined the issue of an unconstitutional taking by considering whether the ordinance had “any reasonable relationship to the legitimate exercise of the police power by the municipality.” *Id.* at 495. In the instant case, the lower

courts appropriately determined the takings issue under the current legal framework of *Penn Central* and *Lingle*. If this Court makes any determinations regarding the validity of *Negin*, it should hold that the case is no longer applicable in light of the *Lingle* decision and the current law on Fifth Amendment takings.

Additionally, the landowner in *Negin* owned property that remained as originally platted. In contrast, in the instant case Appellants' parcel of property did not exist as originally platted. Appellants refuse to accept the distinction between lots that exist as originally platted in 1926, and parcels of land, which have been altered or otherwise changed since 1926. Appellants' property was altered in 1974, such that while Parcel 2 when originally platted existed as a 46,000 square feet piece of property, it was reduced to 33,000 square feet. As such, the parcel is subject to the minimum lot size requirements of the Village's zoning code.

Further, and perhaps most significantly, Appellants have not maintained their property in single and separate ownership, as did the landowner in the *Negin* case. While Ohio courts have not clearly defined "single and separate ownership," most jurisdictions require ownership of a lot by one or more persons, which is separate and distinct from that of any adjoining lot. See e.g. *Jacquelin v. Zoning Hearing Bd.*, 126 Pa. Commw. 20, 25; 558 A.2d 189, 191 (1989) (noting single and separate ownership occurs where contiguous lots have different owners). Further, to establish single and separate ownership of contiguous lots, there must be some physical manifestation that the lots are intended to be separate and distinct from each other. *Id.* Generally, the landowners' subjective intent is not a determining factor in the single and separate ownership analysis. *West Goshen Township v. Crater*, 114 Pa. Commw. 245, 249; 538 A.2d 952, 954 (1985).

Whereas in *Negin* the landowner owned the property in single and separated ownership, Appellants here, at all relevant times, have never owned Parcel 2 in single and separate ownership. At all times relevant to the takings issue, Appellants owned the adjoining property located at 2550 Westchester Road. Further, Appellants obtained Parcel 1 and Parcel 2 in the same deed. (Supp. 15). A portion of Appellants' driveway encroached on Parcel 2. (Tr. Vol. 1. at 86). Appellants utilized Parcel 2 as green space and for the beautiful views for their entire period of ownership. (Tr. Vol. 1 at 199-200). In fact, even as Appellants listed the properties for sale, they treated the two parcels as one, marketing Parcel 2 as a "side yard." (Tr. Vol. 1 at 174). Unable to reach an agreement on the price for both parcels, Appellants chose to sell Parcel 1 separately, with the knowledge that Parcel 2 was not a buildable lot. That was the first instance in their entire period of ownership of treating Parcel 2 as a separate parcel.

Several courts have recognized the "doctrine of merger" in zoning cases, prohibiting the use of individual substandard parcels if contiguous parcels have been, at any relevant time, in the same ownership. *Friends of the Ridge v. Baltimore Gas and Electric Co.*, 352 Md. 645, 653; 724 A.2d 34, 38 (1999); See also *Cottone v. Zoning Hearing Bd.*, 954 A.2d 1271, 1277 (Pa. Commw. 2008) (where two adjoining lots are under common ownership when a zoning ordinance is passed, the two lots are presumed to have merged); *Somol v. Board of Adjustment of Borough of Morris Plains*, 277 N.J. Super. 220; 649 A.2d 422, (N.J. Super. Ct. Law Div. 1994) (under the doctrine of merger, separate undersized but contiguous lots fronting on the same street in single ownership ordinarily merge into one lot).

The Village encourages this Court to adopt a similar rule. Appellants here owned adjoining parcels under common ownership at the time of the enactment of the 1978 ordinance. For their entire period of ownership, they treated the two parcels as one. A portion of

Appellants' driveway was placed over Parcel 2, and Appellants enjoyed Parcel 2 for the additional green space while raising a family. Under the doctrine of merger as applied in zoning cases, the two parcels merged into one. At the very least, Appellants' common ownership of the contiguous properties distinguishes it from the *Negin* case, and supports the finding that no regulatory taking has occurred.

A total taking of property has not occurred under any of the legal theories Appellants have set forth. This Court should overrule Appellants' first assignment of error.

Response to Proposition of Law #2: There is no vested right to a former zoning classification where the landowner has made no use of the property in accordance with the former zoning classification.

In their second proposition of law, Appellants argue "[t]he pre-existing vested rights in property exist independent of a landowner's intent to personally exercise those rights." Appellants' proposition of law is problematic for several reasons, including the initial assumption in the proposition of law that the Appellants even have a vested property right to sell Parcel 2 as a buildable lot, where they made no use of the parcel as a buildable lot. Additionally, this argument is tantamount to an assertion that a parcel of property is never subject to a future zoning regulation so long as the landowner exercised ownership during the existence of a prior zoning regulation. It would also eliminate the longstanding requirement that a landowner make a substantial, nonconforming use of property before the landowner can establish a vested right.

If this Court were to reverse these longstanding and well-established rules of law, it would effectively eliminate the power of a municipality to make changes to its zoning code, as all landowners would be exempt from future regulations. Additionally, it would grant vested property rights to landowners who have nothing more than a mere expectation in the continuance

of existing laws – a broad rule that contravenes the rule in the majority of U.S. jurisdictions. This Court should overrule Appellants’ second proposition of law.

A. Appellants have no vested right to sell Parcel 2 as a buildable lot.

At the forefront of their argument, Appellants allege they have a “pre-existing” vested right, as an incident of ownership, to sell their parcel as a buildable lot, despite never having used Parcel 2 as a buildable lot. They argue this is an aspect of the bundle of property rights, which can never be affected by a new zoning regulation. This broad statement is contradictory to the doctrine of vested property rights under Ohio law.

The determination of whether one has a constitutionally protected property right is a question of state law. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2612 (2010). Under Ohio law, a property right cannot be characterized as vested “unless it constitutes more than a mere expectation or interest based upon an anticipated continuance of existing laws.” *State ex rel. Jordan v. Indus. Comm. of Ohio*, 120 Ohio St.3d 412, 2008-Ohio-6137, 900 N.E.2d 150, ¶ 9. Ohio courts have stated that a vested right is one that “so completely and definitely belongs to a person that it cannot be impaired or taken away without the person’s consent.” *Harden v. Ohio Atty. Gen.*, 101 Ohio St.3d 137, 2004-Ohio-382, 802 N.E.2d 1112.

In this case, Appellants had nothing more than a mere expectation, if that, of the continuance of the zoning ordinance that existed prior to 1978. This is insufficient to establish a vested property right, and requires Appellants’ second proposition of law to be overruled.

1. To establish a vested right, a property owner must make a substantial, non-conforming use of the property.

Under longstanding Ohio law, where no substantial nonconforming use has been made of the property, a property owner has acquired no vested right to such use of the property. *Smith v.*

Juillerat, 161 Ohio St. 424, 431 (1954). A nonconforming use of land is a use that was lawful before the enactment of a zoning amendment, but one which, although no longer valid under the current zoning rules, may be lawfully continued. *Sellers v. Bd. of Twp. Trs. of Union Twp.*, 5th Dist. No. 2009 CA 00073, 2010-Ohio-1138 at ¶ 50. A landowner can show a substantial, non-conforming use by showing it had changed its position, expended significant time, effort or money, or incurred significant obligations with respect to the property. *Abdalla Enterprises v. Liberty Twp. Bd. of Trustees*, 196 Ohio App.3d 204, 211; 2011-Ohio-5085 (12th Dist.) at ¶ 26.

Noticeably absent from Appellants' brief is any discussion of their actions that would constitute a substantial, non-conforming use of Parcel 2 as a buildable lot. This is because the Appellants never used Parcel 2 as a buildable lot. For the entire period of their ownership, Appellants enjoyed the benefit of additional green space and the peaceful setting of having the contiguous parcel remain unoccupied. As Annette Boice testified at trial, neither she nor her husband ever hired a contractor to develop plans to build a house for Parcel 2. (Tr. Vol. 1 at 199). They likewise never hired an engineer to develop housing plans for Parcel 2. (Tr. Vol. 1 at 199). Rather, they enjoyed Parcel 2 for the beauty of the large trees and additional green space. (Tr. Vol. 1 at 200).

Appellants again rely on the *Negin* case, which is misplaced, particularly in the context of vested property rights. Whether a taking has occurred, and whether a landowner has a vested property right, are not identical concepts that can be interchanged at the convenience of the landowner. In the appellate court decision, the Sixth District Court of Appeals analyzed the *Negin* case in the context of Appellants' "use" of the property, and to consider Appellants' investment-backed expectations in accordance with the *Penn Central* decision. *Boice v. Village of Ottawa Hills*, 6th Dist. No. L-09-1253, 2011-Ohio-5681 at ¶ 40. It did not impose an intent to

build requirement as a prerequisite to establishing a vested property right, but rather looked at *Negin* to consider Appellants' investment-backed expectations.

Further, as noted previously in this brief, *Negin* is inapplicable, as the instant case does not involve a landowner who held the parcels of property in single and separate ownership. Appellants treated Parcel 1 and Parcel 2 as a single parcel for their entire period of ownership, and then proceeded to sell Parcel 1 with the knowledge that Parcel 2 was not a buildable lot. (Tr. Vol. 1. at 133, 165). Additionally, *Negin* was decided prior to this Court's adoption of the *Lingle* factors, and under an outdated regulatory takings standard. It is not relevant to the vested rights analysis.

Finally, Appellants' representation that Village Ordinance 78-5 limits the alienability of Parcel 2 is simply incorrect. The ordinance places no restrictions on Appellants' ability to transfer title. While Appellants wish to sell it as a buildable parcel to realize the highest profit, they were required to, and failed to, establish something more than a loss in market value of the property. And that Parcel 2 was considered a buildable lot prior to 1978 does not establish a vested property right in Appellants where they did not use the property as a buildable lot.

In an effort to realize the highest possible profit from the sale of Parcel 2, Appellants argue mere ownership is sufficient to establish a vested property right. However, Appellants made no lawful use of the property as a buildable at any time in their period of ownership of Parcel 2. Because there was no substantial, non-conforming use of the property, Appellants have no vested right to sell Parcel 2 as a buildable lot.

2. The Village's zoning code and the Ohio Revised Code require a substantial, non-conforming use.

Consistent with Ohio law on vested property rights and non-conforming uses, Village Ordinance 78-5 permits the continuation of a lawful *use* of a building or structure or of any land

or premises *existing* at the effective date of enactment of the ordinance. (Supp. 40) (emphasis added). Similarly, R.C. 713.15 permits the lawful *use* of any dwelling, building, or structure, and of any land or premises *existing* and lawful at the time of enactment of the ordinance. R.C. 713.15 (emphasis added). A landowner claiming a nonconforming pursuant to R.C. 713.15 has the burden of proving 1) the use existed prior to the enactment of the prohibitory land use regulation, and 2) the use in question was lawful at the time the use was established. *City of Cleveland v. Abrams*, 8th Dist. Nos. 89904 and 89929, 2008-Ohio-4589 at ¶ 45.

Here, Appellants admittedly made no use of the property as a buildable lot, thus there was no nonconforming use to continue. Appellants therefore have not met their burden of proof in establishing a nonconforming use pursuant to either VOH Ordinance 78-5 or R.C. 713.15. There has never been a dispute that the Appellants used Parcel 2 as green space for the entire period of their ownership, until they sought to sell the parcel for the greatest possible value. To establish a non-conforming use, Appellants needed to present evidence they used Parcel 2 as a buildable lot. In failing to present this evidence, they failed to establish a non-conforming use.

Additionally, both the Village ordinance and the Ohio statute provide that if a nonconforming use is discontinued for a period of two years, any future use shall conform to the use permitted in the ordinance and/or statute. Even if Appellants could successfully argue they treated Parcel 2 as a buildable lot in 1978, it clearly has been more than two years since Appellants discontinued the use.

Ohio law requires evidence of a substantial, non-conforming use before a property owner can establish a vested property right in a zoning classification. Thus, Appellants' second proposition of law is without merit.

B. Property owners do not have a vested right in a zoning classification remaining unchanged.

If this Court were to accept Appellants' second proposition of law, it would reverse a longstanding rule in Ohio holding that a landowner has no vested right to a zoning ordinance remaining unchanged. This proposition of law would have the effect of abrogating a municipality's right to enact zoning ordinances, as, under Appellants' broad assertion, property owners would be exempt from all future zoning ordinances that may adversely affect their property.

As this Court has held, there is no vested right to have a zoning classification remain unchanged. *Curtiss v. City of Cleveland*, 166 Ohio St. 509, 520 (1957). This rule of law is consistent throughout jurisdictions in the United States. See e.g. *Gernatt Asphalt Prods. v. Town of Sardina*, 87 N.Y.2d 668, 684; 664 N.E.2d 1226, 1236 (N.Y. 2006) (holding the plaintiff had no vested right to have an existing zoning ordinance remain unchanged); *University Park v. Benness*, 485 S.W.2d 773, 778 (Tex. 1972) (holding property owners do not acquire a protected vested right in zoning classifications once made); *Browning-Ferris Indus. v. Guilford County Bd. of Adjustment*, 126 N.C. App. 168, 171 (1997) (holding the adoption of a zoning ordinance does not confer upon landowners any vested rights to have the ordinance remain forever in force, inviolate, and unchanged).

This Court should not grant Appellants the vested right to perpetual application of the Village's pre-1978 zoning ordinance. To do so would preclude municipalities from enactment of zoning laws, which is an exercise of lawful police power granted to municipalities under Ohio law. See *University Park*, 485 S.W.2d at 778.

Further, the Village's acceptance of the then-owner's parcel split in 1973 is insufficient to establish a vested right to the pre-1978 zoning ordinance. As noted by the Fourth Circuit Court

of Appeals, in a case where a landowner argued approval of a subdivision plat granted him a vested right to a prior version of a zoning ordinance, no court has adopted such a broad conception that plat approval creates a vested right. *L.M. Everhart Constr., Inc. v. Jefferson County Planning Comm'n*, 2 F.3d 48, 52 (4th Cir. 1993).

Appellants have no vested right to the continuation of a preexisting zoning ordinance, and their failure to make any substantial, non-conforming use of the property precludes their right to assert a vested right in selling Parcel 2 as a buildable lot.

C. Ohio law has clear standards for asserting and establishing vested property rights.

Through the entirety of this litigation, Appellants have ignored the law of the case, have changed their positions on issues at their convenience, and have, on more than one occasion, raised issues for the first time on appeal. Appellants continue this practice in their merit brief to this Court. Under the guise of addressing a non-conforming use, Appellants engage in a lengthy and unsupported argument that Parcel 2 has a special status that no Ohio court has ever recognized, but that this Court should now recognize.

There can be no dispute that Ohio courts have consistently recognized that a vested right in property requires the landowner to make a substantial, non-conforming use of the property. Appellants' attempts to "identify" categories of property that should have "preserved" rights (see page 18 of Appellants' brief), is not only factually inaccurate, it is not an issue that should be in front of this Court. Property owners do have preserved rights under Ohio law – when they make a substantial, non-conforming use of the property. Appellants failed to do so, and now seek a broad ruling of law, based on the specific facts of their case, that a vested right can exist where the property owner has made no use of his property in accordance with or reliance on a prior zoning classification.

Further, Appellants' arguments are nothing more than a ploy to bring a disparate treatment argument before this Court. Appellants previously attempted to raise a disparate treatment claim for the first time at trial in 2009, then again in their subsequent appeal to the Sixth District Court of Appeals. However, as the Sixth District aptly noted, *Boice I* was remanded to the trial court to analyze the regulatory takings issue in light of the standards set forth in *Lingle* and *Penn Central*. The issue of an alleged disparate treatment was outside the scope of remand, and both the trial court and appellate court refused to address the issue for that reason. *Boice*, 2011-Ohio-5681 at ¶¶ 42-43. Appellants cannot use the heading of a non-conforming use when they are in actuality attempting to litigate an issue outside the scope of this Court's review.

Finally, Appellants attempt to argue the lower courts erred in not addressing the *Duncan* standards, again in an attempt to set forth every possible legal standard after losing their case at trial and on appeal. While Ohio courts have consistently applied *Duncan* in the context of administrative appeals, Appellants here chose to proceed on their regulatory takings claim. Their failure to address the *Duncan* factors with the lower courts waives their right to argue for an analysis of these factors now. *Young v. Avon Lake*, 9th Dist. No. C.A. No. 09CA009665, 2010-Ohio-2943 at ¶ 7. The Supreme Court is not the appropriate place to raise issues for the first time that have not been addressed by lower courts.

What has remained consistent throughout the entirety of this litigation is that the case is very fact-intensive. Essential to this case is the fact that Appellants' two parcels of property were contiguous, and treated as a single parcel throughout their entire period of ownership. Appellants never made an attempt to treat Parcel 2 as a buildable lot. Motivated solely by obtaining the highest value possible for each parcel of property, Appellants in 2004 sought to

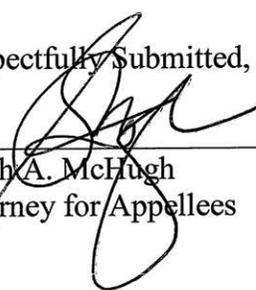
declare Parcel 2 as a buildable lot. Appellants, as owning contiguous parcels, had the opportunity to sell both parcels simultaneously or present alternatives to the Zoning Commission while still owning both parcels. Instead, with the knowledge that Parcel 2 was not a buildable lot, they sold Parcel 1 separately.

The Appellants used Parcel 2 as green space – not as a buildable lot – thus they obtained no vested property right to sell the parcel as a buildable lot. Further, Appellants have no vested right to the application of the zoning ordinance that existed prior to 1978. This Court should overrule their second assignment of error, and affirm the rulings of the lower courts.

CONCLUSION

For the foregoing reasons, Appellees, the Village of Ottawa Hills, respectfully request this Court affirm the ruling of the Sixth District Court of Appeals, and assess costs of this appeal against Appellants.

Respectfully Submitted,

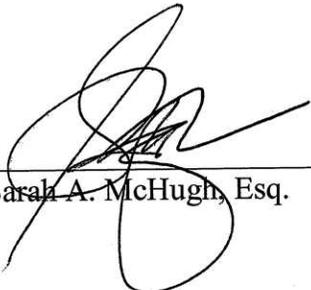


Sarah A. McHugh
Attorney for Appellees

CERTIFICATE OF SERVICE

This is to certify that a copy of the above *Merit Brief of Appellees, The Village of Ottawa*

Hills et al., was sent this 22nd day of October, 2012, to **Marvin A. Robon, Esq. and Larry Yunker, Esq.**, Barkan & Robon, Ltd., 1701 Woodlands Drive, Maumee, Ohio 43537, by ordinary U.S. mail.



Sarah A. McHugh, Esq.