[Cite as *Moore v. Middletown*, 2010-Ohio-2962.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

MATTHEW E. MOORE, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2009-08-205
	:	O P I N I O N
- vs -	:	6/28/2010
CITY OF MIDDLETOWN, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-09-4191

Jay C. Bennett, Oxford Professional Bldg., 5995 Fairfield Road, Suite 5, Oxford, Ohio 45056, for plaintiffs-appellants, Matthew E. and Lori A. Moore

Leslie S. Landen, Middletown City Law Director, Sara E. Mills, One Donham Plaza, Middletown, Ohio 45042 and Crabbe Brown & James LLP, Robert J. Gehring, Brian E. Hurley, 30 Garfield Place, Suite 740, Cincinnati, Ohio 45202, for defendant-appellee, city of Middletown

BRESSLER, P.J.

{¶1} Plaintiffs-appellants, Lori and Matthew Moore, Carol and Robert Cowman, and Bette Anne Metzcar, collectively Landowners, appeal from the decision of the Butler County Court of Common Pleas dismissing their complaint against the city of Middletown in a lawsuit involving a zoning dispute. For the reasons outlined below, we affirm.

{¶2} Landowners own real property located within the city of Monroe that runs

adjacent and contiguous to property known as the Martin-Bake Property located within the city of Middletown. Landowners are not residents of Middletown.

{¶3} On August 19, 2008, Middletown passed Ordinance No. 02008-64 that rezoned 157 acres of the Martin-Bake property from a D-1 residential zone (Low Density Dwelling) to an I-2 industrial zone (General Industrial). Middletown also passed Ordinance No. 02008-63 that revised a set back provision for industrial activities found within its zoning code from 600 feet to zero feet. Together, these ordinances cleared the way for the construction of a coke plant operated by SunCoke Energy for the benefit of AK Steel, one of Middletown's more prominent employers.

{¶4} Following these enactments, Landowners filed an action for declaratory judgment challenging the constitutionality of the two ordinances and petitioned for a writ of mandamus seeking to compel Middletown "to institute appropriation proceedings pursuant to Ohio Revised Code Title 163." Middletown filed a motion to dismiss arguing that Landowners complaint should be dismissed pursuant to Civ.R. 12(B)(6). After accepting briefs and hearing oral arguments, the trial court granted Middletown's motion.

{¶5} Landowners timely appealed from the trial court's decision to dismiss their complaint, raising one assignment of error. However, after hearing oral arguments, this court asked the parties to provide supplemental briefs addressing the issue of whether Landowners had standing to pursue their claim against Middletown. Therefore, since this court specifically asked the parties to brief the issue of whether Landowners lacked standing to bring their claim, we find an initial review of whether Landowners have standing is appropriate.[1]

{¶6} Generally, before an Ohio court can consider the merits of a legal claim,

1. Landowners do not challenge that the methods used by Middletown to enact the disputed zoning ordinances were unlawful. Therefore, we will not address whether Landowners have standing in regards to that issue within this opinion.

the person or entity seeking relief must establish standing to sue. *Ohio Contrs. Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 1994-Ohio-183; *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998-Ohio-275. "Standing" is defined as a "'party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 124 Ohio St.3d 390, 2010-Ohio-169, ¶19, quoting Black's Law Dictionary (8th Ed.2004) 1442. "[T]he question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy * * * as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." (Internal citations and quotations omitted.) *Ohio Pyro, Inc. v. Ohio Dept. of Commerce,* 115 Ohio St.3d 375, 2007-Ohio-5024, ¶27; *Brinkman v. Miami Univ.*, Butler App. No. CA2006-12-313, 2007-Ohio-4372, ¶30. To decide whether one has standing to pursue a claim, "courts must look to the substantive law creating the right being sued upon to see if the action has been instituted by the party possessing the substantive right to relief." *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 25. Whether undisputed facts confer standing to assert a claim involves a question of law that this court reviews de novo. *Cuyahoga Cty. Bd. of Commrs. v. State of Ohio,* 112 Ohio St.3d 59, 2006-Ohio-6499, ¶23.

{¶7} In its "Decision and Entry Granting Motion to Dismiss of Defendant," the trial court determined that R.C. 2721.03 "*confers standing* on 'any person… whose rights, statutes, or other legal relations are affected…by… a municipal ordinance' to file a declaratory action challenging the validity of the ordinance."[2] (Emphasis added.)

2. **{¶a}** R.C. 2721.03, which is titled "Construction and Validity of Instrument," states:

{¶b} "Subject to division (B) of section 2721.02 of the Revised Code, any person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of

However, in *Holcomb v. Schlichter* (1986), 34 Ohio App.3d 161, 164, this court found R.C. 2721.03 merely "represent[ed] [a] legislative [grant] of jurisdiction to Ohio courts under certain circumstances to hear and decide declaratory judgment actions. That declaratory relief is an available remedy is a separate question from one's standing to file such an action." See, e.g., *Wilmington City School Dist. Bd. of Edn. v. Clinton Cty. Bd. of Commrs*. (2000), 141 Ohio App.3d 232, 238; see, also, *Aarti Hospitality, LLC v. City of Grover City* (S.D.Ohio 2007), 486 F.Supp.2d 696, 700 (R.C. 2721.03 is "simply a mechanism through which an appropriate plaintiff may proceed, but the statute does not create the appropriate plaintiff"). In turn, based on our review of the applicable case law, we find it clear that this court does not interpret R.C. 2721.03 as *conferring standing* upon Landowners, but instead, treats the statute as simply a "legislative [grant] of jurisdiction to Ohio courts under certain circumstances to hear and decide declaratory judgment actions." *Holcomb* at 164. Therefore, we find the trial court's decision finding standing was *conferred* upon Landowners by R.C. 2721.03 was in error.

{¶8} Recently, in *Clifton v. Village of Blanchester*, Butler App. No. CA2009-07-009, 2010-Ohio-2309 (*Clifton II*), this court addressed the similar issue of whether a "nonresident contiguous property owner has standing to bring an action against an adjacent political subdivision seeking compensation for rezoning property located solely within its jurisdictional boundaries." Id. at ¶15. In finding that the nonresident contiguous property owner did not have standing to pursue his claim against the neighboring political subdivision, this court stated the following:

{¶9} "It is undisputed that Blanchester's decision to rezone the J & M property did not constitute a physical invasion of Clifton's property, nor did it interfere with the use

---

the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule,

of his property. In fact, by merely rezoning property within its own jurisdictional boundaries, Blanchester did not place *any* limitation on Clifton's ability to continue farming the property or to sell it for residential purposes. Therefore, because Blanchester's decision to rezone the J & M property did not hinder Clifton's use of his own property in any way, we find that Clifton did not allege such a personal stake in the outcome of the controversy that would entitle him to further pursue his claim against Blanchester." (Emphasis sic.) *Clifton II*, 2010-Ohio-2309 at ¶27.

{¶10} This court continued by stating, in pertinent part, the following:

{¶11} "Furthermore, within his cause of action, Clifton merely claims that he should be compensated by Blanchester for its partial regulatory taking via inverse condemnation. However, as the Ohio Supreme Court has previously stated, 'the powers of local self-government, granted to a municipality by Section 3 of Article XVIII of the Ohio Constitution, do not include the power of eminent domain beyond the geographical limits of the municipality.' * * * In turn, because his property is located completely outside Blanchester's jurisdictional boundaries, the remedy Clifton seeks, which is essentially a claim for money damages due to an alleged appropriation of his property by inverse condemnation, is unavailable as a matter of law. Therefore, since Clifton has no substantive right to the relief he seeks from Blanchester, he has no standing to sue." (Internal citations and footnote omitted.) Id. at ¶28.

{¶12} After a thorough review of the record, we find our recent decision in *Clifton II* to be equally applicable to the case at bar. Just as in *Clifton II*, Middletown's decision to rezone the Martin-Bake property did not constitute a physical invasion of Landowners' property, nor did it interfere in any way with their ability to use their property. Id. at ¶27.

---

ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it."

In turn, because Landowners' property is located wholly outside of Middletown's jurisdictional boundaries, the remedy they seek, which is essentially a claim for money damages due to an alleged appropriation of their property by inverse condemnation, is unavailable as a matter of law. Id. at ¶28. Therefore, just as this court found in *Clifton II*, we find Landowners' do not have standing to pursue their claim against Middletown. Id. at ¶27, 28, 31.

{¶13} Having already determined Landowners lacked standing to pursue their claim against Middletown, we would ordinarily not address any remaining arguments. However, under the unique facts and circumstances of this case, we find further discussion of Landowners' assignment of error to be necessary.

{¶14} "THE TRIAL COURT ERRED IN DISMISSING [LANDOWNERS'] COMPLAINT AS A MATTER OF LAW PURSUANT TO OHIO CIVIL RULE 12(B)(6)."

{¶15} In their sole assignment of error, Landowners assert that the trial court erred by dismissing their complaint pursuant to Civ.R. 12(B)(6) because, according to them, each of their three causes of action state a claim for which relief can be granted. We disagree.

{¶16} Civ.R. 12(B)(6) authorizes the dismissal of a complaint if it "fails to state a claim upon which relief can be granted." *Smith v. Village of Waynesville,* Warren App. No. CA2007-03-039, 2008-Ohio-522, ¶6. In order to prevail on a Civ.R. 12(B)(6) motion, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling relief." *DeMell v. The Cleveland Clinic Found.,* Cuyahoga App. No. 88505, 2007-Ohio-2924, ¶7. In turn, "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145. A trial court's order granting a motion to dismiss pursuant to Civ.R. 12(B)(6) is

subject to de novo review. *Sparks v. Bowling*, Butler App. No. CA2009-02-065, 2009-Ohio-5071, ¶10; *Knoop v. Orthopaedic Consultants of Cincinnati, Inc*, Clermont App. No. CA2007-10-101, 2008-Ohio-3892, ¶8.

I. First Cause of Action

{¶17} In their first cause of action, Landowners claim that the Middletown ordinances are unconstitutional as applied to their property because the ordinances are arbitrary, unreasonable, capricious, and not related to the political subdivision's police powers. We disagree.

{¶18} A zoning ordinance is "presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community."[3] *Goldberg Cos., Inc. v. Council of the City of Richmond Heights*, 81 Ohio St.3d 207, 1998-Ohio-456, syllabus. In order to prevail on a challenge to the constitutionality of a zoning ordinance, the challenger "must prove unconstitutionality beyond fair debate." *Miller v. Preble Cty. Bd. of Commrs.*, Preble App. No. CA2007-04-008, 2008-Ohio-2108, ¶13, quoting *Goldberg* at 209. In an "as-applied" challenge, such as the case here, "the landowner questions the validity of the ordinance only as it applies to a particular parcel of property. If the ordinance is unconstitutional as applied under those limited circumstances, it nevertheless will continue to be enforced in all other instances." *Jaylin Investments, Inc. v. Moreland Hills,* 107 Ohio St.3d 339, 2006-Ohio-4, ¶11-12.

{¶19} While Landowners claim their complaint adequately sets forth facts

3. Middletown asserts that *Goldberg* does not contain the appropriate standard because the Ohio Supreme Court relied on *Agins v. Tibruron* (1980), 447 U.S. 255, 100 S.Ct. 2138, which has since been overruled. *Lingle v. Chevron* (2005), 544 U.S. 528, 125 S.Ct. 2074. However, while *Agins* may have been overruled, the Ohio Supreme Court has not revisited its holding in *Goldberg*, and the general principles

supporting their claim that the ordinances are unconstitutional, their complaint explicitly states that the ordinances were passed "for the express purpose of accommodating the construction of a coke plant to be operated by SunCoke Energy for the benefit [of] AK Steel Corporation, a major employer in the City of Middletown." As a result, given Landowners' admission that the ordinances were passed for the benefit of one of Middletown's most prominent employers, we find it clear from the four corners of their complaint that the ordinances were not arbitrary, capricious, or unreasonable. *DeMarco, Inc. v. Johns-Manville Corp.*, Franklin App. No. 05AP-445, 2006-Ohio-3587, ¶16. In turn, because Landowners' complaint simply makes a broad allegation that Middletown's zoning decisions were unconstitutional, and because unsupported conclusions in a complaint are insufficient to withstand a motion to dismiss, Landowners' complaint failed to state a claim for which relief could be granted. *Swint v. Auld*, Hamilton App. No. C-080067, 2009-Ohio-6799, ¶3. Therefore, the trial court did not err in dismissing Landowners' first cause of action.

II. Second Cause of Action

{¶20} In their second cause of action, Landowners claim that the rezoning of the Martin-Bake property constitutes a partial regulatory taking, and therefore, because the trial court determined that a partial regulatory taking could not have occurred, the court erred by granting Middletown's motion to dismiss. We disagree.

{¶21} There are two types of regulatory actions that are considered to be "per se" takings for Fifth Amendment purposes. *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 538, 125 S.Ct.2074; see, also, *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.,* 115 Ohio St.3d 337, 2007-Ohio-5022, ¶18. The first involves

---

regarding the constitutionality of zoning ordinances do not hinge upon whether such ordinances constitute a taking.

governmental regulations that cause an owner to suffer a permanent physical invasion of his property, while the second involves governmental regulations that completely deprive an owner of *all* economically beneficial use of his property. See, e.g., *Loretto v. Teleprompter Manhattan CA TV Corp.* (1982), 458 U.S. 419, 435-40, 102 S.Ct. 3164; *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 1019, 112 S.Ct. 2886.

{¶22} However, apart from these two categories of "per se" regulatory takings, there is a third category for partial takings which is governed by the United States Supreme Court's decision in *Penn Central Transp. Co. v. City of New York* (1978), 438 U.S. 104, 98 S.Ct. 2646. As recently stated by the Ohio Supreme Court, *Penn Central* "recognizes an ad hoc, factual inquiry that requires the examination of the following three factors to determine whether a regulatory taking occurred in cases in which there is no physical invasion and the regulation deprives the property of less than 100 percent of its economically viable use: (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." *State ex rel. Gilbert v. City of Cincinnati*, Slip Opinion No. 2010-Ohio-1473, ¶17, quoting *Shelly Materials* at ¶19; *State ex rel. Horvath v. State Teachers Retirement Bd.,* 83 Ohio St.3d 67, 71, 1998-Ohio-424.

{¶23} With these principles in mind, and while *Penn Central* may require the examination of three factors to determine whether a regulatory taking occurred under certain circumstances, even assuming Landowners actually endured a "drastic diminution in value" of their property due to Middletown's decision to rezone the Martin-Bake property, long-standing precedent holds 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* (1993), 508 U.S. 602, 604, 113

S.Ct. 2264; *Penn Cent.*, 438 U.S. 104 at 131, citing *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 47 S.Ct. 114 (75 percent diminution in value caused by zoning not a taking); *Hadacheck v. Sebastian* (1915), 239 U.S. 394, 36 S.Ct. 143 (87½ percent diminution in value not a taking). In fact, as stated by the Ohio Supreme Court, "something more than loss of market value or loss of the comfortable enjoyment of the property is needed to constitute a taking." *BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 344, 1998-Ohio-287; *Sullivan v. Hamilton Cty. Bd. of Health*, 155 Ohio App.3d 609, 2003-Ohio-6916, ¶36.

{¶24} Applying these principles, which we find to be appropriate, we conclude, as a matter of law, that even if we were to find standing to pursue this claim, Middletown's acts of rezoning the Martin-Bake property did not amount to a partial taking requiring Landowners to receive just compensation. See, e.g., *Clifton II*, 2010-Ohio-2309 at ¶42. In this case, Landowners essentially allege that the rezoning of the Martin-Bake property caused their property to suffer a "drastic diminution in value," and, as noted above, "diminution in a property's value, however serious, is insufficient to demonstrate a taking." *Concrete Pipe*, 508 U.S. 602 at 604; *Penn Cent.*, 438 U.S. 104 at 131. Therefore, because Middletown's decision to rezone the Martin-Bake property did not amount to a partial taking of Landowners' property, the trial court did not err in dismissing their second cause of action.

III. Third Cause of Action

{¶25} In their third cause of action, Landowners claim that they are entitled to pursue a writ of mandamus forcing Middletown, the neighboring political subdivision, to compensate them for a partial regulatory taking via inverse condemnation pursuant to R.C. Chapter 163. We disagree.

{¶26} As the Ohio Supreme Court has previously stated, "the powers of local

self-government, granted to a municipality by Section 3 of Article XVIII of the Ohio Constitution, do not include the power of eminent domain beyond the geographical limits of the municipality." *Britt v. City of Columbus* (1974), 38 Ohio St.2d 1, paragraph one of the syllabus. In turn, while Landowners argue that *Britt* does not apply because "the sole remedy available to [them] has nothing to do with the power of eminent domain," according to R.C. 163.63 "any reference in the Revised Code to any authority to acquire real property by 'condemnation' or to take real property pursuant to a power of eminent domain is deemed to be an appropriation of real property pursuant to this chapter and any such taking or acquisition shall be made pursuant to this chapter." See *Clifton II*, 2010-Ohio-2309 at ¶28. As a result, even though Landowners cite multiple cases where mandamus may have been the proper remedy, none of those plaintiffs sought compensation for an alleged inverse condemnation from a municipality in which they were not a resident. Therefore, as the remedy Landowners seek is unavailable as a matter of law, we find the trial court did not err in dismissing their third cause of action.

{¶27} Despite its enlightening discussion regarding the history of takings jurisprudence, the dissent, just as the dissent in *Clifton II*, is advocating for this court to create a new cause of action not previously available to nonresidents under R.C. Chapter 163. Under Ohio law, "a property owner's remedy for an alleged 'taking' of private property by a public authority is to bring a mandamus action to compel the authority to institute appropriation proceedings." *Hatfield v. Wray* (2000), 140 Ohio App.3d 623, 627; *State ex rel. Shemo v. City of Mayfield Heights*, 95 Ohio St.3d 59, 63, 2002-Ohio-1627. However, as noted by this court's recent decision in *Clifton II*, "R.C. Chapter 163 simply does not allow for a municipality to appropriate property beyond its jurisdictional boundary." Id., 2010-Ohio-2309 at ¶30, citing *Britt*, 38 Ohio St.2d at paragraph one of the syllabus.

{¶28} In addition, while recognizing mandamus as an appropriate remedy for an alleged taking, the dissent also asserts that a direct cause of action exists under these circumstances. However, neither the Ohio Supreme Court nor the Ohio General Assembly has recognized such a claim. Therefore, although Landowners and the dissent have presented well-reasoned and compelling arguments, we must apply the law as it exists in this state and not overstep our own judicial boundaries. See *Winkle v. Zettler Funeral Homes, Inc.*, 182 Ohio App.3d 195, 2009-Ohio-1724, ¶61; see, also, *Erwin v. Bryan*, Slip Opinion No. 2010-Ohio-2202, ¶4; *State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, Slip Opinion No. 2010-Ohio-2430, ¶26.

{¶29} In light of the foregoing, we find that even if Landowners had standing to pursue their claims against Middletown, the trial court did not err by dismissing their complaint pursuant to Civ.R. 12(B)(6) for they failed to state a claim upon which relief could be granted. Accordingly, appellant's sole assignment of error is overruled.

{¶30} Judgment affirmed.

POWELL, J., concurs.

RINGLAND, J., concurs in part and dissents in part.

RINGLAND, J., concurring in part and dissenting in part.

{¶31} For the reasons outlined below, I respectfully dissent. I concur with the majority that the Landowners in this case cannot support a claim for challenging the constitutionality of the Middletown ordinance. However, I disagree with the majority's conclusion denying standing and the trial court's decision to dismiss the partial takings claim in counts two and three of the Landowners' complaint.

{¶32} Protection of private property rights is a core value encompassed in both

the United States and Ohio Constitutional systems. See the Fifth Amendment to the United States Constitution; Sections 1 and 19, Article I, Ohio Constitution. See, also, Treanor, Supreme Neglect of Text and History (2009), 107 Mich.L.Rev. 1059, 1059.

{¶33} In *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393, 416, 43 S.Ct. 158, Justice Oliver Wendell Holmes, speaking for the court, warned that the courts in takings cases were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

{¶34} Private property owners have been subjected to eroding protection of their rights over the ensuing years. See Kanner, Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York (2005), 13 Wm.& Mary Bill Rts.J. 679; Richard A. Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property*, 44 (Oxford Univ.Press 2008); Orme, Kelo v. New London: An Opportunity Lost to Rehabilitate the Takings Clause, 6 Nev.L.J. 272, 276-279.[4] This erosion most recently culminated with the United States Supreme Court decision in *Kelo v. City of New London, Connecticut* (2005), 545 U.S. 469, 125 S.Ct. 2655.[5]

4. One scholar has described the difficulties private property owners face in takings cases as follows, "[l]iberal judges don't believe in private property rights, [while] conservative judges don't believe in making the government pay. So between them you have a hard row to hoe." Kanner at 722, quoting the late Detroit condemnation lawyer Bert Burgoyne.

5. Following decades of economic decline, New London was designated as a "distressed community" by a Connecticut agency. Id. at 473. These conditions prompted state and local officials to target the Fort Trumbull area of New London for economic revitalization. Id. Additionally, Pfizer, Inc., an international pharmaceutical company announced that it planned to develop a $300 million research facility adjacent to the Fort Trumbull area. To capitalize on the arrival of the Pfizer facility, a private nonprofit entity developed an integrated development plan, which was approved by the city. Id. at 474. The plan covered approximately 90 acres designated for different development projects including a waterfront hotel and conference center, a marina, a public walkway along the waterfront, an urban neighborhood, 90,000 square feet of research space, and 140,000 square feet of parking and retail space. Id. Although the nonprofit organization successfully obtained most of the 90-acre real estate, a few property owners refused to sell. Id. at 475. As a result, the nonprofit initiated condemnation proceedings to obtain the parcels

{¶35} In a sharply divided decision, the majority concluded that the redevelopment

plan of the city of New London fell within the Takings Clause. Id. at 478. The court found

that, although the city was not planning to open the condemned land for use by the general public, the private economic development satisfied the "public use" requirement of the United States Constitution because the development resulted in a public benefit. Id. Justice Stevens concluded his opinion noting that "[i]ndeed, many States already impose 'public use' requirements that are stricter than the federal baseline." Id. at 489.

{¶36} Justice O'Connor, in dissent, urged that the majority effectively "delete[d] the words 'for pubic use' from the Takings Clause of the Fifth Amendment." Id. at 494. Justice Thomas went further, agreeing with Justice O'Connor, but also arguing that the court should reconsider its entire body of Takings Clause jurisprudence to allow the government to "take property only if the government owns, or the public has legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever." Id. at 508.

{¶37} *Kelo* resulted in a public uproar and the Supreme Court was roundly criticized for straying from the intended purpose of protecting individual property owners from eminent domain and inverse condemnation abuse. See Comment, Is This the Start of a Silent Spring? Kelo v. City of New London's Effect on Environmental Reforms, 56 Cath.U.L.Rev. 1107. In direct reaction to *Kelo*, the Ohio Legislature passed a moratorium on any takings for economic development until December 31, 2006. See S.B. 167, 126th Gen.Assemb. (2005). The legislature stated that taking for economic

---

owned by the holdouts under authority of the city's ordinance procedure to create municipal development projects. Id. The landowners sought declaratory and injunctive relief from the condemnation actions. Id.

development directly violates Sections 1 and 19 of Article I of the Ohio Constitution and a moratorium was necessary to protect "the rights of Ohio citizens to maintain property as inviolate." Id. See, also, 56 Cath.U.L.Rev. at 1123-1125.

{¶38} Shortly after *Kelo*, the Ohio Supreme Court reviewed a similar development scheme under the Ohio Constitution in *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799. The *Norwood* court found that the Ohio Constitution contains greater protection of private property rights than the United States Constitution. Id. at ¶5-9. Specifically, the court held that "although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement." Id. at paragraph one of the syllabus. "Though the Ohio Constitution may bestow on the sovereign a magnificent power to take private property against the will of the individual who owns it, it also confers an 'inviolable' right of property on the people. When the state elects to take private property without the owner's consent, simple justice requires that the state proceed with due concern for the venerable rights it is preempting." Id. at ¶68.

{¶39} "The sovereign's right to take property may be conferred by the legislature on municipalities, which enjoy broad discretion in determining whether a proposed taking serves the public. But it is for the courts to ensure that the legislature's exercise of power is not beyond the scope of its authority, and that the power is not abused by irregular or oppressive use, or use in bad faith. * * * And when the authority is delegated to another, the courts must ensure that the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner." (Internal citations omitted.) Id. at ¶70.

Inverse Condemnation

{¶40} The landowners in the instant matter assert a claim for inverse condemnation, arguing that the zoning ordinance in this case resulted in a partial nonphysical taking of their property.

{¶41} "Inverse condemnation" refers to a manner in which the government does not formally exercise its power of eminent domain when it probably should as a consequence of its "taking" or intentional "damaging" of one's property by a public work or the enactment of some regulation or restriction. Montague, Inversely Yours: Substantive issues in Inverse Condemnation (2006), SL049 ALI-ABA 623; see, also, *United States v. Clark* (1980), 445 U.S. 253, 257, 100 S.Ct. 1127; and *Agins v. City of Tiburon* (1980), 447 U.S. 255, 100 S.Ct. 2138. "In inverse condemnation cases, the property owner is the moving party claiming an act of the sovereign has damaged his property to the extent of an actual taking entitling him to compensation." Id. at fn 1.

{¶42} The majority's decision in the instant matter, combined with this court's recent decision in *Clifton v. Village of Blanchester*, Clinton App. No. CA2009-07-009, 2010-Ohio-2309, ("*Clifton II*") continues the trend of weakening private property rights by the courts.

a. Standing

{¶43} First, I disagree with the majority's conclusion that the property owners in this case lack standing. As primary support for this conclusion, the majority relies upon *Clifton II*. *Clifton II* involved a nonresident contiguous property owner's takings action against a neighboring political subdivision. Id. at ¶15. In addressing the standing issue, the majority in *Clifton II* first reviewed the litany of persuasive authority from other states conferring standing on disaffected contiguous nonresident landowners. In each case, the foreign court concluded that standing exists for the nonresident landowners. See id. at ¶16-24. Yet, the *Clifton II* majority and the majority in this case summarily reject the

prevailing national view. Id. at ¶25.

{¶44} In a well-reasoned dissent, Judge Hendrickson urged that the prevailing national view was the proper, more prudent approach. Id. at ¶47. Judge Hendrickson suggested that a nonresident landowner's action contesting a zoning ordinance of a neighboring political subdivision should be addressed on a case-by-case basis. Id. at ¶48. I agree. Specifically, if a landowner can sufficiently demonstrate that the neighboring political subdivision's zoning ordinance constitutes a taking by either physical or inverse means, the landowner is entitled to just compensation. Id. at ¶49.

{¶45} In support of its decision for denying standing on the landowners' partial takings claim, the majority in the instant matter and *Clifton II* offer the Ohio Supreme Court's statement in *Britt v. City of Columbus* (1974), 38 Ohio St.2d 1, paragraph one of the syllabus, that "[t]he powers of local self-government, granted to a municipality by Section 3 of Article XVII of the Ohio Constitution, do not include the power of eminent domain beyond the geographical limits of the municipality." See, also R.C. 163.63.

{¶46} The majority construes this statement from *Britt* and R.C. 163.63 to mean that, regardless of how a political subdivision regulates property within its boundaries, the regulation can have no effect upon property outside the subdivision. The majority principally submits that a city can do whatever it pleases with regard to property within its own boundaries, yet neighboring property will never be affected. This is neither the proper context of the statement offered from *Britt* nor the holding of the *Britt* decision. To the contrary, in *Britt* the city of Columbus wished to extend its sewer lines past city limits through unincorporated lands along the Scioto River into the village of Dublin for the purpose of selling excess sewer services to nonresidents. Id. at 2. To effectuate the project, Columbus sought to appropriate lands along the river, outside the municipality, to construct the extended sewer line. Id. Relying upon its previous

decision in *Beachwood v. Bd. of Elections* (1958), 167 Ohio St. 369, the Ohio Supreme Court concluded that Columbus' actions were unconstitutional and not within a political subdivision's power of eminent domain. Id. at 9. *Britt* stands for the proposition that a political subdivision cannot attempt to appropriate property outside its geographical boundaries, not that a regulation of property within the subdivision's boundaries can have no effect on neighboring land or effectuate a taking of neighboring property. Id. at paragraphs one and three of the syllabus. Additionally, *Britt* does not discuss standing, nor does it involve damages in an inverse condemnation or mandamus action. To conclude that a zoning regulation cannot affect adjacent land simply because it exists on the other side of an invisible boundary line, like the majorities in *Clifton II* and the instant matter advocate, is quite novel.

{¶47} "The essence of the doctrine of standing is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317, 321, quoting *Baker v. Carr* (1962), 369 U.S. 186, 204, 82 S.Ct. 691, 703. More simply, "[t]he common-law doctrine of standing to sue involves a determination of whether a party has a sufficient stake in the outcome of a justiciable controversy to obtain a judicial resolution of that controversy." *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8 Ohio App.3d 420, 424.

{¶48} A person has standing to sue only if he or she can demonstrate injury in fact, which requires showing that he or she has suffered or will suffer a specific, judicially redressible injury as a result of the challenged action. *Eng. Technicians Assn., Inc. v. Ohio Dept. of Transp.* (1991), 72 Ohio App.3d 106, 110-111. In order to demonstrate an injury in fact, a party must be able to demonstrate that it has suffered or will suffer a

specific injury traceable to the challenged action that is likely to be redressed if the court invalidates the action or inaction. *In re Estate of York* (1991), 133 Ohio App.3d 234, 241. In addition, a party must demonstrate that the interest he or she seeks to protect "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *State ex rel. Dayton Newspapers v. Phillips* (1976) 46 Ohio St.2d 457, 459, quoting *Data Processing Serv. v. Camp* (1970), 397 U.S. 150, 153, 90 S.Ct. 827.

{¶49} The Landowners in this case have clearly alleged an injury in fact. Few things are more personal than harming an individual's property rights as recognized by the Takings Clauses of the United States and Ohio Constitutions. Through a zoning regulation, Middletown authorized the construction of a large SunCoke plant adjacent to Landowners' residences. Such property regulations can negatively impact neighboring property, even if the property falls outside the political subdivision's geographical limits. See *Borough of Creskill v. Borough of Dumont* (1953), 15 N.J. 238, 247; *Koppel v. City of Fairway* (1962), 189 Kan. 710, 714; *Wittingham v. Village of Woodridge* (1969), 111 Ill. App.2d 147, 150-151; *Scott v. City of Indian Wells* (1972), 6 Cal.3d 541, 547;*Allen v. Coffel* (Mo.App.1972), 488 S.W.2d 671, 674; *Bagley v. Sarpy Cty.* (1972), 189 Neb. 393, 395; *Const. Industry Assn. of Sonoma Cty. v. City of Petaluma* (C.A.9, 1975), 522 F.2d 897, 905; *Orange Fibre Mills, Inc. v. City of Middletown* (N.Y.Sup.1978), 94 Misc.2d 233, 235; *Miller v. Upper Allen Twp. Zoning Hearing Bd.* (1987), 112 Pa.Cmwlth. 274, 283. The Landowners' claim may or may not be successful, but to deny them a forum outright at this stage of the proceedings is improper.

{¶50} *Clifton II* and the instant decision, concluding that a contiguous nonresident landowner never has standing to pursue a takings claim, create a troublesome, sweeping precedent. For example, a municipality could authorize or

develop a noxious use, such as a waste treatment plant or landfill, along its border. It would be difficult to argue that the governmental action in such instances would not extend beyond its borders or severely impact adjacent nonresidential landowners. Yet, under the *Clifton II* precedent, those landowners would have no form of redress due to a lack of standing.

{¶51} The majority in *Clifton II* and the majority in the instant matter argue that, by urging for standing, the dissents are essentially advocating for the court to create a new cause of action. Id. at ¶30. Similarly, the majority in this case takes issue with the trial court's conclusion that R.C. 2721.03 "confers standing" on the Landowners. As discussed above, the majorities cites *Britt*, an inapplicable case that does not involve issues of standing, inverse condemnation or mandamus, as support for this conclusion. Neither the Landowners nor the dissents are asking the court to create a new cause of action under R.C. Chapter 163, nor is R.C. 2721.03 even applicable to the case at bar. A cause of action exists through implication of the Constitutional Takings Clauses. The United States and Ohio Supreme Courts have routinely recognized inverse condemnation actions by aggrieved parties. See *Clark*, 445 U.S. at 257; *Agins*, 447 U.S. 255, at fn. 2; *State ex rel. Duncan v. Middlefield*, 120 Ohio St.3d 313, 2008-Ohio-6200, ¶16. See, also, *State ex rel. Sinay v. Sodders*, 80 Ohio St.3d 224, 226 1997-Ohio-244 (nonresident of municipality has standing to seek mandamus to compel municipality to perform public duties if they will be "directly benefited or injured by a judgment in the case"). The Landowners in this case have demonstrated an injury in fact, if not in theory, and satisfy standing requirements to assert a constitutionally protected partial takings claim through inverse condemnation.

{¶52} I recognize that the Ohio Supreme Court has stated, "[m]andamus is the appropriate action to compel public authorities to institute appropriation proceedings

where an involuntary taking of property is alleged." *State ex rel. Shemo v. City of Mayfield Heights*, 95 Ohio St.3d 59, 63, 2002-Ohio-1627. By making mandamus the sole method of relief, I submit that the Ohio Supreme Court is improperly limiting constitutional causes of action. Under the United States Constitution, federal courts acknowledge that aggrieved landowners can pursue claims for declaratory judgment and "the more common inverse condemnation process." See *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Galarza* (C.A.1, 2007), 484 F.3d 1, fn. 20; *Coles v. Granville* (C.A.6, 2006), 448 F.3d 853, 861. Since the Ohio Constitution lends greater protection of private property rights than the United States Constitution, as discussed below, the Ohio Supreme Court should, at the very least, acknowledge these other forms of relief under the takings clause.

{¶53} As further rationale, the *Clifton II* majority concludes its analysis with the oft-cited notion that allowing such claims would result in unfettered litigation. Specifically, the majority states that allowing standing for nonresident landowners would subject political subdivisions to "endure the costly burden of defending against an infinite number of claims arising from nonresidents" thereby "open[ing] the floodgates on the surge of litigation."[6] Id. at ¶29.

{¶54} This policy consideration is miniscule in comparison to courts allowing municipalities to potentially trample upon fundamental, enumerated Constitutional rights by denying harmed property owners a forum for relief based upon arbitrary boundary lines. See *Clifton II* at ¶47 (Hendrickson, J., dissenting). From an equally hyperbolic perspective, by denying nonresident standing as the majority advocates, a political subdivision could line its borders with destructive, noxious uses without fear of liability to

6. I am unpersuaded by this policy rationale expressed by the *Clifton II* majority primarily because, if these types of suits were common, substantial case law would exist in this area and the issue of standing would

contiguous nonresident landowners.

{¶55} Neither the United States Constitution nor the Ohio Constitution provide that an aggrieved property owner is entitled to just compensation for a taking only if he or she lives within the confines of the political subdivision. Actions of political subdivisions can cause irreparable harm to property not within their geographical boundaries. Therefore, I would find that Landowners in this case have standing to pursue their partial takings and damage claim.

b. Takings Under the United States Constitution

{¶56} In this case, the Landowners allege a nonphysical partial taking of their property due to Middletown's zoning ordinance. Regulatory takings law under the United States Constitution as it currently stands has been described as a "confused muddle, intractable, as an ambiguous area in which the United States Supreme Court complicates its own jurisprudence with each new decision, and as an area in which the Court [refuses] to 'revisit its regulatory takings precedent in order to clarify the current standard.'" Note, Taking the Courts: A Brief History of Takings Jurisprudence and the Relationship Between State, Federal, and the United States Supreme Courts, 35 Hastings Const.L.Q. 897, 897.

{¶57} After the collapse of the Articles of Confederation, the authors of the United States Constitution recognized the need for a stronger central government. Orme, Kelo v. New London: An Opportunity Lost to Rehabilitate the Takings Clause, 6 Nev.L.J. 272, 275. To restrain the newly created central government from infringing upon state and individual rights, the founders included a Bill of Rights. Id. To protect individual property rights, the founders prohibited "private property [from being] taken for

---

have already been clearly settled in Ohio. As it stands, the standing issue appeared to be an issue of first impression in Ohio in *Clifton II* and the instant matter.

public use without just compensation." Fifth Amendment to the United States Constitution. Initially, the Supreme Court narrowly construed the takings clause, adopting a strong position to curb the "despotic power" of eminent domain. *Vanhorne's Lessee v. Dorance* (1795), 2 U.S. 304, 311. Following the Civil War and ratification of the Fourteenth Amendment, the court showed this zealous support of individual property rights by making the Fifth Amendment the first portion of the Bill of Rights to be incorporated against the states. Id., citing *Chicago B & Q.R. Co. v. City of Chicago* (1897), 166 U.S. 226, 17 S.Ct. 581. However, this zealous protection of private property rights under the Takings Clause began to gradually erode. In the early years of American independence, there were few condemnations or examples of the government using its eminent domain power. *Kanner* at 708. Initially, the only industry the government and judiciary favored in invoking the power of eminent domain were railroad companies because they were perceived as a harbinger of progress and prosperity, and necessary for construction of a public highway. *Kanner* at 708-709.

{¶58} Then, in *Head v. Amoskeag Manufacturing Co.* (1885), 113 U.S. 9, 5 S.Ct. 441, the Supreme Court reviewed the constitutionality of the Mill Acts. The Mill Acts were statutes that allowed mill owners to flood neighboring lands in order to power their mills. Id. at 11. The Court held that this was a valid taking under the Takings Clause because the mills were open for public use, benefitted the public, and served as a public utility. Id. at 18-19. However, in addition to public mills, the court also approved takings by private mills operated purely for the benefit of the private owners. Id. at 9.

{¶59} Over the ensuing years, the erosion continued as "the Supreme Court abandoned the strong version of the takings clause championed by the framers of the Fifth Amendment in favor of a much weaker version of the clause advocated by early twentieth-century Progressives and supporters of the New Deal." *Treanor* at 1062.

Latter twentieth-century takings jurisprudence has been characterized by restriction of property rights and redevelopment of deteriorated areas. Cohen, Eminent Domain After Kelo .v City of New London: An Argument for Banning Economic Development Takings, 29 Harv.J.L. & Pub.Policy 491, 510-511. See *Berman v. Parker* (1954), 348 U.S. 26, 75 S.Ct. 28 (taking of department store in blighted area of Washington, D.C. for redevelopment by private agency for private use was for "public purpose"); and *Hawaii Housing Auth. v. Midkiff* (1984) 467 U.S. 229, 104 S.Ct. 2321 (Hawaii land reform plan found constitutional).

{¶60} In 1978, the United States Supreme Court examined the constitutional protection afforded to partial regulatory takings in *Penn Central Transp. Co. v. City of New York* (1978), 438 U.S. 104, 98 S.Ct. 2646. *Penn Central* involved New York City's Landmark Preservation Act, which prevented owners of certain historically-designated landmarks from "destroying or fundamentally altering their character" and required the owners to keep the exterior features "in good repair." Id. at 109 and 111. If the property owner wished to alter the structure, he or she was required to seek approval by the commission. Id. at 111. The owners of New York's Grand Central Terminal wished to construct a 50-story office building above the current structure, which was denied by the commission. Id. at 116. The property owners sued, arguing that the regulation preventing alteration constituted a taking. Id. at 119.

{¶61} In concluding that the regulation did not constitute a partial regulatory taking, the Supreme Court announced a three-factor test for reviewing partial takings claims under the United States Constitution. Id. at 138. To determine whether a taking has occurred, the Supreme Court instructed courts to examine: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with the owner's distinct investment-backed expectations; and (3) the

character of the governmental action. Id. at 124.

{¶62} Like much of the United States Supreme Court's regulatory takings jurisprudence, *Penn Central* has been routinely criticized by both judges and scholars for deviating from the intended purpose of the takings clause and creating a vague, unpredictable standard subject to the whims and personal values of the reviewing judges. Kanner, 13 Wm.& Mary Bill Rts.J. at 734 ("the *Penn Central* test * * * is so vague and indeterminate that it invites unprincipled, subjective decision making by the courts. The three-factor test does not provide any clear direction of how to decide regulatory takings cases, inviting judges to decide based on their own personal values"). Notably, U.S. Circuit Judge James L. Oaks has stated, "[*Penn Central*] jurisprudence permits purely subjective results, with the conflicting precedents simply available as makeweights that may fit preexisting value judgments * * *." Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash.L.Rev. 583, 613.

{¶63} *Penn Central*'s focus upon "investment-backed expectations" has received significant criticism for its vagueness, which has led to conflicting results in the courts. *Kanner* at 734. Further, although the court identified the specific factors for review, it provided no guidance for how the facts should be applied or how much, if any, intrusion is allowed before a regulation is considered a compensable taking.

{¶64} Most recently, in 2005, the United States Supreme Court released two significant decisions relating to the takings clause and eminent domain; the aforementioned *Kelo v. City of New London* and *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 125 S.Ct. 2074. Before *Lingle*, the Supreme Court recognized two tests for attacking partial regulatory takings; the previously-discussed *Penn Central* standard and the "substantially advances" formula from *Agins v. City of Tiburon* (1980), 447 U.S. 255, 100 S.Ct. 2138. *Lingle* at 538 and 540. *Agins* provided that a landowner could

facially challenge a zoning regulation under the standard that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." Id. at 540. In an effort to produce a "doctrinally coherent takings standard," the Court decided to abandon the *Agins* test, concluding that *Agins* derived from due process and "ha[d] no proper place in * * * takings jurisprudence." Id. at 548. "The Supreme Court's decision in *Lingle* effectively sent the message that the federal courts would take an even more hands-off approach to regulatory takings." 35 Hastings Const.L.Q. at 914. Further, *Lingle* functionally broadened the regulatory power of the state and local authorities in land use cases since zoning ordinances are no longer subject to scrutiny under *Agins*. Id.

{¶65} However, states are not bound to follow the federal approach to takings jurisprudence, but may be more expansive in considering the rights of property owners. See *Kelo*, 545 U.S. at 489. In *Norwood*, the Ohio Supreme Court recognized this distinction by finding that the Ohio Constitution affords greater protection of individual property rights than the United States Constitution as interpreted by the U.S. Supreme Court.

c. Takings Under the Ohio Constitution

{¶66} Historically, the laws of Ohio were designed to ensure the right to own and protect property. Ohio's Constitution was significantly influenced by the Northwest Ordinance of 1787. Note, Not by the Hair of My Chinny Chin Chin: Ohio's Attempt to Combat the Big Bad Wolf of Blight, 2 Liberty U.L.Rev. 243, 263. In effect, the Northwest Ordinance was "much more stringent than what is found in the Takings Clause of the Fifth Amendment to the United States Constitution." Id. Accordingly, when attaining statehood in 1803, the framers of the Ohio Constitution were sure to include a rigid takings clause, which embodied the letter and spirit of the Northwest Ordinance that had

served the territory well for its previous 16 years. Id. Ohio's first constitution contained two provisions relating to the protection of private property. Id. "All men * * * have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property." Section 1, Article VIII, Ohio Constitution (1802). The constitution also contained an eminent domain clause, providing "[p]rivate property ought and shall ever be held inviolate, but always subservient to the public welfare; provided a compensation in money be made to the owner." Id. at Section 4.

{¶67} In 1850, a constitutional convention was held and a new constitution was proposed. 2 Liberty U.L.Rev. at 264. One of the faults of the 1802 constitution identified by the drafters was that the earlier clauses were deemed insufficient to properly protect the private property rights of landowners. Fischel, The Offer/Ask Disparity and Just Compensation for Takings: A Constitutional Choice Perspective, 15 International Rev.L. & Econ. 187, 197. As a result, in the revision, the drafters changed the placement and rewrote the property clauses, and strengthened the eminent domain clause. These protections were placed at the forefront of the constitution. 2 Liberty U.L.Rev. at 264. Section 1, Article I of the 1851 Constitution provides, "all men * * * have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property * * *."

{¶68} Further, the drafters reiterated the principle that private property in Ohio is inviolate and injected greater guidelines to ensure payment of just compensation in the event of a taking. Id. "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner,

in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." Id. at Section 19, Article I, Ohio Constitution. This language evinces the fact that the 1851 framers recognized the importance of the Takings Clause and the inviolability of private property. 2 Liberty U.L.Rev. at 264. Further, the stringent guidelines for prepayment of compensation for a taking was a direct reaction to the business dealings of the railroads, which had received great favor from the government. *Fischel* at 197. Before the 1851 Constitution, property would often be appropriated for railroad companies, but the compensation was often late or never paid, and sometimes judgment could not be enforced because the railroad company had gone bankrupt in the meantime. Id.

{¶69} These two provisions of the 1851 Ohio Constitution identify specific protections for private property in addition to the public use requirement. See Note, The Fifth Amendment's Takings Clause: Public Use and Private Use; Unfortunately, There is no Difference (2007), 40 Loy.L.A.L.Rev. 809, 848. With this heightened protection in mind, as recognized in *Norwood*, and the United State Supreme Court's diminishing protection of private property rights, I question whether *Penn Central* is a sufficient standard for analyzing partial takings under the Ohio Constitution.

{¶70} I recognize, however, that the Ohio Supreme Court has continued to apply *Penn Central* in recent Ohio regulatory takings cases. See *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 122 Ohio St.3d 260, 2009-Ohio-2871, ¶16; *State ex rel. Duncan v. Middlefield*, 120 Ohio St.3d 313, 2008-Ohio-6200, ¶17; *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 2007-Ohio-5022, ¶19. By applying *Penn Central*, the Ohio Supreme Court has adopted a narrow standard

unrelated to the stronger protection of private property guaranteed by the Ohio Constitution. The Ohio Supreme Court has stated that "any substantial interference with the elemental rights growing out of ownership of private property is considered a taking." *Smith v. Erie RR. Co.* (1938), 134 Ohio St. 135, 142. Because the Ohio Constitution grants stronger rights to a property owner than the United States Constitution, *Penn Central* should not be controlling in evaluating a partial taking of property in Ohio.

{¶71} Moreover, these cases where the Ohio Supreme Court applied *Penn Central* involve purely business or investment interests where the *Penn Central* factors, although insufficient to fully protect these interests, are somewhat applicable. In contrast, the *Penn Central* factors as they relate to this case, and other cases involving residential landowners, are extremely problematic since the factors bear little relation to residential ownership. *Kanner* at 769-770. As has been routinely criticized, *Penn Central*'s requirement that a court evaluate the landowner's "investment-backed expectations" bears little significance to residential homeownership and the resulting damage from governmental land-use regulation. Further, the Supreme Court has failed to identify what exactly is an "investment-backed expectation." This factor presupposes the existence of a would-be developer wishing to build on the subject land, but homeowners do not principally purchase their homes specifically for profit or to be sold for development. Id. This factor is neither an accurate nor complete picture of reality, especially in the context of residential property where individuals purchase and retain the property for reasons that are not investment-related. Id. By attempting to apply *Penn Central* to residential land, the court is essentially trying to fit square peg into round hole.

{¶72} Most residential landowners are not developers. Individuals purchase or acquire residences based upon a myriad of reasons. A homeowner could purchase

property based upon the community school system, the character of the neighborhood, a safe environment for their children, the proximity to family members, or to live in a quiet neighborhood insulated from business or industry. Further, land can be acquired under many circumstances with no prior expectation: by inheritance, as compensation for services rendered, in a settlement of litigation, purchased at full market value or in foreclosure. The motivations, hopes, or plans are not always simply economic or investment based. Based upon the majority's ruling in this case, we shall never know what the "investment-backed expectations" of the Landowners are, if any.

{¶73} Yet, governmental interference or zoning regulations can greatly interfere with these noninvestment related aspects of homeownership and, based upon the nature of the regulation, can severely affect residential property. Why should the noneconomic, non-"investment-backed" aspects of property ownership be inferior, or not even considered in the context of *Penn Central*, when evaluating an alleged partial taking of residential property? Further, why should a government regulation be allowed to intrude upon, or extinguish, these interests without recourse?

{¶74} Cleary, the economic impact of zoning regulations results in diminution of value. However, the United States Supreme Court has found that diminution of property value alone is insufficient to support a taking. *Euclid v. Amber Realty Co.* (1926), 272 U.S. 365, 384, 47 S.Ct. 114; *Concrete Pipe and Products of Ca., Inc. v. Constr. Laborers Pension Trust* (1993), 508 U.S. 602, 645, 113 S.Ct. 2264. Similarly, the Ohio Supreme Court has also noted diminution in value does not constitute a taking. *State ex rel. Taylor v. Whitehead, Zoning Inspector* (1982), 70 Ohio St.2d 37, 39, citing *Curtiss v. Cleveland* (1957), 166 Ohio St. 509, paragraph two of the syllabus ("there is no right to compensation either for a taking or diminution of value of or damage to property arising either from original zoning or from a rezoning or extension of a use district"). See, also,

State ex rel. BSW Dev. Group v. Dayton, 83 Ohio St.3d 338, 344, 1998-Ohio-287 ("something more than loss of market value or loss of the comfortable enjoyment of the property is needed to constitute a taking"). However, like the Ohio Supreme Court's application of *Penn Central*, this principle has only been applied in a business or investment property context, not to residential property rights. Further, the extent to which the regulation has interfered with the investment-backed expectations arguably goes to the diminution of the value of the house. In cases involving diminution of property value, courts cite this principle almost gratuitously. These holdings, often dicta noting that diminution of value is not a measure of damages, are like well-worn clichés that are repeated by the courts. But, like all clichés, these conclusions are generalities that often do not apply, nor does the rationale always fit. Presumably this principle is based upon the theory that diminution of value is too insignificant to consider when assessing damages. While this may be true in the general context of business investments, diminution has a significant impact when residential property is involved.

{¶75} The Ohio Constitution clearly states that private property is "inviolate." The concept of inviolability is stronger than the generalized takings clause found in the United States Constitution. Other interests besides purely economic considerations should be subject to protection under the Ohio provision. I fail to see why a taking in the form of diminution of value is not a taking of substantial rights. An owner of property has lost part of the benefit of ownership, i.e., resale value of the home, and should be allowed to establish this matter after discovery and at trial. As a result, I urge that a cause of action for diminution of value in the residential context is not prevented under the Ohio Constitution.

{¶76} Additionally, Article I, Section I, providing that "all men * * * have certain inalienable rights, among which are * * * possessing * * * property," arguably creates a

due process right subject to protection under the *Agins* test. Yet, the Ohio Supreme Court has appeared to follow the Supreme Court's abrogation of the *Agins* due process analysis. See *Gilmour Realty*, 2008-Ohio-3181 at ¶20. Like the principle that property in Ohio is inviolate, the Ohio Constitution contains additional protection not included United States Constitution, which should recognized by the Ohio Supreme Court.

d. Motion to Dismiss

{¶77} Finally, regardless of whether the court applies the *Penn Central* standard or an Ohio Constitutional standard, a Civ.R. 12(B)(6) motion for failure to state a claim is not the proper procedure for this court to render a judgment in the Landowners' partial takings case since a court is required to review these matters from a factual perspective on a case-by-case basis. See *Penn Central*, 438 U.S. at 124. I believe that in granting the Civ.R. 12(B)(6), the trial court's analysis involved facts and matters outside "the four corners of the pleadings." *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 281, 1999-Ohio-264. For example, the court apparently used the *Penn Central* investment-backed expectation test. Assuming that this test applies, the court would have considered the expectations of the homeowners, which is not covered in the pleadings. In this case, the Landowners allege that their private residences have been detrimentally affected by the Middletown ordinance authorizing construction of the SunCoke plant. This allegation supports more than a mere diminution of value or reduction in fair market value and the Landowners should at least be able to pursue discovery and present their case. Under the current economic conditions, a residential property may be all that many individuals have. To dismiss such a matter solely on the pleadings is, I submit, a violation of the Ohio Constitution as well as the Ohio Civil Rules.

{¶78} In sum, I dissent because the Landowners have sufficiently alleged an

injury in fact and have standing to sue. The Ohio Constitution affords greater protection of private property rights than the United States Constitution. *Penn Central* does not supply adequate protection to landowners under the Ohio Constitution and the factors do not apply to residential ownership. Additionally, I urge that diminution of property value resulting from governmental regulation is actionable in the residential context and that governmental regulation of property should be subject to due process scrutiny under the Ohio Constitution.