

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

C.J. LUCAS FUNERAL HOME, INC. :
and OAK LANE CREMATORIAL, INC. : **No: 4:07-CV-0285**
Plaintiffs :
Vs. : **(Judge Muir)**
BOROUGH OF KULPMONT, et al. :
Defendants :

OAK LANE CREMATORIAL, INC. :
Plaintiffs : **No: 4:07-CV-0499**
Vs. :
BOROUGH OF KULPMONT, et al. : **(Judge Muir)**
Defendants :

MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

AND NOW, come Defendants, Borough of Kulpmont, Joseph A. Winhofer, Myron Turlis, Clarence Deitrick, Michael Fantanarosa, Ann Martino, Bruno Varano, James Wisloski, Robert M. Slaby, Paul Niglio and Frank Chesney, by and through their counsel, Deasey, Mahoney & Valentini, Ltd., and file this Motion for Summary Judgment pursuant to Rule 56(c), Federal Rules of Civil Procedure and in support thereof aver as follows:

1. Plaintiffs, C.J. Lucas Funeral Home, Inc., and Oak Lane Crematory, Inc., initiated a civil action by filing a Complaint on or about February 13, 2007 seeking compensatory and punitive damages; attorneys fees; and temporary and permanent injunctive relief. (U.S.D.C. MD of PA 4:07-CV-0285). (D.I. 1).

2. The Complaint attempted to assert civil rights claims pursuant to 42 U.S.C. §1983 for a violation of Plaintiffs' Fourteenth Amendment rights to operate a crematory in the Borough of Kulpmont, Northumberland County, Pennsylvania, by the adoption of an Air Pollution Control Ordinance by the Borough of Kulpmont, (Count I – Substantive Due Process) and preventing Plaintiffs from the lawful use of their property without Procedural Due Process (Count II – Procedural Due Process). The Complaint also attempted to assert a civil rights violation for treating the Plaintiffs differently than other individuals or commercial entities whose activities produce emissions in the air (Count III – Equal Protection). The Plaintiffs also attempted to assert a civil rights violation for allegedly preventing the Plaintiffs from using the C.J. Lucas Funeral Home garage as intended: a crematory. (Count V – Taking). Finally, the Plaintiffs pled a claim for Injunctive Relief enjoining the enforcement of the Air Pollution Control Ordinance of the Borough of Kulpmont. (Hereinafter “APCO”). (See Complaint U.S.D.C. MD of PA 4:07-CV-0285).

3. On March 19, 2007, Defendants, Borough of Kulpmont, Joseph A. Winhofer, Myron Turlis, Clarence Deitrick, Michael Fantanarosa, Ann Martino, Bruno Varano, James Wisloski, Robert M. Slaby, Paul Niglio and Frank Chesney, filed an Answer to Plaintiffs' Complaint with Affirmative Defenses. (D.I. 6).

4. Plaintiff, Oak Lane Crematory, Inc., simultaneously filed a second Complaint in the Northumberland Court of Common Pleas requesting a declaratory judgment that the APCO be declared invalid or void and that an Order be entered staying the enforcement of the APCO until such time as the "pending litigation is resolved." (Northumberland County Court of Common Pleas No. 07-222). The Plaintiff, Oak Lane Crematory, Inc., also requested a letter from the Borough of Kulpmont Defendants to the Pennsylvania Department of Environmental Protection that the Plaintiff "is in compliance with Borough requirements" and other such relief as deemed just and equitable.

5. The Northumberland County Court of Common Pleas Complaint involved the exact same Defendants as the Federal Civil Rights Action filed by C.J. Lucas Funeral Home, Inc. and Oak Lane Crematory, Inc., (U.S.D.C. MD of PA 4:07-CV-0285).

6. The Northumberland Complaint involved the very same factual scenario, time-line and the APCO as contained in the Federal Complaint filed on February 13, 2007 (U.S.D.C. MD of PA No. 4:07-CV-0285).

7. The Borough of Kulpmont Defendants removed the Northumberland Declaratory Judgment action to the Federal Court to eliminate the need for duplicate judicial resources and the possibility of inconsistent verdicts/determinations concerning the subject Ordinance.

8. The Declaratory Judgment matter filed in Northumberland was removed on March 21, 2007 in an Amended Petition for Removal and assigned Middle District Docket Number 4:07-CV-0499. (D.I. 2).

9. On January 8, 2008, this Honorable Court granted the Defendants' Motion to Consolidate the original civil rights case (U.S.D.C. MD of PA 4:07-CV-0285) and the removed the Declaratory Judgment case (U.S.D.C. MD of PA 4:07-CV-0499). (See Order of January 8, 2008, D.I. 33).

10. In the Order of January 8, 2008, this Court set a deadline for Dispositive Motions to be filed on or before February 1, 2008.

11. Pursuant to Rule 56(c), Federal Rules of Civil Procedure, Summary Judgment is appropriate when there exists no genuine issue of material fact and the Moving Party is entitled to Summary Judgment as a matter of law.

12. Plaintiffs have sued the Borough of Kulpmont and its elected and appointed officials in their official capacity only. (See Complaints, U.S.D.C. MD of PA 4:07-CV-0285 and U.S.D.C. MD of PA 4:07-CV-0499).

13. The claims against the elected and appointed officials of the Borough of Kulpmont, Joseph A. Winhofer, Myron Turlis, Clarence Deitrick, Michael Fantanarosa, Ann Martino, Bruno Varano, James Wisloski, Robert M. Slaby, Paul Niglio and Frank Chesney, should be dismissed because the claims against the individually named Defendants in their official capacities are the same as the claims as against the Borough of Kulpmont. “A suit against a governmental officer in his official capacity is the same as a suit against [the] entity of which [the] officer is an agent.” McMillan v. Monroe County, 520 U.S. 781, 785 n. 2 (1997).

14. There are no genuine issues of material fact and Moving Defendant Paul Niglio is entitled to Summary Judgment as a matter of law as he is the appointed Borough Treasurer. He is and was the Borough Treasurer during the time the APCO was being considered and eventually passed by Borough Council. Defendant Niglio has no voting power concerning the Ordinances in the Borough of Kulpmont and did not cast a vote concerning the APCO. 53 P.S. §§ 46101-46106.

15. There are no genuine issues of material fact and Moving Defendant Frank Chesney is entitled to Summary Judgment as a matter of law as he was the appointed Borough Secretary and under the Pennsylvania Borough Code has no power to vote on any Borough Ordinance. Specifically, Mr. Chesney did not vote on any matter concerning the APCO. 53 P.S. §46111 (2007).

16. There are no genuine issues of material fact and Moving Defendants, Mayor Robert M. Slaby, Councilman Joseph Winhofer, Councilman Bruno Varano, Councilwoman Ann Martino, Councilman Clarence Deitrick, Councilman Michael Fantanarosa, Councilman James Wisloski and Councilman Myron Turlis, are entitled to Summary Judgment as a matter of law if the Plaintiffs argue in the alternative, that the elected individual Defendants were sued in their individual capacity versus their official capacity, as the Mayor and Councilmen are entitled to absolute legislative immunity in the passage of the Air Pollution Control Ordinance in January 2007. Bogan v. Scott-Harris, 523 U.S. 44 (1998). Legislators are entitled to absolute immunity from civil rights liability, under §1983, for their legislative acts. (See Bogan).

17. There are no genuine issues of material fact and Moving Defendants are entitled to Summary Judgment as a matter of law on the Fourteenth Amendment Substantive Due Process claims for alleged violation of Plaintiffs' right to operate a crematory. (Count I).

18. The Defendants are entitled to Summary Judgment as the Plaintiffs have failed to support any claims against the Borough and/or its elected and appointed officials for actions or inactions that "shock the conscience," the Third Circuit's standard for executive actions that allegedly violate plaintiff's Substantive Due Process Rights. United Artists Theatre Circuit, Inc. v. Township

of Warrington, 316 F.3d 392 (3rd Cir. 2003) “Only the most egregious official conduct” is encompassed with the shocks the conscience standard and only conduct of that nature will suffice to establish a Substantive Due Process claim” United Artists, 316 F.2d 399.

19. Plaintiffs have failed to provide any evidence that the Borough of Kulpmont and its legislative decision makers did not have a legitimate Borough interest that the Borough could rationally conclude was served by the adoption of the APCO: the health, safety and welfare of the Borough residents. Nicholas v. Pennsylvania State University, 227 F.3d 133, (3rd Cir. 2000). “Typically, a legislative act will withstand substantive due process challenge if the government identifies the legitimate state interest that the legislature could rationally conclude was served by the statute.” (See Nicholas, 139).

20. There are no genuine issues of material fact and the Moving Borough of Kulpmont Defendants are entitled to Summary Judgment as a matter of law on Fourteenth Amendment claims for alleged violation of Plaintiffs’ substantive and procedural due process rights concerning the adoption of the APCO on January 9, 2007.

21. Plaintiffs have failed to provide any evidence that there was any significant disruption in continuity of the proposed legislation or appreciable change in the overall policy from the original Ordinance (12/12/06), to the adopted

Ordinance (1/9/07), as the operation of an emission producing facility within 300 yards of multiple residential properties, remained the same. There is no new inclusion of facilities previously not affected by the proposed Ordinance nor was there any indication of adverse impact to adjoining property owners from the original proposed Ordinance (12/12/06) to the amended and adopted Ordinance (1/9/07).

22. The record shows that the changes made from the proposed December 12, 2006 Ordinance, in relationship to the subsequently adopted Ordinance on January 9, 2007, were insignificant. Insignificant modifications to a proposed ordinance, after advertisement and public hearing, do not require re-advertising and re-hearing. Graak v. Board of Supervisors of Lower Nazareth Township, 17 Pa. Cmwlth. Ct. 112, 330 A.2d 578 (1975). Re-advertisement and re-hearing are required only where changes in a proposed ordinance are substantial in relationship to the legislation as a whole, resulting in a significant disruption to the continuity of the proposed legislation or some appreciable change in its overall policy. Wiley Appeal, 399 Pa. 84, 160 A.2d 240 (1960).

23. There are no genuine issues of material fact and Moving Defendants are entitled to Summary Judgment as a matter of law on Plaintiffs' Fourteenth Amendment claims for alleged violation of Plaintiffs' Procedural Due Process rights (Count II).

24. The essence of Procedural Due Process is notice and a meaningful opportunity to be heard. A violation of Procedural Due Process occurs only when a State fails to provide an adequate means to remedy legal errors or irregularities. Plaintiffs have, in fact, been afforded Procedural Due Process rights in that they have appealed the adoption of the APCO by the Kulpmont Defendants simultaneously in the United States District Court for the Middle District of Pennsylvania and the Northumberland County Court of Common Pleas. Procedural Due Process is satisfied when the State provides reasonably remedy for legal error by local administrators. Bello v. Walker, 840 F.2d 1124, 1128 (3rd Cir.) cert. denied, 488 U.S. 868, 102 L. Ed. 2d 145, 109 S.Ct. 176 (1988).

25. The availability of a full judicial mechanism to challenge the administrative decision to deny an application, even an application that was wrongly decided, precluded the determination that the decision was made pursuant to a constitutionally defective procedure. Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 681 (3rd Cir. 1991).

26. There are no genuine issues of material fact and the Moving Defendants are entitled to Summary Judgment as a matter of law on the Equal Protection claims for the alleged violation of Plaintiffs' right to the cremation of bodies in the garage owned by C.J. Lucas Funeral Home.

27. Defendants are entitled to Summary Judgment as a matter of law on Plaintiffs' Equal Protection Claim because Plaintiffs' property is not similarly situated to other properties in Kulpmont Borough, is not being treated differently or, alternatively, there was a rational basis for the difference in treatment. Willow Grove v. Olech, 528 U.S. 562, 564 (2000). Where there is no suspect classification, as in this case, the difference in treatment need only be rationally related to a legitimate state interest, i.e. the health, safety and welfare of the residents of the Borough. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). (Count III).

28. Plaintiffs have produced no evidence that the legally adopted Borough APCO was not enacted to protect the residents of the Borough from future emission-generating facilities and to ensure the health, safety and welfare of all individuals who enter or live in the Borough. The general rule is that the legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate State interest. Cleburne, supra at 439.

29. There are no genuine issues of material fact and the Moving Defendants are entitled to Summary Judgment as a matter of law on the claim of allegedly violating the Plaintiffs' civil rights to build and operate a crematory in the C.J. Lucas garage (County IV).

30. The Plaintiff, C.J. Lucas Funeral Home, Inc., the owner of the garage, which is the subject of this litigation, has retained the right to put it's land to a variety of alternate uses, and therefore there has been no taking by the adoption of the APCO by the Borough of Kulpmont. Bello v. Walker, 840 F.2d 1124 (3rd Cir. 1988).

31. There are no genuine issues of material fact and the Moving Defendants are entitled to Summary Judgment as a matter of law as punitive damages are not recoverable against a municipality or public officials acting in their official capacity.

32. Punitive damages are not available in a §1983 civil rights action against a municipal defendant. Jefferson v. City of Tarrant, 139 L. Ed. 2d 433, 118 S.Ct. 481 (U.S. 1997).

33. A suit against a government employee in his official capacity is the same as a suit against [the] entity of which [the] officer is an agent and the claims against individual defendants in their official capacities, merge with the claims against the Borough. Citing Angelilli v. Borough of Conshohocken, 1996 U.S. Dist. Lexis 16994, 12 (E.D. Pa. 1996).

34. Claims by the Plaintiffs for punitive damages against the Borough, the individual Councilpersons in their official capacity, Mayor acting in his official

capacity, the Borough Secretary acting in his official capacity and the Borough Treasurer acting in his official capacity, should be dismissed.

35. There are no general issues of material fact and Moving Defendants are entitled to Summary Judgment as a matter of law on Plaintiffs' claims for declaratory or injunctive relief as outlined in Plaintiffs' Declaratory Judgment matter. (U.S.D.C. MD of PA 4:07-CV-0499).

36. The facts and circumstances in the Declaratory Judgment matter are same as those identified by the Plaintiffs in their civil rights matter. (U.S.D.C. MD of PA 4:07-CV-0285). The only difference between the two matters is that in the Declaratory Judgment matter, Oak Lane Crematory, Inc. is the only named Plaintiff whereas in the civil rights matter, Oak Lane joined with C.J. Lucas Funeral Home Inc., as Plaintiffs.

37. There has been no further action or enforcement of said Air Pollution Control Ordinance during the pendency of this litigation.

38. A stipulated Order was entered into by the parties in May 23, 2007 in which the Defendants issued a letter to the Pennsylvania Department of Environmental Protection advising that the Borough does not have a zoning code, which was a specific relief requested in the Declaratory Judgment matter. (U.S.D.C. 4:07-CV-0499).

WHEREFORE, Defendants, Borough of Kulpmont, Joseph A. Winhofer, Myron Turlis, Clarence Deitrick, Michael Fantanarosa, Ann Martino, Bruno Varano, James Wisloski, Robert M. Slaby, Paul Niglio and Frank Chesney, respectfully request this Honorable Court grant its Motion for Summary Judgment pursuant to Rule 56(c), Federal Rules of Civil Procedure and enter the accompanying Court Order.

Respectfully submitted,

Deasey, Mahoney & Valentini, Ltd.

Date: _____

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