UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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

OAK LANE CREMATORY, INC.	**:**	
Plaintiff	**:**	**No. 4:07-CV-0499**
	:	
vs.	**:**	**(Judge Muir)**
	:	
BOROUGH OF KULPMONT, et al.	**:**	
Defendants	**:**	

BRIEF OF PLAINTIFFS IN RESPONSE TO MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT PURSUANT TO RULE 56(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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I. PROCEDURAL HISTORY

Plaintiff, C.J. Lucas Funeral Home, Inc., filed its complaint initiating proceedings before this Court, docketed at No. 4:07-CV-0285, on February 13, 2007 challenging the adoption by the Borough of Kulpmont of an Air Pollution Control Ordinance No. 2006-02 at its meeting on January 9, 2007 asserting: Count I - violation of 42 U.S.C. § 1983 - substantive due process; Count II - violation of 42 U.S.C. § 1983 - procedural due process; Count III - violation of 42 U.S.C. § 1983 - equal protection; Count IV - violation of 42 U.S.C. § 1983 - taking; and Count V - requesting injunctive relief.

On February 8, 2007, Oak Lane Crematory, Inc. filed an action in the Northumberland County, Pennsylvania, Court of Common Pleas seeking declaratory relief pursuant to the Declaratory Judgment Act, 42 Pa. C.S.A. § 7531, et seq. asserting state claims including violation of jurisdictional procedural requirements of the Pennsylvania Municipalities Planning Code, 53 Pa. §11002-A, in regard to the same Ordinance.

Defendants removed the Oak Lane Crematory, Inc. action and Order was subsequently entered by the Court consolidating these two cases. Slightly different relief was requested in the state court action by Oak Lane Crematory, Inc. and C.J. Lucas Funeral Home, Inc. was not originally a party to that action.

II. STATEMENT OF MATERIAL FACTS

A. Incorporation. Plaintiffs respectfully incorporate and refer the Court to their Counter Statement of Undisputed Facts, filed contemporaneously with this Brief together with the Affidavits and Exhibits accompanying it and this Reply.

B. Concurrence. As a threshold matter, Plaintiffs would concur in the dismissal of their Complaint as to Defendants Paul Niglio and Frank Chesney. Neither of those gentlemen had a voting power within the Borough of Kulpmont, based on facts obtained from counsel and in discovery. Mayor Slaby did not vote on the Ordinance but is charged with its enforcement and therefore Plaintiffs cannot agree to his dismissal.

III. QUESTIONS PRESENTED

A. WHAT IS THE APPROPRIATE STANDARD FOR CONSIDERATION OF DEFENDANTS' SUMMARY JUDGMENT MOTION?

B. IS THE "SHOCKS THE CONSCIENCE" TEST THE APPROPRIATE STANDARD TO APPLY IN THE CONSIDERATION OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WHERE THE ACTS COMPLAINED OF HERE ARE NOT TRADITIONAL ACTS OF A ZONING OFFICER OR A ZONING HEARING BOARD IN RESPONSE TO AN APPLICATION SUBMITTED TO IT BUT ARE INSTEAD THE WHOLESALE ADOPTION OF AN ORDINANCE, ADOPTED IN VIOLATION OF SEVERAL STATE LAWS, AND WHERE EVIDENCE OF ILL MOTIVE EXISTS AND WHERE THERE IS NO COGNIZANT RATIONAL BASIS BETWEEN THE EXPRESSED REASON FOR THE ORDINANCE AND THE REGULATIONS UNDER IT, WITH NO MEANS TO IMPLEMENT IT, BUT WHERE THERE IS A CLEAR CONNECTION BETWEEN THE DESIRE TO STOP THE PROPOSED CREMATORY AND THE LEGISLATORS UNDERSTANDING OF THE EFFECT OF THE ORDINANCE?

C. SHOULD A MOTION FOR SUMMARY JUDGMENT BE DENIED WHERE SUFFICIENT GENUINE MATERIAL FACTS HAVE BEEN PRODUCED TO ESTABLISH THE CONDUCT COMPLAINED OF WAS BY PERSONS ACTING UNDER COLOR OF STATE LAW, WHICH DEPRIVES PLAINTIFFS OF RIGHTS, PRIVILEGES AND IMMUNITIES SECURED TO THEM UNDER THE CONSTITUTION OR FEDERAL LAW AND WHERE CONDUCT COMPLAINED OF UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DEMONSTRATES THE DEPRIVATION OF LIFE, LIBERTY OR PROCESS WITHOUT DUE PROCESS OF LAW AND WHERE PLAINTIFFS ARE BEING TREATED DIFFERENTLY THAN ANY OTHER AIR EMISSION PRODUCING FACILITIES IN A MANNER WHICH IS DISCRIMINATORY, ARBITRARY AND IRRATIONAL?

D. IS THERE AN EFFECTIVE REMEDY FOR THE VIOLATION OF PLAINTIFFS' RIGHTS IN THIS FORUM?

IV. DISCUSSION

A. SUMMARY JUDGMENT - LEGAL STANDARD

It is well established summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See Federal Rule of Civil Procedure 56(c). A factual dispute is material if it might affect the outcome of the suit under applicable law and a factual dispute is both "material and genuine" only if there is a sufficient evidentiary basis which would allow a reasonable fact finder to return a verdict for the non-moving party. See Corneal v. Jackson Township, Huntingdon County, Pa., et al., 313 F.Supp.2d 457 (M.D.Pa. 2003). All doubts as to the existence of a genuine issue of material fact are to be resolved in favor of the non-moving party. If the moving party has shown there is absence of evidence to support the claims of the non-moving party, then the non-moving party must go beyond the pleadings, and by affidavits, depositions, answers or otherwise designate specific facts showing that there is a genuine issue for trial. Id. at 464. Plaintiffs assert there are a number of genuine material and relevant facts in dispute as to whether Defendants' actions challenged in this litigation and assert Defendants are not entitled to judgment as a matter of law.

B. SHOCKS THE CONSCIENCE

The "shocks the conscience" test was articulated to "avoid converting federal courts into super zoning tribunals". Eichenlaub v. Township of Indiana, 383 F.3d 274, 285 (3rd Cir. 2004).

This case is not about a local township thwarting development by using an existing zoning ordinance, a zoning officer or zoning procedures. Cf. United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392 (3rd Cir. 2003). It is not about zoning enforcement actions.

Cf. Corneal v Jackson Township, Huntingdon County, Pa., et al., 313 F.Supp.2d 457 (M.D.Pa. 2003). It is not a disappointed developer appealing an adverse ruling by a local zoning officer or board. Cf. Development Group LLC. v. Franklin Township, 2004 WL 2812049 (E.D.Pa. 2004). This case is not a "land use case" at all.

As stated in Defendants' Pre-Trial Memorandum filed as document No. 14 on 10/26/07, at page 5 of 18, under the heading "Comprehensive Statement of Undisputed Facts:"

> The Borough of Kulpmont does not have a zoning ordinance. Northumberland County does not have a zoning ordinance. The Air Pollution Control Ordinance is not a zoning ordinance.

If it truly is undisputed that this case does not involve a zoning or land use issue, then analysis of whether Plaintiffs' substantive due process rights have been violated, in the consideration of a Motion for Summary Judgment, is not properly evaluated under the standard announced in and uniformly applied in land use decision cases. Such case analysis is all that is cited by Plaintiffs.

In this case, with no prior concern for air pollution emissions before October 10, 2006, Kulpmont Borough's Air Pollution Control Ordinance had a zoning effect on Plaintiffs in that it prohibits them from building a crematory on their real property in the Borough. There is no variance procedure, no zoning hearing board, no application procedures for exceptions or variances or curative amendments, no appealable violation notices, there is not even a zoning map.

If this is not a zoning ordinance, then the "shocks the conscience" standard articulated in land use cases would be misapplied in this instance. More traditional analysis of whether the conduct complained of was committed by a person acting under color of state law and whether it deprived Plaintiffs of rights, privileges or immunities secured by the Constitution would apply. Further, traditional standards of whether Plaintiffs are being denied equal protection because they are being

treated differently, on a discriminatory, arbitrary or irrational basis would likewise apply.

Accordingly, this first question needs to be resolved: is the "shocks the conscience" analysis appropriate here.

There is an undeniable statutory ban under the Ordinance of Plaintiffs' proposed land use, which was already permitted by a building permit issued by the Borough. The Ordinance was passed in violation of several state statutes prescribing explicit procedures for enactment of such ordinances. See Municipalities Planning Code, 53 P.S. 10101, et seq. Pa. Borough Code at 53 Pa. 46006. It was never the subject of a public hearing. Id. It was modified and revised without proper additional publication and without being made publicly available in those locations where it was to be deposited before enactment. Id. In the case of some of the Borough Council people it was enacted without revised versions of it even having been circulated to them. The Ordinance was clearly started in response to citizen demands that the Borough take some action, in the absence of a comprehensive zoning scheme, to stop Plaintiffs' proposed crematory. It was passed without referral to any appropriate committee, with absolutely no consultation with technical, engineering or any other consultants, with no draft of the Ordinance even in existence when approval was given to begin to advertise a collective intent to adopt the then non-existent Ordinance, with many Council people not understanding significant portions of the Ordinance, not understanding how it would effect those most likely to be regulated by it, with the Borough having absolutely no engineer to enforce it or to implement the technical portions of the Ordinance, and with there being no understanding of whether it would actually bring about the even-expressed reason for it. All discussion regarding it was in illegal executive sessions. See Reading Eagle Co. V. Council of City of Reading, 627 A.2d 305 (Pa.

Cmwlth.) 1993. It was reviewed with a complete disregard of past usual practices in handling controversial ordinances. If you exclude the 29-day period between December 12, 2006 and January 9, 2007, when Plaintiffs and Defendants agreed to hold construction and adoption in abeyance, then the total time from decision to advertise an undrafted document, through one set of significant revisions, was a total of just 28 days (November 14, 2006 to December 12, 2006).

Defendants' answer to this is essentially: "So what?" - the "shocks the conscience" standard in land use cases holds that even when there are illegal practices, just as long as there is any connection whatsoever between the challenged conduct and the land use regulation, it will not fail under substantive due process. See Defendants' Brief, p. 6-9. Plaintiffs would assert that more traditional analysis of whether its rights have been violated should apply in this circumstance.

Even if they did not, Defendants cite the Linquist court for this proposition: "Without more, a violation of state law, even a bad faith violation of state law will not support a substantive due process claim in a land dispute." *Emphasis added*. See Defendants' Brief, p. 7-8.

There is "more" in this case. In addition to trampling almost every procedural requirement for adopting an ordinance, the Borough absolutely refused one simple request: deliver a letter to DEP confirming the Borough's lack of zoning so Plaintiffs could pursue a crematory permit application. There is absolutely no good reason for such refusal. It can only be seen as abuse of Plaintiffs' rights and it provides the "more". The Borough kept up its refusal, after suit, asserting in its Answer to the Complaint in this matter (which at paragraph 29 stated that the Borough had no zoning ordinance) with this reply:

> 29. Denied. After reasonable investigation, Answering Defendants are without sufficient knowledge to admit or deny the contents of the averments and therefore they are denied.

This continued until the Borough was ordered on May 30, 2007 to write such a letter. Their resulting five-page letter contained the ordered language but when on to discredit and defame Plaintiffs' President and stated opposition to Plaintiffs' project, going beyond what was to be included in the letter, according to recorded minutes of the meeting at which the letter was authorized.

This state action was egregious. It was unacceptable. It was outrageous. Does it "shock the conscience"? Whose conscience must be shocked? If egregious, unacceptable and outrageous, Plaintiffs assert sufficient facts exist in support of a "viable substantive due process claim". See Licari v. Ferruzzi, 22 F.3d 344 (1st Cir. 1994).

C. PLAINTIFFS SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS HAVE CLEARLY BEEN VIOLATED

The Pennsylvania Municipalities Planning Code provides a comprehensive statutory scheme regarding the enactment of ordinances, resolutions, regulations involving zoning and subdivision and land development. See Act of July 31, 1568, P.L. §805, Art. I, §101. Reenacted 1988, December 21, P.L. 1329, No. 170, §2 as subsequently amended. 53 P.S. §10101. If the Borough's Ordinance is a zoning ordinance, it is completely defective. Before voting on the enactment of a zoning ordinance, the governing body must hold a public hearing pursuant to "public notice". See Section 10608. "Public notice" is defined as including publication not once, but twice, of the availability of the ordinance for review. See 53 P.S. §10107. There must then be a public hearing and a copy of the ordinance must be supplied to a newspaper of general circulation and a copy of it must be filed in the county law library or other county office designated for such filing. See 53 P.S. §10600.

None of that happened here. The Borough also violated the Pa. Borough Code. See 53 Pa. §46006. There was only one publication of an intent to adopt an ordinance by the Kulpmont Borough. There was no lodging of the Ordinance in the appropriate Law Library. Significant amendments were made to the advertised Ordinance and it should have been re-advertised. Those amendments were not made at a public hearing or public meeting. If they came from executive session, there were executive sessions called in violation of the Sunshine Act. See 1998, Oct. 5, P.L. 779, No. 93, 65 Pa. C.S.A. §708. See Reading Eagle v. Council of City of Reading, 627 A.2d 305 (Pa. Cmwlth. 1993).

Where unre-advertised amendments are significant the underlying ordinance is invalid. See Graack v. Board of Supervisors of Lower Nazareth Township and Schulze v. City of Philadelphia as well as Willey Appeal. Schultz v. City of Philadelphia, 385 Pa. 79, 82, 122 A.2d 279, 281 (Pa. 1956). Willey Appeal, 399 Pa. 84, 160 A.2d 240 (1960). These amendments must disrupt the continuity of the proposed legislation or make an appreciable change in the overall policy of the bill. Id.

That the revisions in Sections 6 and 7 of the Ordinance were significant is evidenced simply by the fact that Defendants', in their Statement of Undisputed Facts in Support of its Motion for Summary Judgment, cite in paragraphs 47, 48, 49, 50, 51, 57, 58, 59, 60, and 62, language which all comes from the added sections 6 and 7. These sections are cited to establish the Borough had a legitimate purpose and a rational relationship for getting into the business of adopting regulations of air polluting facilities. If that is what these sections actually did to the underlying Ordinance, then they are ipso facto substantial and affect the overall policy.

The revisions however are a farce, where they express actual "findings". Minutes from Borough Council meetings show that as of November 28, 2006 no revisions had yet been made. Intent to adopt the Ordinance was advertised on December 4, 2006. The revisions came sometime after December 4. There was no public hearing on December 12, 2006 and none before January 9, 2007 when the Ordinance was adopted. It is not possible the Borough could have made findings without deliberation. There was no public reading of the Ordinance and no public deliberation. There is no doubt that if this is a zoning ordinance, it is void ab initio under Pennsylvania case law. See Schadler v. Zon. Hear. Bd. of Weisenberg Township and Luke vs. Cataldi, 883 A.2d 1114 (Pa. Cmwlth. Ct. 2005).

Defendants also argue these revisions were merely superfluous. They also cite them as proof that the Ordinance is rationally related to a legitimate government interest. These sections included a declaration Plaintiffs' proposed activities were a public nuisance. There was no necessary underlying work done to make such a declaration. See Borough of Macungine v. Hock, 276 A.2d 853 (Pa. Cmwlth. 1971). If activity (operating a crematory) is regulated it cannot then simply be declared a public nuisance. See Diess v. Pennsylvania Dep't of Transp., 935 A.2d 895 (Pa. Commw. Ct. 2007).

The motives and rationality for the adoption of the Ordinance are facts in dispute, but Defendants' assertion of them in its Ordinance findings is clearly pretextual. That the necessary legal steps to make the Ordinance valid were taken would appear not to be in dispute. Under either the MPC or otherwise, the Ordinance is invalid and unenforceable.

Clearly, facts regarding whether the Ordinance should be invalidated and the argument as to the meanings of those facts, whether it is a zoning ordinance or it is not, what the motives were with

respect to its adoption, the significance of the revision to it and the failure to deal with them in a public fashion are facts which are genuinely in dispute and which are material. Defendants cannot dispute they did not properly republish the Ordinance after amending it and did not properly make it available for public review and did not have a public hearing on it but instead did so in unlawful executive sessions.

Plaintiffs' due process rights are violated when Defendants engaged in such activity and then hide behind the protection obtained by placing an onerous proof burden on Plaintiffs.

Regarding Plaintiffs' allegations that Defendants have violated Plaintiffs' equal protection rights, Count III, there must be a rational relationship between the disparity of treatment and some legitimate government purpose. When Defendants argue "land use decisions are quintessentially local in nature", they are arguing their Ordinance is a land use ordinance. Defendants also request great deference to the legislation suggesting it was "designed to insure the air quality in a residential neighborhood". There seems to be a dispute on these positions. The legislation was designed to stop the Lucas project. The legislation was not, in advance of its adoption, understood by the legislators. They still do not know how it necessarily would cure alleged air pollution evils, and they have no idea how it would affect people who would attempt to comply, but the sense is that it would satisfy citizen outcry because it would stop the Lucas project. The speed with which the legislation was adopted and the fact that it so closely followed on the public awareness that Lucas had already subdivided his property, installed a gas line and on October 4, 2006 applied for a building permit compellingly suggests that Lucas' activities caused the Ordinance adoption. In the absence of any zoning ordinance, the Borough did what it could to stop the project. It never previously cared about air pollution emission. It did have an outdoor burning ordinance, which was for odor. A number

of the legislators have no idea what some of the technical terms in the Ordinance even mean, but they do know the crematory cannot be built within 300 feet of a residence.

There are other emitters in the Borough. There is no evidence that any of those emitters are being pursued or that they were in any way a consideration. They simply never mattered. All that mattered was the Ordinance said no crematory could be built within 300 feet of a residence. Plaintiffs are being treated differently than other emitters. That is discriminatory and arbitrary, especially where the regulators have no conception of whether what they did actually accomplishes even their best stated goals, it is completely irrational.

D. IS THERE AN EFFECTIVE REMEDY FOR THE VIOLATION OF PLAINTIFFS' RIGHTS IF THIS MATTER IS DISMISSED?

Plaintiffs' recourse in state court is to seek a declaration as to the invalidity of the Ordinance and perhaps to first amend its Complaint to state additional claims. It might amend its Complaint on remand to try to assert traditional state court zoning claims under the Pending Ordinance Doctrine or Vested Rights. See generally Ryan Pennsylvania Zoning Law and Practice (Bisel - 2005). In the meantime, it would be illegal, under the invalid Ordinance, for Plaintiffs to continue to construct a permitted crematory in the Borough on their property. Plaintiffs would conceivably face immediate criminal action. There is no zoning variance procedure, no appeal to a governing body, none of the traditional outlets or remedies for zoning cases. There is a magistrate proceeding of a criminal nature. It is unlikely the well-reasoned attack on the validity of the underlying Ordinance is going to be effectively brought in that form. Accordingly, Plaintiffs would be in a position of substantial risk while trying to defend against criminal charges. There is a potential for daily fines. The alternative is to not pursue building the crematory and suffer continued damage. Given the

recalcitrance of the Borough to do even the most rudimentary letter writing and in its gross misuse of this Court's Order when it did write a letter to DEP, it is unlikely relief under the Ordinance is going to be available to Plaintiffs from the Borough, as governing body, even if there was a procedure in the Ordinance for such relief from the governing body, and there is not. Defendants acknowledge this problem by suggesting Plaintiffs should just go back into the state court proceeding.

As to such issues of taking and ripeness, it is interesting to note Defendants removed the state court action and now argue this case should be dismissed and that Plaintiffs should have used Pennsylvania state law in the first place. Notwithstanding the arguments regarding inverse condemnation or ripeness, those are not proceedings in which the substantive and due process rights and the issue of equal protection would be determined. Plaintiffs assert they have established a sufficient factual basis, even under the most onerous of standards, to demonstrate Defendants are not entitled to summary judgment as a matter of law in this case.

V. CONCLUSION

It is therefore respectfully requested that the Court deny Defendants' request for summary judgment to the Defendants and that the Court not dismiss Plaintiffs' Complaint, except as noted in regard to Defendants Niglio and Chesney.

Respectfully submitted,

CERULLO, DATTE & WALLBILLICH, P.C.

Date: 2/28/08

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