UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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

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

BRIEF OF 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 IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56(c), FEDERAL RULES OF CIVIL PROCEDURE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Federal Statutes

State Statutes

Federal Rules

State Regulations

I. PROCEDURAL HISTORY

On February 13, 2007, Plaintiffs C.J. Lucas Funeral Home, Inc., and Oak Lane Crematory, Inc. filed an action pursuant to 42 U.S.C. §1983, seeking damages and injunctive relief for the adoption of an Air Pollution Control Ordinance by the Borough of Kulpmont Defendants. On February 8, 2007 Plaintiff Oak Lane Crematory, Inc. filed a Declaratory Judgment matter in Northumberland County, Pennsylvania seeking a declaration that the Defendants' Ordinance be declared invalid, or void the adoption or stay enforcement. The Northumberland matter was removed to this Court on March 16, 2007 and the two matters were consolidated on January 8, 2008.

On February 1, 2008, the Defendants filed a Motion for Summary Judgment and a Concise Statement of Facts. This Brief is filed in support of the pending Motion for Summary Judgment.

II. STATEMENT OF MATERIAL FACTS

The Defendants respectfully refer the Court to the Concise Statement of Undisputed Facts, which was filed contemporaneously with the Motion for Summary Judgment.

III. QUESTIONS PRESENTED

A. SHOULD SUMMARY JUDGMENT BE GRANTED IN FAVOR OF DEFENDANT OFFICIALS IN THEIR OFFICIAL CAPACITY BECAUSE PLAINTIFFS ALSO NAMED THE BOROUGH?

B. SHOULD SUMMARY JUDGMENT BE GRANTED IN FAVOR OF ALL DEFENDANTS WHERE PLAINTIFFS HAVE FAILED TO PROVE THE ACTIONS OF THE BOROUGH "SHOCKS THE CONSCIENCE?"

C. SHOULD SUMMARY JUDGMENT BE GRANTED IN FAVOR OF ALL DEFENDANTS AS PLAINTIFFS HAVE FAILED TO PROVE THAT THEY DO NOT HAVE ACCESS TO THE COURTS TO CHALLENGE THE ORDINANCE?

D. SHOULD SUMMARY JUDGMENT BE GRANTED IN FAVOR OF DEFENDANTS AS PLAINTIFFS ARE UNABLE TO DEMONSTRATE THAT THEIR PROPERTY IS SIMILARILY SITUATED TO OTHERS IN THE BOROUGH AND/OR THAT THE BOROUGH DID NOT HAVE A RATIONAL BASIS TO ADOPT THE ORDINANCE?

E. SHOULD SUMMARY JUDGMENT BE GRANTED FOR ALL DEFENDANTS AS PLAINTIFFS' TAKING CLAIM IS NOT RIPE AND THE DEFENDANTS HAD A RATIONAL BASIS TO ADOPT THE ORDINANCE (HEALTH, SAFETY AND WELFARE OF RESIDENTS)?

F. SHOULD SUMMARY JUDGMENT BE GRANTED FOR ALL DEFENDANTS ON PLAINTIFFS' REQUEST FOR PUNITIVE DAMAGES AS OFFICIAL CAPACITY CLAIMS AGAINST INDIVIDUAL DEFENDANTS MERGE WITH BOROUGH AND A MUNICIPALITY DEFENDANT IS NOT SUBJECT TO PUNITIVE DAMAGES UNDER 42 U.S.C. §1983?

IV. ARGUMENT

A. Summary Judgment Standard

Summary Judgment Standard is proper if the pleadings, depositions, interrogatories, admissions on file, together with an affidavits, show that there is no genuine issue as to any material fact and that the Moving Party is entitled to judgment as a matter of law. Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3rd Cir. 1999), quoting Armbruster v. Unisys Corp. 32 F.3d 768, 777 (3rd Cir. 1994). The Supreme Court of the United States has established that the standard for granting summary judgment pursuant to F.R.C.P. 56(c) is whether, after discovery, the non-moving party has failed to establish the existence of an element essential to its case on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 (1986).

Summary Judgment will not be denied simply because there are some factual disputes between the parties. Rather, only a dispute over those facts that might affect the outcome of the suit under the governing substantive law, i.e. the material facts, will preclude the entry of summary judgment. Orsatti v. N.J. State Police, 71 F.3d 480, 482 (3rd Cir. 1995) citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). If the evidence favoring the non-moving party is merely colorable or not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50. When the moving party has

carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. Matsushita Electrical Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, (1996).

Moving Defendants assert that there are no facts in dispute that are material to the outcome of this litigation and the Defendants are entitled to judgment as a matter of law.

B. The Individual Defendants Are Entitled To Summary Judgment In Their Official Capacities Because Plaintiff Has Also Named the Municipal Entity As A Defendant.

Plaintiffs assert claims against the elected and appointed officials of Defendant Borough of Kulpmont, in their official capacities only. (See Complaint U.S.D.C. MD of PA 4:07-CV-0285 p. 2-3 D.I. 1 (hereinafter "Civil Rights"), and U.S.D.C. MD of PA 4:07-CV-0499 pp. 2-3 D.I. 1 (hereinafter "Declaratory Judgment")). They make no claim against the named Borough officials in their individual capacity. The claims against the ten elected and appointed Borough officials should be dismissed because the claims are same as the claims against the Borough of Kulpmont. McMillian v. Monroe County, 520 U.S. 781, 785 n. 2 (1997) (noting that "a suit against a government officer in his official capacity is the same as a suit against [the] entity of which [the] officer is an agent.") (quotation omitted). Here, because the Plaintiffs only assert claims against

Defendant Councilpersons, the Mayor, Secretary and Treasurer in their official capacities, the claims are redundant of the claims against the Borough of Kulpmont and should be dismissed.

C. Defendants' Conduct Does Not "Shock The Conscience" (Count I).

Plaintiffs have alleged that Defendants violated their right to substantive due process. (See Civil Rights Complaint Count I). Consistent with the holdings of virtually every other circuit, the Third Circuit abrogated its prior holdings on the issue of the appropriate threshold for substantive due process claims and adopted the universally applicable "conscience-shocking" standard. See Universal Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392, 399-402 (3rd Cir. 2003). The Third Circuit in United Artists opined that: "Land use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with "improper" motives." United Artists, Id. at 402. Plaintiffs have failed to allege in their Complaint that any actions by the Borough, or the individually named Defendants, was conscience shocking. Indeed, the Plaintiffs alleged in their Civil Rights Complaint that the Defendants' actions were an "arbitrary exercise of governmental authority" (¶ 62).

"[T]he 'shocks the conscience' standard encompasses 'only the most egregious official conduct.'" United Artists, Id. at 400. "A viable substantive due

process claim requires proof that a state action was 'in and of itself...egregiously, unacceptable, outrageous, or conscience-shocking.'" Licari v. Ferruzzi, 22 F.3d 344, 347 (1st Cir. 1994) (citations omitted). Following United Artists, there have been a series of cases in this Circuit addressing substantive due process claims in the land use context. Judge Baylson in Development Group, LLC v. Franklin Twp., 2004 WL 2812049, *14 (E.D. Pa. 2004) noted that every Third Circuit and District Court to consider this issue post-United Artists has refused to find a violation of substantive due process in a land use case.

Judge Robert F. Kelly of the Eastern District provided a detailed analysis of the post-United Artists cases in his unreported opinion in Highway Materials, Inc. v. Whitemarsh Twp., 2004 U.S. Dist. Lexis 19905 (E.D. Pa.). Judge Kelly reviews, in detail, the Eichenlaub v. Twp. of Indiana, 385 F.3d 274 (3rd Cir. 2004) decision as well as Lindquist v. Buckingham Twp., 2003 WL 22757894 (E.D. Pa. 2003); aff'd 2004 WL 1598735 (3d Cir. 2004) (non-precedential). Judge Kelly noted that the Third Circuit in Lindquist agreed that "[t]he District Court concluded that while the Township 'may have been negligent' and 'may have acted with an improper motive', desirous of thwarting development of the property, its conduct did not shock the conscience." Lindquist, 2004 WL 1598735 at *5. The Lindquist Court noted, "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-use dispute." Id. (noting that there is a substantial difference "between the inevitable misjudgments, wrongheadedness, and mistakes of local government bureaucracies and the utterly unjustified, malignant, and extreme actions of those who would be parochial potentates.")

Judge Chertoff notes that the Third Circuit has previously observed,

> [E]very appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority, but "it is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under Section 1983."

Id., citing United Artists, supra at 402. Judge Chertoff explains that the test is designed to avoid converting federal courts into super zoning tribunals. Eichenlaub, supra at 285.

Even illegal practices by a Township regarding its handling of land-use matters have been found to fail to state a cognizable substantive due process claim. There must be an absence of any rational connection between the challenged conduct and land use regulation.

> [T]o survive summary judgment under the "shocks the conscience" test, rather than the "improper motive" test, the [plaintiffs] must have adduced evidence from which a reasonable jury could conclude that the Board's actions did not serve any rational land use purpose. As a result, unless the evidence indicates that the challenged decision is completely unrelated in any way to a rational land use goal, there is no violation of substantive due process.

> The corollary of that rule being that where the locality's decision is related in any way to some rational goal, then no due process violation occurs even if the locality may have exceeded the scope of its jurisdiction.

Corneal v. Jackson Township, 313 F.Supp.2d 457, 466 (M.D. Pa. 2003) (footnote and citation omitted), aff'd, 94 Fed. Appx. 76 (3rd Cir. 2004). Judge Rambo in Corneal, noted that although the enforcement actions against Plaintiffs, in that case, may have been based on a mixture of legitimate and illegitimate motives, such mixed motives alone are not sufficient to establish a violation of substantive due process. Corneal, supra, 467-68. As further noted in Blain v. Radnor Township, 2004 U.S. Dist. Lexis 9526 (E.D. Pa.), Judge Kauffman indicated that redress can be sought in state courts for arbitrary or capricious executive actions:

> Substantive due process is an outer limit on the legitimacy of governmental action. It does not forbid governmental actions that might fairly be deemed arbitrary or capricious and for that reason correctable in a state court lawsuit seeking review of administrative action. Substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority.

Blain, 2004 U.S. Dist. Lexis, at *18 (affirmed 167 Fed. Appx. 330). Plaintiffs have posited that the Borough did not pass the APOC in a correct manner and there is no rational basis for adopting the APOC.

1. Adopted Ordinance Versus Proposed Ordinance

The Borough Council Defendants authorized the advertising of the "Proposed APCO" at its November 14, 2006 meeting. (See Council Minutes, November 14, 2006, Exhibit 14, p. 6; see also Proposed APCO Ordinance, Exhibit 10). On December 4, 2006, the Proposed APCO was advertised in the local newspaper. (See proof of newspaper publication, December 4, 2006, Exhibit 12). At the request of the Plaintiffs, the Council Defendants agreed not to vote on the Proposed APCO at the next Council Meeting, December 12, 2006, after the APCO Ordinance was advertised. (See Minutes, December 12, 2006, Exhibit 24, p. 5-6).

Between the December 12, 2006 Council Meeting and the next Council Meeting on January 9, 2007, the Borough Solicitor made two amendments to the Proposed APCO (See Turlis, Exhibit 2, p. 21; Winhofer, Exhibit 1, p. 39-40; Martino, Exhibit 4, p. 50). The amendments were minor and included certain additions at the end of the Proposed Ordinance of December 12, 2006. Specifically, the Solicitor added Article IX, Sections 6 and 7, concerning Purposes and Findings Pertaining to Article IX (Section 6) and Definitions Pertaining to Article IX (Section 7). (See Proposed APCO of December 12, 2006, Exhibit 10 and compare to Adopted APCO of January 9, 2007, Exhibit 12, pp. 12-14).

Plaintiffs complain that there was no public hearing on the amendments to the APCO between December 12, 2006 and January 9, 2007 and that the Adopted

APCO 2600-02 is invalid because its passage did not comply with the enabling act pursuant to which it was enacted.

The Pennsylvania Borough Code at 53 Pa. §46006, provides:

> It shall be the duty of the borough council; (4)...In the event substantial amendments are made in the proposed ordinance or resolution before voting upon enactment, council shall within ten days re-advertise in one newspaper of general circulation in the borough a brief summary setting forth all the provisions in reasonable detail together with a summary of the amendments. (emphasis added)

A re-hearing/re-advertising is only required where changes are substantial in relation to the legislation as a whole, resulting in significant disruption in the continuity of the proposed legislation or some appreciable change in overall policy. Willey Appeal, 399 Pa. 84, 160 A.2d 240 (1960), citing Schultz v. Philadelphia, 385 Pa. 79, 122 A.2d 279 (1956).

An examination of the original Proposed APCO of December 12, 2006 and the revised, Adopted APCO of January 9, 2007, shows that the additions were clearly *de minimus* in relation to the whole of the Ordinance. "Re-advertising under these circumstances would result in a wasteful exercise and should not be encourage." Graak v. Board of Supervisors of Lower Nazereth Township, 17 Pa. Cmwlth. 112, 118, 330 A.2d 578, 581 (1975). The amendment/revisions did not add or delete any use nor change the classification of any property.

The adoption of the APCO was procedurally correct and was passed by means of established legislative procedures. The revision/amendments were not substantial and did not disrupt the continuity of the proposed legislation or make any appreciable change in the overall policy of the bill. Willey, supra, 87.

2. The APOC is Rationally Related To A Legitimate Governmental Interest.

As testified to by the President of Borough Council, the Council was not against the Plaintiffs' crematory and the Ordinance was adopted to regulate emissions from air pollution facilities such as waste incinerators, crematories, etc. in a residential neighborhood for the health of the citizens. (Winhofer, Exhibit 1, p. 20, 35, 43). The fact that Council considered the concerns of the residents in adopting the APOC is not a violation of Plaintiffs' constitutional rights. Council also heard from Plaintiffs, the crematorium manufacturer, as well as Plaintiffs' attorney on a number of occasions, prior to the adoption of the APOC. To a person, Council and the Mayor, have all testified that they are not against the Plaintiffs' crematory but they wish only to regulate the emissions from air polluting facilities in proximity to residential properties. The proposed crematory, with its large smoke stack, is with 50 feet of residential properties with children. Council would be remiss or in violation of their sworn oath, if they did not address the potential harmful incinerator emissions within 150 feet of numerous residential properties.

As discussed in Highway Materials and Eichenlaub, supra, there is simply no evidence in this case of corruption or self-dealing so as to find that the Defendants' actions were so egregious as to "shock the conscience." Highway Materials, supra at 45.

Even if Plaintiffs were able to find any support for the allegation that any of the Moving Defendants made arbitrary decisions, their claims must still fail as the challenged decisions were plainly related to rational land use goals. There is no evidence that the cited provisions of the APCO or the concerns over the protection of public welfare either were utilized solely to single out Plaintiffs or were irrational. Council has a legitimate interest in air quality, which involves considerations of the health, safety and welfare of its citizens.

The actions alleged in the Complaint simply do not rise to the exceptionally high level of egregious and utterly irrational behavior that is required in order to state a substantive due process claim. Plaintiffs' substantive due process claims, must be dismissed.

D. Plaintiffs' Claim For Procedural Due Process Violation Fails Because The Municipalities Planning Code, The Pennsylvania Borough Code and the APCO All Provided Full Judicial Remedies To Challenge An Official Decision. (Count II).

Plaintiffs' claim for denial of its procedural due process rights should be dismissed because Pennsylvania unquestionably affords Plaintiffs a full judicial remedy from the Borough's actions pursuant to the Municipality's Planning Code, 53 P.S. § 10101 et seq. (hereinafter MPC) and the Pennsylvania Borough Code, 53 P.S. § 46010, Appeals from Ordinances (hereinafter "PBC"). The test for procedural due process in land use (and zoning areas) is whether the State affords a full judicial mechanism with which to challenge an official decision. In DeBlasio v. Zoning Board of Adjustments, 53 F.3d 592 (3rd Cir. 1995), the U.S. Court of Appeals for the Third Circuit stated:

> In order to establish a violation of (Plaintiffs') right to procedural due process, (Plaintiffs) in addition to proving that a person acting under color of state law deprived him of a protected property interest, must establish that the State procedure for challenging the deprivation does not satisfy the requirements of procedural due process.

See also, Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 680 (3rd Cir. 1991).

A State provides constitutionally adequate procedural due process when it provides reasonable remedies to rectify legal errors by a local administrative body. Bello v. Walker, 840 F.2d 1124, 1128 (3rd Cir. 1988), cert denied 488 U.S. 868

(1988); Omnipoint Communications, Inc. v. Penn Forest Township, 42 F.Supp. 2d 493 (M.D. Pa. 1999). The MPC, 53 P.S. §10101 et seq. provides full and complete remedies for a person aggrieved by a decision of a municipality regarding use of their land. The MPC provides for appeals to the Court of Common Pleas of the county in which the land is located. 53 P.S. §11001A, et seq. Plaintiffs have availed themselves of these remedies provided by the MPC by filing a land use appeal/declaratory judgment action in the Court of Common Pleas of Northumberland County, which was removed to this Court.

Additionally, the PBC, 53 P.S. §46010, "Appeals from Ordinances," states that "Complaint as to the legality of any ordinance (not just land use) or resolution may be made to the court." Since Pennsylvania provides a set of remedies to contest the decisions of the Borough and the Plaintiffs have availed themselves of these remedies, there is no viable procedural due process claim and it should be dismissed as a matter of law.

While not specifically pled as a procedural due process count within the original Civil Rights matter and the removed Declaratory Judgment matter, the Defendants anticipate that the Plaintiffs will argue that their procedural due process rights will be violated upon completion and operation of the crematory as they will not be able to appeal any citations for violations of the Ordinance. The Adopted APCO (Exhibit 11) at Article IX, Section 4, Enforcement, Violations and

Penalties, provides that "the enforcement of this Ordinance shall be by action brought before a District Justice in the same manner as provided for the enforcement of summary offenses under the Pennsylvania Rules of Criminal Procedure."

In light of the foregoing, it is clear that Plaintiffs cannot prove a violation of their present or future procedural due process rights.

E. Plaintiffs Have Failed To Produce Evidence That Defendants Violated Plaintiffs' Equal Protection Rights (Count III).

Plaintiffs contend that the action taken by the Defendants violated Plaintiff's Equal Protection Rights. Where the state law does not classify by suspect class(i.e. race, alienage, national origin, disability or gender), "the general rule is that 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." Highway Material Inc. v. Whitemarsh Township, supra at 64 citing Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). Plaintiffs do not argue that they are members of a suspect class, but rather, that they are members of a "class of one." The Supreme Court has stated that an equal protection claim can be brought by a "class of one" where the Plaintiff alleges that "she has been intentionally treated differently from others similarly situated and where there is no rational basis for the disparate treatment." Village of Willowbrook v. Oleck, 528 U.S. 562, 564 (2000). In a class of one analysis, the Plaintiffs must meet the requirements of an

equal protection claim: (1) that they were treated differently than similarly situated property owners, and (2) there was no rational basis for the difference in treatment. Where there is no suspect classification, as in this case, the difference in treatment need only be rationally related to a legitimate state interest. Cleburne, supra at 440. A statute that does not impinge on a fundamental right or burden a suspect class of persons, such as in this case, "is accorded a strong presumption of validity," Heller v. Doe, 509 U.S. 312, 319-20, 113 S.Ct. 2637, 2642, 125 L.Ed.3d 257 (1993) (citations omitted), and a plaintiff will not prevail so long as "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Id. at 320, 113 S.Ct. at 2642.

The Third Circuit has held that land use decisions are quintessentially local in nature. Lapid-Laurel, L.L.C. v. Zoning Bd. Of the Adjustment of Scotch Plains, 2002 WL 408082 (3rd Cir. 2002). The Circuit Court further emphasized this view when it stated, "[w]e too have recognized in similar contexts the value of local authorities resolving such matters on their own without interference from federal courts." Lapid-Laurel, supra at 6, citing Acierno v. Mitchell, 6 F.3d 970 (3rd Cir. 1993).

1. The APCO Is Municipal Legislation Rationally Related To A Legitimate Government Interest: The Health, Safety And Welfare Of the Borough Residents.

"The Supreme Court has accorded great deference to...legislation...that affects business or other economic activity." Rogin v. Bensalem Township, 616 F.2d 680, 687 (1980). Pointing to the desirability of reducing density in an R-4 Residential District, the court noted that the amendment to the zoning ordinance was a rational and reasonable means to accomplish this goal. Rogin, supra, at 688.

Similarly, in the case at bar, the legislative action by the Councilpersons in amending and adopting the APCO to address emissions from air polluting facilities, was designated to ensure the air quality in a residential neighborhood i.e. the health, safety and welfare of its residents. (See Adopted APCO, Exhibit 11, Section 2, Purpose). Such deference should be accorded the Borough, its' Councilpersons and Mayor with regard to this legislative decision.

2. Plaintiffs' Property Is Not Similarly Situated To Other Property In The Borough of Kulpmont

"Similarly situated" means similar "in all relevant respects." Singh v. Wal-Mart Stores, Inc., 1999 U.S. Dist. Lexis 8531 (E.D. Pa.). In the Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989), the Circuit Court set forth the test of "similarly situated" as follows: "apples should be compared to apples."

It is undisputed that there are no other incinerators of bodies, body parts, infectious and/or chemotherapeutic wastes in the Borough. It is also undisputed that Plaintiff's property is the only property at the present time that wants to operate a incinerator or will be an air pollution facility as defined in the APCO.

Plaintiffs maintain that there are other commercial entities in the Borough whose activities produces emission into the air. Civil Rights Complaint, Count II, ¶70. Plaintiffs have not produced any evidence of similarly situated properties or entities that produced emission into the air from incinerator activities. The test is "comparing apples to apples," not apples to an unknown or unidentified entity in the Borough.

Therefore, the Council's actions were not only rationally based, but also appropriate. Placing an air pollution facility within 150 feet of numerous residential properties is less than appropriate. The APCO does not prevent Plaintiffs from constructing or operating a crematory in Kulpmont. In fact, Plaintiffs can operate a crematory in the Borough as long as they comply with the emission standards concerning mercury and dioxin/furan pollution.

F. Plaintiffs' Claim Of A Taking Is Not Ripe And They Have Failed To Prove The Ordinance Has Taken All Viable Or All Economic Beneficial Use of the Property (Count IV).

A claim for inverse condemnation is a claim against a government defendant in which a land owner seeks just compensation for a taking of his property under

the Fifth Amendment. Agins v. City of Tiburon, 447 U.S. 255, 258 n. 2, 100 S.Ct. 2138, 65 L.Ed.2.d 106 (1980). A land owner may bring a claim for inverse condemnation against a local government if its' ordinance severely diminishes the value or impairs the use of a parcel of land and the state or local government refused to pay the land owner just compensation. See, Pace Res. Inc. v. Schruwsbury Township, 808 F.2d 1023, 1031 (3rd Cir. 1987). For the reasons set forth below, Plaintiffs cannot sustain their claim of a taking.

1. Plaintiffs' Claim Is Not Ripe.

The State provides an adequate procedure for seeking just compensation. The property owners cannot claim a violation of the Takings Clause until it has used the procedure and been denied just compensation. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). "Pennsylvania's Eminent Domain Code provides inverse condemnation procedures to which a land owner may seek just compensation with the taking of property." Cowell v. Palmer Township, 263 F.3d 286, 290 (3rd Cir. 2001) (citing 26 P.C.S.A. §§ 1-408, 1-502(e), 1-609). In the instant case, Plaintiffs have not attempted to use Pennsylvania's inverse condemnation procedures.

2. Plaintiffs Cannot Establish That A Taking Occurred.

Under its police power, a borough may, within limitations, regulate the uses of property within its jurisdiction to promote the public good. The Third Circuit has directed that "[T]he initial step in any taking analysis... is whether the challenged governmental action advances a legitimate public interest" and "[i]n this step, the governmental action is entitled to a presumption that it does advance public interest." Pace Resources, Inc., supra, 1030.

All Borough Councilpersons have testified that the purpose behind the APCO was not to stop a crematory from construction and operation but to ensure the health, safety and welfare of the Borough residents by setting parameters for emissions of air polluting facilities, one of which, is the incineration of bodies, body parts, infectious and/or chemotherapeutic waste, in a residential neighborhood. The PBC grants police powers to the Borough and its Councilpersons to ensure the health, safety and welfare of its residents i.e. Health and Cleanliness (53 P.S. §46202(6)); Smoke Regulations (53 P.S. §46202(16)); Building, Housing, Property Maintenance (53 P.S. §46202(24)); Noxious and Offensive Businesses (53 P.S. §46202(28)); General Powers (53 P.S. §46202(74)). The APCO was adopted consistent with the police powers and mandate to protect the citizens of the Borough.

The question is not whether the Plaintiffs have been substantially deprived of the current use of the property, but whether the Plaintiffs have been deprived of all potential uses. See Miller & Son Paving, Inc. v. Plumstead Township Zoning Hearing Board, 717 A.2d 483, 486 (Pa. Cmwlth. 1996) (holding that a taking does not result merely because a regulation may deprive the owner of the most profitable use of his property). In order to be a taking, the regulation in question must take "all use of the property" First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987) or "all economically beneficial use." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027, 1029 (1992).

Plaintiffs put forth the argument that the Defendants have denied Plaintiffs the economically viable use of the garage as Plaintiffs have already begun construction of the crematory based upon the deemed approval of the Plaintiffs' Building Permit submitted to Borough Code Inspector. (See Civil Rights Complaint, ¶73). Unfortunately, "deemed approval" for the garage renovation is not an approval for the construction and operation of a crematory in Pennsylvania. Only the PA DEP can authorize the construction of a crematory through the DEP Permitting Process for Crematories. (See PA DEP Regulations, Pa. B. Doc. 06-1630 p. 1, Exhibit 21). Plaintiffs began construction of an un-permitted crematory, at their own risk, in August 2006, with the installation of an industrial grade gas line (Exhibit 17) and construction/renovations of the actual garage in

October/November 2006 (Exhibit 19) long before they filed a DEP permit. (Lucas, Exhibit 22, p.175). This is clearly a case of Plaintiffs arguing "empty pockets" with "unclean hands." The Plaintiffs had a garage, storage area, and workshop at the subject property, before the adoption of the APCO and they still have a garage, storage area, and workshop after the APCO passage on January 9, 2007. (Lucas, Exhibit 22, pp.68, 69, 175, 176).

G. Plaintiffs Are Not Entitled To Punitive Damages Against A Municipality Or Public Officials Acting In Their Official Capacity.

Plaintiffs are not entitled to recover punitive damages against the ten elected and appointed Defendants in their official capacity or against the Borough. As discussed earlier, "An official capacity suit is, in all respects other than name, to be treated as a suit against the entity." Kentucky v. Graham, 473 U.S. 159, 166 (1985). The Borough is already a party to the Plaintiffs' lawsuit. Any governmental officer or employee who acts in his official capacity is, in effect, acting on behalf of the municipality, which is also immune from punitive damages. Plaintiff may not recover punitive damages under 42 U.S.C. §1983 against the Borough. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) ("A municipality is immune from punitive damages under 42 U.S.C. §1983).

V. CONCLUSION

It is respectfully requested that the Court grant Summary Judgment to the Defendants and dismiss Plaintiffs' Complaints.

Respectfully submitted,

Deasey, Mahoney & Valentini, Ltd.

Date: 2/13/08

Thomas C. Gallagher, Esquire
Attorney I.D. No. 27156
103 Chesley Drive, Suite 101
Media, PA 19063
(610) 892-2732
Attorney for All Defendants

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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

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

CERTIFICATE OF WORD COUNT

Pursuant to the Middle District's Local Rules, I, Thomas C. Gallagher, Esquire, counsel for Defendants, herby certify that according to Microsoft Word's word count feature, this Brief, excluding the title page, table of contents and authorities, signature blocks, and attached certificate, contains 4,992 words.

_____

Thomas C. Gallagher, Esquire
Attorney for Defendants

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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

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

CERTIFICATE OF SERVICE

I, Thomas C. Gallagher, Esquire, attorney for all Defendants hereby certify that a true and correct copy of the within Brief in Support of Defendants' Motion for Summary Judgment was filed electronically and is available for viewing and downloading from the ECF system. I further certify that I served the foregoing document upon the following individual(s) via U.S. First Class Mail on this 13th day of February, 2008:

James P. Wallbillich, Esquire
Cerullo, Datte & Wallbillich, P.C.
450 West Market Street
P.O. Box 450
Pottsville, PA 17901

_____
Thomas C. Gallagher, Esquire