UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

C.J. LUCAS FUNERAL HOME, INC., and OAK LANE CREMATORY, INC.,	4:CV-07-0285
Plaintiffs,	(Judge Muir)
v.	(Complaint filed 02/13/07)
BOROUGH OF KULPMONT, et al.,	
Defendants	

OAK LANE CREMATORY, INC.,	4:CV-07-0499
Plaintiff,	(Judge Muir)
v.	(Removal petition filed 03/16/07)
BOROUGH OF KULPMONT, et al.,	
Defendants	

ORDER

March 27, 2008

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On February 13, 2007, Plaintiffs C.J. Lucas Funeral Home, Inc., and Oak Lane Crematory, Inc., filed a civil rights complaint containing 5 counts in this court. The Defendants in that matter are the Borough of Kulpmont, various members of that borough's council, and the borough's mayor. That action was assigned docket number 4:CV-07-0285. On March 16, 2007, those same Defendants removed to this court a declaratory judgment action filed against them in state court by Oak Lane Crematory, Inc. That removed action was assigned docket number 4:CV-07-

0499. By order dated January 8, 2008, we granted the Defendants' essentially unopposed motion to consolidate the two related cases.

On February 1, 2008, the Defendants filed a motion for summary judgment supported by a brief, exhibits, and a statement of undisputed material facts. The Plaintiffs' opposition brief, counter-statement of material facts, and exhibits were timely filed on February 28, 2008. The time allowed for the Defendants to file a reply brief expired on March 17, 2008. To this date no such brief has been filed. The Defendants' summary judgment motion is ripe for disposition.

Summary judgment is appropriate only when there is no genuine issue of material fact which is unresolved and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences which a fact finder could draw from them. Peterson v. Lehigh Valley Dist. Council, 676 F.2d 81, 84 (3d Cir. 1982). "When a motion for summary judgment is made and supported as provided in ...[Rule 56], an adverse party may not rest upon mere allegations or denials of the adverse party's pleading...." Fed. R. Civ. P. 56(e).

Initially, the moving party has a burden of demonstrating the absence of a genuine issue of material fact. Celotex

Corporation v. Catrett, 477 U.S. 317, 323 (1986). This may be met by the moving party pointing out to the court that there is an absence of evidence to support an essential element as to which the non-moving party will bear the burden of proof at trial. Id. at 325.

Rule 56 provides that, where such a motion is made and properly supported, the adverse party must show by affidavits, pleadings, depositions, answers to interrogatories, and admissions on file that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The United States Supreme Court has commented that this requirement is tantamount to the non-moving party making a sufficient showing as to the essential elements of their case that a reasonable jury could find in their favor. Celotex Corporation v. Catrett, 477 U.S. 317, 322-23 (1986).

Because summary judgment is a severe remedy, the Court should resolve any doubt about the existence of genuine issues of fact against the moving party. Ness v. Marshall, 660 F.2d 517, 519 (3d Cir. 1981).

The United States Supreme Court has stated that in motions for summary judgment a material fact is one which might affect the outcome of the suit under relevant substantive law. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The Supreme Court also stated in Anderson that a dispute about a material fact is “genuine” if “the evidence is such that a

reasonable jury could return a verdict for the non-moving party." Id. at 248. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 587 (1986).

When addressing such a motion, our inquiry focuses on "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)(emphasis added).

As summarized by the Advisory Committee On Civil Rules, "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56 advisory committee note to 1963 Amendment. We will apply those principles in considering the Defendant's motion for summary judgment.

Before proceeding to set forth the undisputed material facts supported by the evidence of record, we pause to describe in more detail the statements of undisputed facts filed by the parties in connection with the pending dispositive motion. The Defendants' "Statement of Undisputed facts in Support of Motion for Summary Judgment ...," consists of 80 numbered paragraphs.

Local Rule 56.1 of this court, entitled "Motions for Summary Judgment," provides in relevant part as follows:

> A motion for summary judgment ... shall be accompanied by a separate, short and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried.
>
> The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts, responding to the numbered paragraphs set forth in the statement required in the foregoing paragraph, as to which it is contended that there exists a genuine issue to be tried.
>
> . . .
>
> All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

M.D. Local Rule 56.1 (emphasis added).

Although the Plaintiffs on February 28, 2008, filed a "Counter Statement of Undisputed Facts in support of response to Motion for Summary Judgment of Defendants," that document consists of an entirely independent set of facts. The Plaintiffs' counter-statement in no way "respond[s] to the numbered paragraphs set forth in the statement" filed by the Defendants. As required by the second paragraph of Rule 56.1 we will accept the Defendants' statement of undisputed facts as admitted.

Although the Defendants were not required to do so, they declined to file any document in response to the Plaintiffs' proposed statement of undisputed material facts.

Based on the manner in which all of the proposed undisputed

material facts have been presented to us, none of the facts asserted by the parties is in dispute. Consequently, the only facts presented by the parties yet not set forth below are those which we have deemed to be immaterial.

The Borough of Kulpmont (hereinafter at times "Borough") is situated in Northumberland County, Pennsylvania. The Borough is a municipal corporation organized and incorporated under the laws of the Commonwealth of Pennsylvania. It is a political body, with its principal office located at 860 Spruce Street, Kulpmont, Northumberland County, Pennsylvania. The Borough Council is the Borough's governing body. Defendants Myron Turlis, James Wisloski, Bruno R. Varano, Joseph A. Winhofer, Cheryl Ann Martino, Clarence Deitrick, and Michael Fantanarosa are the members of the Borough Council.

Defendant Borough Secretary Frank Chesney was the appointed Borough Secretary. Defendant Chesney had no power to vote on any Borough ordinance and he did not vote on the ordinance at issue in this case.

Defendant Paul Niglio was the appointed Borough Treasurer. Defendant Niglio had no power to vote on any Borough ordinance and he did not vote on the ordinance at issue in this case.

Defendant Robert M. Slaby is the Borough's mayor. The Pennsylvania Borough Code does not authorize a mayor to vote on the adoption of any ordinance.

The Borough does not have a zoning code or ordinance.

C.J. Lucas Funeral Home, Inc., is a Pennsylvania corporation with a registered business address within the Borough of 27 North Vine Street, Mount Carmel, Northumberland County, Pennsylvania. The corporate officers of C.J. Lucas Funeral Home, Inc., are C.J. Lucas, III, Sandra Lucas, and Christina Lucas. Oak Lane Crematory, Inc., is a Pennsylvania corporation with a registered business address within the Borough of 27 North Vine Street, Mount Carmel, Northumberland County, Pennsylvania. C.J. Lucas, III, set up Oak Lane Crematory, Inc., to perform cremations.

C.J. Lucas Funeral Home, Inc., owns a garage located 1054 Oak Street within the Borough. The garage is not attached to the funeral home and in the past it was used to store materials and as a workshop.

In July or August of 2006, the Plaintiffs applied to the provider of natural gas to the Borough for the installation of a large capacity natural gas line requiring a 140 foot long trench, 18 inches wide, to provide natural gas service to the garage. A building permit signed by Thomas Nowraski was obtained from the Borough for that purpose.

On October 4, 2006, C.J. Lucas Funeral Home, Inc., applied for a commercial building permit to construct a crematory at 1054 Oak Street. Prior to the submission of that application, Mr. Lucas had applied for and obtained from the Northumberland County

Planning Commission approval for a subdivision development plan to separate the parcel intended for the crematory from the parent parcel, on which the C.J. Lucas Funeral Home was located.

The location of the proposed crematory is within: 1) 50 feet of residential properties along Chestnut Street in the Borough; 2) 150 feet of residents located on Scott Street in the Borough; 3) 300 feet of a public playground and park; and 4) 300 feet of one large medical facility.

At the next scheduled Borough meeting On October 10, 2006, the residents of Kulpmont expressed their concerns that the emissions from the crematory would affect the health, safety and welfare of the residents living in close proximity to the location of the proposed crematory. During that meeting the Borough Council determined it would be helpful to have a town meeting with the owner of the funeral home and proposed crematory, and a request for same was submitted to C.J. Lucas, III.

On October 20, 2006, in response to Plaintiffs' October 4, 2006, application to the Borough for a commercial building permit to renovate the garage, the Borough's Code Inspector in his capacity as an independent contractor and not in any capacity as a Borough official or employee reviewed the permit and stamped the drawings attached to it "reviewed for code compliance."

The Pennsylvania Department of Environmental Protection

through its Bureau of Air Quality, and not the Borough or its agents, is responsible for interpreting and enforcing the Pennsylvania Air Pollution Control Act. The Pennsylvania Department of Environmental Protection is responsible for permitting and monitoring installation and operation of human crematories in Pennsylvania.

The Pennsylvania Department of Environmental Protection sent copies of its application procedures to counsel for Plaintiffs on October 16, 2006. The instructions for applying to construct or operate a crematory require the applicant to apply to the Pennsylvania Department of Environmental Protection before beginning construction on the crematory.

The natural gas line to the proposed crematory site was installed before the Plaintiffs applied for any Pennsylvania Department of Environmental Protection permit.

In November of 2006, Plaintiff C.J. Lucas Funeral Home, Inc., began construction/renovations to the garage behind its funeral home. The Plaintiffs began renovating the garage before they applied for any Pennsylvania Department of Environmental Protection permit.

The Borough Code Inspector’s review and approval of the renovation plans for the garage did not, in and of itself, authorize the Plaintiffs to construct or operate a crematorium.

By November 1, 2006, citizens of the Borough prepared

petitions expressing their concern about the proposed crematory which were not shared with Borough Council. However, it was explained to Borough Council that some citizens wanted the Borough Council to stop the crematory.

A town meeting, which was not a formal Borough Council meeting, was held in the first week of November 2006, and attended by residents of the Borough, a number of the defendants, C.J. Lucas, III, and a manufacturer of crematoriums. During that meeting the residents expressed concerns to Mr. Lucas about the health, safety and welfare of their community. Mr. Lucas advised the Borough that if the residents did not want the crematory located on Oak Street he would not go forward with the project.

During that meeting an attendee advised those in attendance that he had ordinances from West Reading, Pennsylvania, concerning the controlling of emission producing facilities (i.e., incinerators and crematories).

Defendant Winhofer, President of the Borough Council, requested Borough Solicitor William Cole to look into the issue of air quality for the Borough.

The Borough Solicitor received copies of the West Reading, Pennsylvania air pollution control ordinance and began drafting such a proposed ordinance for the Borough’s Council to review.

A Borough Council meeting was held on November 14, 2006. At that meeting Solicitor Cole explained in general terms and not in

complete detail the requirements for advertising and publishing any proposed Borough ordinance. The Solicitor indicated that he had reviewed the West Reading air pollution control ordinance and could use it to prepare a similar Borough ordinance.

A motion was made and approved by vote to advertise the Borough's intent to adopt the anticipated air pollution control ordinance. The Borough Council authorized the Solicitor at that meeting to advertise and publish an Air Pollution Control Ordinance for the Borough.

Defendant Winhofer at that time called an executive session without stating the purpose of the session.

After the vote on the proposed air pollution control ordinance an executive session was held to authorize advertisement of the Borough's intent to adopt that ordinance.

Council members did not understand the technical terms of the ordinance and they relied on the solicitor for an understanding of them.

On November 28, 2006, there was a special Borough meeting. By the November 28, 2006, meeting the Solicitor still did not have a final draft of an air pollution control ordinance. The Solicitor indicated that Borough Council members would receive the draft 4 or 5 days before the next meeting scheduled for December 12, 2006.

In December of 2006, Plaintiffs' attorney requested the

Borough to issue a letter stating that the Borough had no zoning ordinance so that Plaintiffs could complete and submit an application to the Pennsylvania Department of Environmental Protection for a crematory permit. The Borough solicitor advised that the Borough would not issue such a letter.

On December 4, 2006, the Borough advertised its proposed Borough Air Pollution Control Ordinance. The advertisement contains a very brief summary of the proposed ordinance.

Between December 4, 2006, and December 12, 2006, the Plaintiffs obtained copies of the proposed ordinance.

No version of the ordinance was ever filed in the Northumberland County Law Library for public review.

During the Borough Council meeting on December 12, 2006, representatives of the Plaintiffs requested the Borough to stay for 30 days the vote on adopting the Air Pollution Control Ordinance to allow Plaintiffs an opportunity to review the ordinance and determine if they could comply with the emission standards set by the ordinance.

The Borough Council agreed on December 13, 2006, to stay their vote in return for Plaintiffs' agreement to cease construction on the garage.

Between December 12, 2006, and the next Borough Council meeting on January 9, 2007, the Borough Solicitor amended the ordinance to include certain definitions, findings, and a

statement of purposes.

The above amendments are set forth in Article IX, Sections 6 and 7 of the ordinance. Section 6 relates to "Purposes and Findings," and section 7 deals with "Definitions." The above amendments did not alter the substantive provisions of the ordinance.

The Borough's administrative secretary did not circulate to Borough Council members the amended ordinance.

The revisions to the ordinance were not explained to Borough Council member Wisloski and he did not know what they were.

The changes to the ordinance were shown to and explained to Borough Council president, Defendant Winhofer.

The Borough did not re-advertise the amended ordinance because the Borough Council did not consider the amendments to change the substance of the original version of the ordinance.

On January 9, 2007, the Borough Council unanimously adopted Air Pollution Control Ordinance No. 2006-02, as amended. No public hearing was held before the ordinance was enacted. At least one Borough Council member stated that adoption of the ordinance directly addressed a request made by a number of citizens in a petition to stop the Plaintiffs' crematory. The specific terms of the ordinance were never reviewed at a public Borough meeting. The Borough Council's deliberations regarding the ordinance occurred in executive sessions.

When the air pollution control ordinance was considered and enacted, the Borough's general practice was to refer a proposed ordinance to a specific committee, submit it to the Borough Council at a public meeting, have council review it, authorize its advertisement, and then publicly discuss it at the next public meeting.

The Borough's air pollution control ordinance was a controversial one. Opposition to the proposed crematory was a significant, if not the exclusive, cause of enactment of the ordinance.

The Borough's air pollution control ordinance was adopted pursuant to the powers granted to boroughs by the Pennsylvania Borough Code. The Pennsylvania Air Pollution Control Act, 35 P.S. § 4012(a) also authorizes the Borough to enact the ordinance. The Commonwealth of Pennsylvania's regulations prohibit incinerators or other waste processing facilities from being located within 300 yards of a school, park, playground, or any occupied dwelling.

The ordinance prohibits or prevents any "Person" or "Entity" from maintaining, directing, constructing, utilizing, or operating "Air Polluting Facilities" within 300 yards of any residential properties in the Borough. The ordinance prohibits air polluting facilities from being located in close proximity to residential properties.

The ordinance does not apply to facilities completely constructed and in operation as of its effective date of January 9, 2007.

The Plaintiffs continue to use the crematory facilities which they had used prior to adoption of the ordinance. The Plaintiffs remain able to construct their own crematory at other locations consistent with Pennsylvania laws and regulations.

The Borough Council members had a legitimate interest in adopting the ordinance to protect the health, safety, and welfare of the Borough residents. The elected members of the Borough Council objected to the placement of a crematory on a site as close as Plaintiffs' close to residential properties.

The purpose and intent of the ordinance is to ensure that the operation of any incinerator of bodies, body parts, infectious or chemotherapeutic waste within the Borough does not degrade the ambient air quality so as to impact adversely the health, safety and general welfare and property of the people of the Borough. The ordinance attempts to prevent any adverse impact on plant and animal life or the comfort and convenience of the public and the natural resources of the Commonwealth through the addition of mercury or dioxin/furan pollution to the ambient air.

After Plaintiffs initiated these legal proceedings, the Borough continued to refuse to issue any letter to the

Pennsylvania Department of Environmental Protection stating that the Borough had no zoning. The Borough drafted and sent such a letter only after this court issued an order resolving the Plaintiffs' motion for a preliminary injunction, which required the Borough to issue the letter. In addition to the precise language that was required to be in the letter, the Borough set forth the reasons for its opposition to the crematory.

The Borough, prior to adopting the challenged ordinance, had not undertaken any efforts to eliminate pollution exposure to its residents. The Borough hired no engineers, consultants, or experts regarding air pollution or emissions by crematories.

Other than the two complaints consolidated in this matter, the Plaintiffs have not pursued any other remedies as a result of the Defendants' actions in this case.

Based on all of the above facts, the Defendants seek summary judgment on all of the claims brought against them in the two consolidated action.

In their motion the Defendants contend that "[t]here are no genuine issues of material fact" regarding Plaintiffs' claims against Defendants Paul Niglio and Frank, and that those Defendants are entitled to judgment as a matter of law because they had no power to vote on the challenged ordinance.

The Plaintiffs state the following in their brief opposing the Defendants' summary judgment motion:

> 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.

(Plaintiffs' Brief in Opposition to Summary Judgment Motion, p. 2) Pursuant to that concession by the Plaintiffs, we will grant the Defendants' motion for summary judgment on all of the claims directed at Defendants Niglio and Chesney.

The Defendants next contend that each individual Defendant is entitled to summary judgment on the claims asserted against those Defendants in their respective official capacities because those "claims are the same as the claims against the Borough of Kulpmont." (Brief in Support of Summary Judgment Motion, p. 5) The Defendants cite the United States Supreme Court case of McMillan v. Monroe County, 520 U.S. 781, 785 n.2 (1997), to support the proposition 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." The Plaintiffs do not acknowledge or address that contention in any manner.

The Borough of Kulpmont is a named Defendant. Consequently, the claims against the individual Defendants in their respective officials capacities are unnecessarily duplicative. For that reason summary judgments should be entered as to the claims brought against the individual Defendants in their respective official capacities.

We next consider the specific claims brought by the Plaintiffs in the two complaints consolidated in this action. The complaint filed in this court and assigned docket number 4:CV-07-285 contains the following 4 substantive[1] counts, all of which are based on 42 U.S.C. § 1983: 1) "Violation of 42 U.S.C. § 1983 Substantive Due Process," 2) "Violation of 42 U.S.C. § 1983 Procedural Due Process," 3) "Violation of 42 U.S.C. § 1983 Procedural Equal Protection," and 4) "Violation of 42 U.S.C. § 1983 Taking." The other complaint which was the one filed in the Northumberland County Court of Common Pleas, removed to this court, and assigned in this court docket number 4:07-CV-0499 is entitled that document "Action for Declaratory Judgment," and it is not divided into separate counts or claims.

In both complaints the Plaintiffs' assert the same constitutional due process, equal protection, and taking claims based upon the alleged procedural irregularities in the course of the Borough's enactment of the air pollution control ordinance.

The Defendants stated in the brief supporting their motion to consolidate the two actions that

[t]he above-referenced actions are related in that they are

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[1]A fifth count in the complaint is entitled "Injunctive relief." However, in that count the Plaintiffs merely request an additional form of relief and they do not assert another violation of substantive law. For that same reason we need not address the Defendants' argument that they are entitled to summary judgment with respect to the Plaintiffs' request for punitive damages.

> both actions to declare the Air Pollution Control Ordinance invalid and/or unconstitutional. The only difference is that in Lucas 4-07-CV-0285, Plaintiffs seek money damages for alleged violations of the Plaintiffs' civil rights.

(Brief in support of Motion to Consolidate, p. 2) The Plaintiffs' disagreement with those statements related strictly to the identity of the parties and witnesses involved in each case. The Plaintiffs did not take issue with the implicit conclusion that the claims in each of the two actions were similar, if not identical.

Our conclusion that the substantive claims in each complaint are identical is bolstered by the arguments made by the parties in the briefs which they filed in connection with the Defendants' pending dispositive motion. The only specific claims addressed by the Defendants in their motion and supporting brief are the federal ones listed above and found in the complaint assigned docket number 4:07-CV-0285. According to the Defendants, if they are entitled to summary judgments on those claims, then this entire consolidated matter will been decided in their favor and the case may be closed. The Plaintiffs do not contest that point.

The totality of the information presented to us, in conjunction with our review of the complaints filed in the matters assigned docket numbers 4:07-CV-0285 and 4:07-CV-0499, leads us to believe that the only claims to address in this case are those set forth in the complaint filed in action number 4:07-

CV-0285 and brought pursuant to 42 U.S.C. § 1983. In other words, there are no claims based strictly on Pennsylvania law.

With that understanding of the substantive claims presented, we will proceed to address the federal claims alleged in the complaint filed in action number 4:07-CV-0285.

The two essential elements of a viable § 1983 claim are that the conduct complained of was 1) committed by a person acting under color of state law, and 2) deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978).

The Plaintiffs bear the burden of proof at trial to establish those elements by a preponderance of the evidence. Consequently, in the context of the pending motions for summary judgment, they are required to provide a certain quantum of evidence (i.e., enough for a reasonable finder of fact to find in favor of the Plaintiffs) regarding those elements in order to avoid a summary judgment against them on the § 1983 claims. See Celotex Corporation v. Catrett, 477 U.S. 317, 325 (1986).

Before considering the question of whether any claim has been sufficiently pled, it is necessary to review the scope of a § 1983 claim. The statute is not an independent source of any substantive rights; it merely provides a remedy for the violation of a constitutional right where the violation was committed by a

person acting under color of state law. Baker v. McCollan, 443 U.S. 137, 144 n. 3, 99 S. Ct. 2689, 2694-95 n. 3 (1979); Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995).

> The United States Supreme Court
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> has confirmed in countless cases that a § 1983 cause of action sounds in tort. [The Justices of that Court] have stated repeatedly that § 1983 "creates a species of tort liability," Imbler v. Pachtman, 424 U.S. 409, 417, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); ... Hague v. Committee for Industrial Organization, 307 U.S. 496, 507, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.)(describing a claim brought under a predecessor of § 1983 as seeking relief for "tortious invasions of alleged civil rights by persons acting under color of state authority"). We have commonly described it as creating a "constitutional tort," since violations of constitutional rights have been the most frequently litigated claims. .... In Wilson v. Garcia, [the Court] explicitly identified § 1983 as a personal-injury tort, stating that "[a] violation of [§ 1983] is an injury to the individual rights of the person," and that "Congress unquestionably would have considered the remedies established in the Civil Rights Act [of 1871] to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." 471 U.S., at 277, 105 S.Ct. 1938.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 727, 119 S.Ct. 1624, 1647 (1999)(citing cases).

The first claim to consider is that in count 1, which is entitled “Violation of 42 U.S.C. § 1983 Substantive Due Process.” The United States Supreme Court and the Court of Appeals for the Third Circuit have held that

> the substantive component of the Due Process Clause is violated by executive action *only when “it can be properly characterized as arbitrary, or conscience shocking, in a constitutional sense*.”

United Artists Theatre Circuit, Inc. v. Township of Warrington,

316 F.3d 392, 399 (3d Cir. 2003)(quoting County of Sacramento v. Lewis, 523 U.S. 833, 847, 118 S. Ct. 1708 (1998)(emphasis added by Court of Appeals for the Third Circuit). Those courts acknowledge that "the measure of what is conscience-shocking is no calibrated yard stick," and that conduct which "shocks in one environment may not be so patently egregious in another." Id. (quoting Lewis, 523 U.S. at 847, 850)).

The Plaintiffs initially assert that the "shocks the conscience" standard does not control here because it applies only to cases involving zoning ordinances and "[t]his is not a 'land use case' at all." (Brief in Opposition to Motion for Summary Judgment, p. 5) That assertion is inconsistent with the Plaintiffs' statement in their complaint removed to this court to the effect that "[t]he adopted Ordinance contains zoning requirements." (Petition for removal, Exhibit A, p. 5) When the ordinance as whole and the Plaintiffs' objections thereto are considered, we are of the view that the consolidated actions are most accurately characterized as being based upon a land use dispute.

In addition, our research indicates that the United States Supreme Court and the Court of Appeals for the Third Circuit have applied the "shocks the conscience" standard to many different types of substantive due process claims. For instance, in the case of Collins v. Harker Heights, 503 U.S. 115, 128, 112 S.Ct.

1061, 117 L.Ed.2d 261 (1992), the United States Supreme Court stated "again that the substantive component of the Due Process Clause is violated by executive action *only when it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense*." (Emphasis in original); *See also* County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). We are convinced that the "shocks the conscience" standard applies to this case and that the ordinance at issue is best characterized for purposes of our analysis in this order as a zoning or land-use ordinance.

The undisputed material facts demonstrate that the air pollution control ordinance at issue was conceived and passed after a number of Borough citizens complained about the location of the proposed crematory. The Borough's ordinance effectively creates a buffer zone of 300 yards for the placement of such a facility. In our view those actions were entirely reasonable.

In their attempt to avoid summary judgment on their initial § 1983 claim, the Plaintiffs emphasize certain irregularities in the process employed by the Borough to enact the ordinance. Such circumstances include the facts that this ordinance was never considered by a committee, it was discussed among council members almost entirely in closed executive sessions, and the revisions to the original ordinance were never published before the final version of the ordinance became effective. As a practical

matter, those circumstances are not material because the entire Borough Council considered the ordinance, the public was at all times aware of the most important aspects of the ordinance, and the revisions did not materially differ from the original version of the ordinance which had been published.

The Plaintiffs further point to 1) the Defendants' persistent refusal to draft the letter for the Plaintiffs noting that the proposed crematory was not inconsistent with the Borough's zoning because the Borough had no such code, and 2) the bad faith exhibited by the Borough when it included language critical of the crematory in the letter sent to the Pennsylvania Department of Environmental Protection.

Courts have unanimously held that in a case such as this (i.e., involving a land use dispute) bad faith conduct amounting to a violation of state law is not sufficiently egregious to support an alleged violation of substantive due process rights. *See* Baker v. Coxe, 230 F.3d 470, 474 (1st Cir. 2000); Natale v. Town of Ridgefield, 170 F.3d 258, 262 (2d Cir. 1999); Chesterfield Development Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992); PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1st Cir. 1991).

The Court of Appeals for the Third Circuit has commented that in order to establish a substantive due process violation a plaintiff is required to show egregious conduct on the part of a

defendant such as corruption, self-dealing, or an attempt "to hamper development in order to interfere with otherwise constitutionally protected activity at the project site, or because of some bias against an ethnic group." Eichenlaub v. Township of Indiana, 385 F.3d 274, 286 (3d Cir. 2004). No such conduct has been alleged or is supported by the evidence of record. In addition, no "otherwise constitutionally protected activity," such as conduct protected by the First Amendment has been alleged or established.

We are of the view that no reasonable finder of fact could conclude that the Defendants' actions may be properly characterized as arbitrary, or conscience shocking, in a constitutional sense. We will grant the Defendants' motion for summary judgment with respect to the substantive due process claim in count 1.

The next § 1983 claim to consider is that in count 2, which is entitled "Violation of 42 U.S.C. § 1983 Procedural Due Process." In that count the Plaintiffs contend that they are entitled to relief because "Defendants adopted the aforesaid Air Pollution Control Ordinance No. 2006-02 containing zoning provisions when Defendant, Borough of Kulpmont, does not have a zoning ordinance in place." (Complaint in action No. 4:07-CV-0285, p. 11, ¶66) However, the Plaintiffs have not cited, and we have not found after extensive research, any authority in support

of the proposition that a municipality is precluded from enacting an ordinance encompassing land use provisions where it does not have a zoning scheme in place.

As noted above, the Plaintiffs also rely upon the Borough's failure to follow its own established practices for enacting ordinances. Such procedural irregularities are irrelevant as a matter of law because, "the standard of procedural due process is not whether the municipality deviates from established procedure, but whether it deviates from constitutionally mandated procedure." C & M Group, Inc. v. New Britain Tp., 1991 WL 25684, *3 (E.D Pa. 1991)(Gawthrop, J.)(citing Eguia v. Tompkins, 756 F.2d 1130, 1139 (5th Cir.1985)).

Procedural due process claims are traditionally divided into pre-deprivation and post-deprivation sub-classes. In the context of this case, the dividing line between the two classes is the enactment of the air pollution control ordinance.

With respect to the material pre-deprivation events, it is undisputed that the Plaintiffs had notice of the proposed ordinance and discussed it with Borough officials. *See* Highway Materials, Inc. v. Whitemarsh Tp., Montgomery County, Pa., 2004 WL 2220974, *10 (E.D. Pa. 2004)(Kelly, J.)(noting that "meetings and conversations with Township officials" may be considered in determining whether pre-deprivation due process was constitutionally adequate). Moreover, the Plaintiffs were

actually provided with an opportunity to investigate their ability to comply with it before it became effective.

Although the precise language of the revisions found in sections 6 and 7 of the final version of the ordinance may not have been provided to the Plaintiffs before they became effective, those sections did not add any new limitations or substantive provisions. As a factual matter, in our view the Plaintiffs' receipt of actual notice of the substantive requirements set forth in the original version of the proposed ordinance renders immaterial any other defects regarding publication of the proposed ordinance and its revisions.

With respect to the requisite post-deprivation procedures, the Court of Appeals for the Third Circuit has held that the process provided in Pennsylvania's Municipalities Planning Code for challenging land use decisions is constitutionally adequate. *See* Midnight Sessions, Ltd. V. City of Philadelphia, 945 F.2d 667, 680 (3d Cir. 1991); Rogin v. Bensalem Township, 616 F.2d 680, 694-695 (3d Cir. 1980). The Plaintiffs have not presented any reason to remove this case from the scope of the holdings on those cases.

In light of the governing law and the undisputed material facts, we are of the view that no reasonable finder of fact could conclude that any pre- or post-deprivation violation of the Plaintiffs' due process rights occurred. We will grant the

Defendants' motion for summary judgment with respect to the Plaintiffs' procedural due process claim.

The next § 1983 claim to address is that in count 3, which is entitled "Violation of 42 U.S.C. § 1983 Equal Protection." In a case such as this one where no suspect class is involved, "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." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249 (1985).

The Plaintiffs do not allege membership in any suspect class. Instead they argue that enactment of the ordinance imposes unconstitutionally disparate standards upon their proposed crematory. In effect, they claim to be a "class of one." Courts have held that "a 'class of one' can attack intentionally different treatment if it is 'irrational and wholly arbitrary.'" Eichenlaub v. Township of Indiana, 385 F.3d 274, 286 (3d Cir. 2004)(quoting Village of Willowbrook v. Olech, 528 U.S. 562, 564, 565, 120 S.Ct. 1073 (2000)).

In our view the ordinance's underlying goal of limiting the emission of certain substances, including mercury, into the air in close proximity of residences and a public park is rational. The totality of the evidence presented to us leads us to conclude that no rational trier of fact could find that the ordinance is

irrational or wholly arbitrary. We will grant the Defendants' motion for summary judgment on the Plaintiffs' equal protection claim.

The fourth and final substantive claim to consider is that in count 4 of the complaint, entitled "Violation of 42 U.S.C. § 1983 Taking." The Court of Appeals for the Third Circuit has noted that "Pennsylvania's Eminent Domain Code provides inverse condemnation procedures to which a land owner may seek just compensation with the taking of a property." Cowell v. Palmer Township, 263 F.3d 286, 290 (3d Cir. 2001).

It is undisputed in this case that the Plaintiffs have not yet attempted to avail themselves of those procedures. Consequently, their taking claim has been brought here prematurely and is not yet ripe for disposition. The Defendants are entitled to summary judgment on that claim as well.

We will explicitly limit the scope of this order's dispositive provisions to Plaintiffs' federal claims to allow them the opportunity to pursue any state claims in state court.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Defendants' motion for summary judgment (Document 50) is granted as provided in paragraphs 2 through 5 of this order.

2. The Clerk of Court shall enter judgment in favor of Defendants Paul Niglio and Frank Chesney as to all of

the federal claims brought against them.

3. The Clerk of Court shall enter judgment in favor of each individual Defendant as to every federal claim brought against them in their respective official capacities.

4. The Clerk of Court shall enter judgment in favor of the Defendants on all of Plaintiffs' federal claims.

5. The Clerk of Court shall close this case.

s/Malcolm Muir
MUIR, U.S. District Judge

MM:gja