

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WHITELAND WOODS, L.P. : CIVIL ACTION  
 :  
v. :  
 :  
TOWNSHIP OF WEST WHITELAND, WEST :  
WHITELAND BOARD OF SUPERVISORS, :  
WEST WHITELAND PLANNING COMMISSION, :  
DIANE S. SNYDER, JERRY POLETTO, :  
JACK C. NEWELL, KATHI HOLAHAN, :  
NANCY CARVILLE, and CARL DUSINBERRE :  
 :  
v. :  
 :  
JOHN D. SNYDER : No. 96-8086

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

August \_\_, 2001

Plaintiff Whiteland Woods, L.P. ("Whiteland Woods"), a subsidiary of Toll Brothers, filing a complaint under 42 U.S.C. §1983 against West Whiteland Township (the "Township"), the West Whiteland Board of Supervisors (the "Board of Supervisors"), the West Whiteland Planning Commission (the "Planning Commission") and certain members of the Board of Supervisors and Planning Commission (collectively the "Township defendants"), alleged violations of its rights guaranteed under the First and Fourteenth Amendments, the Pennsylvania Constitution and the Pennsylvania Sunshine Act, 65 Pa. C.S.A. §271 et seq. On October 21, 1997, this court granted the Township defendants' motion for summary judgment on Count I (First and Fourteenth Amendment violations), remanded Count II (violation of the

Pennsylvania Constitution) to state court,<sup>1</sup> and denied as moot Count III (injunctive relief). See Whiteland Woods, L.P. v. Township of West Whiteland, No. Civ. A. 96-8086, 1997 WL 653906 (E.D. Pa. Oct. 21, 1997). Whiteland Woods appealed and the United States Court of Appeals for the Third Circuit affirmed. See Whiteland Woods, L.P. v. Township of West Whiteland, 193 F.3d 177 (3d Cir. 1999). The Township defendants filed a petition for attorney's fees as prevailing defendants as well as a subsequent petition for additional fees incurred in preparing a petition for fees. The Court of Appeals, remanding to this court for a review of the fee petitions and the objections thereto, directed this court to "consider the application and any objections thereto. If the District Court determines the applicant[s are] entitled to fees, the District Court may award what it considers reasonable and proper." Order, October 13, 2000. For the reasons stated below, the fee petitions will be granted in part and denied in part.

#### **BACKGROUND**

Toll Brothers and its subsidiary, Whiteland Woods, own approximately 162.5 acres of land in West Whiteland Township. On June 24, 1996, Whiteland Woods filed a Planned Residential Development Plan ("PRD") application with the Township. The PRD

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<sup>1</sup>This court also remanded the Township defendants' third party claim against John D. Snyder for indemnification arising out of any violation of the Pennsylvania Constitution.

application was placed on the agenda for the September 25, 1996 meeting of the Planning Commission. Third party defendant John D. Snyder ("Snyder"), Township Solicitor, was present at the meeting to offer legal advice to the Planning Commission. Thomas "Buck" A. Riley, Esq. ("Riley") presented Whiteland Woods' PRD application to the Planning Commission.

Whiteland Woods had arranged for a video camera operator to attend the meeting to record the proceedings. Prior to the commencement of the meeting, Jack Newell ("Chairman Newell"), chairman of the Planning Commission, consulted with Snyder about Whiteland Woods' video camera. Members of the Planning Commission had expressed displeasure at being recorded. Snyder prepared a handwritten resolution barring the use of all video cameras at future Planning Commission meetings.<sup>2</sup>

The Planning Commission did not prevent Whiteland Woods from videotaping the September 25, 1996 meeting, but Snyder presented his handwritten resolution to the Planning Committee with an opinion that the resolution complied with federal and Commonwealth law.

Members of the Planning Commission discussed the proposed

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<sup>2</sup>The resolution provided in relevant part: "The following rule shall govern the use of mechanical/electrical recording and/or stenographic devices during public meetings: . . . (5) No video taping or video recording and no additional lighting shall be employed . . . ." West Whiteland Planning Commission Minutes, dated September 25, 1996 at 11.

resolution with Mike Greenburg ("Greenburg"), vice-president of Toll Brothers, and Riley. Chairman Newell informed Riley he believed the resolution was necessary to prevent intimidation of Township residents appearing before the Planning Commission. Other members of the Planning Commission expressed resentment at being videotaped. The Planning Commission then voted in favor of the resolution by a vote of four to two.

Whiteland Woods' counsel, stating Whiteland Woods' intent to videotape a meeting scheduled for October 9, 1996, wrote to the Planning Commission on October 4, 1996. Snyder replied on October 8, 1996 that if Whiteland Woods brought video recording equipment to the meeting, it would do so "at [its] own risk."

The Board of Supervisors, following the lead of the Planning Commission, at its October 8, 1996 meeting, enacted Resolution 96-10 banning the use of video recording devices at Board of Supervisors meetings.<sup>3</sup>

Christopher P. Luning, Esq. ("Luning"), associate counsel for Whiteland Woods, and a video operator came to the Planning Commission's October 9, 1996 meeting and set up video recording equipment with the camera facing the wall. Officer John Curran

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<sup>3</sup>The Board of Supervisors' Resolution 96-10 provided in relevant part: "The following regulations shall govern the use of electrical/mechanical recording equipment during public meetings of the Board: . . . (c) Only audio recording or stenographic recording equipment may be used, i.e., no video recording equipment shall be permitted . . . ." West Whiteland Township Board of Supervisors Resolution 96-10 at 1.

("Officer Curran") of the West Whiteland Township Police Department informed Whiteland Woods' representatives they could not make a video recording of the meeting.<sup>4</sup>

Whiteland Woods filed a civil action on October 14, 1996 in the Chester County Court of Common Pleas. Whiteland Woods sought injunctive relief and relief under the Pennsylvania Declaratory Judgments Act, 42 Pa. C.S.A. §7531, et seq., for violation of the Pennsylvania Sunshine Act. Whiteland Woods also sought a preliminary injunction barring the Township from enforcing the two resolutions.

On October 16, 1996, counsel for the Township, by letter to the Court of Common Pleas, acknowledged the Township could not enforce the resolutions according to Hain v. Board of Sch. Dir. of Reading Sch. Dist., 641 A.2d 661, 633-64 (Pa. Commw. Ct. 1994), and waived a hearing on the preliminary injunction. The Common Pleas court enjoined the Township defendants from enforcing or attempting to enforce the two resolutions or any other resolutions restricting the right to videotape public meetings.<sup>5</sup> The Board of Supervisors and Planning Commission

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<sup>4</sup>Whiteland Woods, expressing surprise that police officers wear uniforms and carry firearms, placed much emphasis on the fact that Officer Curran was "in full uniform and armed with a gun." Pl.'s Memo. in Opp. to Summ. J. at 5, 23.

<sup>5</sup>The preliminary injunction provided in pertinent part that the Township defendants were enjoined from:

- (1) enforcing or attempting to enforce the West Whiteland

never enforced the resolutions after the injunction issued but the Planning Commission did not rescind its resolution until December 11, 1996, and the Board of Supervisors did not rescind Resolution 96-10 until December 18, 1996. Whiteland Woods has videotaped every Board of Supervisors meeting since October 22, 1996.<sup>6</sup>

Whiteland Woods, seeking relief under 42 U.S.C. §1983 for alleged violations of its rights under the First and Fourteenth Amendments, the Pennsylvania Constitution and the Pennsylvania Sunshine Act, filed a second lawsuit on November 13, 1996 in the Court of Common Pleas for Chester County. Whiteland Woods sought damages in excess of \$2,100,000.00 because the Planning Commission prevented it from videotaping its meeting on October 9, 1996. Whiteland Woods also sought relief based on the Board

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Planning Commission Resolution dated September 25, 1996;

(2) enforcing or attempting to enforce the West Whiteland Board of Supervisors Resolution dated October 8, 1996; and

(3) enforcing or attempting to enforce any rule, resolution, or regulation prohibiting video recording of any Township public meeting or the use of video taping equipment at any Township meeting.

Whiteland Woods, L.P. v. Township of West Whiteland, No. 96-8774 (Chester County Ct. C.P. Oct. 17, 1996).

<sup>6</sup>There was no evidence of record that Whiteland Woods had attempted to use video recording equipment at a Board of Supervisors meeting before the Court of Common Pleas issued the preliminary injunction.

of Supervisors' and Planning Commission's failure formally to rescind the unenforceable resolutions. Whiteland Woods sought additional injunctive relief as well.

The Township defendants, alleging original jurisdiction based on 28 U.S.C. §1331 and §1343, removed the Chester County action to this court under 28 U.S.C. §1441. Arguing that Snyder advised the Planning Commission it legally could adopt the resolution barring video recording, the Township defendants filed a third-party complaint against Snyder.

The Township defendants' motion for summary judgment was granted because Whiteland Woods "stated no facts entitling it to relief under the First or Fourteenth Amendments" and "[a]ny claim for injunctive relief is moot," Whiteland Woods, 1997 WL 653906, at \*9. Whiteland Woods appealed and the judgment was affirmed.

## DISCUSSION

### I. "Prevailing Party" Attorney's Fees

42 U.S.C. §1988(b) provides in relevant part: "In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C.A. §1988(b) (West 1994 & Supp. 2001).

A "prevailing party" may be a plaintiff or a defendant, but when awarding attorney's fees to a prevailing defendant, the

standard is more stringent. See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978); Barnes Fdn. v. Township of Lower Merion, 242 F.3d 151, 157 (3d Cir. 2001); Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983)(in determining whether a partially prevailing plaintiff may recover attorneys' fees under §1988, the standards for awarding fees under §1988 are the same as those set out in Christiansburg for Title VII actions). "A district court may in its discretion award attorney's fees to a prevailing defendant . . . upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Christiansburg, 434 U.S. at 421 (prevailing defendant in a Title VII action not awarded attorney's fees because the district court found plaintiff's action was not unreasonable or frivolous and the issue on which the defendant prevailed was one of first impression); Barnes Fdn., 242 F.3d at 158 (the district court did not err in holding that the plaintiff's claim was not frivolous, but the claims were factually groundless; attorney's fees should have been awarded); EEOC v. L.B. Foster Co., 123 F.3d 746, 751 (3d Cir. 1997)(award of attorney's fees to prevailing defendant in a bench trial inappropriate because plaintiff made out a prima facie case on two claims and the third claim was without precedent in the circuit; the claims were not frivolous). See also Hensley, 461 U.S. at 433 n.7. A prevailing defendant is not entitled to

attorney's fees just because a plaintiff did not prevail. See Christiansburg, 434 U.S. at 422; L.B. Foster, 123 F.3d at 751.

Factors that may be considered in determining whether to award attorney's fees to a prevailing defendant include: (1) whether plaintiff established a prima facie case; (2) whether defendant made a settlement offer; and (3) whether the case was dismissed prior to trial. Barnes Fdn., 242 F.3d at 158; L.B. Foster, 123 F.3d at 751. Other factors that may be considered are: (1) whether the issue was one of first impression; and (2) whether there was a real threat of injury to the plaintiff. Barnes Fdn., 242 F.3d at 158. These considerations are guideposts rather than hard and fast rules; determinations are to be made on a case-by-case basis. Id.; L.B. Foster, 123 F.3d at 751. The district court must make clear its reasons for a decision on a fee petition. Barnes Fdn., 242 F.3d at 166.

Defendants argue they are entitled to attorney's fees because: (1) Whiteland Woods failed to establish a prima facie case; (2) defendants' attempts to "engage in meaningful settlement discussions were rebuffed;" and (3) the action was dismissed prior to trial (at summary judgment). Defs.' Br. at 5. Defendants also argue that Whiteland Woods brought this action in bad faith because the issues had already been litigated in state court. Id. at 6.

A. Failure to State a Prima Facie Case

At summary judgment, this court concluded that “[v]iewing the plaintiff’s factual allegations in the most favorable light, Whiteland Woods ha[d] stated no claim under the First Amendment” and also failed sufficiently to allege a substantive due process claim under the Fourteenth Amendment. Whiteland Woods, 1997 WL 653906 at \*6-\*7, \*9. The Court of Appeals affirmed that Whiteland Woods failed to demonstrate a deprivation of its First or Fourteenth Amendment rights. See Whiteland Woods, 193 F.3d at 184-185.

B. Settlement Negotiations

Defendants contend they made “several attempts to engage in meaningful settlement discussions” and these attempts were “rebuffed” by plaintiff. Defs.’ Br. at 5. They further argue that plaintiff insisted on a settlement of other unrelated actions as a condition of settling this action. Id. at 5-6. Plaintiff avers that both sides made efforts to work out a global settlement of all litigation between the parties and that Whiteland Woods negotiated in good faith. Pl.’s Br. at 7-8.

The parties have stipulated that settlement discussions took place between April 30 and October 17, 1997, general terms had been agreed upon on October 17, 1997, but third-party defendant Snyder refused to join in the settlement. See Stipulation dated March 27, 2001.

On April 30, 1997, counsel for plaintiff wrote to counsel for defendants concerning a global settlement of this action and other land use litigation before the zoning board and Common Pleas Court. See Pl.'s Br. at Exh. D. A counter-offer was made by letter dated May 1, 1997. See id. This counter-offer advised plaintiff that third-party defendant Snyder would not agree to a settlement of this action, but that defendants would be willing to settle all other outstanding litigation. Plaintiff, responding to the counter-offer by letter the following day, reiterated its desire to settle all litigation, including this action. Id. The record does not contain a response from defendants; in fact, the record is devoid of any further negotiations until October 17, 1997, when counsel for defendants, writing to plaintiff's counsel to confirm a previous telephone call, offered to settle this action by dismissing the claim against third-party defendant Snyder.<sup>7</sup> See Pl.'s Br., Exh. E. This letter appears to contradict the assertion that the litigation would have settled but for third-party Snyder's refusal to join any settlement of this action.

The record demonstrates that both sides made attempts at global settlement. Plaintiff's failure to submit evidence of its response to defendants' October 17, 1997 proposal allows the

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<sup>7</sup>A draft stipulation of dismissal was attached to the letter.

inference that no further efforts were made on its part. Summary judgment in favor of defendants was granted four days later, but plaintiff still could have attempted settlement instead of pursuing an appeal. The argument that third-party defendant Snyder was the impediment to settlement cannot be credited. As third party defendant, Snyder could be liable only for contribution or indemnification and only if pursued by the defendants. See Fed. R. Civ. P. 14. If defendants settled with plaintiff, absent a counterclaim by Snyder, nothing prevented defendants from seeking leave to dismiss Snyder at any time. See Fed. R. Civ. P. 14.

C. Dismissal Prior to Trial

A finding of frivolity is more often found if the action is decided in defendant's favor on summary judgment rather than at trial. See L.B. Foster, 123 F.3d at 751 (quoting Sullivan v. Sch. Bd., 773 F.2d 1182, 1189 (11th Cir. 1985)). "However, the grant of summary judgment in defendant's favor does not necessarily mean the action was frivolous for awarding attorney's fees." Tuthill v. Consolidated Rail Corp., No. Civ. A. 96-6868, 1998 WL 321245, \*4 (E.D. Pa. June 18, 1998)(Shapiro, J.) (declining to award attorney's fees to defendant prevailing at summary judgment because the court gave "careful consideration" to the claims asserted). A finding of frivolity is appropriate because here summary judgment was granted in defendants' favor

early in the litigation and no real concern of plaintiff was at stake.<sup>8</sup>

D. Other Considerations

A prevailing defendant should not be awarded attorney's fees unless a court finds that the plaintiff continued to litigate after its claim became groundless, frivolous or unreasonable; continuing a claim in bad faith provides a strong basis for an assessment of attorney's fees against the plaintiff. See Christiansburg, 434 U.S. at 422.

Plaintiff obtained substantial relief when the state court issued an uncontested injunction preventing the Planning Commission and the Board of Supervisors from enforcing their resolutions; there was no appeal and plaintiff was thereafter permitted to videotape meetings. Nevertheless, plaintiff brought this second action, seeking \$2,100,000.00 in damages for not having been permitted to videotape one public meeting of the Planning Commission which plaintiff's representatives attended and for the Planning Commission's and Board of Supervisors' failure to rescind the resolutions for two months after the state court injunction was issued. See Whiteland Woods, 1997 WL 653906 at \*4.

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<sup>8</sup>This action was removed to federal court on December 5, 1996. Defendants' Answer was filed on December 9, 1996 and their motion for summary judgment was filed on February 5, 1997. A supplemental memorandum in support of summary judgment was filed on March 24, 1997.

No claim exists for failure to rescind an enjoined resolution and plaintiff suffered no harm for the failure to rescind. See id. To the extent plaintiff's First Amendment claim was based on this ground, it was groundless. The only harm plaintiff suffered was its inability to videotape the October 9, 1996 meeting. To the extent the claim was based on not being able to videotape one meeting, the \$2,100,000.00 in damages requested was unreasonable and vexatious. Plaintiff was not prevented from attending that meeting or making an audio record of the meeting; it was only prevented from videotaping it.

Filing this action was in bad faith in view of the injunction already issued against enforcement of the anti-videotape resolutions. Plaintiff used this action to gain leverage in settling other litigation with the Township defendants.<sup>9</sup> Plaintiff continued to litigate, not only in this court, but also in the appellate court, after obtaining the only relief to which it was entitled in the circumstances. Defendants are entitled to an award of attorney's fees incurred in defending this litigation at trial and on appeal.

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<sup>9</sup>The correspondence submitted by plaintiff in support of its argument that it engaged in meaningful settlement discussions with the Township defendants evidences plaintiff's insistence on a global settlement.

## II. Fees on Fees

On March 30, 2001, this court held a hearing on defendants' application for attorney's fees; the parties were encouraged to resolve the request for fees. Because they were not able to resolve the issue, defendants are asking the court for fees incurred in filing their fee petition - "fees on fees."

In support of their request, defendants rely on Hernandez v. Kalinowski, 146 F.3d 196, 198-99 (3d Cir. 1998), in which the court, in awarding "fees on fees" to counsel for a plaintiff who prevailed under the PLRA, stated, "[g]enerally, under . . . §1988, fees for preparing a motion requesting costs and fees, or 'fees on fees,' are recoverable." Defendants' reliance on Hernandez is misplaced. The Hernandez court found the prevailing **plaintiff** was entitled to such fees because the statute "provide[s] for reasonable fees for all time spent in the vindication of statutory or constitutional rights . . . ." Id. at 199. Here, defendants were not vindicating constitutional rights. Additionally, the Hernandez court reasoned that if counsel for an indigent civil rights plaintiff could not recover "fees on fees," his or her counsel might not receive such fees at all, and this would be a disincentive for attorneys to represent the indigent in civil rights actions. See id. Declining to award "fees on fees" to prevailing defendants will not create such a disincentive.

Defendants do not cite any decision in which a prevailing defendant in a civil rights action was awarded "fees on fees." The rationale for awarding such fees to prevailing plaintiffs does not apply. See Christiansburg, 434 U.S. at 418-19 (two equitable considerations weighing in a favor of a "fees on fees" award to a prevailing plaintiff do not apply to prevailing defendants: prevailing plaintiffs in Section 1983 actions are vindicating Congressional policy, and fee awards to prevailing plaintiffs are awarded against a violator of federal law); Bagby v. Beal, 606 F.2d 411, 416 (3d Cir. 1979) ("[t]he court should . . . evaluate the fee to be awarded in light of the substantive purposes of the civil rights statute relied upon . . ."). In its discretion, the court will not award defendants fees incurred in litigating their fee petition.

### **III. Calculation of Attorney's Fees**

Defendants initially requested \$43,115.42 in fees and costs. They subsequently discovered duplicative entries in their submission and amended their request to \$39,544.00 in fees and \$1,901.95 in costs, a total of \$41,445.95. Defendants then submitted a request for additional fees and costs incurred in seeking attorney's fees in the total amount of \$9677.65 (\$8856.00 for fees and \$821.65 for costs). Because the court has decided that defendants are entitled only to fees incurred in the merits litigation, not in applying for fees, the supplemental petition

for those fees will not be considered.

"A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). Where, as here, such settlement is not possible, it is the fee petitioners' burden to establish entitlement to the award. See id. A reasonable fee is calculated by determining "the number of hours reasonably expended on the litigation by a reasonable hourly rate." Id. at 433; Maldonado v. Houstoun, - F.3d -, No. 97-1893, 2001 WL 720654, \*2 (3d Cir. June 27, 2001); In re Fine Paper Antitrust Litig., 751 F.2d 562, 583 (3d Cir. 1984); Graveley v. City of Philadelphia, No. Civ. A. 90-3620, 1998 WL 476196, \*3 (E.D. Pa. Aug. 12, 1998).

A "reasonable hourly rate" is one commensurate with the rates charged by lawyers of similar skill, experience and reputation in the relevant community. See Maldonado, 2001 WL 720654 at \*3; Graveley, 1998 WL 476196 at \*4. A court is required to assess the experience and skill of the prevailing attorneys and compare their rates to those of their peers; the hourly rate is to be assessed on an individual basis. See Maldonado, 2001 WL 720654 at \*3; In re Fine Paper, 751 F.2d at 583. The attorney's usual billing rate is a good starting point for determining a reasonable hourly rate, but this figure is not dispositive. See id.

Here, defendants' counsel billed \$100.00 to \$125.00 an hour. There was no evidence of any individual attorney's skill or experience or which attorney charged which rate; they merely averred their billing rates were "fair reasonable, and customary in this venue." See Aff. ¶4. However, plaintiff has not objected to the rates charged. When no challenge is made to representations in a fee petition, the court must rely on the uncontested affidavit. See McDonald v. McCarthy, 966 F.2d 112, 119 (3d Cir. 1992)("where a party fails to challenge the accuracy of representations set forth in a fee petition, the 'current submissions provide the necessary record basis for the district court's fee determination.'").

Plaintiff objects to the duplicative entries that defendants have redacted and subtracted from their amended fee petition as well as a charge for attorney time spent photocopying that has also been subtracted. Plaintiff also objects to the following: (1) time spent discussing, updating, and providing monthly reports to insurance claim representatives; (2) time for two attorneys to attend oral argument on appeal; (3) time for attendance at a Board of Supervisors meeting; and (4) unspecified "questionable" entries. Items 1, 2, and 3 will be deducted in part; because item 4 is too vague to determine, the court will not make any deduction based on this objection.

In accordance with plaintiff's objections, the court will

deduct \$2,637.50 for time spent reporting to insurance claim representatives,<sup>10</sup> \$562.50 for more than one attorney's attendance at oral argument on appeal,<sup>11</sup> and \$237.50 for defense

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<sup>10</sup>The .70 hours (\$70.00) deducted for a November 26, 1996 telephone conference with Claims Representative also included time spent on a telephone conference with Steve Ross, finalizing a notice of removal, drafting a letter to the clerk, prothonotary, and calling plaintiff's counsel. Because defendants do not allot the time spent on each of these tasks and it is defendants' burden to prove their fee entitlement for time spent, the court will deduct the .70 hours (or \$70.00) billed. The same is true for a deductions for time spent on telephone calls with, drafting correspondence to, and meeting with the Claims Representative in the following amounts on the following dates: (1) \$310.00 on December 3, 1996; (2) \$50.00 on December 9, 1996; (3) \$80.00 on December 11, 1996, (4) \$10.00 on December 12, 1996; (5) \$20.00 on December 18, 1996; (6) \$30.00 on December 19, 1996; (7)\$70.00 on February 24, 1997; (8) \$280.00 on March 8, 1997; (9) \$30.00 on March 17, 1997; (10) \$50.00 on April 7, 1997; \$40.00 on April 8, 1997; (11) \$30.00 on April 28, 1997; (12) \$20.00 on April 30, 1997; (13) another \$20.00 on April 30, 1997; (14) \$20.00 on May 5, 1997; (15) \$10.00 on May 8, 1997; (16) \$10.00 on May 13, 1997; (17) \$40.00 on May 30, 1997; (18) \$50.00 on June 2, 1997; (19) on June 3, 1997; (20) \$20.00 on June 12, 1997; (21) \$20.00 on June 13, 1997; (22) \$10.00 on June 16, 1997; (23) \$10.00 on June 30, 1997; (24) \$10.00 on July 10, 1997; (25) \$10.00 on August 11, 1997; (26) \$20.00 on August 29, 1997; (27) \$12.50 on October 8, 1997; (28) \$12.50 on October 10, 1997; (29) \$25.00 on October 16, 1997; (30) \$25.00 on October 23, 1997; (31) \$25.00 on November 28, 1997; (32) \$25.00 on December 2, 1997; (33) \$25.00 on December 4, 1997; (34) \$25.00 on December 11, 1997; (35) \$12.50 on December 24, 1997; (36) \$25.00 on January 5, 1998; (37) \$25.00 on January 12, 1998; (38) \$12.50 on February 5, 1998; (39) \$12.50 on March 30, 1998; (40) \$37.50 on April 2, 1998; (41) \$25.00 on April 7, 1998; (42) \$12.50 on April 22, 1998; (43) \$62.50 on June 5, 1998; (44) \$50.00 on June 8, 1998; (45) \$12.50 on June 10, 1998; (46) \$12.50 on November 4, 1998; (47) \$25.00 on November 24, 1998; (48) \$87.50 on December 4, 1998; (49) \$637.50 on December 4, 1998; and (50) \$12.50 on December 8, 1998.

<sup>11</sup>Absent evidence to the contrary, the court finds there was no need for more than one defense attorney to attend oral argument on appeal.

counsel's attendance at a June 23, 1998 Board of Supervisors meeting.<sup>12</sup> A total of \$3,437.50 will be deducted from defendants' request for \$41,445.95 in fees and costs for a total award of \$38,008.45.<sup>13</sup>

#### CONCLUSION

Defendants, as prevailing parties, are entitled to an award of attorney's fees and costs in the amount of \$38,008.45; plaintiff's continuing this litigation after enforcement of the resolutions complained of was enjoined in state court was in bad faith. Defendants are not entitled to fees incurred preparing their fee petition.

An appropriate Order follows.

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<sup>12</sup>This meeting was held after oral argument on appeal; there is no record evidence why attendance at this meeting was necessary to the litigation.

<sup>13</sup>There are additional deductions that might have been made for time spent impleading Township Solicitor Snyder and responding to his briefings, but the court is without power to decrease a fee award for reasons not raised by the adverse party. See Loughner v. University of Pittsburgh, - F.3d -, Nos. 00-1561, 00-1613, 2001 WL 811103, \*3 (3d Cir. July 18, 2001).

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JUDGMENT

AND NOW, this \_\_\_ day of August, 2001, upon consideration of defendants' petition for fees, amended petition for fees and petition for additional fees, and the responses thereto, for the reasons stated in foregoing memorandum, it is **ORDERED** that:

1. Defendants' petition for fees and amended petition for fees is **GRANTED**; defendants are awarded \$38,008.45 in attorney's fees and costs.

2. Defendants' petition for additional fees and costs incurred in the litigation of their fee petition is **DENIED**.

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S.J.