

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

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
	:	
v.	:	
	:	
THORNBURY TOWNSHIP, et al.	:	NO. 99-6460
	:	
O'NEILL, J.	:	MARCH , 2002

MEMORANDUM

Presently before me is defendants' motion for summary judgment on the remaining counts of plaintiff's complaint. For the reasons stated below, the motion will be granted in part and denied in part.

BACKGROUND<sup>1</sup>

Plaintiff Thornbury Noble owns property (hereinafter referred to as "Thornbury Commons") at the intersection of routes 926 and 202 in Thornbury Township, Chester County, Pennsylvania. Thornbury Commons is zoned "B" Business, and Thornbury Noble secured approval of a final zoning and site plan for the construction of an "L-shaped," strip-style complex of retail stores from defendant Thornbury Township Board of Supervisors ("the Board") on March 7, 1995. Sometime thereafter plaintiff received letters from SuperFresh and Genaurdi's supermarkets, each of which expressed an interest in building a store on Thornbury Commons. In November of 1997, Thornbury Noble decided to change the previous plan and replace the "L-

---

<sup>1</sup> As it is defendants who have moved for summary judgment all facts are construed in the light most favorable to plaintiff.

shaped” retail building with a 50,000 square foot “box-shaped” supermarket. In order to improve access and on-site traffic circulation, Thornbury Noble proposed to re-zone two acres of adjacent residential property to “B” Business. On December 16, 1997, representatives of Thornbury Noble and Genaardi’s submitted a concept plan to the Board for a box-shaped building housing a Genaardi’s supermarket.

The new plan was discussed at a Board meeting attended by representatives of Thornbury Noble, Genaardi’s, and residents living near Thornbury Commons on July 7, 1998. At that meeting defendant board member William Schmidt asked plaintiff’s representative if plaintiff had “any interest in helping the township with open space to compensate for the loss of residential zoning.” Plaintiff asserts that it declined to make such a contribution because it was not required under Thornbury Township Ordinances. When plaintiff’s representative brought this to the attention of the Board during the meeting, defendant board member Robert MacDonnell responded by stating that such contributions had previously been made voluntarily. The status of Thornbury Noble’s requested re-zoning was left unresolved by the Board at meetings throughout the summer of 1998. In the interim Thornbury Noble was advised by its attorney and civil engineers that a supermarket could be built under the zoning permits it had already obtained for the construction of the L-shaped building complex. Sometime after the July 7, 1998 meeting, Richard Dugan, Genaardi’s real estate director, contacted MacDonnell in an attempt to learn the Board’s position on re-zoning Thornbury Commons. MacDonnell told Dugan that the Board did not look favorably on re-zoning and as a result Genaardi’s opted to look elsewhere to lease super market space.

On October 6, 1998, Thornbury Noble submitted an application for amendment of its

prior approved plan to allow construction of a food market on Thornbury Commons as currently zoned or in the alternative for the re-zoning as it had previously proposed on July 7, 1998. The application was forwarded by the Board for review by the Chester County Planning Commission, the Thornbury Township Planning Commission, and the Township Engineer.<sup>2</sup> On November 3, 1998, the Board rejected plaintiff's request to re-zone the two acres. Although too late to affect the Board's decision, by letter dated November 23, 1998, the Chester County Planning Commission recommended that plaintiff's re-zoning request be approved. Plaintiff's alternative request to amend its former final plan and build the supermarket on Thornbury Commons as currently zoned was not resolved at the November 3, 1998 meeting.

After failing to secure a contract with Genaurdi's Thornbury Noble entered into discussions with SuperFresh with the aim of building the supermarket on the property as currently zoned. On January 13, 1999, representatives from SuperFresh presented a sketch plan to the Township Planning Commission demonstrating that Thornbury Commons could sustain a supermarket with the current permits granted to Thornbury Noble for the construction of its L-shaped shopping complex. On January 19, 1999 the Board determined that the plan submitted by Thornbury Noble on October 6, 1998 was not an "amended" plan but would be considered as an entirely new application for land development. Further, by letter dated February 3, 1999, the township solicitor informed plaintiff's counsel that this new application would also require "conditional use approval" as well. These determinations required further substantial delays in securing approval for any potential development plan for Thornbury Commons, and as a result SuperFresh allegedly abandoned its plan to build a store on plaintiff's property. According to

---

<sup>2</sup> These entities provide non-binding recommendations to the Board of Supervisors.

plaintiff it was “forced” to proceed with the original “L-shaped” shopping center.

The crux of plaintiff’s complaint is that defendants’ motives in denying Thornbury Noble’s zoning requests were improper. In support of this assertion, plaintiff alleges that while the Board was considering Thornbury Noble’s plans for a supermarket R.J. Waters & Associates, a second developer, was also pursuing plans for a supermarket at another site in the Township. According to plaintiff the Board was initially opposed to the development of the tract owned by Waters. However after agreeing to make a contribution of \$600,000 to the Township, Waters was granted the re-zoning necessary to build a supermarket. Plaintiff claims that the Board thereafter stopped considering Thornbury Noble’s zoning requests in an effort to promote the Waters project and actively encouraged Genuardi’s to locate its grocery store on the Waters’ tract, assuring Genuardi’s that Waters’ approvals would be forthcoming sooner than Thornbury Noble’s. The plan for the Waters’ project was approved on November 3, 1998 at the same meeting at which the Board rejected plaintiff’s re-zoning request.

#### PROCEDURAL HISTORY

On December 17, 1999, Thornbury Noble filed the instant suit against Thornbury Township, its current Board of Supervisors and five individuals who were members of the Board during the period relevant to this law suit: Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Charles A. W. Wilson, and Robert A. MacDonnell. Plaintiff’s suit alleged: a violation of its civil rights pursuant to 42 U.S.C. § 1983 (Count I); violation of the Pennsylvania Municipalities Planning Code (MPC), 53 Pa. Cons. Stat. § 10503(11) (Count II); a regulatory taking (Count III); and a claim of intentional interference with prospective contract (Count IV).

On September 20, 2000, I granted defendants' motion to dismiss Count III in its entirety, and Count IV as to the Township and Board only. On November 9, 2000 I granted defendants' motion to dismiss Count II in its entirety. Before me now are motions for summary judgment filed by Thornbury Township and the Board (hereinafter "the municipal defendants") on Count I and by the individual defendants on Count I and Count IV.

### STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). My task is not to resolve disputed issues of fact, but to determine whether there exist any factual issues to be tried. See Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986). In making this determination, all of the facts must be viewed in the light most favorable to the non-moving party. Id. at 248. However, the non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion, and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989). "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent." Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

## DISCUSSION

All defendants move for summary judgment with respect to plaintiff's § 1983 claim on the grounds that plaintiff has failed to establish a property right entitled to protection, plaintiff's claim is not ripe and plaintiff has failed to allege sufficient evidence of improper motive. In addition the individual defendants have raised various immunity defenses and also have moved for summary judgment on plaintiff's claim of intentional interference with prospective contract.

### I. § 1983

To establish a claim under § 1983,<sup>3</sup> plaintiff must show that its federal statutory or constitutional rights were violated by a person or entity acting under color of state law. See Flagg Bros., Inc. v. Brooks, 426 U.S. 149, 155 (1978). Plaintiff's § 1983 claim alleges a violation of its substantive due process rights under the Fourteenth Amendment. Defendants<sup>4</sup> have opted to address plaintiff's claim in two parts: (1) the denial of plaintiff's request to re-zone a portion of Thornbury Commons to better accommodate a supermarket, and (2) the classification of plaintiff's alternative request to amend its prior plan as a "new" application requiring a conditional use application. These two plans were submitted by plaintiff as alternatives at the same time on October 6, 1998. The individual defendants assert without

---

<sup>3</sup> 42 U.S.C. § 1983. Section 1983 provides in relevant part: "Every person . . . who, under color of any statute, ordinance [or] regulation . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws [of the United States], shall be liable to the party injured."

<sup>4</sup> The individual defendants "adopt[ed] and incorporate[d] by reference the arguments presented by [municipal defendants] that plaintiff has failed as a matter of law to demonstrate any claim under 42 U.S.C. § 1983." (Ind. Def.'s Br. at 15).

citation that “[i]n light of the two vastly different forms of government action at issue, [I] must employ separate analyses” in evaluating the decisions of the Board. (Ind. Def.’s Br. at 1-2).

Throughout their briefs defendants address these two “decisions” as if they are totally unrelated. Defendants’ submissions contain rhetoric laden statements such as: “plaintiff is attempting to change the law of the state. . . by ignoring legislative immunity and overlooking the ripeness doctrine . . .”; plaintiff “is now before the Court claiming it should have gotten a bigger development”, *id.* at 2; “[n]o court . . . has extended substantive due process to protect the right of a landowner to have its property zoned in any manner the landowner wishes”, (Mun. Def.’s Br. at 9); and “[i]n a vain effort to create a genuine issue of material fact, plaintiff attempts to blur the distinction between a request for rezoning and an application for approval of a land development plan,” (Ind. Def.’s Rep. Br. at 1). In my view these statements mischaracterize plaintiff’s claim. Plaintiff is not challenging the power of the Board to render the decisions it made, but rather the manner in which it made them. Plaintiff contends that it is entitled to have those decisions made free from biased or improper motivations.

Plaintiff has provided evidence that its development plan was deliberately impeded in favor of the Waters project following Waters’ \$600,000 “voluntary contribution” to the township. According to plaintiff, the Board’s actions are not separable and the Board’s designation of plaintiff’s “amended” plan as a “new” plan requiring a conditional use application was simply “a continuation of the earlier plan by the Township to thwart Thornbury Noble’s effort to build a supermarket on the property.” (Pl. Br. in Opp. to Mun. Def.’s at 22-23). However, as defendants have chosen to structure their motions for summary judgment by addressing the two “decisions” of the board separately I will address each issue in the order

raised.

Defendants claim that plaintiff cannot claim a substantive due process violation under § 1983 with respect to the Board's denial of its re-zoning request because it cannot establish that a fundamental property interest was affected by the Board's decision. With respect to the Board's treatment of plaintiff's alternative amended plan defendants argue: (a) this determination is not ripe for adjudication, and (b) there is insufficient evidence to support plaintiff's claim of improper motive.

#### A. Property Right

Plaintiff may not proceed with its § 1983 claim unless it can establish that it possessed a property interest worthy of substantive due process protection. See Independent Enterprises, Inc. v. Pittsburgh Water and Sewer Authority, 103 F.3d 1165, 1179 n. 12 (3d Cir. 1997) (“Regardless of whether the decision was motivated by bias, bad faith, or partisan or personal motives [p]laintiff cannot maintain a substantive due process claim unless it can demonstrate that [d]efendants infringed a fundamental property right of [p]laintiff.”). Defendants have moved for summary judgment on the grounds that Thornbury Noble “did not possess a property right to have [a portion of its property] re-zoned to commercial in order to build the supermarket on the site.” (Mun. Def. Br. at 9). Defendants assert that under Pennsylvania law a land owner has no “vested right” in the continuation of a zoning classification, much less a request to re-zone a parcel of land, and that Pennsylvania courts have consistently held that the decision to re-zone is solely at the discretion of the governing body acting in its legislative capacity. Relying on the Court of Appeals’ statement in Acierno v. Cloutier, 40 F.3d 597, 616 (3d Cir. 1994) that “when analyzing substantive due process claims courts are required to turn to state and local law to

determine whether the plaintiff possessed a property interest which was abrogated by government action,” defendants contend that “[p]laintiff enjoyed no entitlement to re-zoning . . . and did not possess a property right worthy of substantive due process protection.” (Mun. Def. Br. at 9).

The Court’s statement in Acierno, however, took place in the context of its determination that a town council was entitled to qualified immunity from suit because the Acierno plaintiff did not have a “clearly established constitutional right” to develop his property in the manner he sought. Acierno does not stand for the proposition that simply because state law grants a government agency unfettered discretion in making decisions affecting individual property rights that those rights are therefore automatically placed outside federal substantive due process protections. In DeBlasio v. Zoning Board of Adjustment, 53 F.3d 592, 600 (3d. Cir. 1995), the Court stated: “in order to state a substantive due process claim, a plaintiff must have been deprived of a particular quality of property interest.” In subsequent decisions the Court has acknowledged that “the case law of this circuit and the Supreme Court provides very little guidance as to what constitutes this ‘certain quality’ of property interest worthy of protection under the substantive due process clause.” Nicholas v. Pennsylvania State University, 227 F.3d 133, 140 (3d Cir. 2000)(citations and internal quotations omitted). Nevertheless, according to the Court of Appeals, “the case law does reveal one guiding principle: whether a certain property interest embodies this ‘particular quality’ is not determined by reference to state law, but rather depends on whether that interest is ‘fundamental’ under the United States Constitution.” Id.

In DeBlasio the Court stated:

[In] the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner’s use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the

decision limiting the intended land use was arbitrarily or irrationally reached. Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection.

53 F.3d at 601. Defendants attempt to distinguish Thornbury Noble's situation from that at issue in DeBlasio by stating:

It is important to point out that the [p]laintiff in DeBlasio did not seek rezoning of his property, but a use variance under state law which may be granted by a zoning authority under certain conditions. It is not the type of land use decision in which the zoning authority has absolute legislative discretion as in the case of a rezoning request.

(Mun. Def.'s Br. at 10, n.3). Apparently defendants contend that the DeBlasio Court's statement regarding "governmental decisions that impinge upon a landowner's use and enjoyment of property" does not encompass re-zoning decisions.<sup>5</sup> I disagree. See Independent Enterprises, 103 F.3d at 1179 n.12 (noting that cases involving "zoning decisions, building permits, or other governmental permission required for some intended use of land owned by the plaintiffs . . . implicate[s] the 'fundamental' property interest in the ownership of the land."); Bello v. Walker, 840 F.2d 1124, 1129 (3d Cir. 1988)(holding that the denial of building permits by a municipality for reasons unrelated to the merits of the permit applications implicated a fundamental due process right); Neiderheiser v. Borough of Berwick, 840 F.2d 213, 218 (3d Cir. 1988)(holding that a lessor who had been denied an exemption from a zoning ordinance stated a substantive due process claim by alleging that the exemption application was arbitrarily and irrationally denied); United Artists Theatre Circuit, Inc. v. The Township of Warrington, No. Civ. A. 98-5556, 2001 WL 936638 at \*2 (E.D. Pa. Aug. 15, 2001)(denying defendants' motion for summary judgment

---

<sup>5</sup> The basis for this contention appears to stem from defendants belief that the decision the Board rendered was a "legislative act" that cannot be challenged as a substantive due process violation. I will discuss any immunities to which defendants may be entitled below.

where plaintiff's substantive due process claim arose out of two competing land use applications and plaintiff alleged its application was disfavored because of its failure to contribute a voluntary "impact" fee to the township).

### B. Ripeness

Defendants also contend that plaintiff's claim of a substantive due process violation arising out of the Township's classification of its alternative amended plan as a "new" plan requiring a conditional use application should be dismissed on the grounds that it is not ripe for adjudication. Ripeness is one aspect of justiciability. It "determines when a proper party may bring an action." Armstrong World Industries, Inc. v. Adams, 961 F.2d 405, 411 (3d Cir. 1992). The function of the ripeness doctrine is to prevent federal courts, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Abbott Labs v. Gardner, 387 U.S. 136, 148 (1967), overruled on other grounds by Califano v. Sanders, 430 U.S. 99, 105 (1977). In short, ripeness is a question of timing that addresses "when ... it [is] appropriate for a court to take up the asserted claim." Felmeister v. Office of Attorney Ethics, 856 F.2d 529, 535 (3d Cir. 1988)(internal quotations omitted).

In Taylor Investment, Ltd. v. Upper Darby Township, 983 F.2d 1285, 1292 (3d Cir. 1993), a zoning officer had revoked a tenant's use permit and the Court held that the tenant's § 1983 claim was not ripe because the tenant had not given the municipality an opportunity to make a final determination with respect to the construction of the applicable ordinances. Specifically, the tenant had not reapplied for the permit, appealed the revocation to the Township Zoning Board or sought a variance or special exception to the township's zoning ordinances. See

id. at 1289. Similarly, in Sameric Corp. of Delaware, Inc. v. City of Philadelphia, 142 F.3d 582, 598 (3d Cir. 1998), the Court held that because plaintiff had not completed its appeal of the city's denial of a demolition permit the denial was not final and therefore plaintiff's substantive due process claim was not ripe for adjudication. In arriving at this determination the Sameric court stated:

It is well established that, in cases involving land-use decisions, a property owner does not have a ripe, constitutional claim until the zoning authorities have had an opportunity to arrive at a final, definitive position regarding how they will apply the regulations at issue to the particular land in question. Thus, we have held that property owners' constitutional claims based upon land-use decisions were premature where the owners or tenants were denied permits by the initial decision-makers but did not avail themselves of available, subsequent procedures

142 F.3d at 597 (citations omitted).

Section 115-15(A) of the Thornbury Township Subdivision and Land Development Ordinance (SALDO) states:

All preliminary and final subdivision of land development plans shall be reviewed by the Township Planning Commission and the County Planning Commission and shall be approved or disapproved by the Board in accordance with the procedures specified in this article and in other sections of this chapter. Any application not processed as required hereafter shall be null and void unless it was made prior to the adoption of these regulations.

Section 115-18 allows for the voluntary submission of a "sketch plan" to the Township Planning Commission for Review but states:

Such sketch plan shall be considered as submitted for informal discussions only between the developer and the Planning Commission. Submission of a sketch plan does not constitute submission of an application for approval of a subdivision or land development plan. The submission of a sketch plan shall not preclude the developer from proceeding with preliminary and final plan application as required in this chapter prior to the approval of a sketch plan by the board.

Essentially, defendants argue that plaintiff's October 6, 1998 submission to the Board entitled

“Application for Amended Final Plan Approval or, in the alternative, for a Zoning Map Amendment” did not constitute a “preliminary” or “final” plan, and that “[t]here is no authority for the submission of such a document in either the Township’s SALDO or the [Pennsylvania Municipalities Planning Code].” (Mun. Def.’s Br. at 16). According to defendants the October 6 submission was merely a “sketch plan” and since a formal proposal was not submitted, the Township was never afforded the opportunity to reach a final determination concerning plaintiff’s request. Plaintiff responds by asserting that the Board’s determination that Thornbury Noble must submit a conditional use application and a new land development plan is simply part of defendants’ effort to delay plaintiff’s plan in favor of the Water’s project.<sup>6</sup>

Plaintiff’s amended plan was submitted to the Board on October 6, 1998. The Board then forwarded it for review by the Chester County Planning Commission, the Thornbury Township Planning Commission and the Township Engineer. On January 13, 1999 representatives of SuperFresh appeared before the Township Planning Commission “in order to present a sketch plan, which demonstrated that Thornbury Commons would sustain a supermarket within current B Business Lands. . . .”<sup>7</sup> (Pl’s Comp. ¶ 55). On January 19, 1999 the Board decided that “any plan submitted by Thornbury Noble to the Township shall be presented as a new application and will not be considered as an amendment to an approved final plan.” (Min. of the Brd. of Sup. Mtg. 1/19/199). As alleged in plaintiff’s complaint, in January

---

<sup>6</sup> Should I hold that the Board’s determination with respect to plaintiff’s amended plan was distinct from its decision to reject plaintiff’s re-zoning request, plaintiff maintains that conditional use approval should not have been applied to its application.

<sup>7</sup> The Township Planning Commission makes recommendations to the Board, but the Board has ultimate authority.

13, 1999 the plan under consideration was a “sketch plan.” Notwithstanding this allegation, plaintiff maintains the Board’s classification is ripe for adjudication and asks that I determine that its amended plan was in fact a “final” and not a “new” plan.

Plaintiff asks that I examine such details as the plan’s “base engineering information, storm water management and grading.” (Pl.’s Resp. to Mun. Def.’s at 23). Further, plaintiff asks that I find that its amended plan did not constitute a “shopping center” under local zoning ordinances and therefore that plaintiff should not have been required to submit a conditional use application. Id. at 26. Mindful of the reluctance expressed by the Court of Appeals’ in Sameric “to allow the Courts to become super land-use boards of appeals,” 142 F.3d at 598, I decline to make such determinations. However, the basis for my decision is not because the Board has been denied the opportunity to render a final decision on these matters, but because, as I have noted previously, viewing the facts in the light most favorable to plaintiff this decision is not separable from the Board’s rejection of plaintiff’s re-zoning request. The heart of plaintiff’s challenge to the Board’s decision regarding its alternative, amended plan is that it was motivated by “the obvious and settled intention of the Township to frustrate [plaintiff’s] efforts to secure approval for a supermarket . . . .” (Pl.’s Resp. to Mun. Def. at 12). In other words plaintiff alleges that the Board classified its amended complaint as a “new” application requiring a conditional use permit in order to allow the Water’s project to complete the application process ahead of Thornbury Noble. It is this alleged improper motivation that forms the basis for plaintiff’s § 1983 claim. Defendants would have me view their decision regarding plaintiff’s alternative amended plan as if it were completely unconnected from plaintiff’s prior submissions and interactions with the Board. I decline to do so. Viewing the facts in the light most favorable

to plaintiff, the Board's treatment of plaintiff's amended plan may be considered further evidence of improper motivation to be believed or dismissed by the factfinder. As I do not consider it an independent source for a separate alleged § 1983 violation it is not a proper basis for a motion for summary judgment.

To the extent that defendants still maintain that plaintiff's § 1983 claim is not ripe for adjudication, I disagree. The situation before me is similar to the issue presented to the Court of Appeals in Blanche Road Corp. v. Bensalem Township, 57 F.3d 253, 267-68 (3d. Cir. 1995), wherein plaintiffs alleged that officers of the Township "deliberately and improperly interfered with the process by which the Township issued permits, in order to block or delay the issuance of plaintiff's permits, and . . . did so for reasons unrelated to the merits of the application . . . ." The Blanche Road Court characterized this type of claim as "substantively different" from those presented in most ripeness cases involving challenges to zoning decisions and held that "internal review of the individual permit decisions is thus unnecessary to render such a claim ripe." Id. at 268. Applying this rationale to the case before me plaintiff need not establish that it followed proper procedure in order to establish that its claim is ripe for adjudication because the basis of its suit is that this procedure was deliberately interfered with. Accordingly, defendants' motion for summary judgment on the grounds that plaintiff's claim concerning its alternative amended plan is not ripe will be denied.

### C. Improper Motive

Defendants contend that even if I find that plaintiff's claim is ripe "there is insufficient evidence as a matter of law to support [p]laintiff's claim of an improper motive attributable to

[d]efendants and sufficient to hold the Township liable.”<sup>8</sup> (Mun. Def.’s Br. at 11). To establish a substantive due process claim plaintiff must prove that it was deprived of a protected property interest by arbitrary or capricious government action. See Taylor Investment, 983 F.2d at 1290. Such a claim may be maintained where “the government’s actions were not rationally related to a legitimate government interest or were in fact motivated by bias, bad faith or improper motive.” Sameric Corp. of Delaware, Inc. v. City of Phila., 142 F.3d 582, 590-91 (3rd Cir. 1998)(citations and internal quotations omitted). The Court employed a similar rationale in Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988), stating:

We need not define, at this juncture, the outer limits of the showing necessary to demonstrate that a governmental action was arbitrary, irrational, or tainted by improper motive. The plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983. While the defendants claim that the building permit was denied because of plaintiff’s failure to build in numerical sequence, thus permitting an arguable rational ground for the denial of the permit, it is the factfinders’ role to resolve this factual dispute.

840 F.2d at 1129-30. See also Woodwind Estates, Ltd. v. W.J. Gretkowski, 205 F.3d 118, 125 (3d Cir. 2000)(reversing the grant of a Rule 50 motion because evidence presented at trial “could provide a jury with a basis from which it could reasonably find that the decision of the

---

<sup>8</sup> Municipal defendants’ argument that plaintiff has presented insufficient evidence of an improper motive is located under subsection “b” which appears with subsection “a,” concerning ripeness, under the subheading: “2. Plaintiff’s Request for Approval of a Land Development Plan to Build a “Big Box” Supermarket.” It is unclear whether the argument involving improper motive is meant to apply to plaintiff’s request to re-zone its property or only to plaintiff’s alternative request to amend the existing plan. As in my view plaintiff’s claim of improper motive is not separable into two distinct decisions, I will construe defendants’ argument as one contending that plaintiff has failed to allege facts sufficient to establish an improper motive.

defendants to deny approval [for a low-income housing subdivision plan] was made in bad faith or was based upon an improper motive”).

Defendants move for summary judgment on the basis that “there is no evidence . . . to suggest that the Township Board of Supervisors was motivated by economic interest with respect to [p]laintiff’s property, or made payment to the Township a condition for any land use approval.” (Mun. Def.’s Br. at 17). At best, according to defendants, plaintiff has presented evidence that two out of the five members of the Board “communicated the possibility of making contributions to the Township as part of the re-zoning process.” Id. at 18. <sup>9</sup> Relying on Holt Cargo Systems, Inc. v. Delaware River Port Authority, 20 F. Supp. 2d 803 (E.D. Pa. 1998), defendants maintain plaintiff’s claim must fail. <sup>10</sup> I disagree.

First I note that according to the minutes of the Board’s meeting on July 7, 1998, Supervisor Schmidt asked plaintiff’s representative if it had any interest in “helping the township” compensate for loss of residential zoning. When plaintiff’s representative stated that Thornbury Noble would do so if required by ordinance, Supervisor MacDonnell stated that these

---

<sup>9</sup> Defendants point out that in any event these statements “were made in the context of discussions regarding rezoning the property, **not** land development.” (Mun. Def.’s Br. at 17)(emphasis in original). This distinction is apparently made to distinguish defendants’ alleged conduct from that specifically forbidden under the MPC, 53 Pa. Cons. Stat. § 10503-A, which states:

No municipality shall have the power to require as a condition for approval of a land development or subdivision application the construction, dedication or payment of any offsite improvements or capital expenditures of any nature whatsoever or impose any contribution in lieu thereof, exaction fee, or any connection, tapping or similar fee except as may be specifically authorized by this act.

<sup>10</sup> The Holt Court stated : “In order to impute the improper motives of two individuals to the [entire] board, plaintiffs must be able to show that a majority of the board knew of the improper motive and ratified it.” 20 F. Supp. 2d at 841

contributions have been made “voluntarily” in the past. These two statements were made in a public meeting attended by the entire Board. There is no question then that a majority of the board had knowledge of this motive. As for ratification, the other element mentioned by the Holt Court, in my view a reasonable juror could infer ratification from the Board’s subsequent actions including: (1) the minutes of the Board’s meeting in May 1997 indicated the Board was not receptive to Waters’ plan, but multiple Board members mentioned that re-zoning might be possible if a suitable tradeoff benefitting the town could be reached; (2) Waters eventually agreed to give the Township \$600,000 for the purchase of property to be kept as “open space” in return for the re-zoning it sought; (3) the town favored the Waters project over plaintiff’s as evidenced by the letter dated March 24, 1998 from Supervisor Wilson wherein he stated that it was important that Waters was assured that its was the next supermarket to be built in order to make sure that the “open space” property was developed; (4) the same letter also states that Wilson would not vote for any additional commercial property to be granted to plaintiff “so [Thornbury Noble is] not likely to get Gernaardi as a lead tenant”; (5) the testimony of Richard Dugan, director of real estate for Gernaardi’s in 1998, who stated that Gernaardi’s decision not to locate a store at Thornbury Commons was due to MacDonnell’s representation that the Board did not look favorably on plaintiff’s request; (6) during that same conversation Dugan testified that MacDonnell suggested Dugan “look at that piece that Waters was developing”; and (7) the Board did not wait for the recommendation of the Chester County Planning Commission before denying plaintiff’s requested rezoning on November 3, 1998. On November 23, 1998 the Commission

recommended that plaintiff's zoning request be granted.<sup>11</sup>

As plaintiff has generated genuine issues of material fact as to whether the actions of the Board were motivated by bias or improper motive, defendants' motion for summary judgment on that basis will be denied.

#### D. Immunity

##### i. Legislative Immunity for Individual Defendants

In arguing that plaintiff has not established the violation of a fundamental property right, defendants repeatedly note that the decisions made by the Board at issue in this case were made in its "legislative capacity." Defendants cite East Lampeter Township v. County of Lancaster, 744 A.2d 359, 364 (Pa. Commw. Ct. 2000), which states that "[w]hen a governing body acts on a rezoning application, it acts in its legislative capacity. Indeed, section 909.1(b)(5) of the [Pennsylvania Municipalities Planning Code] expressly declares actions by a governing body on proposed amendments to land use ordinances to be legislative acts. 53 P.S. § 10909.1(b)(5)." (citations omitted).

Absolute immunity from damage claims brought under § 1983 has been extended to members of legislative bodies for actions taken in a purely legislative capacity. See Ryan v. Burlington County, N.J., 889 F.2d 1286, 1290 (3d. Cir. 1989). Such immunity does not extend however to those decisions rendered while performing "administrative" functions. See id. The applicability of such immunity to local governmental bodies rendering zoning decisions was

---

<sup>11</sup> I note that defendants submitted a substantial amount of material suggesting that the Board had legitimate reasons for taking the actions it did. For example, the individual defendants contend that the minutes from a number of Board meetings indicate that plaintiff simply failed to comply with the reasonable requests of the Board and for this reason his requests were denied. This however represents a factual dispute properly resolved by the factfinder.

examined in Acierno v. Cloutier, 40 F.3d 597 (3d Cir. 1994). In Acierno the Court relied on a two-part test to determine whether actions are to be considered legislative for immunity purposes: “(1) the action must be ‘substantively’ legislative, which requires that it involve a policy making or line-drawing decision; and (2) the action must be ‘procedurally’ legislative, which requires that it be undertaken through established legislative procedures.” 40 F.3d at 610.<sup>12</sup>

The “action” challenged by plaintiff was the Board’s decision to reject its re-zoning request and alternative amended plan.<sup>13</sup> In examining whether a decision is substantively procedural, the Acierno Court stated that one factor to consider is whether the action affected a single or small number of people. The narrow target of an action has often been seen by courts as an indication of an administrative, rather than legislative, act. See id. at 611. Plaintiff has

---

<sup>12</sup> Individual defendants rely on Bass v. Attardi, 868 F.2d 45, 50 (3d Cir. 1989) which held that “members of municipal planning boards in New Jersey are absolutely immune in their individual capacities from damage actions brought pursuant to 42 U.S.C. § 1983 alleging equal protection and first amendment violations arising out of site plan review conducted pursuant to N.J. Stat. Ann. § 40:55D-25(a)(2) (West Supp.1988)”, and Bogan v. Scott-Harris, 523 U.S. 44 (1998), holding that the elimination of a city department by municipal officials was protected by legislative immunity. In Bass the court held that “the duties of planning board members in the state of New Jersey are so integrally related to the judicial process as to warrant shielding from liability those individuals acting in performance of them,” 868 F.2d at 50 (citations omitted), and in Bogan the Court held that the acts of introducing, voting for, and signing an ordinance eliminating a government office was legislative act entitled to protection. 523 U.S. at 46. While both of these cases involved local government officials, neither of them examined activities similar to those engaged in by the Board in the case before me. As the Acierno court examined legislative immunity in the context of a § 1983 action alleging that local government officials violated a landowner’s substantive due process rights through its zoning decisions, I find its reasoning more applicable.

<sup>13</sup> Defendants again separate these two decisions, claiming absolute legislative immunity for their rejection of plaintiff’s re-zoning request and qualified immunity for their reclassification of plaintiff’s amended plan. As I find these two decisions inseparably linked, I decline to make such a distinction.

provided evidence that the action taken by the Board specifically targeted Thornbury Noble in order to allow the Waters project to succeed. The Acierno Court warned, however, that even where a decision targets only one land owner it may constitute a substantively legislative act where it involves the “enactment or amendment of zoning legislation” as opposed to “simply the enforcement of already existing zoning laws.” Id. at 611, quoting Jodeco, Inc. v. Hann, 674 F. Supp. 488, 494-95 (D. N.J. 1987). If plaintiff’s allegations are accepted as true the Board was improperly obstructing plaintiff’s legitimate requests to proceed with its development plans. Since the Board took no affirmative action, instead simply rejecting plaintiff’s re-zoning request and refusing to recognize its alternative plan as an “amended final plan,” in my view its actions cannot be characterized as the “enactment or amendment of zoning legislation.” Even were its actions “substantively legislative” in character, however, the Board would still not be entitled to legislative immunity because its denial of plaintiff’s re-zoning request was not “procedurally legislative.” See Acierno, 40 F.3d at 610.

Under the “procedural prong” of the Ryan test, the members of the Board would be “entitled to absolute legislative immunity for [their] action[s] if they followed the statutory procedures specified for such action.” Id. at 613 (citations omitted). With respect to its denial of plaintiff’s re-zoning request municipal defendants state:

Section 155-73 of the Thornbury Township Zoning Code sets forth the procedure that the Board of Supervisors will follow with respect to amendments to the zoning ordinance. Prior to any rezoning approval, the Board of Supervisors must hold a public hearing. No such hearing occurred in the instant case. Although the Township did not issue an official denial of Plaintiff’s rezoning request, it is undisputed that Plaintiff never received its requested rezoning.

(Mun. Def.’s Br. at 7). Thus defendants admit that the proper procedures were not followed in

handling plaintiff's request. As the actions of the Board were neither substantively nor procedurally legislative in character, defendants are not entitled to legislative immunity for their actions.

ii. Claims Against the Individual Defendants in Their Personal Capacities

Individual defendants move for the dismissal of plaintiff's § 1983 claims against them on the grounds that they are sued in their official capacity only and are therefore legally indistinct from the municipal body on which they serve. See Satterfield v. Borough of Schuylkill Haven, 12 F. Supp.2d 423, 432 (E.D. Pa. 1998)(holding that official capacity suits under § 1983 against individual council members were unnecessary where the township was already a named defendant). In support of this contention individual defendants point out that plaintiff has specifically listed them in the caption of its complaint as sued "in their official capacity."<sup>14</sup> Plaintiff responds without citation that: "[t]he caption of the complaint is not determinative" and "[t]he allegations of the complaint are conclusive on this issue." (Pl.'s Resp. to Ind. Def's at 14). Plaintiff also points to the fact that I recognized in my prior opinion denying defendants' motion to dismiss that its claim for intentional interference with contractual relations can only be brought against the individuals and not against municipal subdivisions. Thornbury Noble, Ltd. v. Thornbury Township, No. Civ. A. 99-6460, 2000 WL 1358483 at \*4 (E.D. Pa. Sept. 20, 2000). However, this provides no support for plaintiff's contention that its § 1983 claim was brought

---

<sup>14</sup> The actual terminology used by individual defendants is that they should not be "found individually liable." (Ind. Def.'s Rep. Br at 14). In responding plaintiff asserts that individual defendants may be held liable in both their "individual" and "official" capacities. As pointed out in Satterfield, however, there is no meaningful difference in a § 1983 suit between suing an official individually or suing the agency the official works for. I assume plaintiff is in fact arguing that it has sued individual plaintiffs in their "personal" capacity. See infra at 23 (discussing the difference between "personal" and "official" capacity suits under § 1983).

against defendants in their personal capacity.

In responding to individual defendants' contentions plaintiff states: "Thornbury Noble's claims against the Township and the individuals in their official capacity are premised upon the misconduct of the Supervisors acting in their official capacity, and even if damages were recovered only from the Township, the individuals sued in their official capacities should nonetheless remain as parties." Id. at 14-15. Clearly plaintiff is suing defendants for actions conducted while in their capacity as township supervisors. However, the question before me is whether plaintiff has brought suit against each of them personally in addition to suing them collectively as a political subdivision.

In Hafer v. Melo, 502 U.S. 21, 25 (1991), the Supreme Court stated:

Personal-capacity suits . . . seek to impose individual liability upon a government officer for actions taken under color of state law. Thus, on the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. While the plaintiff in a personal-capacity suit need not establish a connection to governmental 'policy or custom,' officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law.

(citations and internal quotations omitted). The Hafer Court affirmed the ruling of the Third Circuit Court of Appeals which stated: "[i]t appears that Hafer understood that plaintiffs sought to sue her in her personal capacity because she raised the defense of qualified immunity throughout the course of these proceedings, a defense available only for governmental officials when they are sued in their personal, and not in their official, capacity." 912 F.2d 628, 636 (3d. Cir. 1990). I note that in the defendants' answer, filed on December 6, 2000, under the caption "Second Affirmative Defense" it states: "All claims against the individual defendants are barred

by application of the doctrine of qualified immunity as articulated in Harlow v. Fitzgerald, 457 U.S. 800 (1982).”

I hold that defendants had sufficient notice that they were sued in their personal capacity and will not grant their motion for summary judgment on that basis. As under Satterfield § 1983 claims against government agents in their official capacities are redundant where the agency is also under suit, I will dismiss plaintiff’s claims against individual defendants in their official capacities.

iii. Municipal Liability Under § 1983

The individual defendants also state that “plaintiff cannot prevail unless it proves that its rights were violated by a government custom policy or practice or by an individual or body with final policy-making authority.” (Ind. Def.’s Br. at 18). It is unclear whether defendants are claiming that they do not fall within the definition of a “body with final policy making authority” in general, or whether the above sentence is meant to be read in conjunction with the following paragraph asserting that a majority of a policy making body must be aware of and have ratified a decision before the actions of a minority of the members can be imputed to the entire body. To the extent that individual defendants claim they are not a body with final policy-making authority, I disagree. As defendants point out “the MPC, 53 Pa. C.S.A. § 10909.1(b)(5), grants exclusive jurisdiction to the Thornbury Township Board of Supervisors to decide whether to rezone a parcel of land within its jurisdiction.” (Mun. Def.’s Br. at 7). Similarly, section 115-4 of the Thornbury Code states: “The Board shall have jurisdiction and control of all subdivision and land development within township limits.” The actions of the Board in this case fall squarely within its jurisdiction. The Board is “a body with final policy making authority” for purposes of §

1983 liability.

#### iv. Qualified Immunity

“Government officials performing discretionary functions generally are shielded from liability for civil damages.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). This “qualified immunity” applies so long as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Id. The individual defendants assert that they are entitled to qualified immunity from suit with respect to their determination that plaintiff’s amended plan constituted a “sketch” plan. Once again, in my view defendants distinction between its decision to reject plaintiff’s re-zoning request and its treatment of plaintiff’s alternative plan is inappropriate in this case. While I am mindful of the admonition of the Court of Appeals that “there is a compelling need [to protect legislative bodies from] the severe chilling effect numerous suits for damages would have on prospective officials,” Acierno, 40 F.3d at 615 (citations omitted), I disagree with the individual defendants’ contention that they are entitled to qualified immunity for their actions.

In considering a claim of qualified immunity I must determine: (1) whether the actions of the Board violated a constitutional right; and if so, (2) whether the right was clearly established at the time plaintiff alleges the violation occurred. See Saucier v. Katz, 121 S. Ct. 2151, 2155-56 (2001). With respect to the first prong, plaintiff asserts a violation of its substantive due process rights. In order to succeed with this claim plaintiff must demonstrate that it was deprived of a protected property interest by a government official or body, and that those actions were either: (1) not rationally related to a legitimate governmental interest; or (2) motivated by bias, bad faith, or improper motives. See Parkway Garage v. City of Philadelphia, 5. F.3d 685, 692 (3d Cir.

1993).

Defendants do not dispute that they acted as government officials and I have already determined that their actions affected a fundamental property interest of plaintiff. See supra at 8 § A. I have also found that there is sufficient evidence as a matter of law to support plaintiff's claim of an improper motive attributable to defendants acting as an entire body. See supra at 16 § C; see also United Artists Theatre Circuit, Inc. v. The Township of Warrington, No. Civ. A. 98-5556, 2001 WL 936638 at \*5 (E.D. Pa. Aug. 15, 2001) (“plaintiff has provided evidence permitting a factfinder to conclude the Board intentionally delayed approval of plaintiff's project because it wished to receive the impact fee offered by [another developer]. If proved, the court believes the monetary motivation of the Board was improper and would constitute a violation of substantive due process.”).

In United Artists, since the individual defendant Board members were, as here, represented by the same counsel and referred to themselves as a group the Court found it appropriate to address qualified immunity of the Board as a whole. 2001 WL 936638 at \*3. However, while the Court of Appeals held that the district court Court had properly analyzed the Board members' request for qualified immunity on summary judgment, the Court remanded the case for further analysis under Grant v. City of Pittsburgh, 98 F.3d 116, 122 (3d Cir. 1996). In Grant, the Court was asked to evaluate a claim of qualified immunity raised by members of a city council. The Court stated that “crucial to the resolution of any assertion of qualified immunity is a careful examination of the record (preferably by the district court) to establish, for purposes of summary judgment, a detailed factual description of the actions of each individual defendant (viewed in a light most favorable to the plaintiff).” 98 F.3d at 122. Under Grant the right the

Board is alleged to have violated must not only be clearly established, but there must also be support in the record of specific official actions alleged to have violated the right. Id. With respect to the actions of each of the individual Board members plaintiff points to the following evidence in support his contention that they violated his substantive due process rights:

1. Defendant Wilson: Wrote a memo to the Township Manager in which he stated his desire that Waters be assured that its supermarket would be the next one built in order that the township would be able to use the money promised by Waters. This memo also stated that Wilson would not vote for any additional commercial property for Thornbury Noble so it would not be “likely to get Genaurdi as a lead tenant.” Stated to Waters at a township meeting that the Board would “really have to believe that there would be a true benefit to the township for a trade off to allow this to be rezoned.” Present at a June 17, 1997 meeting when Waters was informed of an absolute minimum tradeoff in return for rezoning. Present at the July 7, 1998 meeting when defendant Schmidt asked plaintiff if it was interested in making a “voluntary contribution.” Present at the meetings granting Waters’ requested re-zoning, denying plaintiff’s, and determining plaintiff’s alternative plan was to be considered “new” rather than amended. Discussed the fate of Thornbury Noble’s application with representatives of Genaurdi’s.
2. Defendant MacDonnell: In July 1998, told a representative of Genaurdi’s that plaintiff’s rezoning request would be denied. Took part in discussions at a meeting concerning the Board’s initial “unreceptive” response to the Waters proposal and the absolute minimum tradeoff it would take Waters to get its requested re-zoning. Was present at the meeting when a request for a contribution from Thornbury Noble was made. Advised plaintiff that such contributions had been made “voluntarily” in the past when plaintiff’s representative stated that it would consider any contribution required by ordinance. Present at the meeting where Waters’ request to re-zone was granted and plaintiff’s was denied.
3. Defendant Schmidt: Present at the initial meetings with Waters and stated that “the only way he would have any interest in [the Waters project] is for the Township to acquire a similar piece of property for open space.” Was present at the meeting with Waters discussing the absolute minimum tradeoff it would take for Waters to get its requested re-zoning. Asked plaintiff if it would be willing to “help[] the township with open space to compensate for loss of residential housing.” Present at the meeting where Waters’ request to re-zone was granted and plaintiff’s was denied.
4. Defendant Lang: Present at initial meetings with Waters. Present at the meeting

denying plaintiff's request to rezone. Told plaintiff's representative that its re-zoning request would not be granted unless plaintiff could convince the township there is a compelling benefit to do so. Present at the meeting where the Board voted unanimously that plaintiff's amended plan was in fact a new plan.

5. Defendant Dewy: Present at the initial meetings with Waters including that discussing the absolute minimum tradeoff it would take Waters to get its requested re-zoning. Informed the Board what the Park & Recreation Committee had told Waters would be required as a trade off for the open space that would be consumed by the Waters project. Was present at the meeting when a request for a contribution from Thornbury Noble was made. Was present at the meeting where Waters' request to re-zone was granted and plaintiff's was denied. Present at the meeting where the Board voted unanimously that plaintiff's amended plan was in fact a new plan.

While it is my belief that defendants' claim of qualified immunity is better understood as one claimed by the Board as a whole, reviewing the record I hold that plaintiff has provided sufficient evidence of the involvement of each of the individual defendants to establish a violation of its constitutional rights under Grant.

The second prong of the qualified immunity analysis, requiring that the constitutional right be clearly established at the time of the alleged violation, ensures that government officials are not held liable for actions they could not reasonably have known were unlawful. Saucier, 121 S. Ct. at 1256-1257. At the time of the of the violation "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." Andersen v. Creighton, 483 U.S. 635, 636-37 (1987). Here plaintiff alleges that the Board intentionally obstructed the approval of its development plan in order to secure funds offered by another developer. The time of the alleged violation was at the earliest July 7, 1998; the date of the meeting at which plaintiff was asked to make a voluntary contribution to compensate for the loss of residential zoning. In Blanche Road Corp., F.3d at 268 (3d Cir.

1995), plaintiff accused town officials of deliberately delaying the process by which the township issued zoning permits for reasons unrelated to the merits of the applications. The Blanche Road Court stated: “[i]f defendants, for reasons unrelated to an appropriate governmental purpose, intentionally conspired to impede the development of the . . . project, . . . such an arbitrary abuse of governmental power would clearly exceed the scope of qualified immunity.” Similarly in Bello, 840 F.2d at 1129 (3d Cir. 1988), the Court held that the denial of a building permit designed to hinder plaintiff’s building project due to personal animosity toward one of plaintiff’s employees constituted a substantive due process violation. In the case before me, plaintiff alleges that defendants were motivated by a desire to secure land for the Township. In Parkway Garage, 5. F.3d at 695 (3d Cir. 1993), the Court held that city officials who deprived plaintiff of a fundamental property right because they wished to increase the value of the city’s property violated plaintiff’s substantive due process rights.

In my view the right defendants are alleged to have violated was clearly established at the time of their actions. The members of the Board should have been aware that their alleged actions were unconstitutional and they are therefore not entitled to the defense of qualified immunity. See United Artists Theatre Circuit, 2001 WL 936638 at \*8 (holding that defendant Board of Supervisor members were not entitled to qualified immunity for decisions made in 1995, where they allegedly had impeded the final approval of a movie theater project so that the township could receive a fee from a competing developer.).

## II. Intentional Interference With Prospective Contractual Relations

Also before me is the individual defendants motion for summary judgment on Count IV,

which alleges that they interfered with prospective contractual relationships between Thornbury Noble and Genaardi's and SuperFresh supermarkets. The elements of a cause of action for intentional interference with a contractual relation, whether existing or prospective, are: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct. See Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. Ct. 1997).

Relying on Lindner v. Mollan, 677 A.2d 1194 (Pa. 1996), the individual supervisors move for summary judgment on the grounds that since the actions alleged by plaintiff were taken in the course of their official duties they are entitled to absolute immunity as high public officials. See Jonnet v. Bodick, 244 A.2d 751, 753 (Pa. 1968)(holding that members of township boards of supervisors are considered "high public officials" under state law for purposes of absolute immunity). The Political Subdivision Tort Claims Act, 42 Pa. C.S.A. § 8541, et seq., contains various immunity provisions for municipalities and their officials. However, 42 Pa. C.S.A. § 8550 provides that there is no immunity for officials that cause injury through "a crime, actual fraud, actual malice or willful misconduct." In my prior opinion denying defendants' motion to dismiss I cited Delate v. Kolte, 667 A.2d 1218 (Pa. Commw. Ct. 1995), stating:

In Delate . . . , the court applied that provision to a case arising from a zoning dispute and held that "the mere failure to reach the correct legal conclusion in a zoning case does not constitute the type of purposeful conduct which is necessary for a finding of willful misconduct [within the meaning of § 8550]." However, the court went on to note that in this context "willful misconduct" is synonymous with the term "intentional tort." Id.

Therefore, individual zoning board members could be held liable if they “intentionally reached the wrong decision knowing that it was wrong, acted from corrupt motives, or engaged in any other type of conduct which would demonstrate willful misconduct.” Id. I therefore hold that if it were confronted with the issue the Pennsylvania Supreme Court would find that the intentional interference with contractual relations alleged here constituted willful misconduct within the meaning of § 8550 and Delate.

Thornbury Noble, 2000 WL 1358483 at \*4.

Individual Defendants appear to contend that since the Lindner Court held that “section 8550 of the PSTCA does not abrogate the common law doctrine of absolute privilege afforded high public officials . . .” they are absolutely immune from intentional tort claims arising out of activity that occurred while performing their official duties. However, the Lindner Court’s decision concerned exemption for high public officials from lawsuits for defamation. As the court in Smith v. School District of Philadelphia, 112 F. Supp. 2d 417, 426 (E.D. Pa. 2000), noted, “the Supreme Court of Pennsylvania . . . has yet to decide whether the immunity for high public officials extends to other intentional torts.” Plaintiff states that the Smith Court then predicted that “the Supreme Court of Pennsylvania would hold that the Tort Claims Act does abrogate high public official immunity for suits for intentional infliction of emotional distress and invasion of privacy. Id. at 424.” (Pl.’s Resp. to Ind. Def.’s at 29). This is incorrect. First, this discussion takes place on page on page 426 rather than page 424. More importantly, however, the Smith Court reached the opposite conclusion than that attributed to it by plaintiff. The Smith Court stated: “This Court predicts that the Supreme Court of Pennsylvania would hold that the Tort Claims Act does *not* abrogate high public official’s absolute immunity from civil suits for intentional infliction of emotional distress and invasion of privacy.” 112 F. Supp. 2d at 426 (emphasis added). The Smith Court based this determination on the Lindner Court’s

explanation that the Pennsylvania common law doctrine of absolute immunity for high public officials “rests upon the idea that conduct which would otherwise be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff’s reputation.” See Smith, 112 F. Supp. 2d at 426 (quoting Lindner, 677 A.2d at 1195). High public officials, as opposed to ordinary local agency employees, “accused of defamation enjoy absolute immunity even when willful misconduct is alleged.” Smith, 112 F. Supp. 2d at 425. The Smith Court also found persuasive the Lindner Court’s statement that “this sweeping immunity is not for the benefit of high public officials but for the benefit of the public.” Id. As the Smith plaintiff’s complaint alleged that the actions taken by defendants all occurred within the course of their official duties, the court held they were entitled to invoke the doctrine of absolute immunity for high public officials as a defense to plaintiff’s intentional tort claims.

Plaintiff contends that the actions of the Board were outside the scope of their duties as township supervisors. According to plaintiff “[t]he Supervisors actions in interfering with the prospective contractual relations of Thornbury Noble are not within the duties prescribed by statute.” (Pl.’s Resp. to Ind. Def. at 30). I agree that there is nothing in the Board members’ statutory job descriptions authorizing them to commit the specific tort they are alleged to have committed; however that is not the question before me. Much of the evidence of misconduct cited by plaintiff involved casting votes, making statements, or merely being present at Board meetings. Such activity was clearly undertaken in the individual defendants’ official capacities. Plaintiff points to the conversations of particular Board members with representatives of Genaurdi’s advising them that the Board would not be voting for any additional property to be re-

zoned at Thornbury Commons, as examples of activity undertaken outside the scope of the official duties of individual defendants. I disagree.

Simply because there is nothing in the statute defining their duties that states that supervisors are permitted to communicate to interested parties how they believe the Board will vote does not mean that if any such communication occurs it must have taken place outside the scope of their official duties. Indeed, the subject of these conversations (how they intended to vote) concerned activity in their official capacity. Further, as I previously noted, plaintiff itself states: “Thornbury Noble’s claims against the Township and the individuals in their official capacity are premised upon the misconduct of the Supervisors acting in their official capacity . . . .” (Pl.’s Resp. to Ind. Def’s at 14-15)(emphasis added). Because such activity took place while the individual defendants were acting in furtherance of their duties as township supervisors it is “entitled to protection even at the expense of uncompensated harm to the plaintiff. . . .” Lindner, 677 A.2d at 1195. Construing the facts in the light most favorable to plaintiff, they do not show that the individual defendants acted for their own benefit, profited at the public’s expense, spent the money at issue for any non-public purpose, or acted in any capacity other than their official one.

My review of Pennsylvania law reveals no Supreme Court precedent on whether “high public officials” are entitled to absolute immunity from civil suits for intentional interference with prospective contractual relations. In order to predict how the Supreme Court of Pennsylvania would resolve this question of unsettled state law, I should consider “relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.”

Markel v. McIndoe, 59 F.3d 463, 473 n. 11 (3d Cir. 1995). While I am mindful that my prior opinion denying defendants’ motion to dismiss stated my belief that defendants could be held liable for wilful misconduct, I find the Smith Court’s application of the rationale employed by the Court in Lindner persuasive.<sup>15</sup> Applying that rationale to the case before me I believe that the Supreme Court of Pennsylvania would hold that absolute immunity protects high officials from civil suits for intentional interference with prospective contractual relations. Accordingly, Count IV of plaintiff’s complaint will be dismissed against the individual defendants.

### III. Immediate Appealability

A district court may certify an order for an interlocutory appeal if it is of the opinion that the order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). The trial court has discretion whether to certify, however, certification is appropriate only in “exceptional” circumstances. See Piazza v. Major League Baseball, 836 F. Supp. 269, 270 (E.D. Pa.1993). The Court of Appeals has held that before an order can be certified for interlocutory appeal, all three factors identified in 28 U.S.C.A. § 1292(b) must be satisfied. See Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974) (finding that “the district judge must certify that the order satisfies the three criteria”).

With respect to the issues in the case before me, in my view there are two controlling issues of law over which there are substantial grounds for differences of opinion: (1) whether the

---

<sup>15</sup> I note that neither Smith nor Lindner were cited in any submission to this court prior to individual defendants’ motion for summary judgment.

plaintiff's allegations constitute a violation of its substantive due process rights, and (2) whether individual defendants are entitled to absolute immunity as high public officials from plaintiff's claim of prospective interference with contractual relations. See Katz, 496 F.2d at 755 (holding that a controlling issue of law is one that "would result in a reversal of a judgment after final hearing"). In light of my prior Orders of September 20, 2000, dismissing Count III of plaintiff's complaint in its entirety and Count IV as to municipal defendants, and November 9, 2000, dismissing Count II in its entirety, the two issues discussed above concern plaintiff's only remaining claims. I hold that an immediate appeal would materially advance the ultimate termination of this litigation and therefore the parties will be granted leave to seek an appeal pursuant to 28 U.S.C. § 1292(b).

An appropriate Order follows.

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

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
	:	
v.	:	
	:	
THORNBURY TOWNSHIP, et al.	:	NO. 99-6460

**ORDER**

AND NOW, this            day of March, 2002, for the reasons set forth in the accompanying memorandum, it is ORDERED:

1. Plaintiff Thornbury Noble's § 1983 claims against individual defendants in their official capacities are DISMISSED.
2. Defendants Thornbury Township and Thornbury Township Board of Supervisors' motion for summary judgment is DENIED.
3. Defendants Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles Wilson and Robert MacDonnell's motion for summary judgment is DENIED in part and GRANTED in part.
  - a. Individual defendants' motion for summary judgment on Count I of plaintiff's complaint is DENIED.

- b. Individual defendants' motion for summary judgment on Count IV of plaintiff's complaint is GRANTED.
4. Judgment is entered in favor of defendants Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles Wilson and Robert MacDonnell and against plaintiff Thornbury Noble as to Count IV of plaintiff's complaint.
5. As this Order involves controlling issues of law as to which there are substantial grounds for differences of opinion and an immediate appeal from them may materially advance the ultimate termination of this litigation, I hereby certify this Order for immediate appeal pursuant to 28 U.S.C. § 1292(b).

---

THOMAS N. O'NEILL, JR., J.