

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

HANKIN FAMILY PARTNERSHIP,	:	CIVIL ACTION
REALEN VALLEY FORGE GREENES	:	NO. 01-1622
ASSOCIATES,	:	
THOMAS J. TIMONEY, ESQUIRE, As	:	
Receiver for the HANKIN FAMILY	:	
PARTNERSHIP,	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
UPPER MERION TOWNSHIP,	:	
THE BOARD OF SUPERVISORS OF	:	
UPPER MERION TOWNSHIP,	:	
THE UPPER MERION TOWNSHIP	:	
ZONING HEARING BOARD,	:	
Defendants	:	

Giles, C.J.

March 22, 2002

MEMORANDUM

I. Introduction

Plaintiffs filed a six count amended complaint in this court for damages and injunctive relief against defendants pursuant to 42 U.S.C. § 1983. They also have requested attorneys' fees. The complaint alleges causes of action for Equal Protection (Count I); Substantive Due Process (Counts II-III); Procedural Due Process (Count IV); and Takings Without Just Compensation (Counts V-VI). Defendants have moved to dismiss the various claims on the grounds that Counts I-III are barred by the statute of limitations; all Counts are barred under the doctrines of res judicata and collateral estoppel; and Counts IV-VI fail to state a legally sufficient cause of action. In the alternative, defendants have asked that the court abstain from adjudicating

plaintiffs' claims pending resolution of two ongoing state court proceedings initiated by plaintiffs. Plaintiffs conceded during the briefing of defendants' motion to dismiss that Counts V and VI should be stayed pending the completion of the state court proceedings and withdrew the request for injunctive relief in the form of a declaration that the zoning classification of plaintiffs' property is unconstitutional. For the reasons discussed below, defendants' motion is granted in part and denied in part.

II. Factual Background and Procedural History¹

A. Facts

1. The Parties

Plaintiffs are the Hankin Family Partnership (“Hankin Family”)² and the Realen Valley Forge Greenes Associates (“Realen”), co-owners of 135 acres of undeveloped land in the Upper Merion Township (“Hankin Property”). Defendants are the Upper Merion Township (“Township”), Board of Supervisors of Upper Merion Township (“Supervisors”), the governing body of the Township which is responsible for the creation and amendment of the Township’s zoning ordinance and zoning map, and the Upper Merion Township Zoning Hearing Board (“Zoning Board”), which has jurisdiction to render final adjudications of substantive challenges to the validity of the Township’s zoning ordinance and zoning map. The Supervisors appoint the

¹ For this motion, the court considered the Amended Complaint, Defendants’ Motion to Dismiss and the Appendix submitted with it, Plaintiffs’ Memorandum of Law in Opposition to the Motion to Dismiss, Defendants’ Reply, and Plaintiffs’ Sur-Reply, as part of the record.

² Thomas J. Timoney brings this action as a court-appointed receiver for the Hankin Family Partnership. (Compl. ¶ 1.)

members of the Zoning Board.

2. *The Hankin Property*

The Hankin Property is zoned “agricultural” (“AG”) and has been since 1953. The Hankin Property was part of an 1800 acre AG district which was zoned in 1953 to act as a “holding zone.” The AG zoned land was reserved from development until specific proposals were submitted to the Supervisors and evaluated on a case-by-case basis. (Pls.’ Mem. of Law in Opp. to Defs.’ Mot to Dismiss at 3.)

A golf course operation has been the use of the Hankin Property since the 1920's. It is located in the King of Prussia section of Montgomery County and Upper Merion Township. The Hankin Property is entirely surrounded by properties which are zoned and used for commercial purposes not permitted by the AG zoning classification.

Plaintiffs allege that the AG zoning classification precludes the development of the Hankin Property for anything other than a golf course and open space because “although single-family detached dwellings, agriculture, and municipal uses are permitted ‘by right’ in the AG district, the Hankin Property is unsuitable for any of the uses...”. (Compl. ¶¶17-18.) Further, although there are twelve (12) uses permitted by special exception and two (2) uses permitted by conditional use in the AG district, plaintiffs cannot qualify for any special exceptions or conditional uses of the property because the Township’s Comprehensive Plan designates the Hankin Property for “parks, recreation, and open space.” (Compl. ¶19.)

3. *Attempts to Change the AG Zoning of the Hankin Property*

From 1955 through 1985, the Supervisors have granted rezoning requests submitted by the owners of all of the privately-owned properties within the original 1800 acre AG area except

for the Hankin Property. Those other properties have been developed for uses not permitted in the AG district. (Compl. ¶ 28.) However, no request for rezoning of any property in the district has been granted since 1985. (Defs.’ Mot. to Dismiss, Ex. C, April 12, 2001 Opinion at 6.)

Since 1967 the Supervisors have rejected **numerous** requests by the Hankin Property owners to change the zoning classification so that their parcel could be used for purposes similar to those permitted on the surrounding parcels. In 1967, the Supervisors denied the first request for rezoning, relying on the Township’s long held and expressed goal of acquiring the Hankin Property for use as a public recreation area through condemnation. (Compl. ¶ 30 A.)

In 1968, the Township authorized creation of a Township Authority for the purpose of acquiring the Hankin Property for public use. The Township Authority filed a Declaration of Taking whereby it condemned the Hankin Property for public use, intending to continue its use as a golf course. (Compl. ¶ 36.) The Declaration of Taking was challenged by the Hankin Property owners and invalidated by the Court of Common Pleas of Montgomery County. (Id. ¶ 37.) Following the invalidation of the Declaration of Taking, at a public meeting, the Supervisors stated their intention to limit the Hankin Property to open space through continuation of the AG designation. (Id. ¶ 38.)

In 1981 Hankin entered into an agreement to sell the Hankin Property contingent upon a buyer, Acorn, obtaining the right to develop the parcel for commercial uses. Acorn filed a substantive challenge to the validity of the AG zoning of the Hankin Property and the Zoning Board rejected it. (Compl. ¶ 40-44.) When the Township’s Comprehensive Plan was amended in 1986, the Township continued to designate the Hankin Property for use as “parks, recreation, and open space.” (Id. ¶ 45.)

In 1996 Hankin entered into an agreement to sell the Hankin Property to Realen, subject to Realen obtaining the right to develop it for commercial purposes. (Id. ¶ 46.) The Supervisors told Realen that, for it to obtain a rezoning of the Hankin Property, it would have to obtain the support of the local community groups which had actively opposed development of the Hankin Property in the past. Realen determined that it was not feasible to obtain their support. (Id. ¶ 48.)

In October of 1997, the Supervisors offered to buy the property for \$4,800,000, based on the fair market value of the property zoned AG as determined by the Montgomery County Board of Assessment. (Compl. ¶ 50.) All of the privately-owned parcels of land immediately adjacent to the Hankin Property zoned for commercial use, have a fair market value ranging from 3 to 22 times per acre more than the Hankin Property's value. (Compl. ¶ 52.)

B. Plaintiffs' State Proceedings

In 1997 Realen submitted a substantive challenge to the validity of the AG zoning of the Hankin Property. The Supervisors opposed the Challenge. (Compl. ¶ 55.) The Realen Challenge argues that the zoning ordinance is substantively invalid because the AG zoning of the property (1) violates due process; (2) is arbitrary and irrational; (3) constitutes special legislation; and (4) constitutes unlawful spot zoning. (Defs.' Mot. to Dismiss, Ex. A, Realen Challenge at 5-7.)

The Zoning Board rejected the Realen Challenge in a decision dated August 13, 1999. The Board found that the Hankin Property is different from any of the other properties that adjoin it, and, therefore, could be treated differently. (Defs.' Mot. to Dismiss, Ex. A, Zoning Board Opinion Aug. 13, 1999 at ¶ 40-46.) The Board found that expert testimony had shown that due

to the large size of the Hankin property (135 acres), there are economically viable uses for the property, zoned AG, which are permitted by right or special exception, or as a conditional use. (Id. at ¶ 59.) Further, the fact that the subject property is surrounded by roadways was deemed a major reason to justify its treatment as a separate zoning district. (Id. at ¶ 61.) Finally, in response to plaintiffs' argument that none of the uses permitted by right or special exception to the AG zoning is consistent with the Township's Comprehensive Plan for the Hankin Property, except for a golf course, the Zoning Board concluded that the Comprehensive Township Plan does not have a legal effect on the zoning ordinance. Where a zoning ordinance and comprehensive plan conflict, the zoning ordinance governs. (Id. at p. 30.) Plaintiffs appealed the Zoning Board's decision to the Court of Common Pleas of Montgomery County.

The Court of Common Pleas of Montgomery County affirmed the Zoning Board by an order dated December 1, 2000 and issued an explanatory opinion on April 12, 2001. The court found that the existing golf course is a viable use for the Hankin Property and that the Hankin property was also suitable for educational, religious and philanthropic uses: hospitals and convalescent homes and assorted living facilities; laboratories, scientific, agricultural or industrial research facilities; single family dwelling units; single family cluster use; and personal care facilities. (Defs.' Mot. to Dismiss, Ex. C, April 12, 2001 Opinion at 11-12.) The court also found that the AG zoning classification allows various low-density options for the property and that the Township's Comprehensive Plan cannot undermine the uses specifically authorized in a zoning ordinance. (Id. at 12-13.)

C. Ongoing State Proceedings

On May 29, 2001, plaintiff Realen appealed the Court of Common Pleas of Montgomery

County's December 1, 2000 order and April 12, 2001 judgment, to the Commonwealth Court of Pennsylvania. This appeal is pending. The brief of Appellant Realen asserts, in relevant part, that (1) the AG zoning of the Hankin property unreasonably restricts the use that can be made of the property; (2) the AG zoning of the property is arbitrary and discriminatory spot zoning; and (3) the lower court erred in holding that the Township's intent in zoning the property AG is not legally relevant to the determination of the validity of the zoning ordinance. (Defs.' Mot. to Dismiss, Ex. D, Br. of Appellant at I-II.)

On March 30, 2001, plaintiff Hankin filed a Petition for the Appointment of a Board of View with the Court of Common Pleas of Montgomery County seeking compensation for inverse condemnation under Section 502(E) of the Pennsylvania Eminent Domain Code. (Defs.' Mot. to Dismiss, Ex. E, Petition for the Appointment of a Board of View.) The petition seeks just compensation for a de facto taking of the Hankin Property. (Id. at ¶ 53.)

D. Federal Proceedings

Plaintiffs filed an initial complaint in this federal action on April 3, 2001 and an amended complaint on May 17, 2001. Defendants filed a motion to dismiss on June 8, 2001. After extensive briefing on the motion and oral argument on February 19, 2002, for the reasons discussed below, the court abstains on the equal protection and substantive due process claims (Counts I-III) as well as the takings claims (Counts V-VI) and dismisses the procedural due process claim (Count IV) for failure to state a claim upon which relief can be granted.³

³ This court only considered the relief sought by defendants and does not decide whether the equal protection and substantive due process claims could have survived a motion to dismiss filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

III. Discussion

A. *Statute of Limitations Bar*

Defendants argue that the equal protection and substantive due process claims (Counts I-III) are barred by the two-year statute of limitation that applies to actions brought pursuant to 42 U.S.C. § 1983. See Sameric Corp. of Delaware, Inc. v. City of Philadelphia, 142 F.3d 582, 599 (3d Cir. 1998). Defendants allege that plaintiffs knew or should have known of the equal protection violation by 1985, the year plaintiffs assert that all other “similarly situated” property owners’ land were rezoned. (Mem of Law in Supp of Defs.’ Mot. to Dismiss at 8.) Similarly, defendants argue that plaintiffs knew or should have known of the substantive due process violations by 1964 when plaintiff Hankin filed a complaint in the Court of Common Pleas of Montgomery County, alleging among other things, that the Township was trying to take the Hankin’s Property without due process of law. (Id. at 9.) Plaintiffs also should have known of the substantive due process injury, according to defendants, following the Zoning Board’s denial of the Acorn challenge in 1985 which was nearly identical to the Realen Challenge in 1996. (Id. at 10.) Further, defendants argue that plaintiffs’ substantive due process injury was allegedly caused by the decisions of the Supervisors and the Zoning Board in 1967, 1981, and 1982. (Id.) According to defendants, since 1987 is the latest date plaintiffs could have brought either their equal protection claim or their substantive due process claims, they have long since missed any opportunity to raise such claims in federal court. (Id.)

Plaintiffs argue that their equal protection and substantive due process claims are timely

based on the “continuing violation theory” since the complaint demonstrates defendants’ wrongful acts were part of a continuous pattern of activities in violation of plaintiffs’ civil rights which continue to the present day. (Pls.’ Mem. of Law in Opp. to Defs.’ Mot. to Dismiss at 13.)

While Pennsylvania law determines the limitations period to be applied for a cause of action under § 1983, federal law determines the date which the statute of limitations period begins to run. See Deary v. Three Unarmed Police Officers, 746 F.2d 185, 197 n.16 (3d Cir. 1984) rev’d on other grounds. When a defendant’s conduct is part of a continuing practice, an action is timely as long as the last act evidencing the continuing practice falls within the limitations period; in such an instance the court will grant relief for the earlier related acts that would otherwise be time-barred. See Brenner v. Local 514, United Brotherhood of Carpenters and Joiners of America, 927 F.2d 1283, 1295 (3d Cir. 1991).

In West v. Philadelphia Elec. Co., 45 F.3d 744, 754-55 (3d Cir. 1995), the third circuit adopted a two-part test to determine if a continuing violation exists such that plaintiff can be granted relief for earlier related acts that occurred outside of the statute of limitations. The test requires a plaintiff to establish that (1) at least one act of the defendant occurred within the filing period and (2) the conduct resulting in the constitutional violation must be “more than the occurrence of isolated or sporadic acts of intentional discrimination” on the part of defendant. Id. at 754-55. The inquiry into the existence of a continuing violation should consider:

- (i) subject matter—whether the violations constitute the same type of discrimination; (ii) frequency; (iii) permanence—whether the nature of the violations should trigger the employee’s awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate. Id. at 755 n.9 (adopting the approach set forth in Berry v. Bd.

of Supervisors of Louisiana State Univ., 715 F.2d 971, 981 (5th Cir. 1983) and Waltman v. Int'l Paper Co., 875 F.2d 468, 474-75 (5th Cir. 1989)).

Here, plaintiffs meet the first prong of West but fail to satisfy the second prong.

The Zoning Board rejected the Realen Challenge to the validity of the AG zoning of the Hankin property in a decision dated August 13, 1999, an act of the defendants which occurred within two-years of the filing of plaintiffs' complaint. Plaintiffs allege that at the hearings on the Realen challenge, which are the basis of the Zoning Board's decision:

the Chairman of the Board of Supervisors exerted pressure upon ZHB [Zoning Board] to deny the Realen Challenge because of the Supervisor's desire that the property be used as a golf course and open space, and that the ZHB acquiesced to the Supervisor's desires, denying the Realen Challenge in order to insure that the Property remained undeveloped. (Pls.' Sur-Reply at 9.)

Therefore, without deciding whether plaintiffs have alleged sufficient facts to state a claim for an equal protection or substantive due process violation, the court finds that this factual predicate for these claims occurred during the relevant statute of limitations.

However, in terms of the second prong of the West test, at best, the decisions of the Supervisors and Zoning Board constitute isolated instances of alleged discrimination with effects that persist into the present. This is insufficient to establish a persistent, ongoing pattern for purposes of a continuing violation. See King v. Township of East Lampeter, 17 F. Supp.2d 394, 409-10 (E.D. Pa. 1998) (quoting E.E.O.C. v. Westinghouse Elec. Corp., 725 F.2d 211, 218 (3d Cir. 1983) rev'd on other grounds 930 F.2d 329 (3d Cir. 1991)).

The decisions of the Supervisors and the Zoning Board that allegedly gave rise to plaintiffs' claims were infrequent, at most five or six times, and each adverse decision was a

discrete event that should have triggered the plaintiffs' awareness of the need to assert their federal rights. Plaintiffs circumstances are materially different from those in West, where the third circuit found a continuing violation of racial harassment by PECO. The third circuit observed that the "postings, threats, and hostile conversations appear to have recurred without respite" and "the harassment did not cause a discrete event such as a lost job or a denied promotion and, thus, did not trigger a duty of plaintiff to assert his rights arising from that deprivation." West 45 F.3d at 755-56.

The court finds that any equal protection or substantive due process claims arising from the August 13, 1999 Zoning Board decision are timely, but claims based on earlier actions of the defendants are time-barred. For purposes of calculating damages on the equal protection and substantive due process claims, should this ever become relevant, the court will only recognize damages arising from the August 13, 1999 denial of Realen's challenge to the validity of the continued AG zoning classification of the Hankin Property.

B. Res Judicata and Claim Preclusion⁴

Defendants argue that plaintiffs have raised or could have raised the § 1983 equal protection and substantive due process claims in the state proceedings and, therefore, are precluded from raising them in federal court. (Defs.' Mem. of Law in Supp. of Mot. to Dismiss at 12.) Defendants argue that plaintiffs appealed the adverse decision of the Zoning Board in the Realen Challenge to the Court of Common Pleas of Montgomery County, which affirmed the denial by the Zoning Board, and, then, plaintiffs appealed the Court of Common Pleas decision

⁴ The court restricts its analysis to claim preclusion because the court centers its analysis on whether the § 1983 claims could have been raised in the zoning board hearing.

as well. (Id.) That court had original jurisdiction over § 1983 claims, so plaintiffs could have raised their § 1983 claims in one of these state proceedings. (Id.) Defendants correctly emphasize that, in considering whether a constitutional claim is barred by res judicata or claim preclusion, the inquiry is not whether the constitutional claims were actually brought but whether they could have been brought in the state action.⁵ (Id. at 12-13.)

Plaintiffs argue that the principles of res judicata and collateral estoppel are not applicable for a number of reasons: (1) the federal equal protection and substantive due process claims are entirely different from the Realen challenge which alleged that the zoning ordinance was invalid; (2) **the Zoning Board does not have jurisdiction over § 1983 claims and thus could not have heard plaintiff's equal protection and due process claims now raised in federal court;** (3) the Court of Common Pleas of Montgomery County heard this matter only in its appellate capacity on appeal from the Zoning Board's denial of the Realen Challenge; (4) in connection with the Realen Challenge, the Zoning Board could not have granted Realen the relief requested -- the award of money damages -- since the Zoning Board lacks the power to award compensatory damages. (Pls.' Mem. of Law in Opp. to Defs.' Mot. to Dismiss at 17.)

The court finds that the Zoning Board did not have jurisdiction over § 1983 claims which, now, are not barred by res judicata and collateral estoppel principles.

⁵ Plaintiffs argue that Pennsylvania law is inconsistent on the issue of finality where a decision is subject to appeal. See Bailey v. Ness, 733 F.2d 279, 281-82 (3d Cir. 1984). One line of Pennsylvania state cases has held that a state court judgment is not considered a final judgment for purposes of res judicata while an appeal is pending. Id. at 281. A second line of cases has found that a state court judgment is final for res judicata purposes unless or until it is reversed. Id. at 281-82.

The Commonwealth Court of Pennsylvania has "twice unequivocally decided that a state trial court judgment is final unless or until it is reversed." O'Hara Sanitation Co. v. Commonwealth Dep't of Env'tl. Resources, 557 A.2d 453, 455 (Pa. Cmwlth Ct. 1989); Bassett v. Civil Serv. Comm'n of Philadelphia, 514 A.2d 984, 986 (Pa. Cmwlth Ct. 1986)). Thus, to the degree that they are relevant to this case at this point in the proceedings, the decisions of the Montgomery Court of Common Pleas are final for purposes of res judicata.

Pursuant to 28 U.S.C. § 1738, federal courts are required to give state court judgments the same full faith and credit that they would receive from other courts of the same state. In determining whether principles of res judicata bar plaintiffs' instant federal constitutional claims against the defendants, the court applies Pennsylvania's law of res judicata or claim preclusion. McNasby v. Crown Cork & Seal Co., Inc., 888 F.2d 270, 276 (3d Cir. 1989). The Pennsylvania Supreme Court has explained the doctrine of res judicata or claim preclusion as follows:

...a former adjudication bars a later action on all or part of the claim which was the subject of the first action. Any final, valid judgment on the merits by a court of competent jurisdiction precludes any future suit between the parties or their privies on the same action. Res judicata applies not only to claims actually litigated but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action. Balent v. City of Wilkes-Barre, 669 A.2d 309, 313 (1995).

As a threshold matter, under Pennsylvania law the doctrine of res judicata does not apply where the adjudicative body in the initial action does not have jurisdiction over the claim brought in the second action. See McNasby, 888 F.2d at 276.

Plaintiffs' failure to raise their § 1983 claims in state court does not bar them from being raised in federal court at a proper time. This court agrees with the conclusion stated in Barnes Foundation v. Township of Lower Merion, 927 F. Supp. 874, 879 (E.D. Pa. 1996) to the effect that a local zoning proceeding is an insufficient forum to raise federal civil rights claims. The "Zoning Hearing Board jurisdiction is limited to substantive and procedural challenges to the validity of a land use ordinance; appeals of decisions made by zoning officers, ...; and applications for variances and special exceptions." Id. (citing Pennsylvania Municipalities

Planning Code (“MPC”), 53 PA. CONS. STAT. ANN. § 10909.1). “Any appeal from the Zoning Hearing Board is similarly limited with regard to subject matter.” *Id.* The relevant state statute provides that “(a) [i]n a land use appeal, the court shall have the power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal.” MPC, 53 PA. CONS. STAT. ANN. §11006-A (a).

When a zoning ordinance is challenged, a Zoning Board is only authorized to determine whether the ordinance is defective and to recommend curative amendments. MPC, 53 PA. CONS. STAT. ANN. § 10916.1(5). Conversely, in federal civil rights suits, a plaintiff may seek compensatory **damages**.⁶ Thus, due to its limited jurisdiction, a Zoning Board proceeding is not an adequate forum in which federal civil rights claims may be raised and the Court of Common Pleas of Montgomery County could review only those claims that were decided by the Board below. Accordingly, as a matter of law, principles of *res judicata* are not applicable here as to the § 1983 claims.

C. Procedural Due Process Claim (Count IV)

1. Plaintiffs Have Failed to State a Procedural Due Process Claim Against The Zoning Board

Plaintiffs assert that because the Supervisors appoint the members of the Zoning Board, the Supervisors can essentially “demand” that the Zoning Board find in favor of the Supervisor’s

⁶ Another decision from this district found that zoning hearing boards have jurisdiction to adjudicate § 1983 and other federal constitutional claims. *See Brame v. Buckingham Township*, No. C.I.V.A.96-5821, 1997 WL 288673, at *5 (E.D. Pa. May 23, 1996).

position at any hearing.⁷ This alleged influence of the Supervisors on members of the Zoning Board deprived plaintiffs of a fair and impartial adjudication of the Realen challenge which the Supervisors opposed. (Pls.' Mem. of Law in Opp. to Defs.' Mot. to Dismiss at 26-27.) Plaintiffs also contend that they lacked an adequate post-deprivation remedy because of their inability to obtain de novo appellate review of the Zoning Board's decision. (Id.)

Specifically, the Complaint alleges that on behalf of the Supervisors, the Township Solicitor participated in and actively opposed the Realen Challenge before the Zoning Board. The Chairman of the Supervisors addressed the Zoning Board and stated that the Supervisors desired that the Hankin property remain undeveloped and requested that the Zoning Board reject the Realen Challenge. (Compl. ¶ 85.) The Zoning Board denied the Realen Challenge. (Compl. ¶ 86.) The Court of Common Pleas of Montgomery County heard this matter only in its appellate capacity so "its hands were tied" and the court had to affirm the Zoning Board decision.⁸

A state provides adequate due process when it provides " 'reasonable remedies to rectify a legal error by a local administrative body.' " Bello v. Walker, 840 F.2d 1124, 1128 (3d Cir. 1988) (quoting Cohen v. City of Philadelphia, 736 F.2d 81, 86 (3d Cir.) rev'd on other grounds). In a factually similar case, the third circuit has decided that the Pennsylvania **procedure**⁹ for

⁷ See Oral Argument Transcript.

⁸ See Oral Argument Transcript.

⁹ The third circuit described the Pennsylvania system for processing challenges to zoning ordinances as follows: "Whenever an appeal or challenge to a zoning ordinance is brought to the Zoning Hearing Board, it is required by statute to conduct a hearing on the claim. Section 10908 of the Commonwealth's Municipal Corporations Code mandates that the Board provide the following procedures: (1) Notice must be given to the public, the Zoning Officer, and the person challenging the ordinance or action. (2) The Board or hearing officer must conduct the hearings and, unless the parties waive this right, the Board itself must make findings and

challenging zoning ordinances substantially conforms with the general due process guidelines enunciated by the Supreme Court. See Rogin v. Bensalem Township, 616 F.2d 680, 695 (3d Cir. 1980). The plaintiff in Rogin, as in this case, did not allege that the Township's zoning and appellate procedures are constitutionally deficient or that the defendants failed to comply with those procedures. Rogin, 616 F.2d at 692. As in Rogin, plaintiffs acknowledge that they submitted to the process for challenging zoning ordinances and that they received a hearing by the zoning board, a decision on the merits by the board, and judicial review of that decision.

Indeed, the Zoning Hearing Board held hearings on 14 evenings and issued a 51 page opinion including extensive findings of fact and conclusions of law. The Montgomery Court of Common Pleas, a two-judge panel, opined that the Zoning Hearing Board's findings were supported by substantial evidence and that the Board did not abuse its discretion or commit an error of law. (Defs.' Mot. to Dismiss, Ex. C, April 12, 2001 Opinion at 2-3).

Plaintiffs offer only conclusory statements that they were denied due process, alleging that the influence of the Supervisors, through its appointment power over the Zoning Board, resulted in a biased hearing. Plaintiffs seek to infer bias from the fact of the publicly expressed

render the decision on the merits. (3) The Board has the power to administer oaths, and to compel the appearance of witnesses and the production of documents requested by the parties. (4) Each party has the right to be represented by counsel. 5) Each party has the right to present evidence and argument, and to cross-examine adverse witnesses. (6) The Board is required to maintain a record of the proceedings. (7) Ex parte communication between the Board or the hearing officer and any party is prohibited. (8) The Board is required to publish its findings and conclusions within forty-five days of the last hearing. If the landowner is dissatisfied with the Board's decision, it then has the right to appeal to the Court of Common Pleas. The appeal may take the form of direct judicial review of the Board's decision, or the court may take new evidence and enter its own findings of fact after trial de novo. The Court is authorized "to declare any ordinance or map invalid and to set aside or modify" any action, decision, or order of the Township, Zoning Officer, or Zoning Hearing Board. See Rogin, 616 F.2d at 695.

opposition of the Supervisors to the Realen Challenge and the published decision of the Zoning Board, without more.

Plaintiffs have not attacked the four corners of the Zoning Board's opinion as being irrational nor have they tried to dispute the reasons set forth in the opinion. They have not alleged any political motivation or impermissible bias on the part of individual Supervisors as the reason they opposed the Realen Challenge or on the part of individual members of the Zoning Board as the reason they decided as they did. Further, all of the statements of the Supervisors which plaintiffs allege improperly influenced the Zoning Board, were made at public meetings or during transcribed public hearings on the Realen Challenge.

Plaintiffs do not allege that the Court of Common Pleas two-judge panel was other than an independent decision. The two-judge panel concluded its opinion affirming the Zoning Board, by stating that "we reviewed the entire record in this matter and conclude that the Board's comprehensive decision is supported by substantial evidence, and that there was no capricious disregard of competent evidence." (Defs.' Mot. to Dismiss, Ex. C, April 12, 2001 Opinion at 2-3.)

Finally, plaintiffs do not contend that the Pennsylvania statute by which Supervisors are directed to appoint Zoning Board members is unconstitutional.¹⁰ Therefore, the court finds, as the third circuit did, that Pennsylvania affords a full judicial mechanism with which to challenge the administrative decision to deny a challenge to a zoning classification and plaintiffs have no cognizable due process claim.

D. Abstention

¹⁰ See Oral Argument Transcript

Defendants have moved this court to abstain on all claims that it does not otherwise dismiss. (Mem. of Law in Supp. of Defs.' Mot. to Dismiss at 21.) There are two ongoing state proceedings as discussed supra. Plaintiff Hankin's petition to appoint a board of view alleges that the Township "has substantially deprived Hankin of the use and enjoyment of its property" and requests just compensation from the Township for a de facto taking of the Hankin Property. (Defs.' Mot. to Dismiss, Ex. E, Petition for the Appointment of a Board of View at ¶¶ 51, 53.) Plaintiff Realen's appeal of the order of the Montgomery Court of Common Pleas affirming the Zoning Board, argues, in relevant part, that (1) the AG zoning of the Hankin Property unreasonably restricts the use that can be made of the property; (2) the AG zoning of the Hankin Property is arbitrary and discriminatory spot zoning; and (3) the lower court erred in determining that the Township's intent in zoning the property AG is irrelevant to the determination of the validity of the zoning. (Defs.' Mot. to Dismiss, Ex. D, Brief of Appellant Realen at I-II.)

Defendants contend that the equal protection and substantive due process claims are raised and are being litigated in Realen's appeal to the Pennsylvania Commonwealth Court, (Mem. of Law in Supp. of Defs.' Mot. to Dismiss at 21). It is apparent from reviewing Realen's brief that these claims are raised. (Defs.' Mot. to Dismiss, Ex. D, Brief of Appellant Realen at 29-41.) Further, the takings claims are squarely raised in the petition for the appointment of view as discussed supra. For these reasons, this court has elected to stay the federal proceedings and await the completion of the state court proceedings.

The Supreme Court has held that federal courts may decline to exercise their jurisdiction, in " 'exceptional circumstances;' " specifically, where abstention is warranted by considerations of "proper constitutional adjudication," "regard for federal-state relations," or "wise judicial

administration." See Quackebush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996); Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976). The mandate of wise and not wasteful judicial administration, which includes avoidance of piecemeal litigation, substantially outweigh the court's duty to exercise immediate jurisdiction. The court abstains from deciding Counts I-III and Counts V-VI and places these remaining claims of the amended complaint in civil suspense pending resolution by the Pennsylvania courts of the matters pressed to them.

The court recognizes that generally, as between state and federal courts, the rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction" Colorado River, 424 U.S. at 817 (quoting McClellan v. Carland, 217 U.S. 268, 282 (1910)). However, these federal proceedings are not only duplicative of pending state proceedings, but rulings in the federal case have the potential to interfere with the ongoing state proceedings, which were commenced first. See Id. at 818-819. In order to resolve the remaining constitutional claims, this court would have to make factual determinations whether plaintiffs could prove or have proven arbitrary and capricious actions by the Township, Supervisors, and the Zoning Board. These factual issues are also central to the proceedings in state court. While state court factual determinations may be dispositive of certain federal issues, adjudication of the same claims by this court would not be binding on the state court but could, nevertheless, lead to confusion over the effect of federal factual determinations on central issues not yet resolved by the state courts.

Therefore, this court has chosen not to dismiss the remaining federal claims, but rather to stay adjudication of them by placing them in civil suspense with instructions to plaintiffs to file a

further amended complaint at the conclusion of the state proceedings should they still wish to pursue this federal court action. Abstention is a threshold matter, see Ford Motor Co. v. Ins. Comm’r of Pennsylvania, 874 F.2d 926, 931 (3d Cir. 1989); accordingly, the court does not decide whether the present amended complaint complies with the pleading requirements for stating an equal protection, substantive due process, and takings claim.¹¹

¹¹ During oral argument, plaintiffs’s counsel attempted to argue that Woodwin Estates, Ltd. v. W. J. Gretkowski, 205 F.3d 118, 123-24 (3d Cir. 2000) fundamentally changed the analysis of whether a governmental action violated substantive due process. Counsel contended that to take one man’s property and to have the motive to make that green space for the benefit of the entire population is an improper zoning purpose and thus, is a substantive due process violation. See Oral Argument Transcript.

This court notes that “irrationality” and “arbitrariness” remain the proper standards to examine a substantive due process claim. **The proper review for judicial scrutiny of zoning ordinances and their compliance with federal substantive due process is limited in that “federal judicial interference with a state zoning board’s quasi-legislative decisions, like invalidation of legislation for ‘irrationality’ or ‘arbitrariness,’ is proper only if the governmental body could have had no legitimate reason for its decision.”** Pace Resources Inc., v. Shrewsbury Township, 808 F.2d 1023, 34-35 (3d Cir. 1987) (quoting Shelton v. City of College Station, 780 F.2d 475, 482-83 (5th Cir. 1986)). Woodwin Estates has not changed this analysis.

Woodwin Estates held that evidence that the government had an improper motive for its actions may support a finding that the government arbitrarily or irrationally abused its power. Id., 205 F.3d at 124 (quoting Parkway Garage v. Philadelphia, 5 F.3d 695, 692 (3d Cir. 1993) (a violation of substantive due process is shown where the government’s actions were “in fact motivated by bias, bad faith, or improper motive.”)).

Woodwin Estates considered whether the district court properly granted defendant’s motion for judgment as a matter of law and decided that a jury could find that a township’s decision to deny approval for a subdivision plan for low-income housing was premised on an improper motive, looking post trial at the evidence which showed that:

- (1) the defendants had no legitimate basis under the ordinance for demanding information about the socioeconomic background and income-levels of prospective tenants as a condition of subdivision approval;
- (2) the defendants denied approval for the plan by adopting significant portions of a letter drafted by the private attorney for the citizens’ group which vigorously opposed the development for improper reasons; and
- (3) the defendants intentionally blocked or delayed the issuance of the permit for subdivision

IV. Conclusion

For the above reasons, defendants' motion to dismiss is granted in part and denied in part. The claims that are not dismissed, are placed in civil suspense until the state court proceedings are concluded and plaintiffs file a further amended complaint indicating to the court that they wish to pursue the remaining federal claims.

An appropriate order follows.

approval because they were aware that by doing so the developer would be unable to meet the building deadline for financing the project. All of this in combination could provide a jury with a basis from which it could reasonably find that the decision of the defendants to deny approval was made in bad faith or was based upon an improper motive. *Id.* 205 F.3d at 125.

Woodwin Estates stands for the proposition that it is possible to establish that a governmental action is "irrational" where it is clear that the defendants acted without authority or justification but the opinion does not transform the standard for evaluating substantive due process claims. Rather, Woodwin Estates is consistent with prior third circuit precedent. See Pace Resources, 808 F.2d at 1026-27; Bello v. Walker, 840 F.2d 1124, 1128 (3d Cir. 1988).

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

HANKIN FAMILY PARTNERSHIP, : CIVIL ACTION
REALEN VALLEY FORGE GREENES : NO. 01-1622
ASSOCIATES, :
THOMAS J. TIMONEY, ESQUIRE, As :
Receiver for the HANKIN FAMILY :
PARTNERSHIP, :
Plaintiffs, :
 :
v. :
 :
UPPER MERION TOWNSHIP, :
THE BOARD OF SUPERVISORS OF :
UPPER MERION TOWNSHIP, :
THE UPPER MERION TOWNSHIP :
ZONING HEARING BOARD, :
Defendants :

ORDER

AND NOW, this ____ day of March 2002, upon consideration of defendants' motion to dismiss, Docket #10, and the responses thereto, it hereby is ORDERED as follows:

- (1) The motion to dismiss Counts I, II, and III as time-barred is DENIED;
- (2) The motion to dismiss Counts I, II, III, IV, V, and VI pursuant to the principles of res judicata or collateral estoppel is DENIED;
- (3) The motion to dismiss Count IV for failure to state a legally sufficient cause of action is GRANTED;
- (4) The motion of defendants for this court to abstain on any claim not otherwise dismissed, is GRANTED in regard to Counts I, II, III, V, and VI.

It is further ORDERED that the remaining claims are placed in civil suspense until the completion of state proceedings. At that time, plaintiff may file a further amended complaint to pursue the federal claims that they still wish to press.

BY THE COURT:

JAMES T. GILES C.J.

copies by FAX on
to