

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

BENNETT LEVIN,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 99-CV-5313
	:	
UPPER MAKEFIELD TOWNSHIP, et al.,	:	
Defendants.	:	

MEMORANDUM AND ORDER

Davis, J.

February 25, 2003

MEMORANDUM

I. FACTUAL BACKGROUND

In June 1997, Bennett Levin (“Plaintiff”) contemplated purchasing approximately seven acres of unimproved land (“Property”) in Upper Makefield Township (“Township”) to construct a single-family dwelling. The Property is flanked by the Delaware River (“River”) on one side, and the Delaware Division of the Pennsylvania Canal (“Canal”) on the other, and zoned within the Conservation Management Zoning District (“CM”) and the Floodplain Zoning District (“Floodplain”). After a preliminary investigation, Plaintiff discovered that a zoning variance was required from the Township before building on the Property, and the prior property owner, Marvin C. Soffen, applied for and was denied a zoning variance on the same property in 1992 (P. Resp., ex. 47 at p. 4). Shortly thereafter, Plaintiff purchased the Property from Mr. Soffen for \$60,000 (P. Resp., ex. 55).

On November 24, 1997, Plaintiff submitted a zoning variance application

(“Application”),¹ which included a request for a hearing before the Zoning Hearing Board (“ZHB”).² On December 17, 1997, the Township held a public meeting, and the Supervisors made a motion authorizing the Solicitor to oppose Plaintiff’s Application (P. Resp., ex. 53 at p. 4). Stephen Harris, through his law firm Harris & Harris, personified the Solicitor.

The December 17, 1997 meeting was the first time that many of the Supervisors actually saw Plaintiff’s Application, and none claimed to have previously read it (P. Resp., ex. 19 at p. 96-97; ex. 22 at p. 12; ex. 24 at p. 8; ex. 27 at p. 24).³ The motion by the Supervisors to authorize the Solicitor to represent the Township’s interest in opposition to the Plaintiff’s Application was carried (P. Resp., ex. 53 at p. 4).⁴ The Supervisors’ votes reflected their individual concerns as to: (i) the safety of the inhabitants in Plaintiff’s proposed home, and the

¹ The Joint Municipal Zoning Ordinance (“JMZO”), Article IX, Exhibit B, specifically details the procedures for an applicant requesting a special exception or variance from the requirements of the “Floodplain District.” Plaintiff’s Application irrefragably complied with these procedures, while Mr. Soffen’s did not (P. Resp., ex. 47 at p. 3).

² The Township does not grant or deny variance applications-- this is the ZHB’s function. Rather, the Township, through the Board of Supervisors (“Supervisors”), reviews variance applications and decides whether to give the Township Solicitor (“Solicitor”) authorization to represent the Township’s position before the ZHB. The Township may be for or against a variance application, or take no stance at all, in which case the Solicitor is not endorsed to go before the ZHB on the Township’s behalf. 53 Pa. Cons. Stat. Ann. § 10909.1.

³ Plaintiff was not given notice of the December 17, 1997 meeting, and neither Plaintiff nor his representative attended (P. Resp., ex. 16 at p. 3).

⁴ The composition of the Board of Supervisors changed on January 5, 1998, and two new members, Edward Ford and John Titterton, replaced two exiting members, Lawrence Saltzman and John Welsh. The new slate of Supervisors, Rosemarie Sauter, Conrad Baldwin, William Gunser, Edward Ford, and John Titterton, held another vote on the Plaintiff’s Application on January 21, 1998, yielding the same result as the December 17, 1997 vote (P. Resp., ex. 54 at p. 4-5).

safety of all subsequent purchasers (D. Motion, ex. 18 at p. 117-18); (ii) the safety of emergency personnel that might be required to rescue the inhabitants under parlous flood conditions (D. Motion, ex. 14 at p. 28-29, 58); and (iii) the environmental effect of potential sewage up-rise from the proposed on-site sewage system (D. Motion, ex. 18 at p. 157; ex. 19 at p. 107; ex. 14 at p. 58).

Thereafter, the ZHB held eight separate evidentiary hearings before rendering a decision on the Application.⁵ At a public hearing on July 30, 1998, the ZHB held that Plaintiff's Application did not meet the requirements of the Municipalities Planning Code ("MPC"), and rejected the Application by a unanimous 3-0 vote (P. Resp., ex. 13 at p. 2-7).

On September 9, 1998, Plaintiff filed a land-use appeal with the Court of Common Pleas, Bucks County, Pennsylvania, and on October 7, 1998, the Supervisors voted in favor of authorizing Mr. Harris to represent the Township in the appeal before the Court of Common Pleas (D. Motion, ex. 42 at p. 10). On February 23, 1999, Common Pleas Judge John J. Rufe issued a Memorandum Opinion and Order reversing the ZHB and granting Plaintiff's Application for a zoning variance. Bennett Levin v. Zoning Hearing Board of Upper Makefield Township, Memorandum Opinion and Order (C.C.P. Bucks Cty. February 23, 1999)(Rufe, J.). On May 7, 1999, Judge Rufe issued a second Opinion further establishing the reasoning of his February 23, 1999 initial Memorandum and Order. Bennett Levin v. Zoning Hearing Board of Upper Makefield Township, Opinion (C.C.P Bucks Cty. May 9, 1999)(Rufe, J.).

On March 3, 1999, after consideration of Judge Rufe's February 23, 1999 Memorandum

⁵ The evidentiary hearings were held on January 29, 1998, March 3, 1998, March 19, 1998, March 31, 1998, April 9, 1998, May 12, 1998, June 2, 1998, and June 23, 1998.

Opinion and Order, the Supervisors voted to empower Mr. Harris to file an appeal, on the Township's behalf, to the Commonwealth Court of Pennsylvania (D. Motion, ex. 46 at p. 7). In an unpublished opinion by Judge Flaherty, the Commonwealth Court affirmed Judge Rufe's Opinion reversing the ZHB's decision to reject Plaintiff's Application. Bennett Levin v. Zoning Hearing Board of Upper Makefield Township, Memorandum Opinion (Pa. Commw. May 11, 2000)(Flaherty, J.).

On May 17, 2000, six days after the Commonwealth Court affirmed Judge Rufe's decision, the Supervisors pondered instituting a change to the Canal Setback Ordinance ("Ordinance"), thereby requiring a 100-foot building setback along the Canal (P. Resp., ex. 50 at p. 7). The Ordinance would have severely limited Plaintiff's ability to develop the Property, and would have required another zoning variance. At the November 1, 2000 Upper Makefield Township Board of Supervisors Meeting, 140 members of the general public, most being directly affected by the potential implications of the Ordinance, came to express their outrage (P. Resp., ex. 51 at p. 1-3).⁶ Under harsh public scrutiny, the Supervisors abandoned the Ordinance (P. Resp., ex. 51 at p. 2).⁷

On May 24, 2000, Plaintiff, through his engineer J.G. Park & Associates, Inc., submitted

⁶ The October 18, 2000 Upper Makefield Township Board of Supervisors Meeting, which immediately preceded the November 1, 2000 meeting, was only attended by 21 members of the public (P. Resp., ex. 52 at p. 1).

⁷After the November 1, 2000 meeting, Supervisor Edward Ford, privately told Richard Pushman, a resident whose home borders the Canal, that the Ordinance was not intended to impact those residents already living on the Canal, but rather the intention was to protect the Canal region from new development. Mr. Pushman knew that Plaintiff's Property was the only potential new development bordering the Canal (P. Resp., ex. 48 at p. 2).

a zoning permit application, a foundation construction permit application, a construction cost estimate, plans for the proposed single-family residence, and plans for the foundation of the proposed single-family residence (P. Resp., ex. 66). Plaintiff paid \$2,300 for the foundation building permit (P. Resp., ex. 68).

On June 12, 2000, Mr. Harris filed a Petition for Allowance of Appeal, on behalf of the Township, with the Supreme Court of Pennsylvania. The Township, through Mr. Harris, also notified Plaintiff that it would not issue the foundation or zoning permits until the Supreme Court ruled on the pending appeal. Plaintiff filed for a grading permit on August 23, 2000 (P. Resp., ex. 67), and again was told by the Township that no permits would be issued until the appeal pending before the Pennsylvania Supreme Court was resolved (P. Resp., ex. 49 at p. 2). The Township cashed Plaintiff's \$2,300 check before the Supreme Court decided the appeal and before the Township issued any of the permits (P. Resp., ex. 68). On November 9, 2000, the Supreme Court denied allocatur.

The Plaintiff was not issued a foundation permit until November 2001, and a final building permit until February 5, 2002 -- almost a year-and-a-half after the Supreme Court denied allocatur (P. Resp., ex. 16 at p. 3). In late-January 2002, the Township required Plaintiff to produce proof of workers' compensation insurance, to complete a "Notice of Intent to Construct and Comply" ("Form"), and to provide the results of a well water test, before issuing the final building permit. Plaintiff contends he need not have workers' compensation insurance, there is no mention of the Form in the Township permit application, and a water well test was already submitted with Plaintiff's original zoning variance application dated November 24, 1997 (P. Resp., ex. 70 at p. 2). Nevertheless, Plaintiff satisfied all of the Township's requests, and was

issued a final building permit on February 5, 2002, notwithstanding that Plaintiff's architectural and structural drawings were approved on November 7, 2001 (P. Resp., ex. 70 at p. 2).

I. PROCEDURAL HISTORY

Plaintiff commenced this case by filing a Complaint in the United States District Court for the Eastern District of Pennsylvania (Document No. 1, filed October 26, 1999). Thereafter, Plaintiff filed an Amended Complaint (Document No. 20, filed September 18, 2000), and Defendants' made a Motion to Dismiss the Amended Complaint pursuant to Fed. R. Civ. P 12(b)(6) (Document No. 21, filed October 4, 2000). Defendants' Motion to Dismiss Plaintiff's Amended Complaint was granted in part and denied in part (Document No. 29, filed May 10, 2001), and the following claims remain in this Court:⁸ (i) compensatory damages, punitive damages, attorneys' fees, and equitable relief for violation of Plaintiff's substantive due process rights pursuant to the Civil Rights Act, 42 U.S.C. § 1983, against the Township, all members of the Board of Supervisors in their individual and official capacities, all members of the ZHB in their individual and official capacity, and the Solicitors, in their individual and official capacities; (ii) compensatory and punitive damages for civil conspiracy against the Township, all members of the Board of Supervisors in their individual and official capacities, the members of the ZHB in their individual and official capacities, and the Solicitors, in their individual and official capacity; and (iii) compensatory and punitive damages for abuse of process against the Township, all members of the Board of Supervisors in their individual and official capacities, and the

⁸By Order, this case was reassigned to the calendar of the Honorable Legrome D. Davis (Document No. 56, filed May 23, 2002).

Solicitors, in their individual and official capacities.

Presently before this court are: (i) Defendants' Motion for Summary Judgment on the aforementioned claims (Document No. 51, filed March 29, 2002); (ii) Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment (Document No. 53, filed April 12, 2002); (iii) Defendants' Reply in Support of Defendants' Motion for Summary Judgment (Document No. 54, filed April 26, 2002); (iv) Plaintiff's Supplemental Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (Document No. 59, filed February 10, 2003); and (v) Defendants' Supplemental Memorandum of Law in Support of their Motion for Summary Judgment (Document No. 60, filed February 10, 2003).⁹

III. DISCUSSION

This Court exercises subject matter jurisdiction over the substantive due process claim pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343. Examining Bd. of Eng'rs., Architects & Surveyors v. Otero, 426 U.S. 572, 583-84, 96 S. Ct 2264, 2272, 49 L. Ed. 2d 65 (1976). Summary judgment may be granted only "if 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

⁹ This Court is in receipt of Plaintiff's May 14, 2002 letter requesting permission to submit the Supplemental Declaration of Edward F. Murphy, Esquire, and Defendants' February 19, 2003 letter requesting permission to submit the Declaration of Stephen B Harris, Esquire. Rule 408 of the Federal Rules of Evidence states that settlements or attempts to settle are "not admissible to prove liability or invalidity of the claim or its amount." Additionally, "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible." Both requests are denied. Any references to the December 1, 1999 or April 13, 2001 settlement conferences will not be considered by this Court.

of law.” Fed. R. Civ. P. 56(c). Upon a motion for summary judgment, the non-moving party “may not rest upon the mere allegations or denials of the adverse party’s pleadings, but the adverse party’s response . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). An issue is genuine if the evidence is such that a reasonable jury could return a judgment in favor of the non-moving party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248, 106 S. Ct 2505, 2510, 91 L. Ed. 2d 202 (1986); Williams v. Borough of West Chester, Pa., 891 F.2d 458, 459 (3d Cir. 1989). Lastly, all facts must be viewed in the light most favorable to the non-moving party, and all reasonable inferences should be drawn from the evidence presented by the non-moving party. Anderson, 477 U.S. at 255; Gass v. Virgin Islands Telephone Corp., 311 F.3d 237, 240 (3d Cir. 2002).

A. Substantive Due Process

Defendants’ qualified immunity defense prompts this Court to make a two-part inquiry: (i) whether the Plaintiff has successfully alleged a deprivation of a constitutional right; and (ii) whether the deprived right was clearly established at the time of the suspect event. County of Sacramento v. Lewis, 523 U.S. 833, 842 n.5, 118 S. Ct. 1708, 1714 n.5, 140 L. Ed. 2d 1043 (1998); Eddy v. Virgin Islands Water and Power Auth., 256 F.3d 204, 208 (3d Cir. 2001). As a result, this Court must first resolve whether the Plaintiff has alleged a deprivation of a constitutional right. Only after affirmatively answering this initial inquiry is it necessary to consider whether the deprived right was clearly established at the time of the suspect event. See, e.g., Siegert v. Gilley, 500 U.S. 226, 232, 111 S. Ct. 1789, 1793, 114 L. Ed. 2d 277 (1991) (“A necessary concomitant to the determination of whether the constitutional right asserted by a

plaintiff is clearly established at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.”); Nicholas v. Pennsylvania State University, 227 F.3d 133, 139-40 (3d Cir. 2000)(“To prevail on a non-legislative substantive due process claim, a plaintiff must establish as a threshold matter that he has a protected property [or liberty] interest to which the Fourteenth Amendment’s due process protection applies.”)(citation omitted).

A substantive due process claim is actionable under 42 U.S.C. § 1983. Zinermon v. Burch, 494 U.S. 113, 125, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990). A successful substantive due process challenge to an executive act¹⁰ requires the Plaintiff to prove: (i) an interest protected by the Fourteenth Amendment’s Due Process Clause; and (ii) the government’s deprivation of that protected interest “shocks-the-conscience.” County of Sacramento v. Lewis, 523 U.S. 833, 846-47, 118 S. Ct. 1708, 1717, 140 L. Ed. 2d 1043 (1998); United Artists Theatre Circuit, Inc. v. The Township of Warrington, PA., 316 F.3d 392, 400 (3d Cir. 2003). Therefore, this Court will first analyze whether the Plaintiff has an interest protected by the Fourteenth Amendment’s Due Process Clause.

The Fourteenth Amendment mandates that “no State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. The Due Process Clause’s procedural protections are complemented by a substantive component--thereby affording more than fair process alone. Washington v. Glucksberg, 521 U.S. 702, 719, 117 S. Ct.

¹⁰ The determination of what constitutes arbitrary action, and hence the legal standard for an alleged substantive due process violation, differs depending on whether the alleged violation is by a legislative or executive action. See Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)(legislative action); Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952)(executive action).

2258, 2267, 138 L. Ed. 2d 772 (1997). The substantive sphere bars “certain government actions regardless of the fairness of the procedures used to implement them.” Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986); Hunterson v. Disabato, 308 F.3d 236, 248 (3d Cir. 2002). Most significantly, substantive due process protects fundamental liberty and property interests.

1. Fundamental Interests

i. Protected Liberty Interests¹¹

Traditionally, substantive due process protects only the most fundamental liberty interests, see, e.g., Griswold v. Connecticut, 381 U.S. 479 (right to use contraception and to marital privacy); Doe v. Delie, 257 F.3d 309, 317, n.5 (3d Cir. 2001)(same); Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973)(right to decide to terminate a pregnancy, absent undue state interference); Planned Parenthood of Central New Jersey v. Farmer, 220 F.3d 127, 142 (3d Cir. 2000)(same); Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)(right to marriage); Murillo v. Bambrick, 681 F.2d 898, 902 (3d Cir. 1982)(same); Moore v. East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1976)(right to live with extended family); Lutz v. City of York, Pa., 899 F.2d 255, 267 (3d Cir. 1990)(same); Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)(right of parents to decide care

¹¹ In Plaintiff’s Amended Complaint he asserted a substantive due process claim based upon the violation of a protected liberty interest. This theory was explicitly abandoned in Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment (P. Resp. at p. 81, n.33), but this Court will nevertheless give the alleged protected liberty interest a cursory review.

and control of their children); McComb v. Wambaugh, 934 F.2d 474, 483 (3d Cir. 1991)(same),¹² and the Supreme Court is reluctant to further expand the scope of protected liberties unless the right is perceived to be “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Snyder v. Com. of Mass., 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); Lutz, 899 F.2d at 268. See also Collins v. City of Harker Heights, Tex., 503 U.S. 115, 125, 112 S. Ct. 1061, 1068, 117 L. Ed. 2d 261 (1992). In Glucksberg, the Supreme Court of the United States cautioned that, “[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field.’” 521 U.S. 702, 720 (quoting Collins, 503 U.S. at 125); Phillips v. Borough of Keyport, 107 F.3d 164, 186 (3d Cir. 1997).

With these judicial policies in mind, this Court will generally tread lightly in the realm of unexplored liberty interests. Liberty interests are typically limited to fundamental rights of the persons, such as family rights, procreation, and the right to bodily integrity. Pecuniary and monetary entitlements, in general, will not be classified as liberty interests worthy of substantive due process protection. The Plaintiff stated that he believes the Defendants violated a protected liberty interest by interfering with his, “right to undisturbed, quiet enjoyment of private property, the right to engage in the valuable use of one’s property and the right not [to] have the value of one’s property diminished by arbitrary government action.” (D. Motion, ex. 53 at p. 11). While

¹² This list is not exhaustive, and only reflects a sampling of rights protected under the umbrella of substantive due process.

every individual should be afforded the rights and protections that Plaintiff demands, it is altogether different to suggest that these rights should be structured as *liberty* interests under substantive due process law. Some of Plaintiff's alleged rights fall under the rubric of protected *property* interests, and others are more appropriately sheltered by the Takings Clause. US CONST. amend. V. The Plaintiff has not asserted that a government actor encroached upon an established liberty interest in violation of Plaintiff's substantive due process rights, and since our "Nation's history, legal tradition, and practices," Collins, 503 U.S. at 125, do not suggest that this Court should craft a new, groundbreaking, and potentially far-reaching protected liberty interest, we see no reason to give further consideration to this particular claim.

ii. Protected Property Interests

Procedural due process protects a broad scope of property rights, and interests often harbored by procedural due process receive disparate substantive due process treatment. See Mauriello v. U. of Med. & Dentistry of N.J., 781 F.2d 46, 50 (3d Cir. 1986); DeBlasio v. Zoning Bd. of Adjustment for the Township of W. Amwell, 53 F.3d 592, 599 (3d Cir. 1995), *cert. denied*, 516 U.S. 937 (1995), *overruled on other grounds by United Artists Theatre Circuit, Inc. v. Township of Warrington, PA.*, 316 F.3d 392 (3d Cir. 2003). Analogous to a substantive due process analysis based upon a fundamental liberty interest, a fundamental property interest claim must originate from an "interest encompassed by the Fourteenth Amendment." Acierno v. Cloutier, 40 F.3d 597, 616 (3d Cir. 1994)(citation omitted). However, the Supreme Court noted that:

property interests . . . are not *created* by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source.

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548

(1972)(emphasis added). Generally, state and local laws function as the independent sources, thereby creating property interests potentially deserving of substantive due process protection.

Applying this rationale, the Third Circuit in DeBlasio explicitly held that, “ownership is a property interest worthy of substantive due process protection,” and that “one would be hard-pressed to find a property interest more worthy of . . . protection than ownership.” 53 F.3d at 600-01. Specifically, the Third Circuit stated that land ownership will be protected by substantive due process where a governmental decision “impinges upon a landowner’s use and enjoyment of property.” Id. As a Third Circuit land-use regulation case, DeBlasio is directly on point for this specific matter on this particular issue.¹³

It is undisputed that: (i) Plaintiff is the owner of the Property;¹⁴ and (ii) the ZHB, by denying Plaintiff’s Application, made a decision impinging upon Plaintiff’s use and enjoyment of the Property. Therefore, as between the Plaintiff and the ZHB, Plaintiff has clearly established a property interest entitled to substantive due process protection. Defendants allege that the ZHB made the only “decision” to limit Plaintiff’s use and enjoyment of his Property, and that the Supervisors and Solicitors (D. Motion, at p. 35) should be dismissed from the substantive due process claim. We find Defendants’ position to be narrow and unpersuasive.

¹³ DeBlasio was abrogated on other grounds, and is only controlling as a land-use regulation case that established a fundamental property interest protected by substantive due process where a governmental decision restricts or regulates a landowner’s use and enjoyment of his/her property.

¹⁴ Neiderhiser v. Borough of Berwick, 840 F.2d 213 (3d Cir. 1988), suggests that when a lessor is denied a variance from a local ordinance, the *lessor* would also be afforded the same substantive due process protections as the actual *owner* of the leased property.

The decisions made by the Supervisors, Solicitors, and the ZHB were harmonious and complementary. This is exemplified by the Township's appeals process. The ZHB issued an opinion denying Plaintiff's Application, and Plaintiff appealed the decision to the Court of Common Pleas. From this point on, the ZHB had no influence or affect on the Plaintiff's Application. The ZHB did not represent itself in the appeal to the Court of Common Pleas, and *it* did not vote to authorize a third-party to represent the ZHB's position. As a result of this procedure, logic suggests that some other party must decide whether to appeal or oppose an appeal, lest the ZHB's decisions would have no force, as every appeal from the ZHB would be unopposed in the Court of Common Pleas. The Township's procedure requires the Supervisors to make all appeals decisions by authorizing the Supervisors to dictate whether the Solicitor should represent the ZHB's ruling in front of the Court of Common Pleas. There is no argument that the Township is irrefutably entitled to appeal any case that it sees fit for further consideration, but if the Township, through the Supervisors and the Solicitor, is inescapably intertwined in the ZHB's appeals process, then in reality all three entities, the ZHB, the Supervisors, and the Solicitor, are speaking uniformly with one voice. Accordingly, we hold that Plaintiff has established a property interest deserving of substantive due process protection.

2. "Shocks the Conscience"

The second prong of a substantive due process challenge to an executive act requires the Plaintiff to prove that the deprivation of a constitutionally protected property interest "shocks-the-conscience." Lewis, 523 U.S. at 846-47; United Artists, 316 F.3d at 400. The Supreme Court recognized that "with abusive executive action . . . only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" Lewis, 523 U.S. at 846, (quoting

Collins, 503 U.S. at 129), and that the cognizable level of executive abuse of power is measured against that which shocks-the-conscience.

Before the Supreme Court's decision in Lewis and for a short time thereafter, the Third Circuit applied the improper motive test to substantive due process claims in land-use regulation cases.¹⁵ For example, in Bello v. Walker, 840 F.2d 1124, 1129 (3d Cir. 1987), *overruled by United Artists*, 316 F.3d 392, the Third Circuit held that a meritorious substantive due process claim against municipal officials in a land-use regulation case required the Plaintiff to prove that the officials' decision to deprive the Plaintiff of a property interest afforded substantive due process protection under the Fourteenth Amendment was arbitrary, irrational, or tainted by improper motive. *See also Pace Resources Inc. v. Shrewsbury Tp.*, 808 F.2d 1023, 1035 (3d Cir. 1987). Similarly, in Woodwind Estates, a developer sued the township for denying the developer's subdivision plans for low-income housing. The court held that the Plaintiff developer could provide the jury with evidence that the township's decision to withhold approval of the plans was arbitrary, irrational, or based upon improper motive, and that summary judgment on the substantive due process claim in favor of the township was inappropriate. 205 F.3d 118 (3d Cir. 2000), *overruled by United Artists*, 316 F.3d 392.

Recently, in United Artists the Third Circuit clarified its standard and definitively applied the shocks-the-conscience test to all executive substantive due process claims, while

¹⁵ Lewis addressed the substantive due process culpability of a law enforcement officer for "causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender," 523 U.S. at 836, and therefore could conceivably be distinguishable from other species of substantive due process claims. *See, e.g., Woodwind Estates Ltd. v. Gretowski*, 205 F.3d 118 (3d Cir. 2000).

simultaneously overruling Bello and its progeny. The Third Circuit stated that its previous land-use regulations rulings are irreconcilable with the Supreme Court's substantive due process analysis under Lewis, and that the "less demanding improper motive test for governmental behavior," is no longer applicable. United Artists, 316 F.3d at 400. The Third Circuit reinforced the stark contrast between the improper motive and shocks-the-conscience standards by noting that, "the term 'improper' sweeps much more broadly, and neither Bello nor the cases that it spawned ever suggest that conduct could be 'improper' only if it shocked the conscience." Id.

The implications and levity of this elevated standard are clear, but the Supreme Court has not provided a precise formula for determining what actions specifically constitute conscience shocking behavior. See Lewis, 523 U.S. at 847 ("the measure of what is conscience shocking is no calibrated yard stick."). We are only guided by rough contours. See, e.g., Breithaupt v. Abram, 352 U.S. 432, 435, 77 S. Ct. 408, 410, 1 L. Ed. 2d 448 (1957) (behavior that shocks the conscience is so "brutal and offensive that it [does] not comport with traditional ideas of fair play and decency."); United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 2101, 95 L. Ed. 2d 697 (1987)("conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.")(quotation and citation omitted); Lewis, 523 U.S. at 849 ("conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."). Additionally, the force and veracity of the shocks-the-conscience standard is versatile and adaptable, metamorphosing to the particular factual situation, see, e.g., Lewis, 523 U.S. at 850 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances

before any abuse of power is condemned as conscience shocking.”); Betts v. Brady, 316 U.S. 455, 462, 62 S. Ct. 1252, 1256, 86 L. Ed. 1595 (1942)(“That which may, in one setting constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other consideration, fall short of such denial.”), and as a result of the nature of the standard, its application is not an exacting science. For example, in Whitley v. Albers, the Supreme Court held that acts of “deliberate indifference” could not accurately measure whether an officer’s behavior in a prison riot amounted to shocking-the-conscience because in this setting it is inappropriate “to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance,” 475 U.S. 312, 320, 106 S. Ct. 1078, 1084, 89 L. Ed. 2d 251 (1986)(emphasis added), and that a lesser standard was more appropriate. On the contrary, the Supreme Court in Lewis, 523 U.S. at 850, noted that the actions in Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976), exhibited a deliberate indifference to the prisoner’s medical needs and would shock-the-conscience since the prison officials had the opportunity to exercise forethought over the inmate’s well-being.

The Supervisors decision to oppose Plaintiff’s Application, the ZHB’s decision to deny Plaintiff’s zoning variance Application, and the Supervisors’ and Solicitor’s subsequent decisions pursuant to the Plaintiff’s appeal to the Court of Common Pleas, were not arbitrary in such a manner as to be constitutionally characterized as shocking-the-conscience. On the contrary, the ZHB’s opinion is plainly based upon the applicable zoning variance statutes: the Conservation Management Zoning District, the overlay of Floodplain Zoning District § 905, and the five-pronged test under the Municipalities Planning Code § 10910.2, and although this Court

will not substantively address whether the ZHB properly applied each of these three governing sets of laws to the Plaintiff's Application, the ZHB's conclusions of law, right or wrong, do not shock-the-conscience. Additionally, the Supervisors specifically supported their opposition to the Plaintiff's Application and their decisions to appeal the case to both the Commonwealth Court and the Supreme Court, based upon the legitimate safety concerns for the Plaintiff and his family, the safety concerns for the rescue workers, and the potential polluting effect of the proposed on-site sewage system.

The Plaintiff's strongest arguments against Defendants are: (i) the Township delayed issuing a final building permit to the Plaintiff after the Pennsylvania Supreme Court denied allocatur; (ii) the dubious tactic of cashing Plaintiff's \$2,300 permit fee before issuing any of the requested permits; and (iii) Edward Ford's conversation with Mr. Pushman that implied that the proposed Setback Ordinance was only intended to restrict Plaintiff from building on his Property. There is evidence suggesting that the Township purposefully delayed issuing the Plaintiff his final building permit *after* the Supreme Court denied allocatur. The Township claimed that the Plaintiff needed to surpass a few minor procedural hurdles, such as proof of workers' compensation insurance, completion of the Form, and redoing the water well test, before issuing the final building permit. We are not overly concerned with the need to complete these requirements before issuing the permits, rather we find it very curious that the Township did not bring these additional requirements to the Plaintiff's attention until late-January 2002, 15 months after the Supreme Court denied allocatur. This chain of events strongly points to a bad motive and purposeful intention to delay issuing the Plaintiff a final building permit, but it does not foster a finding that Defendants' behavior shocked-the-conscience. Similarly, cashing Plaintiff's

\$2,300 check is senseless and spiteful, but it does not necessarily point to shocking-the-conscience. Furthermore, Mr. Ford's secret-society badinage with Mr. Pushman is most worrisome and unprofessional and circumstantially points to improper motive, but nevertheless, improper motive is no longer the bar of culpability in land-use regulation substantive due process claims in this Circuit, and therefore Plaintiff's claim is without merit. We conclude that Plaintiff failed to establish that the totality of circumstances, compounding all of Defendants' questionable and unscrupulous behavior, amounted to shocking-the-conscience, and since we find that the Plaintiff was not deprived of any constitutional right, we will forego a superfluous analysis of the second prong of the Defendants' qualified immunity defense claim.

B. State Law Claims

Federal courts have discretion to exercise supplemental jurisdiction over state law claims if those claims arise from the same common nucleus of operative facts as the claim to which the federal court rightfully asserts original jurisdiction. 28 U.S.C. § 1367; United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138, 16 L. Ed. 2d 218 (1966); Pryzbowski v. U.S. Healthcare, Inc., 245 F.3d 266, 275 (3d Cir. 2000). Furthermore, a district court has discretion to “decline to exercise supplemental jurisdiction over a claim . . . if the district court has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3). However, in Borough of W. Mifflin v. Lancaster, the Third Circuit refined the nature of this discretion and held that, “[u]nder Gibbs jurisprudence, where the claim over which the district court has original jurisdiction is dismissed *before trial*, the district court *must* decline to decide the pendent state law claims unless considerations of judicial economy, convenience, and fairness to the parties

provide an affirmative justification for doing so.” 45 F.3d 780, 788 (3d Cir. 1995)(emphasis added). See also Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1284 (3d Cir. 1993).

Neither party has submitted any evidence suggesting that considerations of judicial economy, convenience, or fairness to the parties should prevent this Court from declining to hear the state law claims pursuant to 28 U.S.C. § 1367(c)(3) and Lancaster. However, none is needed. This case was commenced in the Eastern District of Pennsylvania over 40 months ago and this Court feels that it would be fundamentally unfair to the parties if we declined to hear the Plaintiff’s state law claims. Accordingly, we exercise subject matter jurisdiction over Plaintiff’s state law claims pursuant to 28 U.S.C. § 1367(a).

1. Abuse of Process

“The action for abuse of process . . . lies where there has been a use of process for some collateral purpose and it is clear that the process must have been intentionally used for that wrongful purpose.” Psinakis v. Psinakis, 221 F.2d 418, 423 (3d Cir. 1955). Abuse of process is commonly characterized as a “perversion” of the legal process. Id. To establish an abuse of process claim plaintiff must show that the defendant: (i) used the legal process against the plaintiff; (ii) primarily for a purpose which the process was not designed; and (iii) plaintiff suffered harm. Shiner v. Moriarty, 706 A.2d 1228, 1236 (Pa. Super. 1998). Plaintiff must show some “definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process . . . and that there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.” Id. (quoting Di Sante v. Russ Financial Co., 380 A.2d 439, 441 (Pa. Super. 1977)). In Al

Hamilton Contracting Co. v. Cowder, 644 A.2d 188, 192 (Pa. Super 1994), the court noted that “it is not enough that the defendants had bad or malicious intentions or that the defendant acted from spite or with an ulterior motive,” and “there must be an act or threat not authorized by the process, or the process must be used for an illegitimate aim such as extortion, blackmail, or to coerce or compel the plaintiff to take some collateral action.”

There can be no argument that the Defendants used the legal process against the Plaintiff and as a result, the Plaintiff suffered harm. However, the Defendants did not use the legal process for some illegitimate aim resulting in a perversion of the legal process. The Defendants felt that the Court of Common Pleas misconstrued the MPC as it applied to the Plaintiff’s Application and appealed the case to the Commonwealth Court. Similarly, when the Commonwealth Court affirmed the Court of Common Pleas, the Township chose to Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, thereby exhausting its legal recourse in the Pennsylvania state courts. Until the final decision by the Supreme Court of Pennsylvania to deny allocatur, the Defendants were in line with the legitimate objectives of the legal process,¹⁶ and there is no proof of an illegitimate aim such as “extortion, blackmail, or to coerce or compel the plaintiff to take some collateral action.” *Id.* Furthermore, this Court finds it significant that *Plaintiff* initiated the underlying legal process and that the Defendants only acted to appeal the trial court’s decision, reversing the ZHB’s holding, to the Commonwealth Court and Supreme Court of Pennsylvania. Of course, an appellant can be liable for abuse of process, but the Plaintiff will have a higher burden to overcome where the appellant is appealing a

¹⁶ There is evidence that the Defendants delayed issuing Plaintiff’s permits *after* the Supreme Court denied allocatur, however, at this point, this case no longer falls within the realm of abuse of process because the legal process has already run its course.

decision that was reversed by the trial court, because in this situation it is more likely that there could be a legitimate discrepancy in the interpretation or application of relevant law.

Accordingly, we find that the Plaintiff's abuse of process claim is without merit.

2. Civil Conspiracy

A claim for civil conspiracy has three essential elements: (i) two or more persons; (ii) combined or agreed; (iii) with the "intent to do an unlawful act or to do an otherwise lawful act by unlawful means." Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 211, 412 A.2d 466, 472 (1979); Scully v. US WATS, Inc., 238 F.3d 497, 516 (3d Cir. 2001). Furthermore, proof of malice is required in a successful civil conspiracy claim. Thompson Coal, 488 Pa. at 211; Tyler v. O'Neill, 994 F. Supp. 603, 612 (E.D. Pa. 1998). It is also clear that "since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather it is a means for establishing vicarious liability for the underlying tort." Beck v. Prupis, 529 U.S. 494, 503, 120 S. Ct. 1608, 1615, 146 L. Ed. 2d 561 (2000)(quoting Halberstam v. Welch, 705 F.2d 472, 479 (D.C. Cir. 1983)); Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 407 (3d Cir. 2000). See also Allegheny General Hosp. v. Phillip Morris, Inc., 228 F.3d 429, 446 (3d Cir. 2000)("aiding and abetting and civil conspiracy require an underlying tort cause of action."); In re: Orthopedic Bone Screw Prods., 193 F.3d 781, 789 (3d Cir. 1999)("The established rule is that a cause of action for civil conspiracy requires a separate underlying tort as a predicate for liability."). Civil conspiracy only acts as a mechanism for casting a wide net of liability on co-conspirators, who themselves may not have committed a tortious act. Beck, 529 U.S. at 494.

Plaintiff asserts that, "the indicia of a common plan to preserve open space in Upper

Makefield Township establishes a conspiracy among the defendants.” (P. Resp., at p. 113).

However, as a prerequisite to civil conspiracy liability, the Plaintiff must prove that the Defendants have some underlying tort liability, and since we dismissed all other counts against the Defendants, then as a matter of law, they cannot be held liable for civil conspiracy. See In re: Orthopedic Bone Screw Prods., 193 F.3d at 789. See also Jones v. Johnson & Johnson, 1997 WL 549995, at *13 (E.D. Pa. 1997)(plaintiff’s civil conspiracy to defame claim must fail since the underlying defamation claim was insufficient); Pelagatti v. Cohen, 536 A.2d 1337, 1342 (Pa. Super. Ct. 1987)(“absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy.”). Accordingly, we find that Plaintiff’s civil conspiracy claim is without merit.

IV. CONCLUSION

Based on the foregoing reasons, Defendants’ Motion for Summary Judgment is granted. An order has been issued.

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

BENNETT LEVIN,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 99-CV-5313
	:	
UPPER MAKEFIELD TOWNSHIP, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this day of February, 2003 upon consideration of (i) Defendants' Motion for Summary Judgment (Document No. 51, filed March 29, 2002); (ii) Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment (Document No. 53, filed April 12, 2002); (iii) Defendants' Reply in Support of Defendants' Motion for Summary Judgment (Document No. 54, filed April 26, 2002); (iv) Plaintiff's Supplemental Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (Document No. 59, filed February 10, 2003); and (v) Defendants' Supplemental Memorandum of Law in Support of their Motion for Summary Judgment (Document No. 60, filed February 10, 2003), it is hereby **ORDERED** that Defendants' Motion for Summary Judgment is **GRANTED**. This is a final legal judgment and the Clerk of Court is directed to statistically close this matter.

BY THE COURT:

Legrome D. Davis, U.S.D.J.

