

Cons. Stat. Ann. § 901 et seq. At the time of their purchase, the property was divided into three separate parcels. However, the Robinsons executed a Deed of Consolidation on May 31, 2002, consolidating the three parcels into a single parcel and incorporating restrictions prohibiting the subdivision of the single parcel and perpetually limiting it to agricultural use. Thereafter, the Robinsons received approval for a preferential tax assessment of the property under the Pennsylvania Farmland and Forest Land Assessment Act of 1974, 72 Pa. Cons. Stat. Ann. § 5490.1 et seq.

The Robinsons have been active in municipal politics since 1981. They have held several municipal government positions in Limerick Township, including service on the Township Planning Commission, Recycling Committee, Lands Trust Committee, Parks and Recreation Committee, and the Multi-Purpose Trail System Committee. The Robinsons claim that they have not always agreed with the Township Supervisors and have at times been outspoken with their disagreement.

In the summer of 2002, the Robinsons were given the opportunity to repair pastures on the property using topsoil they acquired at no cost. The Robinsons submitted a Soil and Erosion Control Plan to the Montgomery County Soil Conservation Service for the pasture repair that was approved by the County. The Robinsons also consulted with the Limerick Township Code Enforcement Officer, who told them that they did not need to meet any additional requirements if their project was approved by the County. As a result, the Robinsons did not submit an application for a grading permit as required by the Limerick Township Code, which requires that submissions to the Soil Conservation Service also be submitted to the

Township and the Township Engineer. Limerick Township, Pa., Code § 147-5 (hereinafter “Township Code”).

On August 8, 2002, the Township Code Enforcement Officer served a Cease and Desist Order on the Robinsons, claiming that their pasture repair constituted a grading activity and that they were in violation of Chapter 147 of the Township Code because they did not have a permit.² The Robinsons allege that the issuance of the Cease and Desist Order was done at the direction of some or all of the Township Board of Supervisors.

The Robinsons chose not to file an application for a grading permit. Rather, they chose to appeal the Cease and Desist Order, claiming that their pasture repair was excluded from the permit requirements as a farming activity. See Township Code § 147-8.B. The Robinsons’ initial appeal was made to the Limerick Township Zoning Hearing Board which held that it was without jurisdiction to hear the appeal on October 30, 2002. The Zoning Hearing Board held that the appropriate forum to hear the appeal was the Code Hearing Board. As the Township’s Code Hearing Board had no members appointed to it at the time of the Robinson’s appeal, the Township Supervisors appointed a Code Hearing Board from among their own numbers to hear the appeal in January 2003. The Code Hearing Board ruled against the Robinsons on June 5, 2003, finding that their pasture repair was not a farming activity and that a grading permit was therefore required. The Robinsons appealed this decision to the Montgomery County Pennsylvania Court of Common Pleas where the matter is currently pending.

² The Township Code provides that “paving, filling, stripping, excavating, grading, or regrading any land” requires a grading permit. Township Code § 147-7.

Subsequent to the Robinsons' appeal of the Cease and Desist Order, the Township has taken several actions that the Robinsons characterize as retaliatory and made to harass. First, the Township issued a Notice of Violation on November 19, 2002, alleging eight separate violations of the Township Code, which the Robinsons contend are frivolous. Second, a criminal summons was filed in the District Court by the Township on December 17, 2002, for violations subject to the appeal of the Cease and Desist Order. Finally, the Township appealed the Robinsons' preferential tax assessment for their farm property to the Montgomery County Board of Assessments on August 29, 2003. The Board of Assessments ruled in the Robinsons' favor on December 3, 2003, and the Township has appealed that decision to the Montgomery County Court of Common Pleas where the matter is currently pending.

The Robinsons filed the present action in this Court on August 6, 2004, alleging constitutional violations and jurisdiction pursuant to the Civil Rights Act, 42 U.S.C. § 1983. The two count complaint alleges Fourteenth Amendment violations of equal protection, procedural due process, and substantive due process for deprivation of a protected property interest, as well as a claim for deprivation of liberty without due process. The Defendants filed the instant motion seeking dismissal of the complaint on October 7, 2004.

II. STANDARD

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the Complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In evaluating a motion to dismiss, the Court must determine whether the allegations contained in the Complaint, when construed in the light most favorable to the plaintiff, entitle the plaintiff to the requested relief. Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997). Dismissal is appropriate

where it clearly appears that the plaintiff has alleged no set of facts that, if proven, would entitle the plaintiff to relief. Conley, 355 U.S. at 45-46; Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990).

III. DISCUSSION

The Robinsons bring a two count complaint. The first count, entitled “Violation of Civil Rights,” brings claims for violations of procedural due process, substantive due process, and equal protection. The second count, entitled “Deprivation of Liberty Without Due Process,” brings a complaint for deprivation of an unspecified liberty interest. I will analyze the two counts separately.

A. VIOLATION OF CIVIL RIGHTS

1. Procedural Due Process

To establish a cause of action for a violation of procedural due process, a plaintiff, in addition to proving that a person acting under color of state law deprived him of a protected property interest, must establish that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. Parratt v. Taylor, 451 U.S. 527, 537 (1981). Due process requires that a deprivation of property “be preceded by notice and opportunity for hearing appropriate to the nature of the case,” Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985), and the opportunity to be heard must be at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545 (1965). When a state “affords a full judicial mechanism with which to challenge the administrative decision,” however, the state provides adequate due process. Bello v. Walker, 840 F.2d 1124, 1128 (3d Cir. 1988).

The Robinsons have failed to allege either the absence of state procedures to remedy their dispute with the Township or that the state procedures available to them were inadequate and violative of due process. The allegations in this case demonstrate the opposite. Both the Municipalities Planning Code and the Township Code permit the Robinsons to appeal the Township's decisions through the state courts. In fact, the Robinsons have appealed the Code Hearing Board's finding against them to the Montgomery County Court of Common Pleas. Furthermore, the tax appeal launched by the Township is also pending in the Court of Common Pleas. As a result, the Robinsons have access to a full judicial mechanism to resolve these issues.

The Robinsons contend that the Supervisors decision to appoint a Code Hearing Board from among their own numbers was taken *ultra vires*, as Supervisors are prohibited from holding other elected or appointed township positions with the exception of membership on the planning commission. 53 Pa. Cons. Stat. Ann. § 65403(b). However, this does not demonstrate that the procedural remedy afforded by the state is deficient. Rather, it is a deviation from the established procedure that is remedied through the state court appeal process, which is a full judicial remedy. In light of the judicial remedy available to the Robinsons, they cannot state a claim for a violation of procedural due process. As a result, the Robinsons' Procedural Due Process claim is dismissed..

2. Substantive Due Process

In order to present a cognizable claim for violation of substantive due process, the plaintiff must allege facts demonstrating that the Township's conduct was arbitrary, irrational, or motivated by a constitutionally impermissible factors. Sameric Corp. of Del., Inc. v. City of

Phila., 142 F.2d 582, 590-91 (3d Cir. 1998). In addition, the plaintiff must also show that the conduct of the defendants “shocks the conscience.” Id. (citing United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392 (3d Cir. 2003)); see also County of Sacramento v. Lewis, 523 U.S. 833 (1998). Whether the conduct at issue in any particular land use case meets the “shocks the conscience” standard will depend upon the facts of the particular case. United Artists, 316 F.3d at 399-400. However, “[w]hat shocks the conscience is only the most egregious official conduct.” Id. at 400.

There is little guidance for district courts in this Circuit attempting to apply the shocks the conscience test to municipal land use cases. See Dev. Group, LLC v. Franklin Township Bd. of Supervisors, No. 03-2936, 2003 WL 22358440, at *6 (E.D. Pa. Sept. 24, 2003). Prior to United Artists, a plaintiff in a land use matter was required to prove only that the defendant acted with “an improper motive,” in making its determination, or that the defendant’s conduct constituted an “improper interference.” Id. at *5. However, current law requires that a plaintiff meet the shocks the conscience test traditionally applied to substantive due process claims. See id. What is clear from the new test is “that this test is designed to avoid converting federal courts into super zoning tribunals.” Eichenlaub v. Township of Indiana, 385 F.3d 274, 285 (3d Cir. 2004) (citing Lewis, 523 U.S. at 846; United Artists, 316 F.3d at 400).

The Complaint fails to aver facts establishing that the conduct of the Township shocks the conscience. The Robinsons allege the Township has taken action motivated by bias, bad faith, and improper motives and intended to threaten, intimidate, and harass them. There are no allegations of self dealing, or unjust enrichment of the Township Supervisors or anyone

related to them.³ Instead, the Robinsons argue that the Township’s conduct is automatically conscience shocking due to its improper motive. I am unable to agree. Every appeal in a land use matter “involves some claim of abuse of legal authority, but it is not enough simply to give these state law claims constitutional labels such as due process, or equal protection.” United Artists, 316 F.3d at 402 (quoting Creative Env’ts v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982)). As a result, the Robinsons must go considerably further than mere allegations that the Township’s conduct was taken with an improper motive. Id. at 400 (“Although the District Court opined that there are few differences between the shocks the conscience standard and the improper motive standard, we must respectfully disagree.”) (internal alterations omitted). Land use disputes such as this “should not be transformed into substantive due process claims based only on allegations that the government officials acted with improper motives.” Id. at 402.

To the extent that the Robinsons allege that the Township has taken action *ultra vires* in violation of state law, that remains a violation of state law and not a constitutional injury, see id., and the shocks the conscience standard leaves ample room for dispute among the parties in land use cases. See Baker v. Coxe, 230 F.3d 470, 474 (1st Cir. 2000) (noting that there is a substantial difference “between the inevitable misjudgments, wrongheadedness, and mistakes of local government bureaucracies and the utterly unjustified, malignant, and extreme actions of those who would be parochial potentates”). As a result, the Robinsons cannot state a claim for a violation of substantive due process and this claim will be dismissed.

³ The latest jurisprudence of the Third Circuit Court of Appeals evinces a preference for evidence of self dealing or other unjust enrichment of the municipal decision makers as a way to meet the shocks the conscience standard. See Eichenlaub, 385 F.3d at 285.

3. Equal Protection

A plaintiff who fails to allege membership of a suspect or otherwise protected class may nonetheless bring an equal protection claim if it can be shown that the defendants, acting under color of state law, intentionally treated plaintiffs differently from others similarly situated, and that there is no rational basis for the difference in treatment. Highway Materials, Inc. v. Whitemarsh Township, No. 02-3212, 2004 WL 2220974, at *21 (E.D. Pa. Oct. 4, 2004). Although the substantive due process and equal protection tests have not been combined for permit cases in this Circuit, it has been noted that the

irrational and wholly arbitrary standard is doubtless difficult for a plaintiff to meet in a zoning dispute, and we do not view an equal protection claim as a device to dilute the stringent requirements needed to show a substantive due process violation. It may be very unlikely that a claim that fails the substantive due process test will survive an equal protection approach.

Eichenlaub, 385 F.3d at 287 (citation omitted); cf. Baker, 230 F.3d at 474 (“[T]he nature of government conduct (or misconduct) required to establish either a substantive due process violation or an equal protection claim is so similar as to compress the inquiries into one.”).

The Robinsons have failed to allege that they have been treated differently from a similarly situated party. They have made no allegation that the Township has allowed any other landowner to engage in a grading, filling, or pasture repair operation without a permit, or that the Township has permitted any similar activity for which a permit is required to be undertaken without one. As a result, they have failed to state an adequate equal protection claim.

B. DEPRIVATION OF LIBERTY

Traditionally, substantive due process protects only the most fundamental liberty interests. The protected liberty interests generally extend to fundamental rights of the persons, such as family rights, procreation, and the right to bodily integrity. See, e.g., Troxel v. Granville, 530 U.S. 57 (2000) (right of parents to control care of their children); Moore v. East Cleveland, 431 U.S. 494 (1976) (right to live with extended family); Roe v. Wade, 410 U.S. 113 (1973) (right to terminate pregnancy absent undue state interference); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to contraception and marital privacy). The Supreme Court is reluctant to further expand the scope of these 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. See Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). Pecuniary and monetary entitlements, in general, will not be classified as liberty interests worthy of substantive due process protection. Levin v. Upper Makefield Township, No. 99-5313, 2003 U.S. Dist. LEXIS 3213 at *20 (E.D. Pa. Feb. 25, 2003).

The Complaint does not name a specific liberty interest that has been violated, nor does it name a new interest worthy of this Court's protection. The Robinsons allege only that "[t]he acts of Limerick Township and its agents, as set forth above, constitute arbitrary, capricious, irrational and abusive conduct which unlawfully interferes with Plaintiffs' liberty interests protected by the due process clause of the Fourteenth Amendment to the United States Constitution." (Compl. ¶ 82). Furthermore, Count II of the Complaint is titled only "Deprivation of Liberty Without Due Process," which provides no clues as to the particular rights the Robinsons seek to enforce with that count.

The Robinsons have argued on this motion that the Township's conduct in this case has been based upon partisan political animus and undertaken to harass them for their participation in municipal politics. However, their only allegation to that respect is that they have "at times [been] outspoken with respect to commenting on the actions of the Limerick Township Supervisors." (Compl. ¶ 22). While the Robinsons are correct that the First Amendment right to free speech is included among the liberty interests protected by the Fourteenth Amendment, *see Gitlow v. New York*, 268 U.S. 652 (1923), the Complaint is insufficient to state a claim. As a result, it will be dismissed. However, as I am mindful that a "court should not dismiss a complaint under Rule 12(b)(6) for failure to state a claim for relief 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief,'" *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 559 (3d Cir. 2002) (quoting *Conley*, 355 at 45-46), I will dismiss the complaint without prejudice and grant leave to amend to state a proper First Amendment claim.

IV. CONCLUSION

As I conclude that the Complaint is insufficient to state a claim upon which relief can be granted, it will be dismissed. However, I grant leave to amend to state a proper claim for deprivation of a liberty interest. Furthermore, should there be additional facts not contained in the complaint substantiating claims for substantive due process or equal protection, those claims may be amended as well.

An appropriate Order follows.

