

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

<b>WINDSOR JEWELS OF</b>	:	<b>CIVIL ACTION</b>
<b>PENNSYLVANIA, INC., <u>et al.</u></b>	:	
	:	<b>NO. 01-CV-553</b>
<b>v.</b>	:	
	:	
<b>BRISTOL TOWNSHIP, <u>et al.</u></b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**February 10, 2005**

Plaintiffs Windsor Jewels of Pennsylvania, Inc. t/a Diamond Check Cashing (“Windsor Jewels”), Edward Yantes, and Keith Yantes (collectively “Plaintiffs”) bring this action against Defendants Bristol Township (“the Township”); several individual members of the Bristol Township Council (“the Council”);<sup>1</sup> several members of the Bristol Zoning Hearing Board (“the ZHB”);<sup>2</sup> Daniel Bogan (“Bogan”), Director of the Bristol Township Department of Licenses and Inspections (“the DLI”); and, William M. Norton (“Norton”), an officer of the DLI. Plaintiffs’ Amended Complaint, filed on May 17, 2001, alleges violations of equal protection pursuant to 42 U.S.C. § 1983 (Count I) and state law tortious interference with contract (Count IV).<sup>3</sup>

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<sup>1</sup> Kenneth Balcom, Kenneth Worthington, Donald Lorady, Kathryn Hill, and William Tuthill.

<sup>2</sup> Albert J. Burgess, Eleanor Clancy, Margaret Horvath, Ronald Marczak, and John Dutton.

<sup>3</sup> Plaintiffs’ Complaint originally included counts alleging violations of substantive due process, taking without just compensation, and equitable estoppel. On March 28, 2002, this Court dismissed those counts, as well as several defendants. See Windsor Jewels of Pennsylvania, Inc. v. Bristol Township, 2002 WL 31999367 (E.D. Pa. March 28, 2002). Counts I and IV are the only remaining Counts.

Defendants have filed a Motion for Summary Judgement. For the reasons that follow, Defendants' Motion will be granted.

## **I. Background**

Plaintiffs Edward and Keith Yantes, who are shareholders and officers of Windsor Jewels, purchased real estate located at 7100 New Falls Road in Bristol Township ("the Property"), for the purpose of opening a check cashing business, which would also sell various retail items, provide money orders and vehicle permits, and offer tax form filing and preparation. Defendants' Motion for Summary Judgment ("Motion") ¶ 4. At the time of purchase, the property was zoned Commercial Service Station ("C-SS"). Motion ¶ 5; Plaintiffs' Response to Defendants' Motion for Summary Judgment ("Response") ¶ 5. The Property had previously been a Cumberland Farms gas station and convenience store. See Deposition of William Tuthill at 78-79, attached as Exhibit C to Response.

Subsequently, Plaintiffs attempted to submit an application for a Use and Occupancy permit for the use of the Property as a check cashing business, but were informed by Township personnel that because they were going to perform renovation work, they would have to obtain building and improvement permits and pass inspection before a Use and Occupancy permit could issue. Motion ¶¶ 6-10; see also Permits, attached as Exhibit A to Response. In July 2000, Plaintiffs met with Defendant Bogan to discuss their proposed use of the Property. Response at 1-2. Plaintiff Keith Yantes stated that Bogan "couldn't give [him] 100 percent guarantee" that the use would be acceptable, but that the meeting was positive and that they left "optimistic," with a "handshake at the end." Deposition of Keith Yantes at 30, attached as Exhibit F to Response. By correspondence to Township Solicitor Russell Sacco, Plaintiffs' attorney at that

time, Blair Granger, repeatedly disclosed the intended use of the Property as a check cashing business and sought to verify that this would be acceptable to the Township. See Letters, attached as Exhibit H to Response. There is no evidence that Solicitor Sacco responded to these inquiries in any way. Throughout the summer of 2000, Plaintiffs applied for and were granted various construction permits as they made improvements to the Property. See Permits, attached as Exhibit A to Response.

While Plaintiffs' efforts to establish their new business were on-going, Plaintiffs allege that certain members of the Council were taking steps to stall this opening. On July 11, 2000, Council Member William Tuthill introduced a moratorium designed to suspend the opening of new check cashing agencies and similar establishments, which was approved by the Council as a whole. See Minutes of Meeting, attached as Exhibit E to Response. Because it was not enacted by the proper procedure, however, this moratorium never went into effect. See Deposition of Russell Sacco at 39, attached as Exhibit B to Response. Nonetheless, Plaintiffs argue that this was the first act in a developing conspiracy to prevent the establishment of their business.

Response ¶ 21.

On August 4, 2000, Plaintiffs again submitted an application for a Use and Occupancy permit. See Letter from William Norton, attached as Exhibit S to Motion. By correspondence dated October 10, 2000, Defendant Norton, a zoning officer with the DLI, rejected Plaintiffs' application for the permit, purportedly because the Property was located within a "C-SS Commercial Service Station district," meaning that it was zoned for limited commercial

purposes, which did not include the intended use as a check cashing agency.<sup>4</sup> See id. Plaintiffs conceded that neither they nor their attorney verified the zoning laws prior to purchasing the Property. See Deposition of Keith Yantes at 19, attached as Exhibit H to Motion; Deposition of Edward Yantes at 59, attached as Exhibit I; Deposition of Blair Granger at 32, attached as Exhibit G. Nevertheless, Plaintiffs allege that Norton’s rejection of their application for the Use and Occupancy permit constituted selective and discriminatory enforcement of the C-SS zoning ordinance, which was part of a continuing scheme to prevent Plaintiffs from opening their check cashing business. Response ¶¶ 3, 20.

On October 13, 2000, Plaintiffs filed an appeal with the Bristol Township Zoning Hearing Board (“the ZHB”) challenging Norton’s rejection of their Use and Occupancy permit. See Opinion of the ZHB at 2, attached as Exhibit T to Motion. After a hearing, the ZHB rejected Plaintiffs’ appeal in a written decision dated December 11, 2000. Id. Plaintiffs next appealed the decision of the ZHB to the Court of Common Pleas for Bucks County. On May 2, 2001, the Court of Common Pleas denied Plaintiffs’ appeal on all grounds. Plaintiffs then appealed to the Commonwealth Court of Pennsylvania.

Throughout this period, Plaintiffs allege that Council members continued to be hostile to their business. Plaintiffs cite the actions of Defendant Tuthill, who apparently complained about their improper use of the Property at a January 16, 2001 Council meeting. See Minutes of

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<sup>4</sup> C-SS, Ordinance 21, Chapter XXVII, Part 11, Section 102 was enacted to “provide for the appropriate location and regulation of gasoline service stations in view of the special hazards created by the storage and supply of volatile liquid fluids, special traffic hazards and the proliferation of abandoned service stations.” Ordinance, attached as Exhibit E to Motion. The Ordinance limits use of zoned property to a “[p]ublic garage, service station, parking lot, or garage having all facilities and all services conducted with [sic] the confines of the lot,” but provides for the possibility of auxiliary uses. Id.

Council Meeting, attached as Exhibit L to Response. Then, on February 20, 2001, Councilman Kenneth Worthington called for a motion at the meeting to condemn check cashing businesses and attempt to prohibit their operation in the Township within 2000 feet of one another. See Minutes of Council Meeting, attached as Exhibit O to Response.

On January 3, 2002, the Commonwealth Court reversed the decision of the Court of Common Pleas as to one issue, concluding that the C-SS zoning designation constituted illegal spot zoning.<sup>5</sup> See Windsor Jewels v. Bristol Township Zoning Hearing Bd., No. 1144 C.D. 2001, at 4 (Pa. Commw. Ct. Jan. 3, 2002) (slip op.). As a result of this decision, Plaintiffs were able to secure an order that they be issued a Use and Occupancy permit in January 2002. See Order, attached as Exhibit R to Response.

Based on this series of events and the initial denial of the Use and Occupancy permit, Plaintiffs press claims of (1) a violation of equal protection pursuant to § 1983 and (2) tortious interference with prospective business relations. Defendants have moved for summary judgment.

## **II. Legal Standard**

In deciding a motion for summary judgment pursuant to Rule 56, the test is “whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.” Med. Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (quoting Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)). “[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby,

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<sup>5</sup> The opinion defines “spot zoning” as an unreasonable or arbitrary classification of a small parcel of land, dissected or set apart from surrounding properties, with no reasonable basis for differential zoning.

Inc., 477 U.S. 242, 248 (1986). The Court must examine the evidence in the light most favorable to the non-moving party and resolve all reasonable inferences in that party's favor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, "there can be 'no genuine issue as to any material fact' ... [where the non-moving party's] complete failure of proof concerning an essential element ... necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

### **III. Analysis**

#### A. Violations of Equal Protection Law (Count I)

##### *1. Claims Against Members of the Zoning Hearing Board*

As a preliminary matter, Plaintiffs have consented to the dismissal of Defendants Albert J. Burgess, Eleanor Clancy, Margaret Horvath, Ronald Marczak, and John Dutton – members of the Zoning Hearing Board – based on judicial immunity. See Response at 14; see also Ryan v. Lower Merion Township, 205 F. Supp. 2d 434, 439 (E.D. Pa. 2002) (noting that courts in this district have consistently held members of zoning boards immune from suit when ruling on zoning permits on the basis of judicial immunity). Accordingly, these defendants will be dismissed from the present action.

##### *2. Equal Protection Claim Against Council Members*

Plaintiffs contend that enforcement of the C-SS zoning designation to deny them a Use and Occupancy permit violated equal protection, because it was the only instance where the Ordinance had been employed to prevent an otherwise valid use of commercial property.<sup>6</sup>

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<sup>6</sup> The C-SS zoning ordinance at issue in this case was enacted in 1952 and functions to prohibit commercial activity not including the operation of a "public garage, service station, [or] parking lot" on zoned areas, as described above. See Ordinance, attached as Exhibit

Because the case does not involve a suspect class or fundamental right, Plaintiffs' equal protection claims are not entitled to heightened scrutiny. See Taylor Inv., Ltd. v. Upper Darby Township, 983 F.2d 1285, 1294 (3d Cir. 1993). Consequently, for Plaintiffs to prevail, they must demonstrate that Defendants intentionally treated them differently than others who were similarly situated and that these actions were not rationally related to a legitimate governmental purpose, or were arbitrary or irrational. Timoney v. Upper Merion Township, 2004 WL 2823227, at \*4-5 (E.D. Pa. Dec. 8, 2004); Ryan, 205 F. Supp. 2d at 442; Salem Blue Collar Workers Assoc. v. City of Salem ("Salem"), 33 F.3d 265, 271 (3d Cir. 1994).

Given this standard, there is no evidence of an equal protection violation committed by the Council members. The gravamen of Plaintiffs' equal protection claim is the alleged discriminatory denial of the Use and Occupancy permit. However, the Council members had no role in this decision; Norton, the zoning officer, is responsible for the issuance or denial of such permits. See Letter, attached as Exhibit J to Response; see also Deposition of Russell Sacco at 71-72, attached as Exhibit P to Motion (stating that he spoke to Norton regarding the zoning of the parcel and that Norton had no discretion to approve Plaintiffs' permit in light of the zoning laws). In addition, to the extent that the Ordinance has more generally been enforced in a discriminatory manner, the only evidence presented states that enforcement is the responsibility of the Director of DLI, Defendant Bogan. See Deposition of William Norton at 76-77, attached as Exhibit D to Response. There is no evidence that Council members attempted to influence

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M to Response. Plaintiffs do not challenge the constitutionality of the zoning ordinance itself; rather, they challenge its alleged discriminatory application in their case. Cf. Rogin v. Bensalem Township, 616 F.2d 680, 688 (3d Cir. 1980) (finding that zoning laws are generally constitutional if they bear a substantial relation to public safety, health or welfare).

these individuals to deny Plaintiffs' permit. Plaintiffs claim that "enforcement of the ordinance was orchestrated by Bristol Township Council as part of an intentional scheme to prevent Plaintiffs from opening" their business. Response at 13. However, they have offered no evidence of such a scheme. At most, Plaintiffs have shown that certain Council members were concerned about the proliferation of check cashing businesses in the Township. There is no evidence from which a reasonable jury could conclude that Council members were part of a larger conspiracy aimed at thwarting Plaintiffs' attempts to establish a business, and concerns regarding check cashing businesses generally do not constitute a violation of equal protection. See Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 503 (2d Cir. 2001) (finding that hostility towards a general business cannot violate equal protection because such rights are vested in individuals). Accordingly, summary judgment on the equal protection claim must be granted in favor of the individual Council members.

### *3. Equal Protection Claim Against the Remaining Defendants*

Consequently, any equal protection liability would rest on Defendant Norton, the zoning officer who denied the permit; Defendant Bogan, the Director of DLI who initially discussed the establishment of the business with Plaintiffs; or, possibly, the Township. However, there is no evidence of an equal protection violation. Plaintiffs bear the burden of presenting evidence of similarly situated individuals or businesses who were treated differently, and they have failed to do so in this case. See, e.g., Adams Parking Garage, Inc. v. City of Scranton, 33 Fed. Appx. 28, 32 (3d Cir. 2002) (finding grant of summary judgment appropriate where plaintiff fails to present evidence of others who were similarly situated, yet treated differently). In support of their claim of discriminatory enforcement, Plaintiffs reference two other businesses they allege were

permitted to operate in violation of the Ordinance: the Cumberland Farms previously on the Property and a nearby Texaco station. Plaintiffs argue that these two properties were within a C-SS zone, but that they were permitted to engage in prohibited commercial activities, including the sale of grocery items. See Deposition of William Tuthill at 84, attached as Exhibit C to Response (stating that business formerly on Property had a convenience store).

However, these businesses are not “similarly situated” to Plaintiffs’ proposed use, as required under equal protection law. First, the Texaco referenced by Plaintiffs is apparently located in Middletown Township, not Bristol, placing it outside the authority of Bristol Township officials. See Affidavit of Daniel Bogan, attached as Exhibit G to Defendants’ Supplemental Memorandum. Regarding the Cumberland Farms, it is undisputed that this property had a gas or service station, as required by the Ordinance, and the allegedly prohibited activities were merely auxiliary to this main function. As a result, the use accorded with the Ordinance’s stated purpose of “provid[ing] for the appropriate location and regulation of gasoline service stations” and is materially distinguishable from the check cashing agency Plaintiffs proposed. See Timoney, 2004 WL 2823227 at \*6 (ruling that two entities must be “similarly situated” in all material respects for purposes of equal protection law); Congregation Kol Ami v. Abington Township, 309 F.3d 120, 139 (3d Cir. 2002) (stating that plaintiff must show others similarly situated in relation to the purpose of the Ordinance in question).<sup>7</sup> Finally, Plaintiffs

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<sup>7</sup> There is some question as to whether the Cumberland Farms had a special variance to operate its convenience store. Defendants argue in their Supplemental Memorandum that it did not, while at least one individual testified that he thought it did. See Deposition of William Tuthill at 85, attached as Exhibit C to Response. However, this dispute is not material to the case, given the language of the Ordinance, which clearly permitted auxiliary uses to gas or service stations. Furthermore, Plaintiffs’ assertion that any such variance would run with the property, and that Defendants’ denial of a Use and Occupancy permit despite the possibility of

concede that they have no evidence of Use and Occupancy permits issued to businesses similar to that which they sought to establish within C-SS zoned areas. See Deposition of Keith Yantes at 32, attached as Exhibit L to Motion (stating he has no knowledge of other check cashing businesses on C-SS zoned property); see also Affidavit of Daniel Bogan, attached as Exhibit G to Defendants' Supplemental Memorandum (stating he has no knowledge of any property in Bristol Township zoned C-SS that did not sell gasoline); Granahan v. Borough of Pennsburg, 2004 WL 1858357, at \*6 (E.D. Pa. Aug. 4, 2004) (finding no equal protection violation where plaintiff admitted no knowledge of disparate treatment of those similarly situated). Therefore, there is no evidence of differential treatment of similarly situated businesses and Plaintiffs' equal protection claim must fail.

As an additional matter, Plaintiffs cannot establish that Norton's actions in denying the permit were irrational, wholly arbitrary, or motivated by ill will. See Timoney, 2004 WL 2823227 at \*4-5 (setting out the intent requirements for proof of equal protection violation); see also Eichenlaub v. Township of Indiana, 385 F.3d 274, 287 (3d Cir. 2004) (stating that equal protection arbitrariness standard is very difficult to meet in a zoning dispute). Plaintiffs submitted an application for a permit to Norton; the only evidence offered shows that Norton believed that the intended use as stated on the permit was in violation of the zoning laws and that he had no choice but to deny the application. See Deposition of William Norton at 74-75,

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such a variance evinces discriminatory intent, is similarly immaterial. See Plaintiffs' Supplemental Memorandum at 1-2. There is no evidence that any party, including Plaintiffs themselves, had knowledge of the possibility of a variance running with the land when the permit was initially denied; indeed, Plaintiffs later applied for a variance from the ZHB, apparently ignorant of their own legal rights. As a result, this is not evidence from which a reasonable jury could conclude that Defendants acted irrationally or with discriminatory intent.

attached as Exhibit D to Response (stating he believed Plaintiffs' proposed use to be in violation of the Ordinance); Deposition of Russell Sacco, attached as Exhibit P to Motion (testifying that Norton had no discretion in the issuance of permits); see also Deposition of Russell Sacco, attached as Exhibit F to Motion (agreeing with Norton's interpretation of the Ordinance). After extensive discovery, Plaintiffs have failed to adduce anything to support their contention that this was an irrational or purposeful discriminatory act. See Demeter v. Buskirk, 2003 WL 22416082, at \*5-6 (E.D. Pa. Oct. 20, 2003) (rejecting equal protection claim where there is no evidence of intentional discrimination, stating that "vague and unsubstantiated" allegations are not enough to survive summary judgment). To the contrary, zoning officials in this case acted pursuant to a valid, reasonable zoning regulation, as they understood it. Cf. Bizzarro v. Miranda, 2005 WL 31015, at \*7 (2d Cir. Jan. 7, 2005). Consequently, in addition to failing to show disparate treatment of similarly situated individuals, Plaintiffs have also failed to meet their burden of demonstrating irrational action on the part of Defendants.

B. Tortious Interference with Prospective Business Relations (Count IV)

Plaintiffs next assert a state law claim for tortious interference with prospective business relations. The elements for such a claim in Pennsylvania include: (1) some prospective contract or business relation between plaintiff and a third party; (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of defendant; and, (4) actual damages. Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979); see also Glenn v. Point Park College, 272 A.2d 895, 899 (Pa. 1971) (emphasizing that this is a specific intent tort and that defendants must act with the intent to harm plaintiff). The "intent to harm" element is lacking and a claim for tortious interference will fail

where the defendant acts upon a reasonable good faith belief that he has some legally protected interest or right. See Singleton v. HGO Svs., Inc., 2001 WL 1729995, at \*7 (E.D. Pa. Nov. 15, 2001) (citing Peoples Mortgage Co. v. Fed. Nat'l Mortgage Assoc., 856 F. Supp. 910, 940-42 (E.D. Pa. 1994)); see also Schmidt, Long & Assoc., Inc. v. Aetna U.S. Healthcare, Inc., 2001 WL 856946, at \*3 (E.D. Pa. July 26, 2001) (noting the close relationship between privilege and intent to harm and adding that when a party acts out of a good faith belief of the propriety of his actions, claim for tortious interference cannot be maintained).

Again, insofar as Plaintiffs' claim rests on the denial of the Use and Occupancy permit, there is no evidence that the Council members had any part in this decision, and the claim must fail as to those defendants. More broadly, there is no proof of the necessary intent to harm element. As discussed above, the only evidence put forth shows that Defendants Norton and Bogan acted in good faith, believing that they had no discretion to permit Plaintiffs' proposed use of the property in light of the zoning regulations. Their actions accorded with proper procedure and were simply in furtherance of enforcing a reasonable, then valid zoning ordinance. See Nichols v. Ferguson, 2004 WL 868222, at \*14 (E.D. Pa. April 21, 2004) (citing the Restatement of Torts in ruling that courts should consider such factors as the nature of the actor's conduct, the actor's motive, and the interests he is advancing, in gauging intent to interfere). Accordingly, there is no evidence from which a reasonable jury could conclude that Defendants acted out of an intent to harm Plaintiffs and summary judgment must be granted.

#### **IV. Conclusion**

Based on the above analysis, the Court will grant Defendants' Motion for Summary Judgment as to all Counts. An appropriate Order follows.<sup>8</sup>

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<sup>8</sup> Because this Court has determined that there is no question of material fact regarding either the equal protection or tortious interference claims, it need not reach Defendants' renewed assertion of qualified immunity or the question of the Township's liability.

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	:	<b>NO. 01-CV-553</b>
<b>v.</b>	:	
	:	
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**ORDER**

**AND NOW**, this 10th day of February, 2005, upon consideration of Defendants' Motion for Summary Judgment (docket no. 42), Plaintiffs' Response thereto, additional briefings by each party, and after a hearing on January 14, 2005, it is **ORDERED** that Defendants' Motion is **GRANTED**. Accordingly, judgment is entered in favor of Defendants and against Plaintiffs on all remaining counts.

**BY THE COURT:**

**S/Bruce W. Kauffman**  
**BRUCE W. KAUFFMAN, J.**