

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

TRI-COUNTY CONCERNED CITIZENS	:	
ASSOCIATION, PATTY BRANN,	:	
KATHY BRILL, WILLIAM CRANSTON,	:	
HOLLY HARTSHORNE, and	:	
BARBARA MESSNER,	:	CIVIL ACTION
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
RAYMOND CARR, MORGANTOWN	:	
PROPERTIES, INC., WILLIAM BETZ,	:	
JUDITH BETZ, ROBERT G. WILLIAMS,	:	
CAROLYN WILLIAMS, CHERYL	:	
CONKEL, and NEW MORGAN BOROUGH	:	NO. 98-CV-4184
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

September 18, 2001

The procedural history of this ongoing fight between the incorporated municipality of New Morgan Borough and the residents of neighboring townships Caernarvon and Robeson was thoroughly documented in the Court’s December 11, 2000 Memorandum which denied Plaintiffs’ October 16, 2000 Motion for Leave to Amend Complaint. Since then, Plaintiffs’ filed their December 7, 1998 Amended Complaint (the “Amended Complaint”), as instructed by the Court.¹ Presently before the Court is Defendants’ Motion to Dismiss the

¹ Since December 2000, the Court also denied the following motions: 1) Plaintiffs’ Motion for Reconsideration, Stay and Recusal; 2) Plaintiffs’ Motion for an Evidentiary Hearing; and, 3) Plaintiffs’ Renewed Motion for Leave to Respond.

Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated below, Defendants' motion will be granted.

I. FACTUAL BACKGROUND

Plaintiffs are owners of land abutting New Morgan Borough in Berks County, Pennsylvania, and an organization of citizens from neighboring townships (collectively "Plaintiffs"). Am. Compl. P 1. Plaintiffs commenced this lawsuit in August 1998 against Morgantown Properties, Inc., New Morgan Borough, and six individuals, five of whom are officials of the Borough (collectively "Defendants"). Raymond Carr, one of the individual defendants, allegedly "owns or has interest in virtually all or completely all the land comprising 'New Morgan Borough.'" Id. at P 4. Morgantown Properties, Inc. is owned and operated by Carr. Id. The five officials are: William Betz, the mayor; Judith Betz, the president of the Borough Council and chairperson of the Borough Planning Commission; Robert Williams, a council member; Carolyn Williams, the treasurer and secretary of the council, and secretary of the planning commission; and Cheryl Conkel, the vice-president of the council and co-chair of the planning commission. Id.

In 1985, Carr and Morgantown Properties acquired over 3,000 acres of land located in Caernarvon and Robeson Townships, which was, at the time of purchase, a mostly rural farming community with a small urbanized area in Morgantown. Id. at P 10. Having unsuccessfully sought permission from Caernarvon Township to construct a trash-to-steam plant on the property, Carr then brought a petition in Pennsylvania state court to incorporate the land as a borough, thereby being able to claim independent legal status and promulgate land-use

regulation within its boundaries. Id. at P 11-12. The propriety of the incorporation of New Morgan Borough is now well settled and beyond dispute. See In Incorporation of Borough of New Morgan, 590 A.2d 274 (Pa. 1991) (affirming incorporation of borough over objections of twelve non-resident interveners, various amici, and Caernarvon and Robeson Townships), cert. denied, Caernarvon Township v. Morgantown Properties, 502 U.S. 860 (1991).

Carr allegedly conferred public offices on family members, friends, employees, and tenants. Am. Compl. P 13. Plaintiffs allege that Carr and Morgantown Properties "have effectively created a company town" and that "Carr controls the election and identity of any and all political persons eligible for holding public office . . . in that each such person is a family member, employee, and/or a tenant of Carr, his enterprises, and the Borough itself, and among other things, are subject to firing and/or eviction if they fail to carry out Carr's wishes in all matters." Id. at P 15.

Through this extortionate control, Plaintiffs allege that "Defendants by their actions have caused to be erected, authorized, and threatened to erect virtually throughout 'New Morgan Borough' . . . a massive accumulation of unreasonably noxious, abusive, destructive, and objectionable uses, imposing a wide range of adverse effects on their surrounding neighbors, for Carr's benefit." Id. at P 17. Specifically, Plaintiffs claim "Defendants, have been and are, threatening noxious uses such as . . . a trash-to-steam incinerator, a race track, a leachate treatment plant in the [existing] landfill, a privately operated prison, and a \$17 million tile factory. Id. at P 20. Notably, the Amended Complaint alleges "Morgantown Properties sold land to New Morgan Borough for \$15 million, payable through bonds taken out by the Borough," so, in effect "of the Boroughs' approximately \$1.7 million budget, \$1.4 million goes to pay these

bonds.” Id. at 18. This alleged financial structure enables Carr and Morgantown Properties “to funnel money from the operation of the race track, detention center and industrial tile/ceramics factory.” Id. Allegedly, as a result of Defendants’ operations, Plaintiffs are subjected to “noxious odors, loud and disruptive noises, trash hanging from trees on local roads, damaged streets, and broken windshields and other property, constituting a public and private nuisance and giving rise to inhuman living conditions and a chronic, continuing devaluation of property.” Id. at P 19.

II. STANDARD OF REVIEW

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that, in response to a pleading, a defense of “failure to state a claim upon which relief can be granted” may be raised by motion. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The court must only consider those facts alleged in the complaint in considering such a motion. See ALA v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d. Cir. 1993). A complaint should be dismissed if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

III. DISCUSSION

Plaintiffs set forth six counts in their Amended Complaint, three federal claims and three state claims. All three federal claims will be dismissed on the merits and the state claims will be dismissed pursuant to 28 U.S.C. § 1367(c)(3).

A. Substantive Due Process

Plaintiffs have alleged a denial of their constitutional rights to substantive due process. The interests protected by substantive due process are roughly defined and the Supreme Court has yet to provide substantial guidance in this area. DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 598 (3d Cir. 1995). However, the Supreme Court has stated that “the history of substantive due process ‘counsels caution and restraint.’” Regents of University of Michigan v. Ewing, 474 U.S. 214, 229 (1985), quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977). The Third Circuit has determined that a party making a substantive due process claim must prove that it was deprived of a protected property interest by arbitrary or capricious government action. See Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1290 (3d Cir. 1993). Furthermore, the Third Circuit has explained that “a plaintiff must have been deprived of a particular quality of property interest,” which, more specifically, must be one “encompassed by the Fourteenth Amendment.” See DeBlasio, 53 F.3d at 600, quoting Acierno v. Cloutier, 40 F.3d 597, 616 (3d Cir. 1994). Courts have also explained that although such property interests may be protected by the Constitution, “they stem from such sources as state law.” MacNamara v. County Council of Sussex County, 738 F. Supp. 134, 141 (D. Del. 1993), citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972). “Although land ownership might initially appear to present a straightforward example of a protected property interest, it is far from clear that every

impact on landownership caused by zoning regulations creates a right to process.” MacNamara, 738 F. Supp. at 141, citing Developments in the Law -- Zoning, 91 Harv. L. Rev. 1427, 1514 (1978).

Here, the issue presented is whether Plaintiffs have pled a property interest that is of the sort which warrants substantive due process protection.² In a cautious effort to be inclusive and thorough, the Court credits Plaintiffs with arguing Defendants deprived or infringed upon the following interests: (1) the right to use and enjoy their land; (2) the right to be free from uncompensated takings; (3) the right not to be subjected to common nuisances such as odors, noise, pollution, dirt and other noxious and dangerous situations; (4) the right not to have their property values diminished; and (5) the right to own, use and enjoy “property that is not subject to a [neighboring jurisdiction’s] sham government’s sham zoning and permitting machinations.” See Pls.’ Mem. in Opp’n to Defs.’ Mot. to Dismiss at 22-3 and 25-6; see also Pls.’ Surrebuttal at 9 and 12.

The Court believes the first three of these “interests” essentially stand for the same proposition, however, the Court will try to parse them out and treat them separately. First, the Court has been hard pressed to find either controlling or persuasive authority which establishes a fundamental right in or allowed a party to base a substantive due process claim on the unfettered use and enjoyment of one’s land. At least one other court has rejected a constitutional claim based on the allegation that a rezoned area has interfered with the use and enjoyment of a plaintiff’s land. See MacNamara, 738 F.Supp. at 142-43 (dismissing plaintiffs case which was

² The Court believes Plaintiffs have sufficiently alleged arbitrary and capricious government action in their Amended Complaint and will limit its analysis to the first part of substantive due process analysis.

centered on the theory that the defendants' approval of an electrical power station on a parcel of land located near plaintiffs' property violated plaintiffs' constitutional rights). The Court finds no reason to depart from the limited authority on this issue.

Second, to the extent Plaintiffs have attempted to argue that the limitations placed on their use of their land constitute takings, they fail to make out a claim. The most apparent takings occur when the government has physically invaded one's land. See *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 712 (3d Cir. 1985) aff'd, 480 U.S. 470 (1987). However, takings can also occur without physical invasion if the governmental action deprives a land owner of all economically viable uses of property. See *Rogin v. Bensalem Twp.*, 616 F.2d 680, 692 (3d Cir. 1980) (explaining that the Supreme Court will uphold the application of a zoning ordinance even if the new law prohibits a beneficial use to which certain parcels had been devoted). Here, Plaintiffs do not make any allegations of physical invasion or deprivation of all possible economic uses. Consequently, there is no basis for a takings argument in Plaintiffs' case.

Third, as to the claim that Plaintiffs have a right not to be subjected to common nuisances such as odors, noise, pollution, dirt and other noxious and dangerous situations, Plaintiffs again fail to raise a constitutionally protected interest. In *Stop-Save Twp. Open Places, Inc. v. Bd. Of Supervisors*, No. 96-7325, 1996 U.S. Dist. LEXIS 16998, at *13-16 (E.D. Pa. 1996), a case in which the plaintiff made a claim closely resembling Plaintiffs' assertion of a right to be free from nuisance, Judge Waldman wrote "[t]here is no fundamental right in modern society to be free from increased traffic, noise or an incursion on open space . . . [i]ncreased residential and commercial development is an inevitable fact of life in expanding suburban

areas.” Stop-Save, 1996 U.S. Dist. LEXIS 16998 at *13. Judge Waldman’s observation rings true in this case. Plaintiffs, assuming their allegations are true, understandably are not pleased with the effects of a land fill, but rural areas are also becoming subject to change. The nuisances which may result from these changes in land use may be actionable under state nuisance law, but they do not constitute violations of substantive due process.

Fourth, the Court believes diminution of property values does not give rise to substantive due process protection. See MacNamara, 738 F.Supp. at 142, citing BAM Historic District Association v. Koch, 723 F.2d 233, 237 (2d Cir. 1983) (holding that a land use decision causing a decline in property values did not deprive a person of property within the meaning of the Fourteenth Amendment); see also Stop-Save, 1996 U.S. Dist. LEXIS 16998 at *13, citing Fusco v. State of Connecticut, 815 F.2d 201, 205-06 (2d Cir. 1987) (holding plaintiffs’ claim that their property values decreased because of neighboring development did not constitute a deprivation of property rights protected by Fourteenth Amendment).

Finally, the Court is not sure what Plaintiffs mean when they assert the right to own, use and enjoy “property that is not subject to a [neighboring jurisdiction’s] sham government’s sham zoning and permitting machinations.” See Pls.’ Mem. in Opp’n to Defs.’ Mot. to Dismiss at 26. Plaintiffs do not provide the Court with any statute or case law from which it can evaluate this substantive due process claim; the Court is fairly confident nothing of that sort exists. In summary, the Court does not believe any of the property interests Plaintiffs pled give rise to substantive due process protection. Accordingly, Plaintiffs’ substantive due process claim will be dismissed.

B. Procedural Due Process

Plaintiffs have also alleged a denial of their constitutional rights to procedural due process. To establish a violation of procedural due process, Plaintiffs must establish two elements: (1) a person acting under color of state law deprived them of a protected property interest and (2) the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 680 (3d Cir. 1991), citing Parratt v. Taylor, 451 U.S. 527, 537 (1981). Regarding the first element, Plaintiffs argue they have raised a constitutionally “protected interest in the ownership, use and enjoyment of their property.” Pls.’ Mem. in Opp’n to Defs.’ Mot. to Dismiss at 26. As addressed *supra*, Plaintiffs have not raised a constitutionally protected interest. This determination alone could serve as a basis for dismissing Plaintiffs’ procedural due process claim. See MacNamara v. County Council of Sussex County, 738 F. Supp. 134, 143 (D. Del. 1993) (dismissing both a substantive due process claim and a procedural due process claim because the plaintiff failed to raise a constitutionally protected interest).

Assuming *arguendo*, Plaintiffs have established deprivation of a protected property interest, the question becomes can Plaintiffs show the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. Plaintiffs argue that the “sham” nature of New Morgan Borough precludes the existence of a “legitimate procedure for challenging the complained-of actions” and that “Pennsylvania law . . . severely restricts both substantive rights and procedural remedies of persons situated like the [P]laintiffs.” Pls.’ Mem. in Opp’n to Defs.’ Mot. to Dismiss at 27.

This argument carries no weight. The Third Circuit has conclusively held Pennsylvania's statutory scheme adequately protects the procedural due process rights of a plaintiff challenging a municipality's zoning decisions. See Rogin v. Bensalem Twp., 616 F.2d 680, 694-95 (3d Cir. 1980) (upholding Pennsylvania's scheme for challenging zoning ordinances because it provided for a ministerial review of a proposed use by a Zoning Officer, an appeal to the Zoning Hearing Board, and an appeal of that decision to the Court of Common Pleas); see also Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1294-95 (3d Cir. 1993) (remarking Pennsylvania's scheme for challenging zoning ordinances is consistent with due process); Omnipoint Communications, Inc. v. Penn Forest Twp., 42 F. Supp. 2d 493, 507 (M.D. Pa. 1999) (dismissing "procedural due process claim as the Third Circuit has determined that Pennsylvania's scheme for challenging zoning determinations satisfie[s] procedural due process"). Thus, the Court believes Plaintiffs fail to establish either of the two necessary elements of a due process claim. Accordingly, Plaintiffs' procedural due process claim will be dismissed.

C. RICO

Plaintiffs' final federal claim is a civil RICO claim. To prevail in a civil action for damages under RICO, a plaintiff must establish a violation of Section 1962, allege an injury to their business or property "by reason of" the alleged violation of Section 1962, and plead the requisite causal connection between the injury and the violation of Section 1962. E.g., Masnik v Bolar Pharmaceutical Co. Inc., No. 90-4086, 1991 U.S. Dist. LEXIS 10138, *19-*20 (E.D. Pa.

July 18, 1991), citing 18 U.S.C. 1964(c).³ The Supreme Court has determined that the phrase “by reason of” in Section 1964(c) requires a plaintiff to show the alleged RICO violations proximately caused the plaintiff’s injury, meaning the violation can not be too remote from the injury. See Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992);⁴ see also Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 443-44 (3d Cir. 2000) (upholding lower Court’s dismissal of RICO claims because proximate cause was lacking); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 934 (3d Cir. 1999) (finding that plaintiffs failed to allege a compensable injury proximately caused by defendants’ allegedly fraudulent and conspiratorial conduct sufficient to avoid dismissal under Fed. R. Civ. P. 12(b)(6)), cert. denied, 528 U.S. 1105 (2000).

There are three factors of proximate cause in RICO:

(1) the directness of the injury – “the more indirect the injury, ‘the more difficult it becomes to ascertain the amount of a plaintiff’s damages attributable to [defendant’s wrongdoing], as distinct from other, independent, factors;” (2) the difficulty of apportioning damages among potential plaintiffs – “allowing recovery by indirectly injured parties would require complicated rules for apportioning damages;” and, (3) the possibility of other plaintiffs vindicating the goals of RICO – “direct victims could generally be counted on to vindicate the policies underlying” RICO in a better manner than indirect victims.

³ Section 1964(c), the civil damages provision of RICO, provides the following:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.

⁴ The proximate cause requirement the Supreme Court imposes on civil RICO claims is an aspect of standing rather than an element of a plaintiff’s civil RICO prima facie case. See Allegheny Gen. Hosp., 228 F.3d at 443; see also Masnik at *21-*22. Plaintiffs argue the Third Circuit conclusively determined that Plaintiffs have standing under RICO in its December, 7, 1999 unreported Memorandum Opinion which reversed the Court’s November 20, 1998 decision. The Court disagrees. Rather, the Third Circuit determined the Court improperly conducted its 12(b)(6) RICO analysis by relying on independent factual findings reached during the Court’s 12(b)(1) analysis regarding Plaintiffs’ constitutional claims. The Third Circuit’s prior opinion in this case does not bear weight on the analysis herein which the Court conducts independently of another analysis.

Allegheny, 228 F.3d at 443, quoting Steamfitters, 171 F.3d at 932, quoting Holmes, 503 U.S. at 268-69.

A threshold issue is whether Plaintiffs have alleged facts which, if taken as true, sufficiently establish proximate causation. Plaintiffs allege that Defendants' extortion scheme has caused Plaintiffs to suffer loss of property including "loss of property value." Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss at 37, quoting Pls.' Am. Compl. P 48. Plaintiffs also allege that "Defendants knew that the zoning of property for . . . noxious uses . . . would lead in fact to the development and operation of those uses, in part because defendants stood illegally to gain and are gaining financially from the operation of these facilities." Id., quoting Pls.' Am. Compl. P 49. Finally, Plaintiffs allege:

the defendants' extortionate acts . . . were a direct proximate cause of plaintiffs' injuries, in that it was foreseeable to defendants that their extortion and control of the Zoning Board and other entities, with the purpose of zoning a pattern of noxious uses throughout New Morgan Borough, would create conditions that would be and are injurious to plaintiffs' property.

Id., quoting Pls.' Am. Compl. P 50.

1. The Directness of the Injury

This factor addresses the difficulty of ascertaining damages traceable to Defendants' conduct. See Allegheny Gen. Hosp., 228 F.3d at 443. Plaintiffs' chain of allegations has an inherent indirectness. Under Plaintiffs' logic, the cause of their injuries are the noxious businesses, not the alleged extortion, bribery and blackmail. The alleged extortion, bribery and blackmail merely had the effect of making the operation of noxious businesses possible. Further, assuming Defendants have a financial stake in the businesses, and the acts of

the businesses can therefore be attributed to Defendants, the acts of the businesses are not in themselves predicate acts under RICO. This indirectness creates problems for a fact finder who would be required to determine the extent to which Defendants' alleged RICO violations affected Plaintiffs' property as opposed to other factors. First, a fact finder would have to determine whether the zoning of New Morgan Borough would have been the same absent Defendants' alleged RICO violations. It is possible the zoning which permits the noxious businesses would have been approved even if Defendants did not exert illegal pressures. Second, other factors would have to be considered when assessing the damage to Plaintiffs' property such as, *inter alia*, zoning and uses in jurisdictions other than New Morgan Borough, standard depreciation of Plaintiffs' homes, and other market forces such as supply and demand. Consequently, tracing a value back to the alleged RICO violations would be extremely difficult and impractical.

2. The Difficulty in Apportioning Damages Among Plaintiffs

As to this second factor in the proximate cause analysis, apportioning damages among Plaintiffs would be as impractical as ascertaining damages traceable to Defendants' conduct. Allowing recovery by the indirectly injured Plaintiffs would require complicated rules for apportioning damages which would likely include, *inter alia*, valuation of properties before and after the alleged RICO violations, identification and valuation of other sources of positive and negative effects on Plaintiffs' properties, and establishment of ownership identification and property histories. The necessary degree of complexity and problems of apportionment are significant.

3. The Possibility of Other Plaintiffs Vindicating RICO's Goals

Finally, it is unclear whether the individuals targeted by the alleged extortion, bribery and blackmail – who are not identified in Plaintiffs’ Amended Complaint – could recover damages from Defendants. The Court is unaware of any case brought by those alleged victims, which suggests the alleged victims are not likely to vindicate the policies underlying RICO.

In summary, while Plaintiffs may be the only willing prosecutors of Defendants’ alleged RICO violations, the indirectness of Plaintiffs’ injuries and the difficulty in apportioning damages among Plaintiffs suggests proximate cause is lacking. Accordingly, Plaintiffs’ RICO claim will be dismissed.

D. State Claims

Considering the Court will dismiss Plaintiffs’ substantive due process, procedural due process and RICO claims, there will be no federal anchor claims upon which original subject matter jurisdiction may be based. Pursuant to 28 U.S.C. § 1367(c)(3), the Court will dismiss the pendent state law claims as well. See Markowitz v. Northeast Land Co., 906 F.2d 100, 106 (3d Cir. 1990) (“the rule within this Circuit is that once all claims with an independent basis of federal jurisdiction have been dismissed the case no longer belongs in federal court”), citing Lovell Mfg. Corp. v. Export-Import Bank of the United States, 843 F.2d 725, 734 (3d Cir. 1988).

IV. CONCLUSION

For the reasons set forth above, the Court will grant Defendants’ Motion to Dismiss and Plaintiffs’ Amended Complaint will be dismissed in its entirety.

An appropriate Order follows.

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ASSOCIATION, PATTY BRANN,	:	
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CAROLYN WILLIAMS, CHERYL	:	
CONKEL, and NEW MORGAN BOROUGH	:	NO. 98-CV-4184
	:	
Defendants.	:	

ORDER

AND NOW, this 18th day of September, 2001, upon consideration of Defendants' Joint Motion to Dismiss (Docket No. 59) and Plaintiffs' response (Docket No. 61), *et cetera*, it is ORDERED Defendants' motion is GRANTED. Plaintiffs' Amended Complaint is dismissed in its entirety.

This case is CLOSED.

BY THE COURT:

RONALD L. BUCKWALTER, J.