

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

THOMAS TIMONEY, ESQ., RECEIVER :
FOR THE HANKIN FAMILY PARTNERSHIP :
and REALEN VALLEY FORGE GREENES :
ASSOCIATION : CIVIL ACTION
:
v. :
:
NO. 01-1622
UPPER MERION TOWNSHIP, THE BOARD :
OF SUPERVISORS OF UPPER MERION :
TOWNSHIP, and THE UPPER MERION :
TOWNSHIP ZONING HEARING BOARD :

MEMORANDUM

Giles, C.J.

December ____, 2004

I. Introduction

Plaintiffs brought this action against defendants seeking damages based on alleged constitutional violations of their right to equal protection of the law, due process, and just compensation upon a taking of property, pursuant to 42 U.S.C. § 1983. Relief is sought through the Fifth and Fourteenth Amendments to the United States Constitution.

Now before the court is plaintiffs' Motion for Partial Summary Judgment filed pursuant to Fed. R. Civ. Proc. 56. For the reasons that follow, that motion is denied.

II. Factual Background

Plaintiffs are the legal and equitable owners of the tract of land called the Valley Forge Golf Course¹ ("Property"). They have sued defendants for alleged civil rights violations arising

¹ The Hankin Family Partnership, the legal owner of the Property at the initiation of this suit, recently consummated an agreement to sell it to Realen Valley Forge Greenes Associates, the former equitable owner. (Def.'s Mem. of Law in Opp'n at 2 n.1).

from the Upper Merion Township Zoning Board's 1999 decision to deny their petition for permission to develop the Property for commercial and recreational purposes. The Zoning Board decided that the Agricultural (AG) zoning designation of the Property was proper and would not be changed for the use sought. Plaintiffs claimed then and now that the Zoning Board had, and continues to, treat them differently from other surrounding property owners similarly situated. Specifically, plaintiffs claim that the Upper Merion defendants permitted surrounding properties, formerly zoned as AG, to be rezoned for a high commercial use while denying plaintiffs' requests, all in an effort to either force the owners of the Property to maintain it as an open space for public benefit or to force a sale of it to the Upper Merion Township ("Township") at a price below its true value. (Pl.'s Mem. of Law in Supp. at 2.)

A. History of the Property

The Property is a 135 acre parcel that has been landscaped and operated as a golf course since the 1920s, prior to the zoning by the Township. In 1953, the Property was part of an 1800 acre AG district that was created as a "holding zone." The AG zoned land was reserved from development until specific proposals were submitted to the Board of Supervisors of Merion Township ("Supervisors") and evaluated on a case-by-case basis. Hankin Family Partnership v. Upper Merion Township, No. 01-1622, 2002 WL 461794, at *1 (E.D. Pa. March 22, 2002).

The AG zoning designation permits four uses by right, eleven by special exception, and two as conditional uses.² (Def.'s Mot. in Opp'n at 2.) In 1959, the Township put a

² Section 165-10 of the Upper Merion Township Zoning ordinance permits the following four uses by right for property zoned AG: (1) single-family detached dwellings; (2) conversion of single family detached dwelling; (3) agricultural; and (4) municipal uses.

The following eleven uses are permitted by special exception for property zoned AG: (1) educational, religious, philanthropic use excluding correctional or penal institutions; (2) day

Comprehensive Plan into place that stated, among other things, that the preferred use for the Property is “parks, recreation and open space” and that the properties should be put to a use that is “beneficial to the township.” (Id. at 3.)

In 1968 the Township authorized the creation of a Township Authority for the purpose of acquiring the Property for public use. Hankin, 2002 WL 461794, at *2. The Township Authority filed a Declaration of Taking whereby it condemned the Property for public use, intending to continue its use as a golf course. (Id.) The Declaration of Taking was challenged by the Property owners and invalidated by the Court of Common Pleas of Montgomery County. (Id.) Following the invalidation of the Declaration of Taking, at a public meeting, the Supervisors then in office stated their intention to limit the Property to open space through continuation of the AG designation. (Id.) In 1981, Hankin entered into an agreement to sell the Property contingent upon a buyer, Acorn, obtaining the right to develop the parcel for commercial uses. Acorn filed a substantive challenge to the validity of the AG zoning of the Property and the Zoning Board rejected it. (Id.) When the Township's Comprehensive Plan was amended in 1986, the Township continued to designate the Property for use as “parks, recreation, and open space.” (Id.) In 1996 Hankin agreed to sell the Property to Realen, subject to Realen obtaining the right to develop it for commercial purposes. (Id.) The Supervisors told Realen that, in order to obtain a

camp; (3) hospital, convalescent home, sanatorium; (4) club, fraternity house or lodge; (5) passenger station for public transportation, telephone central office, other public utility uses; (6) radio and television transmitting station and towers; (7) laboratory for scientific, agricultural or industrial research; (8) community center, noncommercial park, athletic field, recreational use; (9) golf course, excluding golf driving range and miniature golf course; (10) riding academy; and (11) cemetery.

The following two uses are permitted by conditional use for property zoned AG: (1) cluster residential development; and (2) personal care facility.

rezoning of the Property, it would have to obtain the support of the local community groups which had actively opposed development of the Property in the past. Realen determined that it was not feasible to obtain their support. (Id.) In October of 1997, the Supervisors offered to buy the property for \$4,800,000, based on the fair market value of the Property, zoned AG, as determined by the Montgomery County Board of Assessment. (Id.) All the privately-owned parcels of land immediately adjacent to the Property zoned for commercial use have a fair market value ranging from 3 to 22 times per acre more than the Property's AG value. (Id.)

B. Challenges to the AG Designation

Between 1955 and 1985, the Board granted rezoning requests submitted by the owners of all of the privately-owned properties within the original 1800 acre AG area, except for the Hankin Property. Hankin, 2002 WL 461794, at *2. The other properties have all been developed for uses not permitted in the AG district. These areas include a combination of commercial, restaurant, hotel and office uses, including the present Valley Forge Industrial Park, King of Prussia Mall, General Electric, Acme and Valley Forge Convention Center areas. In re Realen Valley Forge Greene Associates, 838 A.2d 718, 722 (Pa. 2003). The areas surrounding the Property also include a bank, a gas station, a Home Depot store and a condominium development. Id. No request for rezoning in the district has been granted since 1985. Hankin, 2002 WL 461794, at *2.

The Hankin Family Partnership (“Hankin”) made four requests to the Board to rezone the Property, each of which has been rejected. In 1967, Hankin requested rezoning of a part of the Property to allow for a hotel, clubhouse, parking and other recreational facilities. (Def.’s Mot. in Opp’n at 2.) The Supervisors denied the request, relying on the Township’s goal of acquiring the

Property for use as a public recreation area through condemnation. Hankin, 2002 WL 461794, at

*2. In 1981, Hankin requested a rezoning of part of the Property in order to build a hotel.

(Def.'s Mot. in Opp'n at 2.) In 1982 Hankin requested that the Board rezone the Property to

allow for offices and a hotel. (Id.) Again in 1982, Hankin petitioned the Board to rezone a

portion of the Property to allow for offices and a hotel. (Id.)

C. State Court Decision

In 1997, when Realen challenged the validity of the AG zoning of the Property, it argued that the AG designation was invalid because it: 1) violated due process; 2) was arbitrary and irrational; 3) constituted special legislation; and 4) constituted unlawful spot zoning. (Hankin, 2002 WL 461794 at *3). After taking evidence, the Board rejected the challenge on August 13, 1999, finding that the Property is materially different from the surrounding properties in question and could be treated differently. (Id.)

Appeal was taken to the Court of Common Pleas of Montgomery County. That court affirmed the Board's decision on December 1, 2000, finding that since the AG designation still permitted the Property to be utilized for viable purposes other than the uses sought, the designation was proper. (Id.). Without taking any additional evidence, the Court of Common Pleas determined that the AG designation was valid and rational due to the unique characteristics of the Property as compared to surrounding properties that had been rezoned commercial. In re Realen Valley Forge Greenes Associates, 59 Pa. D. & C. 4th 429 (C.P. Montgomery 2001).

However, the state record and opinion did not discuss the specific characteristics of the surrounding properties. Id. at 430-40. The Court of Common Pleas held that the Board's motives in the zoning decision-making were irrelevant in determining whether the zoning

designation was appropriate. Id. at 447.

Realen appealed to the Commonwealth Court of Pennsylvania, arguing that the AG zoning was discriminatory and impermissible spot zoning, and otherwise improper and invalid under Pennsylvania law. (Pl.'s Mem. of Law in Supp. at 6, Def.'s Mem. of Law in Opp'n at 4-5.) On June 3, 2002, the Commonwealth Court affirmed the Court of Common Pleas' decision, finding that the zoning was proper and valid. It also declared that the intent and motives of the Township were irrelevant to the zoning law issues decided. In re Realen Valley Forge Greene Associates, 799 A.2d 938, 946 (Pa. Cmwlth. 2002).

Realen filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which granted *allocatur*. On December 18, 2003, the Pennsylvania Supreme Court held, based on the record before it, that the continued AG zoning of the Property was an unlawful and arbitrary exercise of police power, and constituted reverse spot zoning. In re Realen Valley Forge Greene Associates, 838 A.2d 718 (Pa. 2003). The Court found that the record contained "no characteristic of the Golf Club's property [that] justifies the degree of its developmental restriction by zoning as compared to the district designation and use of all the surrounding area." Id. at 730. The opinion focused on what it described as unwarranted and irrational differences between the Property and the previously rezoned properties. However, the Court did not, and could not, because of the state of the record, specifically compare the characteristics of the Property and those of the individual surrounding properties. Id. at 730-32.

While the state court proceedings were ongoing, plaintiffs filed for relief in federal court, alleging violations of equal protection and due process, and unjust taking of property. Hankin Family Partnership v. Upper Merion Township, No. 01-1622, 2002 WL 461794 (E.D. Pa. March

22, 2002).

This court dismissed the procedural due process claim for failure to state a claim on which relief could be granted. Id. We determined that the remaining claims were parallel to the state proceedings and, under Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), should be placed in suspense pending the outcome of the state court proceedings. Plaintiffs appealed. The third circuit remanded for further determination as to whether “exceptional circumstances” were presented as required by Colorado River. See, Timoney v. Upper Merion Township, 2003 WL 21213332 (3d Cir. 2003). Following this ruling, the parties agreed to hold the case in abeyance pending final adjudication by the state court system. Decision was then pending before the Pennsylvania Supreme Court. Promptly following the Supreme Court’s final disposition, plaintiffs filed this Motion for Partial Summary Judgment.

III. Discussion

A. “Class of One” Equal Protection Claim

Traditionally, equal protection claims have been limited to plaintiffs who allege that they are members of a protected class that has been denied equal protection of the law. See, e.g., Lawrence v. Texas, 539 U.S. 558, 584 (2003); Keenan v. City of Philadelphia, 983 F.2d 459, 465 (3d Cir. 1992). However, in Village of Willowbrook v. Olech, 528 U.S. 562 (2000), the Supreme Court held that single individuals or entities who are not alleged to be members of a protected class can bring an equal protection claim under a theory of “class of one.” Id. at 564 (per curiam). “Class of one” equal protection claims require that “the individual plaintiff alleges intentional and disparate treatment compared to others similarly situated and that there is no rational basis for the difference in treatment.” Id. The Court explained that “the purpose of the

equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Id. (internal citations omitted).

Mrs. Olech and her husband had requested access to the municipal water system after their well dried up. Id. at 563. The Village initially agreed and the Olechs paid the customary installation fee. Olech v. Village of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998). However, shortly after work began, the Village stopped and informed the Olechs that they would be required to grant, not the standard 15-foot easement, but a 33-foot easement, to permit the Village to widen the road on which they lived. Id. The Olechs refused and, after three months, the Village relented and hooked up the water line requiring only the 15-foot easement. Id. During the intervening months the Olechs had been without water and, as a result, suffered various damages. Id.

The Olechs filed suit, alleging that imposition of the 33-foot easement requirement was a violation of equal protection because it was "irrational and wholly arbitrary." Olech, 528 U.S. at 563. The Olechs alleged that the Village acted with "either the intent to deprive [Mrs.] Olech of her rights or in reckless disregard of her rights." Id. Further, the Olechs alleged that the Village was motivated by ill will in seeking the non-standard easement because the Olechs had previously brought suit against the Village and won damages for flood damage caused by the Village's negligent installation and enlargement of culverts located near their property. Olech, 160 F.3d at 387 (citing Zimmer v. Village of Willowbrook, 610 N.E.2d 709, 712 (Ill. App. 1993)).

The Court granted certiorari “to determine whether the Equal Protection Clause gives rise to a cause of action on behalf of a ‘class of one’ where the plaintiff did not allege membership in a class or a group.” Id. at 564. The Court held that an equal protection claim was adequately pled because the complaint alleged that the Village’s demand was “irrational and wholly arbitrary,” as was shown by the later installation of the water line on the standard 15-foot easement. Id. at 565. While there was no dispute that the plaintiffs had alleged the Village’s actions were due to “subjective ill will,” the Court did not specifically spell out subjective motivation as an element of a “class of one” claim. Id. The Court stated that “allegations [that the defendants’ actions were irrational and arbitrary], quite apart from the Village’s subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis.” Id. The Court did not state that subjective ill will and a finding of improper motive were necessary for an equal protection claim. Id.

In his concurrence in Olech, Justice Breyer expressed concern that the Equal Protection Clause not be interpreted so as to transform many violations of city and state law into violations of the Constitution. Olech, 528 U.S. at 565. He cautioned that when one considers that zoning decisions will almost always treat one landowner differently from another, unless the standard of intentional conduct is made clear, it might be claimed whenever a city's zoning authority takes an action that fails to conform to a city zoning regulation, that “it lacks a ‘rational basis’ for its action (at least if the regulation in question is reasonably clear).” Id. Justice Breyer concluded that the added pleading factor in Olech of “vindictive action,” “illegitimate animus” or “ill will” on the part of the municipality satisfied his concerns about “transforming run-of-the-mill cases into cases of constitutional right.” Id. at 565-66.

Recently, the third circuit adopted Justice Breyer’s position on the essential bad faith element in zoning cases. In Eichenlaub v. Twp. of Ind., 385 F.3d 274 (3d Cir., 2004), the court cited with approval his Olech concurrence, noting that the “irrational and wholly arbitrary standard” is difficult for a plaintiff to meet in a zoning dispute. Id. at 287 (citing Olech, 528 U.S. at 565-66). Further, Eichenlaub stated, “[W]e 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 under an equal protection approach.” Id.

The Eichenlaubs had sought to develop a subdivision on certain pieces of property they owned in the Township of Indiana County, Pennsylvania. Eichenlaub, 385 F.3d at 276-77. The township insisted that the development comply with a number of regulations. Id. The plaintiffs claimed that the township violated their substantive due process and equal protection rights by denying or delaying approval to develop the land. Id. They also claimed that township officials violated one family member’s First Amendment rights at a public meeting by curtailing his speech and ejecting him from the meeting, and that they retaliated against him for exercising his First Amendment Rights. Id. The district court granted summary judgment in favor of the township on the substantive due process, equal protection and First Amendment claims, and denied the mandamus claim as moot. The third circuit affirmed the district court’s order with regard to substantive due process, stating that the zoning officials’ alleged actions did not meet the “shocks the conscience” test. Id. at 285. The test is not precise, and varies depending upon the facts of a given case. Id. It is reserved for “only the most egregious official conduct” in order

to “avoid converting federal courts into super zoning tribunals.” Id. (citations omitted)³

Here, plaintiffs allege that they were intentionally treated differently with respect to the zoning designation of the property, and that there was no rational explanation for such treatment. In support of these allegations, plaintiffs offer the record, together with the majority opinion of the Pennsylvania Supreme Court, which seemingly found that plaintiffs were treated arbitrarily by the Zoning Board and that such treatment was unlawful under state law. Accordingly, plaintiffs have properly raised a “class of one” equal protection claim. They now argue that, under the doctrine of collateral estoppel, summary judgment on the equal protection claims should be granted in their favor.

B. Collateral Estoppel

Under 28 U.S.C. § 1738, federal courts are required to give the same full faith and credit to state court judgments that such judgments would receive from other courts in the state. See 28 U.S.C. § 1738; Allen v. McCurry, 449 U.S. 90, 96 (1980). “[R]es judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance upon adjudication.” Allen, 449 U.S. at 94. In addition, these doctrines “promote the comity between state and federal courts that

³ Courts in this circuit and others have uniformly held that a “class of one” theory in equal protection requires a plaintiff to demonstrate that: 1) defendants, acting under color of state law, intentionally treated plaintiff differently from others similarly situated, and 2) there is no rational basis for the difference in treatment. Olech, 528 U.S. at 564; Adams Parking Garage, Inc. v. City of Scranton, 33 Fed. Appx. 28, 32 (3d Cir. 2002) (unpublished); Marwood v. Elizabeth Foward Sch. Dist., 91 Fed. Appx. 207, 209 (3d Cir. 2004); see also Congregation Kol Ami v. Abinton Township, 309 F.3d 120 (3d Cir. 2002); Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 944 (9th Cir., 2004); Bell v. Duperrault, 367 F.3d 703, 707 (7th Cir., 2004); Hayut v. State Univ. of N.Y., 352 F.3d 733, 754 (2d Cir., 2003); 3883 Conn. LLC v. District of Columbia, 357 U.S. App. D.C. 396 (D.C. Cir., 2003).

has been recognized as a bulwark of the federal system.” Id. at 96.

In deciding whether collateral estoppel controls, this court must apply Pennsylvania law. See McNasby v. Crown, Cork, & Seal Co., 888 F.2d 270, 276 (3d Cir. 1989). For collateral estoppel to apply to a Pennsylvania decision, the party invoking the doctrine must demonstrate: 1) that the issue decided in the prior adjudication was identical to the one presented in the later action and that it was necessary to the final judgment on the merits; 2) that there was a final adjudication on the merits; 3) that the party against whom collateral estoppel is asserted was a party, or in privity with a party, to the prior adjudication; and 4) that the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue in question in the prior action. Tucker v. Philadelphia Daily News, 848 A.2d 113, 120 (Pa. 2004).

Here, plaintiffs assert that the decision of the Pennsylvania Supreme Court is binding, through the doctrine of collateral estoppel, with regard to the equal protection claim. Pl.’s Mem. of Law in Supp. at 7. When a plaintiff seeks to use collateral estoppel, it is termed “offensive collateral estoppel,” and is a form that is less favored because it can be applied unfairly to a defendant. See Delaware River Port Auth. v. FOP, Penn-Jersey Lodge, 290 F.3d 567, 572 (3d Cir. 2002); Raytech Corp. v. White, 54 F.3d 187, 195 (3d Cir. 1995). The parties agree that both the second and third requirements of collateral estoppel are satisfied. (Pl.’s Mem. of Law in Supp. at 15, Def.’s Mem. of Law in Opp. at 26.) However, there is dispute whether the first and fourth requirements are: that is, whether the issues addressed in the Pennsylvania Supreme Court decision were identical to those presented by the equal protection claim and whether the defendant had a full and fair opportunity to litigate such issues.

1. Identical Issues - “Similarly Situated”

Collateral estoppel applies only when the issue decided issue to be determined in the subsequent case. Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1346, 1348 (Pa. 1991); Harter v. Reliance Ins. Co., 562 A.2d 330, 335 (Pa. Super. Ct. 1989).

The essence of the equal protection clause of the United States Constitution is the requirement that similarly situated persons be treated alike. Plyer v. Doe, 457 U.S. 202, 216 (1982). However, to be “similarly situated” two individuals or entities must be “similarly situated in all material respects.” Shumway v. United Parcel Service, 118 F.3d 60, 64 (2d Cir. 1997).

"Identity of the issue is established by showing that the same general legal rules govern both cases and that the facts of both cases are indistinguishable as measured by those rules." Hitchens v. County of Montgomery, 98 Fed. Appx. 106, 112 (3d Cir., 2004) (quoting Suppan v. Dadonna, 203 F.3d 228, 233 (3d Cir. 2000)). The moving party has the burden to demonstrate that the “issue actually litigated” in a previous action is identical to the current issue before the court. See id. “To defeat a finding of identity of the issues for preclusion purposes, the difference in the applicable legal standards must be substantial.” Hitchens, 98 Fed. Appx. at 112 (quoting Raytech Corp. v. White, 54 F.3d 187, 191 (3d Cir. 1995)).

Here, plaintiffs contend that the Court’s decision did, in fact, determine that the Property was “similarly situated” to the surrounding parcels that formerly held AG designations. To support this argument, plaintiffs refer to the “finding” that spot zoning had occurred, and assert that spot zoning necessarily involves “similarly situated” land owners.

At the outset, it is important to ascertain the role that the Court gave itself. By its words,

the Court limited its analysis to “whether the board abused its discretion or committed a legal error.” 838 A.2d at 727. Thus, it did not purport to put itself in the role of fact-finder, although at times the language of the opinion appears to suggest otherwise. Therefore, it cannot be said that the Court found as fact that the surrounding properties were identical or similarly situated, as if a fact-finder had accumulated all of the necessary information from which a definitive decision could be made. Language of the opinion regarding spot zoning must be viewed in the context that the Court acted, not as a fact-finder, but as discerner of legal error within the constraints of the record before it.

Clearly, there was no record evidence of ill-will, and one cannot infer from the Court’s statements regarding spot zoning that it determined that ill will or bad motive by the Zoning Board existed in 1999. Rather, one must view the statements as concluding that the Zoning Board and the lower reviewing courts committed legal error in concluding that the record supported a continued AG zoning designation.

The Zoning Board had determined that the different treatment of the Property, as compared to the surrounding land, was justified due to the Property’s “shape, road frontage, adjoining and existing uses as well as natural features, not to mention the sheer large size of the property.” 838 A.2d at 729-30. The trial court agreed: “[T]he Board found that the Property is unique and distinguishable in several respects from the surrounding properties. Two notable differences found by the Board were that the Property is considerably larger than the surrounding properties and the Property is completely surrounded by roadways.” Id. at 730 (quoting In re Realen Valley Forge Greenes Associates, 799 A.2d 938, 944-45 (Pa. Cmwlth. 2002) (internal citations omitted)).

On the other hand, the Supreme Court emphasized that the size of the tract and its location being entirely bound by highways were irrelevant to a proper AG designation. 838 A.2d at 730. The Court held that “[o]n this record, no characteristic of the Golf Club’s property justifies the degree of its developmental restriction by zoning as compared to the district designation and use of all the surrounding lands both within the Township and in the adjoining Municipality.” Id. (emphasis added)

Because the record did not contain other distinguishing factors, a ruling of spot zoning was made as a matter of law. The opinion did not analyze or compare all the characteristics of the former AG properties to the characteristics of the Property because the record was deficient on those items and devoid of evidence as to motive.⁴

Without a comparison by a fact-finder of the Property with the individual characteristics of the surrounding parcels of land, this court cannot rely upon the Supreme Court’s opinion as a finding that the properties are “similarly situated” for equal protection purposes. For this reason, and because motivation has not been determined by any Pennsylvania court, this court finds that the doctrine of collateral estoppel has no applicability in this case.

2. Full and Fair Opportunity to Litigate

Defendants claim that the Pennsylvania Supreme Court and lower courts did not provide a full and fair opportunity to litigate and defend against plaintiffs’ class-of-one equal protection claim. (Def.’s Mem. of Law in Opp’n at 32.) Specifically, defendants assert that they did not have an opportunity to argue that their motive for maintaining the AG designation of the Golf

⁴In his dissent, Justice Saylor noted that the Court’s majority failed to treat record evidence which would be consistent with good faith error, e.g., topography of the land, proximity to roadways. Id. at 734.

Course was not based on ill will or illegitimate animus towards plaintiffs. (Id.)

The parties did not litigate the issue of ill will or bad motive because the trial court ruled as a matter of law, as did the Commonwealth Court, that motive was irrelevant. Because the parties never litigated motive, the issue could not have been determined by the Pennsylvania Supreme Court.

It is observed that the Supreme Court devoted much of its opinion discussing historical decisions of the Zoning Board. However, there is no record proof that the member composition of the Board in 1999 was the same as it was in 1967. Further, the Zoning Board's decision-making justification and the desires of the Township supervisors may have to be separately evaluated for equal protection purposes.

IV. Conclusion

For the foregoing reasons, plaintiff's Motion for Partial Summary Judgment is denied and judgment is entered in favor of defendants.

An appropriate order follows.

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

THOMAS TIMONEY, ESQ., RECEIVER :
FOR THE HANKIN FAMILY PARTNERSHIP :
and REALEN VALLEY FORGE GREENES :
ASSOCIATION : CIVIL ACTION
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v. :
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NO. 01-1622
UPPER MERION TOWNSHIP, THE BOARD :
OF SUPERVISORS OF UPPER MERION :
TOWNSHIP, and THE UPPER MERION :
TOWNSHIP ZONING HEARING BOARD :

ORDER

AND NOW, this ___ day of December, 2004, upon consideration of Defendants Upper Merion Township, the Board of Supervisors of Upper Merion Township, and the Upper Merion Township Zoning Hearing Board's Opposition to Plaintiffs' Motion for Partial Summary Judgment, it is hereby ORDERED that Plaintiffs' Motion for Partial Summary Judgment is DENIED.

BY THE COURT:

JAMES T. GILES C.J.

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