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

DONALD A. BRUBAKER, BRUBAKER & BRUBAKER, a Partnership, and BRUBAKER, INC.,	)	Civil Action No. 04-CV-03355
Plaintiffs	)	
vs.	)	
EAST HEMPFIELD TOWNSHIP, THE BOARD OF SUPERVISORS OF EAST HEMPFIELD TOWNSHIP, R. MICHAEL WAGNER, NEIL R. KINSEY, SUSAN R. BERNHARDT, JOHN BINGHAM, LARRY L. MILLHOUSE and GEORGE R. MARCINKO,	)	
Defendants	)	

* * *

APPEARANCES:

JOSEPH G. MUZIC, ESQUIRE
On Behalf of Plaintiffs

ROBERT G. HANNA, ESQUIRE
On Behalf of Defendants

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER
United States District Judge

This matter is before the court on Defendants' Motion for Summary Judgment filed August 15, 2005. Plaintiffs' Brief in Reply to Defendants' Summary Judgment Motion was filed September 30, 2005. For the reasons expressed below, we grant defendants'

motion for summary judgment and dismiss plaintiffs' Complaint.

JURISDICTION AND VENUE

Jurisdiction is based upon federal question jurisdiction under 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events giving rise to plaintiffs' claims allegedly occurred in Lancaster County, Pennsylvania, which county is located in this judicial district.

PROCEDURAL HISTORY

On July 16, 2005 plaintiffs Donald A. Brubaker, Brubaker & Brubaker partnership, and Brubaker, Inc. filed a Complaint against East Hempfield Township, the Board of Supervisors of East Hempfield Township, R. Michael Wagner, Neil R. Kinsey, Susan R. Bernhardt, John Bingham, Larry L. Millhouse and George R. Marcinko.[1]

Plaintiffs' Complaint asserts four separate causes of action. Count I alleges that defendants' actions constituted an unlawful taking of plaintiffs' private property, in violation of the Fifth Amendment of the United States Constitution. Count II avers that defendants violated the Fourteenth Amendment by

[1] All of the named individual defendants other than George C. Marcinko were, at some point, members of the East Hempfield Township's Board of Supervisors ("Board"). Mr. Marcinko is the Manager of East Hempfield Township. His role as Manager involves gathering information for the Board and carrying out the directives of the Board. He does not vote in Board meetings.

depriving plaintiffs of their property rights without due process of law and by denying plaintiffs equal protection of law in violation of the Fourteenth Amendment. Count III asserts a private cause of action pursuant to 42 U.S.C. § 1983. Finally, Count IV alleges a conspiracy to interfere with plaintiffs' civil rights in violation of 42 U.S.C. § 1985.

By Order dated September 25, 2005, we denied Defendants' Motion to Dismiss Plaintiffs' Complaint Pursuant to Rule 12(b)(6). We denied defendants' motion to dismiss without prejudice to raise the same issues in a motion for summary judgment. However, defendants had already filed their motion for summary judgment on August 15, 2005, which is the matter presently before the court.

FACTS

Based upon the pleadings, record papers, depositions, affidavits and exhibits of the parties, the relevant facts are as follows.

In May 2001 plaintiff Donald Brubaker filed an Application for Zoning Review and Permit with East Hempfield Township. Mr. Brubaker's application stated his intention to build a 250-foot communications tower on property he owned in the

township.[2] In his application for a building permit, Mr. Brubaker represented that this tower would be used by plaintiff Brubaker, Inc. for existing two-way communications and would replace an existing 100-foot tower built in 1954.

Plaintiffs' construction of the communications tower on their property posed two potential problems. First, Section 112 of the Zoning Ordinance of East Hempfield Township does not permit construction of communications towers in the C-2 zoning district in which Mr. Brubaker's land is located. Second, Section 207.9 of the Zoning Ordinance imposes a 35-foot height limit for all structures in this zoning district. Section 304.1 of the Zoning Ordinance provides that the height limit will not apply if the structure is set back from all property lines a distance at least equal to its height.

Based on Mr. Brubaker's representations in his application, township Zoning Officer Ronald E. Kistler believed that the proposed communications tower qualified for an exception to the general rule prohibiting use of communications towers in this district because the tower would constitute an "accessory use."[3] Section 112 of the Zoning Ordinance defines "accessory

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[2] The property involved in this matter is located at 2220 Harrisburg Pike, Lancaster, Pennsylvania, and is designated as Lot No. 290485780000. For zoning purposes, this property is located in the Township's Community Commercial Zone (C-2).

[3] Defendants assert that Mr. Kistler's belief that the tower constituted a permitted accessory use under the ordinance was the reason he

(Footnote 3 continued):

use" as "a use customarily incidental and subordinate to the principal use or building and located on the same lot as the principal use or building."

Accessory uses, unlike communications towers in general, are permitted uses within the Township's C-2 Zone pursuant to section 207.2. Accordingly, on May 24, 2001, Mr. Kistler approved plaintiff Brubaker's application and issued a building permit for the proposed communications tower.[4]

Construction of the tower began soon after Mr. Brubaker received the required permit and was completed on July 16, 2001. Plaintiff Brubaker avers that on August 17, 2001, he entered into a lease with Nextel Partners, Inc. ("Nextel"). The lease allowed Nextel to place antennas on the tower. The lease agreement required Nextel to make monthly payments of $1500 for a period of twenty-five years.

(Continuation of footnote 3):

issued a permit in spite of the contrary zoning regulations. Plaintiffs do not refute this assertion in either their Complaint or Plaintiffs' Brief in Reply to Defendants' Summary Judgment Motion. Therefore, we consider this to be an undisputed fact.

Furthermore, in his deposition, Mr. Kistler admits that he did not tell plaintiff Brubaker that the tower was required to be a distance equal to its height from all property lines. Transcript of the Deposition of Ronald E. Kistler, November 7, 2001 ("Kistler Deposition"), page 14. In his deposition Mr. Kistler alleges that he did, however, tell plaintiff that "the further away from the property line the better off he'd be." Kistler Deposition at page 11.

[4] Paragraph 4 of plaintiffs' Complaint lists the approval date as May 29, 2001. However, defendants include a copy of the application as Exhibit 1 in Defendants' Appendix of Exhibits in Support of Defendants' Motion for Summary Judgment. It reflects that the authorization was signed by R. Kistler on May 24, 2001. In addition, Mr. Kistler's deposition indicates that the permit was issued on May 24, 2001. Kistler Deposition at page 18.

Nextel then applied to the East Hempfield Township Zoning Hearing Board for a special exception to the zoning ordinance to permit erection of Nextel's cellular antennas on the Brubaker tower. Hearings were held on the application for special exception on August 20, 2001 and September 17, 2001. The application was approved on September 17, 2001.

At the same time, plaintiff Brubaker applied to East Hempfield Township for a Certificate of Occupancy. At this time, officials informed Mr. Brubaker that "problems or potential problems" existed regarding the tower and requested "as built" drawings of the tower. Subsequently, during a regular Board of Supervisors meeting on September 19, 2001, plaintiff was advised of the revocation of his building permit.

On October 3, 2001 defendant Township initiated an action in the Court of Common Pleas of Lancaster County, Pennsylvania, seeking to obtain an injunction requiring that Mr. Brubaker either remove his structure from the property or relocate it to comply with the setback requirements described above if it was found to be an accessory use.

Lancaster County Court of Common Pleas Judge Louis J. Farina determined that Mr. Brubaker had obtained a vested but defeasible right to the tower as a result of the Township's erroneous approval of the tower's construction. In an

Adjudication and Decree Nisi issued on May 23, 2002,[5] Judge Farina directed the following procedure for defeasance:

> If the township declares within 60 days the possibility of collapse of the defendants' tower is so great a public safety issue as to warrant its removal or relocation, and agrees to bear all costs, expenses, and fees necessary to accomplish removal or relocation, and if removal without relocation also agrees to bear all costs, expenses and fees necessary for Brubaker to acquire alternative technology that would provide an equally viable substitute means of communication for defendant Brubaker's commercial operation, then Brubaker shall remove or relocate the tower upon deposit by Township of adequate security to fund its obligation.

Exhibit A to Plaintiffs' Brief in Reply to Defendants' Summary Judgment Motion ("Plantiffs' Brief") at page 16.

On July 18, 2002 the Township Board of Supervisors issued a formal declaration in accordance with the directive of Judge Farina quoted above. The decision to issue this declaration was made at the regularly scheduled meeting of the Board of Supervisors on July 17, 2002.

As indicated in footnote 5, above, Judge Farina entered a Final Decree in the Lancaster County equity action on September 6, 2002, which formally entered the May 23, 2002 Decree

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[5] The equity action in the Court of Common Pleas of Lancaster County was styled East Hempfield Township, plaintiff v. Donald Brubaker; Brubaker and Brubaker, a partnership; Brubaker, Inc.; and Nextel Partners, Inc., defendants, Civil Action number C1-01-09685. Plaintiff Brubaker (as defendant in the equity action) filed a Motion for Post-Trial Relief in Lancaster County in the form of a request for modification of Judge Farina's Decree Nisi. After oral argument Judge Farina entered a Final Decree and Opinion dated and filed September 6, 2002 which denied defendant Brubaker's post-trial motion and entered the Decree Nisi as a Final Decree.

Nisi as a Final Decree as of September 6, 2002. Plaintiffs (as defendants in the Lancaster County action) appealed to the Commonwealth Court of Pennsylvania from Judge Farina's Final Decree. On July 16, 2003 the Commonwealth Court held, similarly to Judge Farina, that plaintiff Brubaker had obtained a vested right in the communications tower. The Commonwealth Court reversed the final decree of the Lancaster Court of Common Pleas, however, finding that plaintiff Brubaker's right was not defeasible.

Plaintiffs commenced the within action by filing their Complaint on July 16, 2004.

STANDARD OF REVIEW

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). See also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-2510, 91 L.Ed.2d 202, 211 (1986); Federal Home Loan Mortgage Corporation v. Scottsdale Insurance Company, 316 F.3d 431, 443 (3d Cir. 2003). Only facts that may affect the outcome of a case are "material." Moreover, all reasonable inferences from the

record are drawn in favor of the non-movant. Anderson, 477 U.S. at 255, 106 S.Ct. at 2513, 91 L.Ed.2d at 216.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See Watson v. Eastman Kodak Company, 235 F.3d 851, 857-858 (3d Cir. 2000). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Woods v. Bentsen, 889 F.Supp. 179, 184 (E.D.Pa. 1995).

DISCUSSION

In their Brief in Support of Defendants' Motion for Summary Judgment ("Defendants' Brief"), defendants argue that plaintiffs lack a viable claim under the Fifth Amendment and the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983 and 42 U.S.C. § 1985. In the alternative, defendants assert that the individual defendants are protected by legislative and qualified immunity. Moreover, defendants aver that the instant action is precluded by the remedial scheme of the Telecommunications Act of 1996. 47 U.S.C. § 332. For the

reasons expressed below, we agree with defendants.

Fifth Amendment Claim

Plaintiffs' first claim is brought under the "takings clause" of the Fifth Amendment to the United States Constitution. The Fifth Amendment is made applicable to the states by the Fourteenth Amendment.

In support of this claim, plaintiffs allege that "as a result of the actions of the Defendants, Nextel opted to terminate its agreement with Plaintiff Brubaker and eventually co-locate their communication equipment on a tower approximately one mile away from the Brubaker property."[6] Plaintiffs argue that this sequence of events, which in their view constituted a "serious economic deprivation as a direct result of actions taken by Defendants", is sufficient to sustain a Fifth Amendment takings claim at the summary judgment stage.[7]

Plaintiffs misapprehend the applicable caselaw. Their takings claim fails on three independent grounds. Initially, as a result of their failure to exhaust their remedies under state law, plaintiffs' takings claim is not ripe for review at this time. Next, plaintiffs' claim fails on the merits because the actions by the township Board of Supervisors did not constitute a

[6] Plaintiffs' Brief at page 9.

[7] Plaintiffs' Brief at page 11.

final decision. Finally, the actions taken by defendants, even if carried to completion and properly attacked pursuant to state law, could not constitute a taking because plaintiffs were not denied all economically viable use of their property.

In Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 196-197, 105 S.Ct. 3108, 3122, 87 L.Ed.2d 126, 145 (1985), the United States Supreme Court held that a takings claim brought in federal court before the plaintiff has sought compensation through available state procedures is premature. This holding rests on the premise that the Fifth Amendment prohibits the taking of private property *without compensation*. U.S. Const. Amend. V. See also, Williamson County, 473 U.S. at 194, 105 S.Ct. at 3120, 87 L.Ed.2d at 143.

The taking of private property is not absolutely prohibited. As a result, if a state provides administrative or judicial procedures through which individuals may receive just compensation for their loss of property, individuals must first utilize the state process. A plaintiff could receive adequate compensation at that stage, mooting his federal takings claim. Williamson County, 473 U.S. at 194-195, 105 S.Ct. at 3121, 87 L.Ed.2d at 144.

In this case, plaintiffs have not attempted to utilize any state procedure in order to receive compensation for their

alleged loss. The United States Court of Appeals for the Third Circuit has found, in accordance with the Supreme Court precedent cited above, that Pennsylvania's Eminent Domain Code provides a procedure for obtaining compensation for private property takings which must be utilized prior to pursuit of a federal takings claim. Cowell v. Palmer Township, 263 F.3d 286, 290-291 (3d Cir. 2001) (citing 26 Pa.C.S.A. §§ 1-408, 1-502(e), and 1-609). Accordingly, we must reject plaintiffs' takings claim because it is not ripe.

In addition, the declaration by the Township Board of Supervisors alone did not, without further action, constitute a taking. As the Supreme Court explained in Danforth v. United States, 308 U.S. 271, 284, 60 S.Ct. 231, 236, 84 L.Ed. 240, 246 (1939), "[u]ntil taking, the condemnor may discontinue or abandon his effort."

Moreover, Supreme Court precedent provides that reductions in the value of property resulting from legislation not yet enacted are "incidents of ownership" and "cannot be considered as a 'taking' in the constitutional sense." Danforth, 308 U.S. at 285, 60 S.Ct. at 236, 84 L.Ed. at 246.

Here, although the Board announced its intention to move plaintiffs' communications tower, it did not ultimately do so. Even assuming that Nextel did repudiate its contract with plaintiffs on the sole basis of the Board's declaration, as

plaintiffs contend, there could be no taking because the Board did not ultimately act on its decision. See Danforth, supra.

Finally, no taking occurred because plaintiffs have not been deprived of all economically-viable use of their property.[8] A review of regulatory takings jurisprudence yields two primary lines of takings cases. The first involves permanent physical invasion of an individual's private property, while the second denies a property owner all economically beneficial use of his land. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-1019, 112 S.Ct. 2886, 2893-2895, 120 L.Ed.2d 798 (1992). Plaintiffs' case falls within the latter category.

Mere diminution of property value is not sufficient to support a claim of regulatory taking. In Cowell, supra, the Third Circuit explains that "a regulatory taking occurs only when the government's action deprives a landowner of all economically viable uses of his or her property." 263 F.3d at 291. In this case, plaintiffs do not contend that they were ever, at any point during their dispute with the Township, denied all economically viable use of their land.

In their brief, plaintiffs aver that "there are facts on the record to show that Plaintiff Brubaker sustained a serious

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[8] In fact, given that the Commonwealth Court's decision permitted plaintiffs to retain and use the communications tower, it is difficult to see how plaintiffs have been denied *any* economically beneficial use of their property. See East Hempsfield Township v. Brubaker, 828 A.2d 1184 (Pa. Commw. 2003).

economic deprivation."[9] This allegation is insufficient as a matter of law to support a takings claim. Although plaintiffs cite a passage from Lucas which highlights the difficulty of determining whether a "deprivation of all economically feasible use" has occurred, there can be no dispute that "deprivation of all economically feasible use" is the standard for takings claims.[10]

As a result, plaintiffs have failed to plead facts that could support a takings claim under the Fifth Amendment. A "serious economic deprivation" is not a taking unless it rises to the level of denial of all economically feasible use. See Cowell, supra, at 291. Accordingly, plaintiffs do not assert any facts which, if proven at trial, would support a takings claim under the Fifth Amendment.

Fourteenth Amendment Claim

Plaintiffs aver that their substantive due process rights were violated by the actions taken by defendants in this dispute.[11]

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[9] Plaintiffs' Brief at page 11.

[10] Plaintiffs' Brief at page 10.

[11] Plaintiffs' Complaint was not clear as to whether Count II asserted a violation of substantive due process, procedural due process or equal protection principles. In Plaintiffs' Brief in Reply to Defendants' Summary Judgment Motion, however, plaintiffs address only substantive due process. Because a non-movant is not permitted to rest on his pleadings under Fed.R.Civ.P. 56, we construe plaintiffs' Fourteenth Amendment claim as being limited to substantive due process.

Plaintiffs argue that the actions of defendants "rise to the level of shocking the conscience", thereby meeting the test for substantive due process violations enunciated by the Supreme Court in County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), and applied in the context of land use by the Third Circuit in United Artists Theater, Inc. v. Township of Warrington, 316 F.3d 392, 401 (3d Cir. 2003).

Even taking each of plaintiffs' factual allegations regarding the Board's motivations with all reasonable inferences drawn in favor of plaintiffs, however, we are unable to find that defendants' actions shock the conscience. Accordingly, we grant defendants' motion for summary judgment regarding plaintiffs' Fourteenth Amendment claim.

In United Artists, supra, the Third Circuit repudiated the preexisting "improper motive" standard for substantive due process claims under Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988) and its progeny. United Artists, 316 F.3d at 401. The Third Circuit determined that there was "no reason why the the present case should be exempted from the Lewis shocks-the-conscience test simply because the case concerns a land use dispute." United Artists, supra.

Further, the Third Circuit articulated the view that "[l]and-use decisions are matters of local concern and such disputes should not be transformed into substantive due process

claims based only on allegations that government officials acted with 'improper' motives." United Artists, supra, at 402.

Plaintiffs assert the following facts in support of their substantive due process claim. First, they allege that there was "personal animus" toward Mr. Brubaker.[12] Second, they allege that the Board was concerned that the findings in the Court of Common Pleas "made the Defendant Township 'look bad.'"[13] Third, plaintiffs allege that defendants believed that Mr. Brubaker "was either misrepresenting or lying on his permit application."[14]

Finally, plaintiffs allege that the public safety concerns cited by defendants were unsupported by any expert opinion.[15] Making all reasonable inferences in favor of the plaintiffs, as we must do on a motion for summary judgment, we are unable to find that plaintiffs have alleged facts sufficient to meet the shocks-the-conscience standard.

In issuing their July 19, 2002 declaration, defendants acted in accordance with the Adjudication and Decree Nisi issued by the Court of Common Pleas.[16] Plaintiffs' averments, outlined

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[12] Plaintiffs' Brief at page 12.

[13] Plaintiffs' Brief at page 13.

[14] Id.

[15] Id.

[16] See Adjudication and Decree Nisi, Defendants' Exhibit 9.

above, that defendants did so as a result of an improper motive are not sufficient to establish a substantive due process violation. We conclude that defendants, by exercising the right accorded them by the decision of the Court of Common Pleas, cannot be said to have acted in a manner that "shocks the conscience."

The motives alleged in plaintiffs' brief, while not relevant to the question of whether plaintiffs' tower posed a safety risk, are not so improper as to meet the "shocks the conscience" test applied to substantive due process claims. The Supreme Court has said that "only the most egregious official conduct" will suffice to carry this burden. See County of Sacramento, 523 U.S. at 846, 118 S.Ct. at 1716, 140 L.Ed.2d at 1057. Plaintiffs' have not presented competent evidence from which a jury could reasonably find that the conduct of the Board satisfied this standard. See Ridgewood, 172 F.2d at 252.

Section 1983 Claim

To have a cause of action under section 1983, an individual must first demonstrate that he was deprived of "rights, privileges, or immunities secured by the Constitution and laws". 42 U.S.C. § 1983. Although plaintiffs allege violations of their Fifth and Fourteenth Amendment rights, as stated above, no such violations have occurred. Consequently, we

find that defendants are entitled to summary judgment on this claim.

Section 1985 Claim

Plaintiffs concede in their reply brief that there are currently insufficient facts on the record to support a section 1985 claim. 42 U.S.C. § 1985. Accordingly, we grant defendants summary judgment on this point.

Immunity

Defendants allege that each of the individual defendants is entitled to legislative and qualified immunity.[17] We make no finding regarding whether the individual defendants are entitled to immunity because we have found that defendants did not violate plaintiffs' Fifth or Fourteenth Amendment rights. See Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272, 281 (2001), which states that "[i]f no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries regarding qualified immunity".

[17] Defendants allege that George R. Marcinko, as the appointed Township Manager for East Hempfield Township, is entitled to qualified immunity only. Defendants allege that John D. Bingham, Neil R. Kinsey, Larry L. Millhouse, R. Michael Wagner, and Susan R. Bernhardt, as Board members, are entitled to legislative and qualified immunity.

Telecommunications Act

Finally, we examine defendants' sweeping argument regarding section 332 the Telecommunications Act. Defendants claim that the TCA precludes the filing of the instant action by plaintiffs. Defendants aver that the judgment for plaintiffs in state court "was, is, and remains Brubaker's remedy by application of the Third Circuit's decision in Nextel Ptnrs. Inc. v. Kingston Township, Id."[18] We abstain from ruling on this point because we have granted defendants' motion for summary judgment on the basis of the arguments presented above.[19]

CONCLUSION

For all of the foregoing reasons, we grant defendants' motion for summary judgment and dismiss plaintiffs' Complaint.

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[18] Defendants' Brief at page 10.

[19] We note, however, that both of the cases cited by defendants in support of this argument address whether the TCA creates individual rights which may serve as the basis for a 42 U.S.C. § 1983 claim. See City of Rancho Palos Verdes, California, et al., v. Mark J. Abrams, ___ U.S. ____, 125 S.Ct. 1453, 1458, 161 L.Ed.2d 316, 326 (2005), Nextel Partners Inc. v. Kingston Township, 286 F.3d 687, 694 (3d Cir. 2002). In each case, the court determines that a section 1983 claim cannot arise from the TCA because Congress intended for the TCA to provide a comprehensive set of remedies. City of Rancho Palos Verdes, ___ U.S. at ___, 125 S.Ct. at 1462, 161 L.Ed.2d at 330, Nextel Partners Inc., 286 F.3d at 695.

Here, however, plaintiffs are not attempting to assert a section 1983 claim based upon any right created in the TCA. Neither plaintiffs' Complaint nor Plaintiffs' Brief in Reply to Defendants' Summary Judgment Motion contains any reference to the TCA. Moreover, plaintiffs assert substantive rights under the Fifth and Fourteenth Amendments which could serve as the basis of a section 1983 claim. Accordingly, defendants' argument on this point is unavailing.

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

DONALD A. BRUBAKER, BRUBAKER & BRUBAKER, a Partnership, and BRUBAKER, INC., Plaintiffs v. EAST HEMPFIELD TOWNSHIP, THE BOARD OF SUPERVISORS OF EAST HEMPFIELD TOWNSHIP, R. MICHAEL WAGNER, NEIL R. KINSEY, SUSAN R. BERNHARDT, JOHN BINGHAM, LARRY L. MILLHOUSE and GEORGE R. MARCINKO, Defendants	)	Civil Action No. 04-CV-03355

O R D E R

NOW, this 31st day of March, 2006, upon consideration of Defendants' Motion for Summary Judgment filed August 15, 2005; upon consideration of Plaintiffs' Brief in Reply to Defendants' Summary Judgment Motion, which brief was filed September 30, 2005; and for the reasons expressed in the accompanying Memorandum,

IT IS ORDERED that the Defendants' Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that plaintiffs' Complaint is dismissed.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge