THOMAS POWERS, Plaintiff, v. TOWNSHIP OF MAHWAH, MAYOR JOHN ROTH, TOWNSHIP COUNCIL MEMBERS, Defendants, THE RAMAPOUGH MOUNTAIN INDIANS, INC., Nominal Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER L-6223-19 Civil Action **Before:** Hon. Lisa Perez-Friscia, J.S.C. **Returnable:** January 10, 2020

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE IN LIEU OF AN ANSWER PURSUANT TO RULE 4:6-2(e)

CLEARY GIACOBBE ALFIERI JACOBS, LLC
169 Ramapo Valley Road
Upper Level 105
Oakland, New Jersey 07436
(T) 973-845-6700
(F) 201-644-7601
Ruby Kumar-Thompson, Esq. (044951999)
Attorneys for Defendants, Township of Mahwah, Mayor John Roth, and Township Council Members

TABLE OF CONTENTS

Page

Appendix:

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rules

PRELIMINARY STATEMENT

This office represents Defendants Township of Mahwah and Mayor John Roth, and the Township Council Members (hereinafter collectively referred to as "Defendants"). Plaintiff's Complaint was initially filed on August 16, 2019. Thereafter, Powers filed an Amended Complaint on September 6, 2019. Following service of the Amended Complaint on September 20, 2019, a Stipulation Extending Time to Answer was signed by counsel to the parties and filed with the Court on October 17, 2019 extending the time to Answer, move, or respond to the Amended Complaint for an additional 60 days from when the Answer would have otherwise been due from the date of service or until December 14, 2019. In accordance with same, Defendants hereby respond to the Amended Complaint by filing a motion to dismiss in lieu of an Answer pursuant to Court Rule 4:6-2(e).

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Plaintiff Thomas Powers ("Powers" or "Plaintiff"), a resident of Ramapo Hunt & Polo Club located at Mahwah, New Jersey, has initiated this lawsuit for the sole purpose of nullifying the Settlement Agreement that was approved in all material respects by the Township Council on May 9, 2019, and to enjoin the RMI from continuing to use its existing Bridle Path driveway due to safety concerns over the turning width of Bridle Path Lane and to compel any future driveway to be constructed instead on Halifax Road.

The Settlement agreement between the RMI and Mahwah constitute the negotiated and amicable resolution of several legal disputes over the intensity

of the use of "Green Acres designated open space" property owned by the RMI at 95 Halifax Road in Mahwah, New Jersey (hereinafter "the Property") that was reached in an enforcement action filed by the Township of Mahwah under Docket Number 3189-17 on May 9, 2017 (see "Exhibit B" to Plaintiff's Amended Complaint, Settlement Agreement dated June 28, 2019). Prior thereto, the RMI, Mahwah and Polo Club had previously reached a settlement with respect to the structures then existing on the property and regarding the unreasonable uses of the Property by the RMI beginning in the fall of 2017 before the Honorable Lisa Perez Friscia, J.S.C. on terms that were much more favorable to the RMI than the current settlement agreement and the action was dismissed without prejudice (see Transcript of the Settlement Hearing and Order of dismissal dated February 28, 2018 annexed to Certification of Defense Counsel as **Exhibit A**). The enforcement action was then reinstated by Mahwah after the RMI refused to execute the written settlement agreement containing the terms for settlement agreed upon in court on February 28, 2018, and after months-long court ordered mediation efforts in connection with the RMI's federal court litigation alleging violations of their right to Freedom of Religion and under RLUIPA had failed to resolve the differences between the RMI, the Polo Club, and Mahwah (see Order of reinstatement annexed to the Certification of Defense Counsel as **Exhibit B**).

Notably, the terms of the present agreement, unlike the previous agreement, expressly recognize that any use of the property must be consistent with the other uses permitted in the C200 Conservation Zone and in

recognition that the property is in a flood plain (see "Exhibit B," to Plaintiff's Amended Complaint, Settlement Agreement dated June 28, 2019). Furthermore, as it pertains to the settlement itself, the Ramapo Hunt and Polo Club (hereinafter "Polo Club"), which is a homeowners' association to which Powers belongs and is a member, was involved throughout the litigation under Docket Number BER-L-3189 from which the global settlement arose between the RMI and Mahwah. (See Order of Consolidation with BER-L-3197-17 dated December 7, 2019 annexed to the Certification of Defense Counsel as **Exhibit C;** and Def. **Exhibit A**, Transcript of the Settlement Hearing on February 28, 2018). In that litigation, the Polo Club brought similar challenges to the use of the Property by the RMI as is being brought by Powers in the matter at bar, including but not limited to raising the issues of flooding, traffic, the load bearing of the one lane bridge, alleged violations of Mahwah's zoning code, and asserting a claim generally for nuisance against the RMI (see Verified Complaint filed by the Polo Club on September 22, 2017 annexed to the Certification of Defense Counsel as **Exhibit D**).

The Polo Club's claims were fully adjudicated at a trial and dismissed on May 3, 2019 (see Trial Transcript of Decision dated May 3, 2019 annexed to the Certification of Defense Counsel as **Exhibit E**). In dismissing the claims of the Polo Club after hearing testimony and considering the evidence, the Trial Judge found that two years since the filing of the parties' respective Complaints against the RMI, the Property had remained undeveloped and kept "probably better than when it was first deeded to the RMI" by the very same developer

who deeded the Polo Club's property and the one lane bridge now belonging to it. (see Def. **Exhibit E**, Trial Transcript of Decision dated May 3, 2019, p. 5, lines 2-6). The Court also found that the structures, conditions and outrageous uses of the Property which led to Mahwah, along with the Association members, to file their respective enforcement and nuisance actions in Superior Court in 2017 had been abated, and thus no prior restraints could be issued as a result because those conditions no longer existed on the Property. (see Def. **Exhibit E**, Trial Transcript of Decision dated May 3, 2019, p. 5, line 13 through p. 6, line 10; and p. 7, lines 20-23). As to the remaining structures on the Property, namely the prayer circle and stone alter, if they could be considered structures, the Court determined that there was no showing that any laws were being violated by their presence on the Property. (See Def. **Exhibit E**, Trial Transcript of Decision dated May 3, 2019, p. 9 line 13 through p. 10, line 1). Most significantly, the Court also found that to the extent that the Polo Club was seeking to prevent the RMI from merely gathering on the Property and praying, it did not have the power to grant such relief where those activities would otherwise be protected by the First Amendment of the Constitution. (see Def. **Exhibit E**, Trial Transcript of Decision dated May 3, 2019, p. 8, line 10 through p. 9, line 12).

Notwithstanding that the Court rejected all of the challenges brought by the Polo Club in earlier litigation, Powers now brings, in Count One of the Amended Complaint, claims that his right to Due Process and Equal Protection

have been violated as a result of the settlement between the RMI and Mahwah. In support of these claims, Powers alleges the following:

1. The terms of the agreement permitting the RMI to maintain a prayer circle and stone alter, install a driveway on Bridle Path Lane, and to use their property for cultural and religious assembly in a "Conservation Zone" and flood plain violate Mahwah's zoning and site plan requirements.
2. The proposed Settlement Agreement had to be debated in public and subject to public hearing under New Jersey law.
3. The Township Council's approval of the Settlement terms permitted the RMI to bypass land use and site plan approval process applicable to all other taxpayers, and therefore, treated Plaintiff less favorably than the RMI.
4. The settlement constitutes contract zoning or spot zoning because it rezones a particular parcel of land for a purpose that is less restrictive than other permitted uses or that is for a use that is totally different than surrounding area.

In counts Two and Three, Plaintiff raises a challenge to the settlement agreement as arbitrary, capricious and unreasonable by alleging that the agreed upon use of the RMI property for religious assembly is "unsafe" for the following reasons:

1. The Zoning uses and activities permitted on the subject property can create health and safety issues and damages to the

Community and nearby properties due to an alleged high traffic volume associated with the permitted use by the RMI of the property.

2. The property is located in a flood plain which could strand visitors and create safety issues for egress and ingress to the property because the one lane bridge available for ingress and egress to the properties that is owned by the Ramapo Hunt and Polo Club was not designed for large gatherings.
3. The contemplated future construction of a 25 vehicle parking lot on RMI's land and driveway on Bridle Path Lane should not be permitted in a flood way and without a site plan, traffic study, or environmental impact statement due to line of sight and turning radius issues for large vehicles.

None of these challenges are legally viable in light of the Court's decision on May 3, 2019, are furthermore untimely, and must be dismissed for the reasons that follow.

LEGAL ARGUMENT

POINT ONE

PLAINTIFF'S PROCEDURAL DUE PROCESS CLAIM IS SUBJECT TO DISMISSAL AS A MATTER OF LAW.

In Count One of the Amended Complaint, Plaintiff brings a claim for a violation of his constitutional right to procedural due process on the basis of his allegation that the proposed settlement agreement, which was approved by the Township Council at a public meeting on May 9, 2019 "had to be debated

in public and subject to public hearing under New Jersey law." Based upon a plain reading of the other allegations in the Amended Complaint, it appears that Plaintiff's claim for violation of his due process rights are based upon: 1) an alleged failure to properly notice and apprise the public regarding the details of the settlement prior to voting on same, and 2) the Council's actions to hold its discussion on matters involving settlement of litigation in private, rather than in public.

The test that a litigant must satisfy for a viable procedural due process claim is well-established:

> When a plaintiff sues under 42 U.S.C. §1983 for a state actor's failure to provide procedural due process, we employ the "familiar two-stage analysis," inquiring (1) whether "the asserted individual interests are encompassed within the fourteenth amendment's protection of "life, liberty, or property"; and (2) whether the procedures available provided the plaintiff with "due process of law."

Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000). Thus, a procedural due process analysis addresses two questions. The "first asks whether there exists a [life,] liberty or property interest which has been interfered with by the state; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989) (citations omitted); see also Parratt v. Taylor, 451 U.S. 527, 537 (1981).

A. Powers Has Failed To Allege Facts To Demonstrate That He Has An Individual Interest That Is Protected By The Procedural Due Process Clause

As to the first inquiry, whether the plaintiff has a protected property interest for the purpose of the Procedural Due Process Clause of the Fourteenth Amendment depends upon whether state law creates a "legitimate claim of entitlement" in the particular interest or benefit. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); see also Antonelli v. New Jersey, 310 F. Supp. 2d 700, 716 (D.N.J. 2004) ("For the purposes of the Due Process Clause, property interests are defined by state law"), quoting Larsen v. Senate of the Com. of Pa., 154 F.3d 82, 92 (3d Cir. 1998), aff'd, 419 F.3d 267 (3d Cir. 2005). Under New Jersey law, however, it is well established that liability against a landowners' reasonable use of his or own property cannot attach, unless the use constitutes an appropriation of the adjoining land, and deprives the adjoining landowner reasonable enjoyment of his or her property to a material degree. Brownsey v. General Printing Ink Corp., 118 N.J.L. 505, 508 (Sup. Ct. 1937) (emphasis added). As such, an adjoining landowner does not have standing under New Jersey law to challenge the use by a neighboring property unless he can prove some "special injury" particular to him. South Camden Citizens in Action v. New Jersey Department of Environmental Protection, 254 F. Supp. 2d 486, 504 (D.N.J. 2003) (holding that there must be more than slight inconvenience or petty annoyance for nuisance liability to attach under New Jersey common law).

Here, Powers cannot establish that he has suffered a "special injury" by virtue of the fact that he is not an adjoining landowner to the RMI property; nor do his other allegations rise to the level of a "special injury" which would

otherwise trigger any right to be provided with an individualized hearing, before the Township could take the action to settle litigation with a neighboring land owner in the manner that they did. See Trotta v. Borough of Bogota, 2016 WL 3265689, *7-8 (D.N.J. June 6, 2016) (courts have repeatedly refused to recognize a protected property interest in real property for purposes of the Fourteenth Amendment's procedural due process clause where plaintiffs were not deprived in any ownership interest in same but who merely argued that the proposed development by the Township incidentally affected the value of their real estate) (annexed hereto as Exhibit 1). More specifically, Powers has not alleged any material trespass or damage to his property by virtue of any of the contemplated uses by the RMI or approved terms of the Settlement Agreement. Rather, his allegations encompass only his own personal disagreement with the manner in which Mahwah is interpreting its zoning ordinances, as well as his unsubstantiated fears regarding traffic and about alleged future damage to a bridge that is admittedly not owned by him, but rather by his homeowners' association, the Ramapo Hunt and Polo Club. This personal disagreement and Plaintiff's unsubstantiated fears relative to what might happen if the settlement terms are enforced so as to facilitate the RMI's use of the property in a manner consistent with the C200 Conservation Zone and in recognition that the Property is in a flood plain are wholly insufficient to support a procedural due process claim. See Spalt v. New Jersey Dept. of Envt'l Protection, 237 N.J. Super. 206, 212-213 (App. Div. 1989) (J. Coleman) (holding that objectors to development of neighboring property do not have a particularized property

interest entitling them to an adjudicatory hearing as a constitutional right based solely on fear that injury may result to their property).

Furthermore, the alleged incidental effects of permitting the RMI to use their land freely for religious and cultural assembly, traffic concerns, load bearing of the bridge, and the positioning of the RMI's driveway on Bridle Path Lane instead of Halifax Road do not in any significant manner deprive Powers of private use and enjoyment of his real property that is different from other neighboring landowners who are located in the vicinity of property that is similarly being used for religious purposes would experience. See In re Amico/Tunnel Carwash, 371 N.J. Super. 199, 212 (App. Div. 2004) (holding that adjacent landowners did not have "a particularized property interest in development plan that entitled them to a hearing since any increased traffic congestion in front of their property was "similar to the impacts commonly experienced by owners of property in the vicinity of any proposed new development"). Instead, similar to the plaintiffs in Trotta, supra, Powers's objections encompass only his disagreement regarding a purported change to the use of the RMI's property which does not belong to him, and which does not directly affect his own neighboring property in any significant manner recognized under our state's nuisance laws or the Fourteenth Amendment. See Trotta at *9. Last but not least, this Court has already rejected the notion that there were any safety issues which were sufficient to enjoin the RMI from gathering on the land to worship and engage in cultural activities on property that they owned and belonged to them by dismissing the Polo Club's lawsuit

seeking an injunction against the RMI for these very same activities (see Def. **Exhibit E**, Trial Transcript of Decision dated May 3, 2019). As such, there is no question that none of Powers' allegations implicate any substantive personal right belonging to him, nor a right to a notice and a hearing under the Fourteenth Amendment.

B. Powers Has Failed To Identify How The Process For Approving The Settlement Was Constitutionally Inadequate Within The Meaning Of The Procedural Due Process Clause

Assuming *arguendo*, that this Court is inclined to nonetheless find that Powers has a protected property right in his real property based on any of the allegations in the Amended Complaint, his claim for violation of his Fourteenth Amendment procedural due process rights still fails as a matter of law. This is because there is no question that the May 9, 2019 Meeting at which the settlement was voted upon by the Township was properly noticed, and was conducted in accordance with all controlling state law procedures, significantly, the New Jersey Open Public Meetings Act, ("OPMA"). See Parratt v. Taylor, supra, 451 U.S. at 537 (holding that in order to bring a claim for the violation of Procedural Due Process, a plaintiff must first establish that he or she was deprived of a protected property interest, and then additionally establish that the state procedure for challenging the deprivation does not satisfy the requirements of Procedural Due Process).

In relevant part, OPMA provides that adequate notice may be provided in writing either on an annual basis within seven days of the annual organization of reorganization meeting or no later than January 10th, or "at least 48 hours,

giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken." N.J.S.A. 10:4-8. This advance notice provision has been interpreted by our courts to be satisfied upon publication of either 1) an annual notice or 2) a "48 hour notice." N.J.S.A. 10:4-8 (d). Nothing contained in the adequate notice requirement of OPMA requires that the public body distribute or make available any attachments or supplemental documents referenced in the agenda or notice. Opederbeck v. Midland Park Board of Education, 442 N.J. Super. 40, 55-59 (App. Div. 2015). This is because, elsewhere, the terms of a proposed settlement and any related materials are statutorily protected from such disclosure under New Jersey's Open Public Records Act as advisory, consultative, or deliberative materials. See N.J.S.A. 47:1A-1.1.

Here, this Court may take judicial notice of the fact that, prior to the May 9, 2017 meeting the Township released an agenda 48 hours prior to the meeting, which contained the date, time, location, and agenda items to the extent known (see "Exhibit A" attached to Plaintiff's Amended Complaint, Township of Mahwah Combined Work Session and Public Meeting Agenda dated May 9, 2019 and proposed Resolution approving settlement). Attached to the Agenda was a Resolution approving settlement with the RMI (Id.) Additionally, the May 9, 2019 Agenda clearly set forth that the Township Committee could conduct a closed executive session, and expressly advised the public that the litigations involving the RMI over the use of their property

would be discussed. Furthermore, and irrespective of the fact that settlement agreement itself is not required to be disseminated to the public, as a member of the Ramapo Hunt and Polo Club, Powers was in a unique position to have had knowledge of the specifics of the settlement prior to the May 9, 2019 Mayor and Council Meeting, since the Polo Club was a party to the settlement discussions in the litigation from which the settlement arose. (see Order dated May 3, 2019 dismissing matter against Mahwah annexed to Certification of Defense Counsel as **Exhibit F**). Thus, to the extent that Powers is claiming that he was not given "adequate notice" because he did not have notice of the specifics of the settlement agreement because same was not attached to the agenda, this claim is nothing short of frivolous.

Second, to the extent that Plaintiff is alleging that he was not given an adequate notice and opportunity to be heard by the Council prior to the Council's vote to approve the Resolution authorizing the settlement, as amended, because the Council discussed the settlement terms in private, this contention also has no merit (see "Exhibit C" attached to Plaintiff's Amended Complaint, approved Amended Resolution dated May 9, 2019). N.J.S.A. 10:4-12(b)(7) expressly permits discussions relating to settlement of litigation outside of the view of the public. Houman v. Mayor and Council of Borough of Pompton Lakes, 155 N.J. Super. 129, 144-45 (App. Div. 1977). Thus, OPMA is not violated where settlement discussions occur in private session so long as no official decisions, vote or action are reached therein. See Gandolfi v. Town of Hammonton, 367 N.J. Super. 527 (App. Div. 2004) (holding that OPMA is not

violated when a decision to ratify a settlement is made following a discussion in executive session). In other words, nothing in OPMA requires that a settlement be negotiated or debated in public. Rather, the only right the public has with respect to confidential settlement discussions is the opportunity to comment upon same generally during the public portion of the meeting. Burnett v. Gloucester County Board of Chosen Freeholders, 409 N.J.Super. 219, 238-39 (App. Div. 2009), citing Houman v. Pompton Lakes, 155 N.J. Super. 129, 145 (L. Div. 1977) (holding OPMA is not violated when a decision to ratify a settlement is made following a discussion in executive session); see also, South Jersey Publ'g Co. v. N.J. Expressway Auth., 124 N.J. 478, 493 (1991). Thus, there is no merit to Powers's contention that the Township was required to conduct discussion on matters involving settlement of litigation involving private land belonging to the RMI, in public, rather than in private session.

Nor was Powers, as he alleges in the Amended Complaint, in fact, deprived of any opportunity to speak in opposition to the settlement prior to being voted upon by the Council on May 9, 2019. Again, assuming *arguendo* that Powers can establish a deprivation of his property, all that the Fourteenth Amendment requires in that circumstance is notice and "an opportunity" to be heard. Rivkin v. Dover Tp. Rent Leveling Board, 143 N.J. 352, 372 (1996) (rejecting in the land use context, the proposition that meaningful time and in a meaningful manner always requires the State to provide a hearing prior to the initial deprivation of a property). Thus, a resident's opportunity to be heard on an issue that is required to be decided in public need not consist of

anything more than an opportunity to speak for a limited time period at a public meeting. Eichenlaub v. Township of Indiana, 385 F.3d 274, 281 (3d Cir. 2004) (opining that "public bodies may confine their meetings to specified subject matter … matters presented at a citizen's forum may be limited to issues germane to town government).

Here, there is no question that, in accordance with N.J.S.A. 10:4-12(b)(8), the Township Council discussed the proposed settlement in executive session and then voted to approve Resolution #186-19, as amended, which ratified the settlement of multiple litigations between the Township and the RMI during public session on May 9, 2019 (see "Exhibit C" attached to Plaintiff's Amended Complaint, approved Amended Resolution dated May 9, 2019). However, prior to discussing the settlement in private, the public was in fact, permitted to comment at the May 9, 2019 meeting on any matter on the agenda that was distributed by the Township 48 hours prior to the meeting, including but not limited to Resolution #186-19 authorizing settlement with the RMI over the use of their land (see video link for the May 9, 2019 Mayor and Council Public Work Session Meeting annexed to the Certification of Defense Counsel as **Exhibit G**). In addition, thereto, the meeting also contained a second public portion where residents could speak about any matter that they desired, irrespective of whether it was on the agenda for the May 9, 2019 meeting (Id). In fact, five members of the Polo Club spoke during the first public session, including Mr. Powers. When Mr. Powers addressed the Council he made several comments about the specific terms of the proposed settlement

(Id). Importantly, even after Mr. Powers spoke, no decision to ratify the settlement was made in closed session. It was only after the Council heard from the public and member of the Polo Club including Powers on the agenda item for settlement did they deliberate in executive session and then they voted upon an amended Resolution to ratify the settlement, which passed by a majority vote on May 9, 2019 (Id). Accordingly, there is no merit to Powers's contention that he was deprived of the "opportunity" to speak in opposition to the Settlement.

For all of the foregoing reasons, the Township Defendants are entitled to a dismissal of Plaintiff's claims for violation of his procedural due process rights.

POINT TWO

PLAINTIFF'S CHALLENGE TO THE TOWNSHIP COUNCIL'S ACTIONS TO RATIFY THE SETTLEMENT WITH THE RMI AS ARBITRARY, CAPRICIOUS, AND UNREASONABLE IS BARRED FOR THE FAILURE TO COMPLY WITH THE TIME LIMITS FOR FILING

In the matter at bar, Powers seeks to annul, cancel or otherwise void the Township's actions to ratify the settlement with the RMI at the May 9, 2019 meeting on two grounds. The first is that he was not given an adequate opportunity to oppose the settlement in a public meeting. The second is that he contends that the Township's actions to agree to settle multiple litigations with the RMI was arbitrary, capricious and unreasonable. However, Powers failed to comply with N.J.S.A. 10:4-15 for challenging the Council's actions in a public meeting within 45 days of the date that the action was first made public, so as to now bring a claim for violations he alleges occurred in connection with the

approval of the settlement at said May 9, 2019 public meeting. He also failed to comply with the 45-day time limit for instituting a proceeding in lieu of prerogative writ in Superior Court. R. 4:69-6(a). The right to challenge municipal action taken in violation of OPMA or that is alleged to be arbitrary, capricious, or unreasonable, both accrue on the date of the meeting in which municipal action was voted upon and made public. See Gregory v. Avalon, 391 N.J. Super. 181 (App. Div. 2007) (trial court's rejection of plaintiff's argument that statute of limitations did not accrue for resolutions authorizing agreements entered into by Mayor with a land owner until the date the resolutions were published following vote and adoption, were not disturbed on appeal); see also Dolente v. Borough of Pine Hill, 313 N.J. Super. 410 (App. Div. 1998) (holding that 45 days to challenge action taken during a meeting in violation of OPMA does not begin to run until the action becomes public); and Libeskind v. Mayor & Council of Bayonne, 265 N.J. Super. 389, 410 (App. Div. 1993) (challenge under OPMA starts to run on date of the meeting objected to).

Here, Powers was present at the public meeting when Resolution ratifying the settlement on the agenda for a vote passed by a majority vote of the Council on May 9, 2019, with only one minor modification to the wording in the agreement regarding the type of assembly that the RMI could engage in on the property ("public" vs private). (see Def. **Exhibit G**, link to May 9, 2019 Mahwah public work session meeting). As such, the action authorizing settlement with the RMI was made in public, and known to Powers, not later than May 9, 2019. Yet Plaintiff's initial Complaint in the matter at bar was not

filed until August 16, 2019, more than three (3) months later. As Powers's challenges to the Township's actions to ratify the settlement is clearly outside of the time limits for raising those challenges pursuant to an action in lieu of prerogative writ or under OPMA, it must be dismissed as a matter of law.

POINT THREE

PLAINTIFF'S CHALLENGE TO THE TOWNSHIP COUNCIL'S ACTIONS TO RATIFY THE SETTLEMENT WITH THE RMI IS NOT REVIEWABLE BY THIS COURT IN THE ABSENCE OF ANY ALLEGATION AMOUNTING TO FRAUD, VIOLATION OF PUBLIC POLICY, OR UNCONSCIONABILITY AND IS FURTHER BARRED BECAUSE HE IS NOT A PARTY TO THE SETTLEMENT AGREEMENT

Here, Powers action in lieu of prerogative writs seeks essentially to set aside a settlement reached between Mahwah and the RMI. Although "New Jersey has a broad definition of standing when it comes to challenging governmental actions," for example, through an action in lieu of prerogative writs, this review procedure does not extend, absent compelling circumstances, to claims by a third party to null and void a settlement reached between a municipality and another party in litigation between them. This is because in New Jersey there exists a "strong public policy in favor of settlement of litigation." Gere v. Louis, 209 N.J. 486, 500 (2012), citing Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008); Continental Ins. v. Honeywell, 406 N.J. Super. 156, 195, n. 31 (App. Div. 2009). Thus, in the absence of any allegations for fraud, self-dealing, or unconscionability, so long as the written agreement addresses the principal terms required to resolve the dispute, settlement agreements resolving litigation should not be set aside by a Court. Borough of Haledon v. Borough of N. Haledon, 358 N.J. Super. 289, 305 (App.

Div. 2003), citing Nolan v. Lee Ho, 120 N.J. 465, 472 (1990); see also J.B. v. W.B., 215 N.J. 305 (2013) (holding that absent unconscionability, fraud, or overreaching in negotiations of the settlement a trial court has no legal or equitable basis to reform a parties' property settlement agreement).

Here, Powers makes no allegations which could plausibly lead the Court to conclude that the ratification of the settlement with RMI was rife with fraud, was unconscionable, or was otherwise procured in violation of state law. Nor does Powers allege that the Council abused its broad discretionary authority granted to it to recognize the RMI's use of the property as consistent with other permitted uses in the C200 zone and to settle litigation for the benefit of the public good. See DEG, LLC v. Township of Fairfield, 198 N.J. 242, 259-260, 270, 273 (2009) (holding that absent fraud or allegations of public corruption, a settlement falls within broad discretionary power afforded to municipalities to interpret its zoning ordinances in any manner that would avoid the "formidable burden" of trying a case with an established low likelihood of prevailing and may not be set aside by the courts unless there has been an abuse of the delegated legal discretion).

Furthermore, in New Jersey a settlement agreement between parties is considered to be "a contract." Cumberland Farms, Inc. v. N.J. Dep't of Envtl. Prot., 447 N.J. Super. 423, 438 (App. Div. 2016), quoting Nolan, 120 N.J. at 470). As such, a court must apply general principles of contract law when determining whether to enforce or set aside a settlement agreement. Glove Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016), quoting Brundage, 195 N.J. at

600-601). Under general contract principles, a third party does not have standing to mount a collateral attack upon a binding contract between two separate parties unless the contracting parties intended that a third party should receive a benefit which might be enforced in the courts. Broadway Maintenance Corp. v. Rutgers, State University, 90 N.J. 253, 259, 272 (1982). As the settlement agreement entered into between Mahwah and the RMI here does not even mention Powers, nor directly affects his neighboring property in any significant manner, then, as a taxpayer, he is, at most, only an incidental beneficiary of the settlement. For all of these reasons, Powers's challenge to the settlement agreement fail to state a claim upon which he may obtain relief from this Court in an action in lieu of prerogative writ, and as such these challenges to the power of the municipality to enter into such a settlement must be rejected.

POINT FOUR

RES JUDICATA AND/OR COLLATERAL ESTOPPEL REQUIRES DISMISSAL OF POWERS'S CHALLENGES TO THE SETTLEMENT AS THE SAME UNDERLYING ISSUES HAVE ALREADY BEEN ADJUDICATED IN PRIOR LITIGATION FILED ON HIS BEHALF BY HIS HOMEOWNERS' ASSOCIATION

Last but not least, principles of collateral estoppel and/or res judicata to operate to bar Powers's collateral attacks on the settlement at issue in this matter. The doctrine of collateral estoppel (otherwise known as issue preclusion) is an extension of the principle of res judicata, wherein it bars relitigation of any issue actually determined in a prior action between the same parties and privies involving a different claim or cause of action, while the doctrine of res judicata bars any subsequent claim or demand that was raised

in the first action or any matter which "might have been offered" or received to sustain and defeat same. Allessandra v. Gross, 187 N.J. Super. 96, 103 (App. Div. 1982). There are three elements that must be demonstrated before a party can be estopped from relitigating an issue before a court. These are:

> (1) the issue decided in the prior adjudication was identical with the one presented in the subsequent action,
> (2) the prior action was a judgment on the merits, and
> (3) the party against whom it was asserted had been a party or **in privity** with a party to the earlier adjudication.

Id. at 105, citing State v. Gonzalez, 175 N.J. 181, 189 (N.J. 1977) (emphasis added).

Here, it is undisputed that Powers is a member of the Polo Club and thus had interests that were common with it. In fact, as acknowledged by Powers, the Polo Club previously filed litigation on behalf of all its members seeking to enjoin the RMI from gathering and praying on the land based upon its assertion that public assembly is prohibited in Mahwah's C200 Conservation zone. (see Def. **Exhibit D**, Complaint filed by the Polo Club on September 22, 2017, para. 1). Thus, there is no question that as a nonprofit Homeowners' Association consisting of homeowners residing therein, that the Association can bind its members in litigation that is brought on their behalf in an earlier action. See Allen v. A Bros., Inc., 208 N.J. 114, 139 (2011) (defining privity to be a sufficiently close relationship between two parties, such as, when a party is a virtual representative of the non-party in earlier litigation). Thus, as one of those residential homeowners, there is clearly privity between Powers and the Polo Club.

The Polo Club's litigation was then consolidated with the Township's enforcement action under BER-L-3189-17, which action was settled prior to trial by way of the very same settlement agreement that underlies Powers's claims in the matter at bar. (see Def. **Exhibit C**, Order of consolidation dated December 7, 2018). Thereafter, a trial was held solely as to the claims and issues raised by the Polo Club seeking to enjoin the assembly use of the property by the RMI. The issues that were raised and adjudicated at trial included the very same issues with the settlement terms that Powers raises to now void the settlement reached in the prior enforcement action. Those common issues are as follows:

1. Whether any of the uses being undertaken by the RMI on its property are permitted in Mahwah's C-200 zone. (see Def. **Exhibit D**, Complaint filed by the Polo Club on September 22, 2017, Paras 10, 56, and 96; and Counts One, Three, and Four);
2. Whether the location of the Property in a flood zone makes it dangerous for the assembly uses to be conducted on the Property by the RMI (see Def. **Exhibit D**, Complaint filed by the Polo Club on September 22, 2017, Paras. 17, 36, and 43; and Count Eight and Count Sixteen);
3. Whether blockage issues with the sole access point to the property over a one lane bridge traversing Halifax Road make it inimical to the health safety and welfare of the public for the RMI to use the Property in the manner that they have been using the Property

since at least May 5, 2012 (see Def. **Exhibit D**, Complaint filed by the Polo Club on September 22, 2017, Paras 34 and 127);

4. Whether parking and traffic concerns due to heavy vehicle use by the RMI flooding and safety concerns due to the sole access to the Association and RMI's property over a one-lane bridge traversing Halifax Road. (see Def. **Exhibit D**, Complaint filed by the Polo Club on September 22, 2017, Paras. 38, 55-56, and 75; and Count Ten);
5. Whether RMI violated the law when they failed to obtain site plan approval for uses on the land, including but not limited to on-site parking (see Def. **Exhibit D**, Complaint filed by the Polo Club on September 22, 2017, Count Twelve, and Para. 189); and last but not least
6. Whether RMI's use and assembly on the property constitutes a nuisance or an unreasonable interference with the property rights of the Association and the Association's members who live at the Ramapo Hunt & Polo Club for the reasons set forth in the Complaint (see Def. **Exhibit D**, Complaint filed by the Polo Club on September 22, 2017, Count Seventeen, and Para 216-217).

Unfortunately for Powers, Judge Wilson rejected all of the aforementioned issues in their entirety when he decided to dismiss the Polo Club's entire case on the merits by deciding that there was nothing illegal about the manner in which the property was being used by the RMI to assemble and pray, nor about

the existing prayer circle and stone altar (see Def. **Exhibit E**, Trial Transcript of Decision dated May 3, 2019).

Thus, not only were the identical issues raised by the Polo Club to support their claims that the RMI's use and assembly on the property are illegal or otherwise constitute a nuisance, but also those issues were ultimately decided in the RMI's favor. As such, collateral estoppel applies to bar re-litigation of these adjudicated matters in any subsequent action filed by the Polo Club or any of its individual members, who are also bound by the Court's judgment. In other words, since Powers was a member of the HOA, he is not entitled to have those issues re-litigated by filing a different action against Mahwah in the matter at bar. As the only issues raised by Powers to support his claim for setting aside the terms for settlement have already been adjudicated against his and his Association's favor, then, as a matter of fairness, the Mahwah Defendants are entitled to a dismissal of his Amended Complaint in its entirety.

POINT FIVE

PLAINTIFF FAILS TO STATE A CLAIM FOR VIOLATION OF HIS EQUAL PROTECTION RIGHTS

Powers also brings a claim for violation of his right to equal protection in Count One of the Amended Complaint. To state a claim for violation of one's right to equal protection under the Fourteenth Amendment, however, a plaintiff must allege that he or she has been "singled because of membership in a class [for differential treatment,] and cannot be just the victim of a random act of governmental incompetence." Rivkin v. Dover Tp. Rent Leveling Board, 143

N.J. 352, 381 (1996)[1] Accordingly, in order for Powers to sustain an equal protection challenge to the settlement, he is required to establish something more than conduct which is merely arbitrary, unreasonable or capricious. United Artists Theatre Circuit, Inc. v. Township of Warrington, P.A., 316 F.3d 392, 402 (2003) (holding that disputes over land use decisions all involve some claim of abuse of legal authority, and it is not enough to transform these disputes into substantive due process claims based only on allegations that a government official acted with improper motive).

Furthermore, the Third Circuit has held that Equal Protection claims which rest instead on a "class of one" theory first recognized by the Supreme Court in Village of Willowbrook v. Olech, 528 U.S. 562, 564(2000), are not viable where a plaintiff has not also met the stringent requirements for bringing a Substantive Due Process claim. Eichenlaub, 385 F.3d at 287. In order to maintain a substantive due process claim, our Supreme Court in analyzing federal law on this issue has held that a plaintiff must allege "egregious misconduct that **shocks the conscience** in the sense of violating civilized norms of governance," and offending human dignity. Rivkin at 358 (emphasis added). In this respect, the United States Supreme Court has categorically rejected the notion that the "lowest common denominator of customary tort

[1] Since claims brought under the New Jersey Constitution are analyzed in the same manner as federal courts analyze the United States Constitution, to the extent that Powers also asserts an equal protection claim under the New Jersey Constitution, they will be addressed together and interchangeably by reference to federal and state case law.

liability" will suffice as having any mark of sufficiently-shocking conduct. County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998). Similarly insufficient are "the kind of disagreement that is frequent in planning disputes such as: applying requirements to appellant's property not applied to other properties, making unannounced and unnecessary inspections and enforcement actions, delaying permits and approvals, improperly increasing tax assessments, and "malign[ing] and muzzl[ing]" the plaintiff. Eichenlaub, 385 F.3d at 285-86.

As to what types of action constitute sufficiently-shocking conduct which violates substantive due process, the Third Circuit in Eichenlaub v. Twp of Indiana, supra, listed as "conscience shocking" those actions involving corruption or self-dealing, hampering development to interfere with otherwise constitutionally-protected activity, bias against an ethnic group, or a "virtual taking." Id. at 286. Thus, given the type of behavior necessary to establish a violation of a person's Substantive Due Process rights, it is not surprising that only rarely will the conduct of municipal government rise to the level of a substantive due process or equal protection violation, particularly in a municipal land use approval setting.

In the matter at bar, it is clear that Powers does not allege any type of fraud, corruption or other conduct by the Township or the Mayor that could possibly support an underlying substantive due process or an equal protection claim. No claim of differential treatment based upon a membership in a protected class such as race, religion, or disability is asserted, and there are no allegations to plausibly suggest that Powers was singled-out for any invidious

discriminatory reason when the Township voted to ratify the settlement agreement with the RMI on May 9, 2019. In fact, the only conduct that Powers complains about concern allegedly "arbitrary, capricious and unreasonable" official municipal action to settle litigation, not through rezoning of its land, but by settling litigation so as to permit the use of the Property in a manner consistent with the other uses permitted in the C200 Conservation Zone and with the First Amendment of the Constitution, governing freedom of religion.

Also absent from the Amended Complaint are any facts to suggest that any of the Mahwah Defendants acted with any "improper motives" to settle with the RMI in the manner that they did. Absent such factual allegations, the Township indisputably acted entirely within their authority as granted to them by the State of New Jersey to bring an end to multiple ongoing litigations with the RMI, including a federal court action in which the Township could have been required to reimburse the RMI's significantly inflated legal fees. As stated earlier, the act to settle litigation to avoid the significant risks attendant to continuing to litigate with the RMI and to act for the benefit of the public's welfare overall is clearly a legitimate exercise of the Township's authority. See DEG, LLC v. Township of Fairfield, supra (refusing to permit municipality to void a settlement with a landowner due to broad discretionary authority to settle litigation by acting within their police powers to reject impediments to land use). Accordingly, Powers's allegations fall far short of the type of egregious conduct that was rejected by the New Jersey Supreme Court and the Third Circuit in Rivkin, United Artists Theatre Circuit, Inc., and Eichenlaub, as

rising to the level of a "shocks the conscience" violation, necessary to prevail on a class of one theory of Equal Protection. In other words, simply alleging that there are issues with the settlement that make it arbitrary, capricious, or unreasonable is not sufficient to transform Powers's personal neighbor dispute over Mahwah's interpretation of its own zoning ordinances under conditions that no longer existed at the time the decision was made to settle with the RMI, into violations of an individual's equal protection rights under the Fourteenth Amendment. United Artists, supra.

For all of the foregoing reasons, there is no question that Powers has failed to state a claim for relief under the Equal Protection Clause of the Fourteenth Amendment in the context of his dissatisfaction with the settlement that resolved a land use dispute with the RMI. Accordingly, Powers's Equal Protection challenge to the settlement must also be dismissed as a matter of law.

POINT SIX

PLAINTIFF'S ENTIRE AMENDED COMPLAINT CHALLENGING THE SETTLEMENT ENTERED BY AND BETWEEN THE RMI AND THE TOWNSHIP IS SUBJECT TO DISMISSAL

On a motion to dismiss pursuant to Rule 4:6-2 (e), a court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989); Cf. Tisby v. Camden Cty. Correctional Facility, 448 N.J. Super. 241, 247 (App. Div), cert. denied, 230 N.J. 376 (2017) (holding

that when challenging a complaint for failure to state a claim, the plaintiff is entitled to a liberal interpretation of its contents and to the benefits of all its allegations and the most favorable inferences which may be reasonably drawn from them). However, "the essential facts supporting plaintiff's cause of action must be presented in order for the claim to survive; conclusory allegations are insufficient in that regard." Scheidt v. DRS Technologies, Inc., 424 N.J. Super. 188, 193 (App. Div. 2012). A court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief. Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div.), cert. denied, 185 N.J. 297 (2005); see also Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (holding that a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted). "Obviously, if the complaint states no basis for relief and discovery would not provide one, dismissal is the appropriate remedy." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005) (citation omitted).

Moreover, in reviewing a motion under R. 4:6–2(e), a court may consider documents attached to in the complaint or documents explicitly referred to or relied on in the complaint, without converting the motion to dismiss into one for summary judgment. New Jersey Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 605 (App. Div. 2007), certif. denied, 192 N.J. 597 (2007); and see also N.J. Sports Prods., Inc. v. Bobby Bostick Promotions, L.L.C., 405 N.J. Super. 173, 178 (Ch. Div. 2007). Likewise, documents which the court may take judicial notice of on a motion to dismiss are court records pursuant

to N.J.R.E. 201(b)(4) or government records pursuant to N.J.R.E. 201(a). Accordingly, consideration of the documents, meeting minutes, public agendas, resolutions, and prior judicial decisions referenced herein need not convert Defendants' Motion to Dismiss into one for Summary Judgment.

Here, it is clear that Plaintiff has failed to allege sufficient facts to support his claims in the matter at bar for an individual equal protection or a procedural due process violation, since those facts are otherwise contradicted by the public record where Powers was clearly provided with notice of that the Township intended to settle litigation with the RMI and vote to ratify terms of the settlement at a public meeting on May 9, 2019, at which meeting Powers stood and spoke against the settlement. Additionally, Plaintiff's Amended Complaint collaterally attacking Defendants' actions to settle litigation as arbitrary, capricious and unreasonable are barred by the statute of limitations for bringing an action in lieu of prerogative writs and/or by the doctrine of collateral estoppel from relitigating the same issues as had been adjudicated in an earlier action by a party with whom Powers was in privity. And, since the Amended Complaint's challenges to the settlement concern a local governing body's broad discretionary authority to interpret its land use ordinances in a manner favorable to achieve the laudable goal of settling litigation for the benefit of the health, safety, and welfare of the public, then, as a neighbor whose interests have not been directly affected, Powers has no standing to have the settlement for reviewed by this Court based solely on allegations that do not evidence government corruption or self-dealing on the part of the Mahwah

Defendants. In other words, as the only relief requested by Powers is essentially to "set aside" or declare the settlement agreement and its terms null and void, he cannot obtain such relief for all of the reasons set forth above. As such, Defendants are entitled to a dismissal of the Amended Complaint and all of the claims contained therein in its entirety and with prejudice.

CONCLUSION

For all of the foregoing reasons, Defendants Township of Mahwah, Mayor John Roth, and the Township Council Members respectfully request the dismissal of Powers's Amended Complaint in its entirety for the failure to state a claim pursuant to Court Rule 4:6-2(e).

Respectfully submitted,

Cleary Giacobbe Alfieri Jacobs, LLC
Attorneys for Defendants Township of Mahwah and Mayor John Roth, and the Township Council Members

s/ Ruby Kumar-Thompson, Esq.
Ruby Kumar-Thompson, Esq.

Date: December 13, 2019

APPENDIX

Exhibit 1

2016 WL 3265689
Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

Tina P. TROTTA, Casey Guerra, and Belinda Guerra, Plaintiffs,
v.
BOROUGH OF BOGOTA and Patrick McHale (in his official capacity as Mayor of the Borough of Bogota); Leonard Nicolosi (in his official capacity as Business Administrator of the Borough of Bogota); John Does 1-10 (names being fictitious), Defendants.

No. 12-cv-2654 (KM)(MAH)
|
Signed 06/06/2016

Attorneys and Law Firms

Lawrence P. Cohen, Lavery Selvaggi Abromitis & Cohen PC, Hackettstown, NJ, for Plaintiffs.

Christopher C. Botta, Botta & Associates, L.L.C., Ramsey, NJ, for Defendants.

OPINION

KEVIN MCNULTY, U.S.D.J.

***1** The plaintiffs, Tina P. Trotta, Casey Guerra, and Belinda Guerra, are homeowners and residents of the Borough of Bogota, a town of some 8,000 persons in Bergen County, New Jersey. The rear of the plaintiffs' properties borders Olsen Park, a public park owned by the defendant Borough. Until 2011, an area of trees and vegetation provided a buffer between the plaintiffs' properties and the park. In 2011, the Borough used County grant money to remove the trees and vegetation and build a nine-space parking lot. Plaintiffs, aggrieved by the process and the result, filed this Section 1983 action against the Borough; Patrick McHale, the Borough's mayor; and Leonard Nicolosi, the Borough's business administrator.

The destruction of trees is regrettable, and the plaintiffs feel that the Borough acted underhandedly and shabbily. They are distressed and disappointed to find that the portion of Olsen Park adjacent to their properties is no longer as wooded or as quiet as before. Nevertheless, even a bad decision is not an unconstitutional one. The Borough's decision to build a small parking lot in a public park did not violate the legal rights of the plaintiffs. In short, this is an issue for the local political process.

Now before the Court is the defendants' motion for summary judgment under Federal Rule of Civil Procedure 56. For the reasons stated below, I will grant the motion.

I. BACKGROUND

I here recite the essential chronology. Further facts are referred to in the legal discussion. [1]

A. The Properties and the Park

The plaintiff's houses face the west side of River Road, a north-south artery in the Borough of Bogota. To access their driveways, which are in the rear of their properties, the plaintiffs use Bogert Lane, which runs west from River Road. Perpendicular to Bogert (*i.e.*, running north-south behind the properties and parallel to River Road), there is a gravel-road easement. (Pl Facts ¶¶ 1-3) Beyond that gravel road, on its west side, lies the bulk of Olsen Park. Until 2011, the portion of the park adjacent to the gravel-road easement contained trees and other vegetation that provided a buffer between the park's fields and the plaintiffs' properties. (Pl Facts ¶¶ 4, 7, 88-90) (A diagram of the area is attached to this opinion as an appendix.)

B. The Project

***2** In 2008, the Borough applied for a grant from the Bergen County Open Space Trust Fund to install a picnic grove and bocce court in Olsen Park, as well as to improve drainage. (Pl Facts ¶¶ 8, 10) In the application, the Borough answered "no" to this question: "Will the project scope include any major disturbance to surrounding area, i.e., felling of trees, clearing of vegetation, etc." (Pl Ex. A at 3 (ECF No. 33-4); Pl Facts ¶ 12) In June 2008 the Borough approved a resolution matching the County grant award. In March 2009 the Borough entered into a contract with the County, which listed as objectives: "Installation of bocc[e] court, bike racks, tables, benches and footpaths." (Def Ex. F at 12 (ECF No. 25-10); Pl Facts ¶¶ 14-17)

Construction did not commence until the latter part of 2011. By then, the project's objectives had shifted somewhat. (Def Reply Facts at 12 ¶ 18) That shift had its genesis in May 2011, when Mayor McHale had the idea to construct a parking

lot as part of the project. (Def Reply Facts at 13 ¶ 24; Pl Facts ¶ 24) In July 2011, the Borough Council passed a resolution to authorize the commencement of bidding "for the purpose of drainage improvements at Olsen Park and ditch cleaning." (Def Ex. I (ECF No. 25-13))

The project in its final form was first revealed in August 2011, when a notice requested bids for "Olsen Park drainage and parking improvements," which would include "the removal of large trees, the installation of drainage piping ... construction of a new asphalt parking area and any incidental construction." (Def Ex. J (ECF No. 25-14)) In September 2011, the Borough Council passed a resolution awarding the "Olsen Park Drainage & Parking Improvements Project". (Def Ex. K (ECF No. 25—15)) "This resolution was on the Consent Agenda." Accordingly, it was not formally slated for discussion, but any individual council member could initiate discussion or ask for a separate vote. (Def Facts ¶ 35) Apparently no one did.

Certain facts about the process by which the project evolved to include a parking lot are disputed. Mayor McHale testified that he discussed changing the scope of the project with all the council members. (McHale Dep. 53:14-20) Councilman Nunez denied that he ever had such a discussion with McHale. (Nunez Dep. 54:14-22) Nevertheless, Nunez voted in favor of both the July and September resolutions. (Def Exs. K-J)

McHale testified that safety was one consideration in building the parking lot. Park patrons, including children, were crossing a dangerous street to access the fields, and the area in question had been "full of half dead trees [and] poison ivy." (Def Facts ¶ 21) Another consideration had to do with the playing fields. Mayor McHale had a keen interest in baseball, and had been involved with the Bogota Baseball Organization for twenty years. (Pl Facts ¶ 66) McHale favored the project because it would provide easier access to the baseball fields, and would eliminate vegetation where baseballs were getting lost. (Pl Facts ¶¶ 41, 65) Apparently this was not the only possible site for a parking lot in the park, although according to McHale the alternative location was narrower and less suitable. (Pl Facts ¶¶ 69-70; Def Reply Facts at 18 ¶ 70)

Robert Abbatomarco, the executive director of the Bergen County Open Space Trust Fund, testified that Nicolosi told him of the need for a parking lot on that side of the park. Nicolosi, he said, cited safety concerns based on increased traffic caused by the closure of a nearby bridge. (Def Facts ¶ 38) Abbatomarco replied that "the parking lot would be considered an eligible use of the grant money as part of the park project." (Abbatomarco Dep. 128:9-11; *see* Def Facts ¶ 39)

The construction plan for the parking lot included the removal of fifteen trees. (Pl Facts ¶ 35; Def Facts ¶ 50) McHale testified that he authorized the removal of an additional fifteen trees after the contractor advised him that they were "leaning" and "weren't that stable." (McHale Dep. 66:5-12, 69:13-22, 72:1-14) Those additional fifteen trees were removed without the approval of the Borough Council. (Pl Facts ¶ 42) One of those extra fifteen trees was removed from Borough property behind the home of the plaintiffs' neighbor, Ken O'Donnell, at O'Donnell's request. (Pl Facts ¶ 53-56); Def Reply Facts at 16-17) [2]

C. Aftermath

***3** Plaintiffs say they first learned of the project when construction began. (Pl Facts ¶¶ 57-58) On October 20, 2011, they attended the Bogota Mayor and Council meeting to voice their opposition. (Pl Facts ¶ 62; Def Facts ¶ 53) Trotta testified that at this meeting McHale told plaintiffs, in essence, that the project was a done deal. (Trotta Dep. 43:8-25) [3]

The plaintiffs testified that the removal of the trees as a buffer and construction of a parking lot have increased noise, traffic, and safety concerns on their properties and decreased their privacy and enjoyment of their homes. (Pl Facts ¶¶ 91-107) For example, plaintiffs' sleeping, eating, and TV watching have been disturbed (Pl Facts ¶¶ 93-97) The parking lot's nine spaces are constantly full, and overflow cars block their driveways. (Pl Facts ¶ 100) Trespassers walk across their properties or use their driveways to turn cars around. (Pl Facts ¶¶ 104-05) Individuals sometimes gather in the parking lot to consume alcoholic beverages or play loud music. (Pl Facts ¶¶ 106-07) [4] As a result, plaintiffs allege, the market values of their properties have been reduced. (Pl Facts ¶ 91; *but see* Def Reply Facts at 20 ¶ 91 (citing competing expert reports))

D. Claims

plaintiffs' complaint contains seven claims for relief:

Count 1: equal protection claim pursuant to the Fifth and Fourteenth Amendments under 42 U.S.C. § 1983 (Compl. ¶¶ 67-71);

Count 2 (mislabeled Count 3): substantive due process claim pursuant to the Fifth and Fourteenth Amendments under 42 U.S.C. § 1983 (Compl. ¶¶ 76-78);

Count 3: procedural due process claim pursuant to the Fifth and Fourteenth Amendments under 42 U.S.C. § 1983 (Compl. ¶¶ 72-75);

Count 4: state law nuisance (Compl. ¶¶ 75-82);

Count 5: state law inverse condemnation (Compl. ¶¶ 83-87);

Count 6: state law diminution of property value (Compl. ¶¶ 88-89);

Count 7: state law breach of contract (Compl. ¶¶ 90-93).

Plaintiffs seek damages and attorney's fees for all claims. For the federal and nuisance claims they seek the return of the area to its prior condition. (Compl. ¶¶ 67-93)

II. ANALYSIS

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(a) provides that summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505 (1986); *Kreschollek v. S. Stevedoring Co.*, 223 F.3d 202, 204 (3d Cir. 2000).

In deciding a motion for summary judgment, a court must construe all facts and inferences in the light most favorable to the nonmoving party. *See Boyle v. County of Allegheny Pennsylvania*, 139 F.3d 386, 393 (3d Cir. 1998). The moving party bears the burden of establishing that no genuine issue of material fact remains. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548 (1986). "[W]ith respect to an issue on which the nonmoving party bears the burden of proof ... the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.

***4** Once the moving party has met that threshold burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348 (1986). The opposing party must present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson*, 477 U.S. at 248; *see also* Fed. R. Civ. P. 56(c) (setting forth types of evidence on which nonmoving party must rely to support its assertion that genuine issues of material fact exist). "[U]nsupported allegations ... and pleadings are insufficient to repel summary judgment." *Schoch v. First Fid. Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990); *see also Gleason v. Norwest Mortg., Inc.*, 243 F.3d 130, 138 (3d Cir. 2001) ("A nonmoving party has created a genuine issue of material fact if it has provided sufficient evidence to allow a jury to find in its favor at trial."). If the nonmoving party has failed "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, ... there can be 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Katz v. Aetna Cas. & Sur. Co.*, 972 F.2d 53, 55 (3d Cir. 1992) (quoting *Celotex*, 477 U.S. at 322-23).

B. Federal Section 1983 Claims

Plaintiffs allege three causes of action under Section 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. § 1983.

"Section 1983 provides remedies for deprivations of rights established in the Constitution or federal laws." *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006) To state

a claim under Section 1983, a plaintiff must allege facts sufficient to show (1) a deprivation of a federal constitutional right or a federal statutory right, and (2) that the conduct at issue occurred "under color of state law." *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908 (1981); *accord Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir. 2000). Accordingly, the Court must first " 'identify the exact contours of the underlying right said to have been violated' and [ ] determine 'whether the plaintiff has alleged a deprivation of a constitutional right at all.' " *Nicini*, 212 F.3d at 806 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708 (1998)) *accord Chainey v. Street*, 523 F.3d 200, 219 (3d Cir. 2008).

Plaintiffs allege that the defendants violated their rights to equal protection, substantive due process, and procedural due process. [5] There is no dispute that the Borough acted under color of state law.

1. Equal Protection (Count 1)

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254 (1985) (quoting U.S. Const. amend. XIV); *accord Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 133 (3d Cir. 2002). To state an equal protection claim under Section 1983, a plaintiff must allege facts showing the existence of purposeful discrimination. *Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 196 (3d Cir. 2009) (citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990)). The plaintiff must have received different treatment from that received by other individuals similarly situated. *Id.*

***5** A class-based equal protection claim may rest on allegations that a state actor intentionally discriminated because of the plaintiffs membership in a protected class. *Lande v. City of Bethlehem*, 457 Fed.Appx. 188, 192 (3d Cir. 2012) (citing *Chambers*, 587 F.3d at 196). Classically, but not exclusively, such a protected class may be a racial, ethnic or religious minority. No such claim is made here.

Alternatively, however, a plaintiff (like plaintiffs here) may assert a "class of one" theory: *i.e.*, that plaintiff has been intentionally treated differently from other similarly situated persons without a rational basis. [6] *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073 (2000) (citing *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 43 S. Ct. 190 (1923); *Allegheny Pittsburgh Coal Co. v. Comm'n of Webster County*, 488 U.S. 336, 109 S. Ct. 633 (1989)). The Third Circuit has held that, in order to make out such a claim, a plaintiff must establish that: "(1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment." *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006). "No rational basis" is a very forgiving standard, from a defendant's point of view; the claim is a difficult one to allege, let alone prove. *See Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 287 (3d Cir. 2004) (citing *Willowbrook*, 528 U.S. at 565-66 (Breyer, J., concurring)).

Plaintiffs assert a "class of one" equal protection claim, but fail to show that there are genuine issues of material fact as to any of its three elements. True, plaintiffs cite facts from which it could be inferred that a neighbor, unlike plaintiffs, received notice of the parking lot construction ahead of time. (*See* Def Reply Facts at 16-17 ¶¶ 54, 56; Pl Facts ¶ 56) That fact is not material because, as a matter of law, a procedural claim cannot be bootstrapped into an equal protection claim. "[A]s a matter of logic and law a plaintiff may not convert a procedural due process claim into an equal protection claim by expediently alleging that he was denied procedural rights by an official who has accorded such rights to others in the past." *Stop-Save Twp. Open Places, Inc. v. Bd. of Sup'rs of Montgomery Twp.*, No. CIV. 96-7325, 1996 WL 663875, at *3 (E.D. Pa. Nov. 15, 1996); *accord Highway Materials, Inc. v. Whitemarsh Twp., Montgomery County, Pa.*, No. CIV 02-3212, 2004 WL 2220974, at *23 n.21 (E.D. Pa. Oct. 4, 2004), *aff'd*, 386 Fed.Appx. 251 (3d Cir. 2010); *Cf. Rivkin v. Dover Twp. Rent Leveling Bd.*, 671 A.2d 567, 582 (N.J. 1996) (admonishing against "relabeling procedural due process claims as equal protection claims" in a different context).

There is no other evidence to suggest that the defendants treated plaintiffs disparately from their neighbors or any other similarly situated individuals. Of course, the building of a parking lot most directly affects those whose property is nearby. And anyone may argue that a public facility near his property should not be built at all, or could be built somewhere else. [7] Disparate treatment, however, does not encompass a claim in this unavoidable sense; rather, equal protection requires that the challenged action treat plaintiff distinctly *vis-à-vis some other, similarly situated person*, and that the distinction satisfy the test of rationality. There is no evidence

at all that this site was chosen in order to favor the interests of some other similarly situated property owner. The parking lot, which by hypothesis was intended to serve the ball field, was placed near the ball field.

***6** Without sufficient evidence of element 1—a relevant disparity in treatment—the other elements become merely theoretical. In any event, however, they are not met.

As to element 2, there is no evidence that the Borough, McHale, or Nicolosi had the required intent. When considering their actions, they seemingly had no intention whatsoever to treat plaintiffs differently from anyone else. [8]

As to element 3, several rational and plausible reasons were given for building the parking lot at this site and cutting down the trees. (Def Facts ¶ 21) One such reason, obviously, is the provision of parking. Plaintiffs themselves acknowledge to their chagrin that the lot is extensively used by park goers, confirming that there was and is a demand for parking in that location. Another stated and plausible justification is safety; visitors were formerly required to cross a busy street to enter the park.

Plaintiffs allege that Mayor McHale's judgment was warped by his and his friends' personal enthusiasm for amateur baseball. (Pl Facts ¶¶ 41, 65-66) A playing field, however, is widely accepted as a permissible public recreational use. By extension, the provision of parking or the clearing of vegetation to provide access to a playing field is rationally viewed as an acceptable public improvement. Such improvements must be sited near the ball fields they serve. To the extent they impact on plaintiffs, the rational basis for that impact is that plaintiffs' properties, too, happen to be situated near the ball fields.

Improving access to the park was not on its face an irrational exercise of the Borough's power, which is properly exercised on behalf of all residents, not just a few. Whether the Borough exercised its power wisely is a question this Court is not equipped to consider. Ultimately, it is one for the voters.

Plaintiffs fail to show that there are genuine issues of material fact as to any of the elements of the "class of one" equal protection claim. Therefore, I will grant defendants' motion for summary judgment as to Count 1.

2. Substantive Due Process (Count 2)

"To establish a substantive due process claim, a plaintiff must prove the particular interest at issue is protected by the substantive due process clause and the government's deprivation of that protected interest shocks the conscience." *Chainey*, 523 F.3d at 219 (3d Cir. 2008) (citing *United Artists Theatre Circuit, Inc. v. Twp. of Warrington, Pa.*, 316 F.3d 392, 400-02 (3d Cir. 2003)).

Real property "ownership is a property interest worthy of substantive due process protection," *DeBlasio v. Zoning Bd. Of Adjustment*, 53 F.3d 592, 600 (3d Cir. 1995), *abrogated on other grounds by United Artists*, 316 F.3d 392, as it "is unquestionably 'a fundamental property interest dating back to the foundation of the American colonies.' " *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 141 (3d Cir. 2000) (internal quotations and citations omitted). To say that real property ownership is the interest at stake here, however, is to paint with too broad a brush. "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." *Tri-Cty. Concerned Citizens Ass'n v. Carr*, No. CIV. A. 98-CV-4184, 2001 WL 1132227, at *3 (E.D. Pa. Sept. 18, 2001), *aff'd*, 47 Fed.Appx. 149 (3d Cir. 2002) (quoting *MacNamara v. Cnty. Council of Sussex Cnty.*, 738 F. Supp. 134, 141 (D. Del.), *aff'd*, 922 F.2d 832 (3d Cir. 1990)).

***7** There is no contention that plaintiffs have been deprived of any ownership interest in land. Rather, they make the narrower contention that neighboring conditions have impaired the market value of their properties.

The Third Circuit has not yet stated whether substantive due process protection extends to a diminution of property value, as opposed to a deprivation of property. *See Kriss v. Fayette Cnty.*, 827 F. Supp. 2d 477, 493 (W.D. Pa. 2011), *aff'd*, 504 Fed.Appx. 182 (3d Cir. 2012). The Second Circuit, however, has held that "[g]overnmental action allegedly causing a decline in property values has never been held to deprive a person of property within the meaning of the Fourteenth Amendment." *Fusco v. State of Connecticut*, 815 F.2d 201, 206 (2d Cir. 1987) (internal brackets and quotation marks omitted) (quoting *BAM Historic Dist. Ass'n v. Koch*, 723 F.2d 233, 237 (2d Cir. 1983) (a homeless shelter in the neighborhood)). District courts in the Third Circuit have

followed suit. *See Kriss*, 827 F. Supp. 2d at 493 (collecting cases); *MacNamara*, 738 F. Supp. at 142 (electric power substation); *see also Bellocchio v. New Jersey Dep't of Envtl. Prot.*, 16 F. Supp. 3d 367, 378 (D.N.J. 2014), *aff'd*, 602 Fed.Appx. 876 (3d Cir. 2015) (noise and air pollution from turnpike and airport); *Smith & Morris Holdings, LLC v. Smith*, No. CIV 14-803, 2014 WL 4660095, at *6 (M.D. Pa. Sept. 17, 2014). I agree, and will do the same.

I conclude that the indirect property right asserted by plaintiffs in this case is not one that is protected by substantive due process. "There is [ ] no fundamental right in modern society to be free from increased traffic, noise or an incursion on open space. One does not have a protected property interest in the use of neighboring property because that use may adversely affect the value of his property." *Stop-Save*, 1996 WL 663875, at *4 (citing *Mehta v. Surles*, 905 F.2d 595, 598 (2d Cir. 1990)); *accord Tri-County*, 2001 WL 1132227, at *4.

There is a second problem. Even as to fundamental property rights, only State conduct that "shocks the conscience" violates substantive due process standards. *United Artists*, 316 F.3d at 402. That, too, is lacking here. Overruling prior cases applying a lesser standard, *United Artists* held that an "improper motive" is not sufficient to transform a municipal land-use dispute into a substantive due process claim. *Id.* The "shocks the conscience" standard, generally applicable to substantive due process claims, limits liability to the most egregious conduct and prevents the federal court from becoming a "zoning board of appeals." *Id.* at 401-02; *see Eichenlaub*, 385 F.3d at 286 (holding that allegations that township "maligned and muzzled" plaintiffs, applied standards not applied to similar properties, delayed permits and approvals, improperly increased tax assessments, and pursued unannounced and unnecessary enforcement actions in denying zoning requests failed to "shock the conscience").

The Third Circuit has provided examples of wrongdoing in the land-use context that might rise to the level of shocking the conscience. These include corruption, self-dealing, and bias against an ethnic group. *See Chainey*, 523 F.3d at 220 (discussing *Eichenlaub, supra*). Nothing in this record approaches that threshold. Adding a parking lot to a public park—even if done for the sake of improving access to a baseball field, and at the behest of a hypothetical baseball-crazed mayor—is hardly conscience-shocking. The Mayor's personal preferences notwithstanding, this remains an action to open up Olsen Park to those who wish to use it for recreation. That is a legitimate public purpose. *See Skiles v. City of Reading*, 449 Fed.Appx. 153, 158 (3d Cir. 2011) (action with legitimate governmental interest belied substantive due process claim). The benefit of the project is public and diffuse; even assuming for purposes of argument that the Mayor's motives were somehow irregular, they were not corrupt. I therefore do not believe this is the sort of "self-dealing" that concerned the Third Circuit in *Chainey* and *Eichenlaub*. [9]

***8** The interest at issue is not one that is protected by substantive due process. Even if it were, there is no showing of conduct that shocks the conscience. I therefore grant the defendants' motion for summary judgment as to Count 2 (mislabeled as Count 3), the substantive due process claim.

3. Procedural Due Process (Count 3)

To state a procedural due process claim, a plaintiff must establish "(1) that it was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of life, liberty and property, and (2) that the procedures available to it did not provide due process of law." *Nat'l Amusements Inc. v. Borough of Palmyra*, 716 F.3d 57, 62 (3d Cir. 2013) (citing *Schmidt v. Creedon*, 639 F.3d 587, 595 (3d Cir. 2011)).

i. Deprivation of property

A procedural due process analysis can be triggered by a range of property rights, including those created by state law. [10] *See DeBlasio*, 53 F.3d at 598-99. Where a plaintiff can point to a personal entitlement to some benefit, the plaintiff may have a right to an individualized hearing before he or she can be deprived of it. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972) (absent tenure or other entitlement, no hearing required before deciding not to rehire professor); *see also, e.g., Goldberg v. Kelly*, 397 U.S. 254, 261-62, 90 S. Ct. 1011 (1970) (deprivation of statutory entitlement to welfare benefits triggers due process); *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1134 (3d Cir. 1992) (deprivation of tenured faculty position triggers due process).

Real property ownership is obviously a protected property interest, and the Borough may not deprive a person of such property without due process (and just compensation). *See* U.S. Const. amends. XIV, V. The plaintiffs here, however,

do not assert a taking claim; they are not being deprived of the use of their properties, or of the properties themselves. (*See* n.5, *supra.*) Rather, the plaintiffs assert a more elusive entitlement to have the market value of their properties remain undiminished by official action. Now a homeowner can plausibly tie virtually any local political issue to the value of his or her property. Almost any condition in a small New Jersey town—traffic, schools, transit schedules—affects property values. But each citizen is not constitutionally entitled to a hearing in advance of every change in traffic patterns, curricula, or bus schedules. In short, lines must be drawn. Case law has not extended procedural due process protections to a person's derivative or indirect economic interest in the condition of neighboring (public) properties as they affect the value of that person's own property.

In *BAM Historic Dist. Ass'n v. Koch*, 723 F.2d 233, 237 (2d Cir. 1983), for example, residents brought a procedural due process challenge against New York City for failing to hold a hearing before opening a homeless shelter in their neighborhood. The residents contended that the shelter would cause a decline in their own property values. 723 F.2d 233. The Second Circuit held that government action that causes a decline in property values (short of a Fifth Amendment taking or a near-total destruction of value) "has never been held to 'deprive' a person of property within the meaning of the Fourteenth Amendment." *Id.* at 237.

***9** At least one court in this district has adopted the Second Circuit's reasoning in *BAM*. *See Twp. of W. Orange v. Whitman*, 8 F. Supp. 2d 408, 416 (D.N.J. 1998) (procedural due process claim against establishment of group homes for the mentally ill). I adopt it as well. The U.S. Constitution does not protect us from fluctuations in the value of our property based on changes, even government-initiated changes, to the neighborhood. It therefore does not confer an individual entitlement to any particular level of process before such changes can occur.

It is only human to *feel* entitled to the status quo, in this case a fortuitous private benefit: a wooded preserve, maintained at public expense, sheltering plaintiffs' property. But "[t]o have a property interest in a benefit, a person ... must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972).

Plaintiffs clearly had a subjective expectation that the configuration of uses in the park adjoining their property would always remain the same. They do not, however, point to any legal basis for elevating that expectation to a protectable property interest. Changes to facilities and parking on public land do not implicate a personal right or entitlement belonging to any plaintiff. It follows that plaintiffs were not entitled to, *e.g.*, an individualized hearing before the Borough could take the action it did.

ii. Procedure

Even assuming *arguendo* that some protected interest is involved, plaintiffs cite no authority for the proposition that they are entitled to a pre-deprivation hearing before implementation of a government decision—here, construction of a parking lot on public land—that might affect the value of their real estate. Plaintiffs cite only very general procedural due process precedent, involving personal property, rights, and entitlements, such as *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487 (1985) (civil service employment requiring cause for termination); *Parratt*, 451 U.S. at 536-44, 101 S. Ct. at 1913-17 (hobby kit ordered by prisoner); and *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 307, 70 S. Ct. 652 (1950) (notice to known beneficiaries of trust).

Plaintiffs have much to say about the creeping process by which the proposal came to include a parking lot. It must be said that the Borough did not exactly solicit citizen input. It did, however, obtain authorization from the County, put the project out for public bid, and enact the necessary resolution *via* the Borough Council's Consent Agenda. Whether or not this fully complied with State law is not the issue as such. State-mandated procedures are not federally required: "Whether notice and hearing procedures should be instituted to broaden public participation in governmental decisions of the sort challenged in this case remains a matter for consideration by state and local legislative bodies." *BAM*, 723 F.2d at 237. State-mandated procedures can, however, satisfy federal standards and thereby defeat a procedural due process claim. *Cf. Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 679-80 (3d Cir. 1991).

Defendants argue in the alternative that adequate post-deprivation hearings or remedies can satisfy due process requirements. In the somewhat analogous context of zoning, it is an element of plaintiff's claim "that the state procedure for

challenging the deprivation does not satisfy the requirements of procedural due process." *DeBlasio*, 53 F.3d at 597. [11]

> ***10** [A] state provides constitutionally adequate procedural due process when it provides reasonable remedies to rectify a legal error by a local administrative body. In other words, when a state affords a full judicial mechanism with which to challenge the administrative decision in question, the state provides adequate procedural due process, whether or not the plaintiff avails him or herself of the provided appeal mechanism.

Id. (internal quotation marks and citations omitted). In *DeBlasio*, the Third Circuit recognized that New Jersey provides adequate process, in part because, pursuant to N.J. Ct. R. 4:59–1 to –7, a plaintiff can file a complaint "in lieu of prerogative writs to challenge official action within 45 days of receiving notice of it. 53 F.3d at 598; *see Hartman v. Twp. of Readington*, No. CIV 02-2017, 2006 WL 3485995, at *12 (D.N.J. Nov. 30, 2006) ("the Third Circuit has determined that the availability in New Jersey of prerogative writ litigation is constitutionally sufficient to meet the requirements of procedural due process." (citing *DeBlasio*)); *John E. Long, Inc. v. Borough of Ringwood*, 61 F. Supp. 2d 273, 279 (D.N.J. 1998), *aff'd*, 213 F.3d 628 (3d Cir. 2000) (same); *see also Rivkin*, 671 A.2d at 580-81 (citing N.J. Const. art. VI, § 5, ¶ 4).

Plaintiffs contend that New Jersey's action in lieu of prerogative writs is inadequate because there was no opportunity to file it; it does not enable plaintiffs to recover monetary damages, attorney's fees, and costs; and "because the park cannot be returned to its previous state through that legal action." (Pl Br. 24) It is black letter law, however, that "[a]lthough the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." *Parratt*, 451 U.S. at 544; *see also Rivkin*, 671 A.2d at 580-82 (action in lieu of prerogative writs not inadequate simply because it does not routinely allow recovery of attorney's fees); *Wessie Corp. v. Sea Isle City Zoning Bd. of Adjustment*, No. CIV 06-589, 2007 WL 1892473, at *7 (D.N.J. June 29, 2007). No legal action (including this one) can return the park to its previous state, but New Jersey's action in lieu of prerogative writs was likely plaintiffs' best chance for prospective injunctive relief, or, failing that, for redress. When plaintiffs fail to take advantage of an adequate process available to them they cannot claim constitutional injury. *Elsmere Park Club, L.P. v. Town of Elsmere*, 542 F.3d 412, 423 (3d Cir. 2008).

Neither requirement of a procedural due process claim is met here. Plaintiffs have not been deprived of property. In the alternative, they have not been denied procedures required by the Constitution or federal law. Summary judgment is therefore granted on Count 3, the procedural due process claim.

C. State Law Claims

1. Supplemental Jurisdiction

I have granted summary judgment to defendants on all federal law claims. "The district courts may decline to exercise supplemental jurisdiction over a [state law] claim under subsection (a) if ... (3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). I therefore consider whether I should exercise my discretion to assert supplemental jurisdiction over the associated state law claims: nuisance, inverse condemnation, diminution of property value, and breach of contract.

***11** As to the limits of discretion to retain state law claims after federal claims have been dismissed, the United States Court of Appeals for the Third Circuit has given the district courts some guidance:

> [W]here the claim over which the district court has original jurisdiction is dismissed before trial, the district court *must* decline to decide the pendent state claims unless considerations of judicial economy, convenience and fairness to the parties provide an affirmative justification for doing so.

Hedges v. Musco, 204 F.3d 109, 123 (3d Cir. 2000) (quoting *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir.

1995)). In short, the presumptive rule is that the state claims shall be dismissed, unless reasons of economy and fairness dictate otherwise.

Where a case has been substantially litigated for some time, it may be a proper exercise of discretion to retain it. *See Growth Horizons, Inc. v. Delaware County, Pa.*, 983 F.2d 1277, 1284-85 (3d Cir. 1993) (remanding for exercise of discretion as to whether to retain pendent claim, noting that where the district court already heard all evidence necessary to decide the state contract claim, it might retain jurisdiction). Where, on the other hand, time and effort will not be wasted and the case is nowhere close to trial, remand may be the proper course. *See Freund v. Florio*, 795 F. Supp. 702, 710 (D.N.J. 1992) ("[A]t this early stage in the litigation, dismissal of the pendent state claims in a federal forum will result in neither a waste of judicial resources nor prejudice to the parties.").

This case, filed in 2012, has been substantially litigated. The state law claims are alternative theories applied to the same facts. The parties have conducted significant discovery and it would be unfair and wasteful to require that the action be recommenced in State court. I therefore exercise my discretion to retain jurisdiction over the state claims.

2. Nuisance (Count 4)

The plaintiffs assert a state-law tort claim for nuisance. There is a threshold bar to such a claim, in that plaintiffs have not demonstrated compliance with the New Jersey Tort Claims Act ("TCA"). Setting that aside, plaintiffs and defendants argue over whether the parking lot amounts to a public nuisance, a private nuisance, both, or neither. (Def Br. § VI; Pl Br. § VI)

i. *Compliance with the TCA*

In New Jersey, "public entity liability for nuisance is recognized under the Tort Claims Act." *Birchwood Lakes Colony Club, Inc. v. Borough of Medford Lakes*, 449 A.2d 472, 478 (N.J. 1982). " 'Public entity' includes the State, and any ... municipality...." N.J.S.A. § 59:1-3. "Under *N.J.S.A.* 59:8–8 of the Tort Claims Act, the claims will be barred if suit is not filed within two years after accrual, or if notice of claim is not given within ninety days." *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 675 A.2d 1077, 1083 (N.J. 1996).

Plaintiffs have provided no evidence (or even alleged) that they ever complied with the notice requirement of the TCA. Thus, I will grant the defendants' motion for summary judgment and dismiss Count 4, the nuisance claim.

Out of caution, I authorize a motion for reconsideration if, within fourteen days, plaintiffs can provide proof of compliance with the TCA. For the parties' guidance in the event this is done, I briefly state the legal standards that would govern a nuisance claim.

ii. Private nuisance

***12** "The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land." *Sans v. Ramsey Golf & Country Club, Inc.*, 149 A.2d 599, 605 (N.J. 1959). The Supreme Court of New Jersey has held that the TCA at N.J. Stat. Ann. § 59:4-2 "imposes liability upon a municipality in its status as property owner for nuisance where its actions can be found to be palpably unreasonable.' " *Birchwood Lakes*, 449 A.2d at 478. Further, N.J.S.A 59:2-2 "makes the public entity liable for the acts and omissions of public employees to the same extent and in the same manner as a private individual under like circumstances." *Id.* A private nuisance claim, then, permits a neighboring property owner to sue the municipality *qua* property owner.

These requirements are heightened in the context of the TCA where "[p]laintiff[s] bear[ ] the burden of proving that [defendants] acted in a palpably unreasonable manner." *Muhammad v. New Jersey Transit*, 821 A.2d 1148, 1154 (N.J. 2003). Palpably unreasonable behavior is that which is " 'patently unacceptable under any given circumstance.... [F]or a public entity to have acted or failed to act in a manner that is palpably unreasonable, it must be manifest and obvious that no prudent person would approve of its course of action or inaction.' " *Ogborne v. Mercer Cemetery Corp.*, 963 A.2d 828, 834 (N.J. 2009) (alterations in original) (quoting *Kolitch v. Lindedahl*, 497 A.2d 183, 187 (N.J. 1985)). "Although the question of palpable unreasonableness is generally one for the jury, it may be decided by the court as a matter of law in appropriate cases." *Garrison v. Twp. of Middletown*, 712 A.2d 1101, 1116 (N.J. 1998) (Stein, J., concurring) (citing *Wooley v. Bd. of Chosen Freeholders Monmouth Cty.*, 526 A.2d 1116, 1119 (N.J. Super. Ct. App. Div. 1987) ("it is a jury question of whether or not the State's actions were 'palpably unreasonable' ... except in cases where reasonable

men could not differ." (internal quotation marks and citations omitted))); *accord Maslo v. City of Jersey City*, 787 A.2d 963, 965 (N.J. Super. Ct. App. Div. 2002); *see also Muhammad*, 821 A.2d at 1156—57 (deciding whether action was palpably unreasonable on summary judgment).

One strand of the claim appears to be that the Borough is guilty of nuisance because it failed to maintain the park in its former condition. Another might be more narrowly directed at the Borough's failure to control annoying activities in and around the parking lot. Where, for example, a nuisance claim is based on noise, "a plaintiff must show '(1) injury to the health or comfort of ordinary people to an unreasonable extent, and (2) unreasonableness under all the circumstances, particularly after balancing the needs of the maker to the needs of the listeners.' " *Traetto v. Palazzo*, 91 A.3d 29, 33 (N.J. Super. Ct. App. Div. 2014) (quoting *Malhame v. Borough of Demarest*, 162 248, 261, 392 A.2d 652, 658 (N.J. Super. Ct. Law Div. 1978)).

> With regard to the first element, "[t]he interruption of normal conversation, the drowning out of TV sound, an occasional disturbance during sleeping hours, and like complaints, may all fall within the area of mere annoyance." *Malhame, supra, 162 N.J. Super.* at 261, 392 A.2d 652. However, occasional noisy disturbances concomitant with residential living can rise to the level of nuisance if, based on proximity, magnitude, frequency, and time of day, they cause some residents "more than mere annoyance, ... temporary physical pain[,] and more than usual anxiety and fright." *Id.* at 263, 392 A.2d 652

Id. at 33-34 (alterations in original).

iii. Public nuisance

***13** The Restatement (Second) of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public." § 821B (1979). The New Jersey Supreme Court adopted the Restatement definition and held that "the right with which the actor has interfered must be a public right, in the sense of a right 'common to all members of the general public,' rather than a right merely enjoyed by a number, even a large number, of people." *In re Lead Paint Litig.*, 924 A.2d 484, 497 (N.J. 2007) (quoting Restatement (Second) of Torts § 821B cmt g.) The Restatement (Second) offers the following example:

> [P]ollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.

Restatement (Second) of Torts § 821B cmt g; *accord In re Lead Paint*, 924 A.2d at 497.

Plaintiffs do not complain of anything approaching an interference common to the general public. The presence of the parking lot interferes with them and possibly a few other neighbors. (*See* Pl Facts ¶ 59) Plaintiffs argue that defendants interfered with "the public's right to the preservation of trees and green spaces in the Borough's parks." (Pl Br. 34) The asserted right to the preservation of every tree or slice of green space would rule out all change or development; indeed, the park itself, or perhaps even plaintiffs' own homes, could not have been built in the first place. Count 4, assuming it is viable under the TCA, does not state a claim for public nuisance.

Summary judgment is granted as to Count 4 for failure to comply with the TCA. Assuming *arguendo* that compliance is demonstrated, I would consider the merits of the private nuisance claim at that time. I would dismiss the public nuisance claim as a matter of law in any event.

3. Inverse Condemnation (Count 5)

Defendants correctly argue that plaintiffs cannot succeed on a state-law inverse condemnation claim. [12] Plaintiffs do not defend this count in their opposition brief.

"The concept of inverse condemnation recognizes that the landowner may initiate the action to compel compensation from government; one need not wait in vain for government compensation." *Klumpp v. Borough of Avalon*, 997 A.2d 967, 976 (N.J. 2010).

> In an inverse condemnation action, a landowner is seeking compensation for a *de facto* taking of his or her property. [A] property owner is barred from any claim to a right to inverse condemnation unless deprived of all or substantially all of the beneficial use of the totality of his property as the result of excessive police power regulation. [N]ot every impairment of value establishes a taking. To constitute a compensable taking, the land owner must be deprived of all reasonably beneficial use of the property.

Greenway, 750 A.2d at 767 (alterations in original) (internal quotation marks and citations omitted). "Diminution of land value itself does not constitute a taking." *Gardner v. N.J. Pinelands Comm'n*, 593 A.2d 251, 259 (N.J. 1991); *accord Pheasant Bridge Corp. v. Twp. of Warren*, 298, 777 A.2d 334, 344 (N.J. 2001). Further, "incidental inconveniences or annoyances" do not amount to a taking in New Jersey. *Klein v. N.J. Dep't of Transp.*, 624 A.2d 618, 623 (N.J. Super. Ct. App. Div. 1993).

***14** Plaintiffs provide no facts to suggest that they have been deprived all or substantially all of the beneficial use of the totality of their property, as required by inverse condemnation precedent. At most they allege disruptions to their daily life and some impairment of the value and enjoyment of their property. (Pl Facts ¶¶ 91-107) I grant summary judgment as to Count 5, the inverse condemnation claim.

4. Diminution of Property Value (Count 6)

"Diminution of property value" is not a recognized cause of action in New Jersey. Plaintiffs do not defend this count in their opposition brief. I grant summary judgment as to Count 6.

5. Breach of Contract (Count 7)

Plaintiffs allege that they are third-party beneficiaries of a contract between the Borough and the County, and that the Borough has breached that contract. (Compl. ¶¶ 91-92) Plaintiffs do not defend this count in their opposition brief.

"It is a fundamental premise of contract law that a third party is deemed to be a beneficiary of a contract only if the contracting parties so intended when they entered into their agreement." *Ross v. Lowitz*, 120 A.3d 178, 190-91 (N.J. 2015) (citing *Broadway Maint. Corp. v. Rutgers, State Univ.*, 447 A.2d 906, 909 (N.J. 1982)). No facts suggest that the Borough and County intended the plaintiffs to be third-party beneficiaries of their contract. *See id.* (stating upon affirming a grant of summary judgment that "there is no suggestion in the record that the parties... had any intention to make plaintiffs... a third-party beneficiary of their agreements"). The contract itself explicitly mentions third parties only in the wholly unrelated context of subcontractors. (*See* Def. Ex. F at 10 ¶ 22)

The obvious and overriding purpose of the Contract is to improve a park established for the recreational use of the general public. There is no indication that the parties, in entering into this contract, intended to confer upon these plaintiffs any particularized benefit beyond that accruing to the public as a whole. Seeing no express provision for third-party rights, and lacking any facts implying that the contracting parties intended such benefits, I grant summary judgment on Count 7, the breach of contract claim.

III. CONCLUSION

Defendants' motion for summary judgment is **GRANTED** as to all counts. An appropriate order accompanies this Opinion.

Tabular or Graphical Material not displayable at this time.

All Citations

Not Reported in Fed. Supp., 2016 WL 3265689

Footnotes

1 Citations to the record will be abbreviated as follows: "Compl." — Complaint (ECF No. 1).

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

"Def. Ex."— Defendants' Exhibits (ECF Nos. 25-5 to 25-16), attached to the Certification of Christopher C. Botta (ECF No 25-4)
"Pl. Ex." — plaintiffs' Exhibits (ECF No. 33-4 to 33-25), attached to the Certification of Lawrence P. Cohen (ECF No. 33-3).
"Def Br." — Brief in Support of Defendants' Motion for Summary Judgment (ECF No. 25-1).
"Pl Br." — plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment (ECF No. 33).
"Def Reply" — Defendants' Reply Brief to Pl Br. (ECF No. 35).
"Def Facts" — Defendants' Statement of Material Facts (ECF No. 25-2) I have relied on statements in the Def Facts to the extent that plaintiffs admitted them or did not offer substantive evidence in response.
"Pl Response" — plaintiffs' Response to Def Facts (ECF No. 33-1).
"Pl Facts" — plaintiffs' Counterstatement of Material Facts (ECF No. 33-2).
"Def Reply Facts" — Defendants' Response to Pl Response Facts and Pl Facts (ECF No. 35-1).
"Trotta Dep." — Transcript of the Deposition of Tina Trotta (Def Ex. B (ECF No. 25-6)).
"McHale Dep." — Transcript of the Deposition of Patrick McHale (Def Ex. D (ECF No. 25-8)).
"Abbatomarco Dep." — Transcript of the Deposition of Robert Abbatomarco (Def Ex. G (ECF No. 25-11)).
"Nunez Dep." — Transcript of the Deposition of Jorge Nunez (Pl Ex G (ECF No. 33-10)).

2 Another neighbor's fence was damaged by the contractor. The contractor repaired it and installed slats in the fence for additional privacy. (Pl Facts ¶ 73)

3 The Guerra plaintiffs did not speak at this meeting. (Def Facts ¶ 53)

4 There is no evidence that plaintiffs have adopted measures (construction of a fence, for example) as a substitute for the screening function once served by the trees and vegetation. At times, plaintiffs seem to imply that the lot is not big enough—*i.e.*, that because it has only nine spaces, people park on their street. (*See* Pl. Br. at 19-20.)

5 To state what has largely gone unsaid, the plaintiffs do *not* allege a claim under the takings clause of the Fifth Amendment. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 125 S. Ct. 2074 (2005) (describing the *per se* takings categories of permanent physical invasion and total regulatory takings and the *Penn Central* factors for evaluating other regulatory takings claims). plaintiffs' alternative constitutional theories are, in many ways, an awkward attempt to circumvent that problematic case law. *See generally Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 721, 130 S. Ct. 2592, 2606 (2010) (plurality opinion of Scalia, J.) (warning against "using Substantive Due Process to do the work of the Takings Clause," an explicit textual source of constitutional protection designed for this situation).

6 "Class of one" should not be taken to signify there can be one and only one plaintiff or injured party. The term is used to differentiate such a claim from a claim of discrimination brought on the basis of the plaintiffs membership in a protected class.

7 Such a claim, of course, often leaves officials with a conundrum. That somewhere else is usually near someone else. And that someone else, as property owner, will inevitably voice a similar complaint.

8 McHale testified that he did not consider the impact the parking lot might have on plaintiffs until they brought it up at the Mayor and Council Meeting on October 20. (McHale Dep. 125:19-127:9) While this may not be a paradigm example of local governance, it is evidence that there was no discriminatory intent directed at plaintiffs. Plaintiffs provide no counter evidence and simply write "denied" in response to defendants' citation in their statement of facts to this part of McHale's deposition transcript. (*See* Def Facts ¶ 22; Pl. Response ¶ 22; Def Reply Facts at 4 ¶ 22)

9 The plaintiff also refer to political animus between themselves and the Mayor. The events cited, however, date from after the construction of the parking lot. The animus is an artifact, not a cause, of the parking lot issue.

10 In this respect it is broader than substantive due process, where the property interest must be fundamental. *See* Section II.B.2, immediately preceding.

11 The overruling of *DeBlasio*, noted above, pertained to the substantive due process shocks-the-conscience standard, a separate issue.

12 The requirements of the TCA do not apply to an action for inverse condemnation. *Greenway Dev. Co. v. Borough of Paramus*, 750 A.2d 764 (N.J. 2000).

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.