UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

Hon. Marianne O. Battani
Case No. 2:18-cv-13330

THE CHARTER TOWNSHIP OF MILFORD, a Michigan municipal corporation, TOWNSHIP OF MILFORD BOARD, a public body, DONALD D. GREEN, in his personal capacity and in his official capacity as Supervisor of Milford Township, and TIMOTHY C. BRANDT, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

Defendants.

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DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BRIEF IN SUPPORT

PROOF OF SERVICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

Hon. Marianne O. Battani
Case No. 2:18-cv-13330

v.

THE CHARTER TOWNSHIP OF MILFORD, a Michigan municipal corporation, TOWNSHIP OF MILFORD BOARD, a public body, DONALD D. GREEN, in his personal capacity and in his official capacity as Supervisor of Milford Township, and TIMOTHY C. BRANDT, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

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DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NOW COME the Defendants, **THE CHARTER TOWNSHIP OF MILFORD, TOWNSHIP OF MILFORD BOARD, DONALD D. GREEN** and

TIMOTHY C. BRANDT and for their Motion for Summary Judgment, state as follows:

1. This case arises out of a claim that the Defendants placed unlawful conditions on Plaintiffs in their attempt to construct a residential driveway.

2. On October 17, 2018, Plaintiffs filed their Complaint in the Oakland County Circuit Court which Defendants subsequently removed to this Court. **(Doc. # 1)**.

3. Plaintiffs' Complaint asserts five counts: Count I, Action for Declaratory Relief and Judgment; Count II, Injunctive Relief; Count III, Inverse Condemnation; Count IV, Violation of Due Process; Count V, Violation of 42 U.S.C. §§ 1983 and 1988. **(Doc. # 1, Pg. ID 28-34)**.

4. Plaintiffs' inverse condemnation claim fails because it is not ripe for review and because Defendants' actions of imposing preconditions to the construction of a residential driveway does not amount to an unlawful taking.

5. Plaintiffs' due process claim must also fail because Plaintiffs lack a constitutionally protected property interest and because Defendants' actions were neither arbitrary nor capricious.

6. The remaining claims in the Complaint for declaratory and injunctive relief, as well as Count V alleging 42 U.S.C. §§ 1983 and 1988 liability, must be dismissed because the foregoing are remedies or procedural mechanisms to vindicate

rights elsewhere conferred – not substantive causes of action. *McCann v. U.S. Bank, N.A.*, 873 F. Supp. 2d 823, 848 (E.D. Mich. 2012) quoting *Mettler Walloon, L.L.C. v. Melrose Twp.*, 281 Mich. App. 184, 221; 761 N.W.2d 293 (2008); *Terlecki v. Stewart*, 278 Mich. App. 644, 663; 754 N.W.2d 899 (2008); *Albright v. Oliver*, 510 U.S. 266, 271; 114 S. Ct. 807; 127 L. Ed. 2d 114 (1994). Thus, without an underlying violation, Plaintiffs are not entitled to the relief sought therein.

7. Pursuant to FED. R. CIV. P. 56, Defendants now seek dismissal of Plaintiffs' Complaint in its entirety based on the evidence and legal authority set forth in the attached Brief in Support.

8. Pursuant to Local Rule 7.1, Counsel for Defendants certifies that, on December 12, 2018, Counsel requested the concurrence of Plaintiffs' Counsel regarding the relief sought herein. No response was received.

WHEREFORE, Defendants respectfully request that this Honorable Court grant the present Motion for Summary Judgment, enter an Order dismissing, with prejudice, Plaintiffs' Complaint, and to aware such other relief as this Court deems appropriate.

Respectfully submitted,

O'CONNOR, DEGRAZIA, TAMM & O'CONNOR, P.C.

BY:/s/ James E. Tamm

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Dated: December 12, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

Hon. Marianne O. Battani
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THE CHARTER TOWNSHIP OF MILFORD, a Michigan municipal corporation, TOWNSHIP OF MILFORD BOARD, a public body, DONALD D. GREEN, in his personal capacity and in his official capacity as Supervisor of Milford Township, and TIMOTHY C. BRANDT, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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ISSUES PRESENTED

I. Whether Plaintiffs' takings claim is ripe for review where Plaintiffs have failed to seek a final determination from the Township of Milford or the Zoning Board of Appeals.

Defendants answer: No
This Court should answer: No

II. Whether Plaintiffs' takings claim must be dismissed where Defendants' actions do not amount to a categorical taking or a taking under the balancing test established in *Penn Central*.

Defendants answer: Yes
This Court should answer: Yes

III. Whether Plaintiffs possessed a protected property interest in the construction of a residential driveway as required to state a claim under the Due Process Clause.

Defendants answer: No
This Court should answer: No

IV. Whether Plaintiffs' due process claims must be dismissed where Plaintiffs were provided notice and an opportunity to be heard and where Defendants' actions do not shock the conscience.

Defendants answer: Yes
This Court should answer: Yes

V. Whether Plaintiffs' remaining claims for declaratory relief, injunctive relief, and 42 U.S.C. § 1983 liability must be dismissed where these claims are derivative of Plaintiffs' baseless constitutional allegations.

Defendants answer: Yes
This Court should answer: Yes

CONTROLLING AUTHORITY

I. Plaintiffs' takings claim is not ripe for judicial review. *Texas Gas Transmissions, LLC v. Butler Cty. Bd. of Comm'rs*, 625 F.3d 973, 976 (6th Cir. 2010); *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172; 105 S. Ct. 3108; 87 L. Ed. 2d 126 (1985); *Paragon Properties Co. v. City of Novi*, 452 Mich. 568; 550 N.W.2d 772 (1996).

II. Defendants' actions do not amount to either a categorical taking or a taking pursuant to the test laid out in *Penn Central*. *Schmude Oil, Inc v Dept of Envtl Quality*, 306 Mich. App. 35, 51; 856 N.W.2d 84 (2014); *Penn Central Trans'p Co v New York City*, 438 U.S. 104; 98 S.Ct. 2646; 57 L.Ed.2d 631 (1978); *K & K Construction, Inc. v Dep't of Natural Resources*, 456 Mich. 570, 576-577; 575 N.W.2d 531 (1998).

III. Plaintiffs do not possess a protected property interest in the construction of a residential driveway as required to state a claim under the Due Process Clause. *Braun v Ann Arbor Charter Twp*, 519 F.3d 564, 573 (6th Cir. 2008); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 208-209; 761 NW2d 293 (2008); *Silver v Franklin Twp Bd of Zoning Appeals*, 966 F2d 1031 (6th Cir. 1992).

IV. Plaintiffs cannot establish a violation of due process where Defendants' actions do not "shock the conscience" and where Plaintiffs were provided with notice and an opportunity to be heard before a neutral decision-maker. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 208-209; 761 NW2d 293 (2008); *Mongeau v. City of Marlborough*, 492 F.3d 14 (1st Cir. 2007); *G.M. Engineers & Assocs., Inc. v. West Bloomfield Twp.*, 922 F.2d 328, 332 (6th Cir. 1990); *Hahn v Star Bank*, 190 F3d 708, 716 (6th Cir. 1999).

V. Plaintiffs' claims for declaratory and injunctive relief, as well as for § 1983 liability, must be dismissed where these claims are not standalone causes of action. *McCann v. U.S. Bank, N.A.*, 873 F. Supp. 2d 823, 848 (E.D. Mich. 2012); *Terlecki v. Stewart*, 278 Mich. App. 644, 663; 754 N.W.2d 899 (2008); *Albright v. Oliver*, 510 U.S. 266, 271; 114 S. Ct. 807; 127 L. Ed. 2d 114 (1994).

STATEMENT OF MATERIAL FACTS

Plaintiffs Joel Hack and Wren Beaulieu-Hack (collectively, "Plaintiffs") purchased a vacant 3.15-acre parcel of land located at 2610 Pearson Road in Milford Township for $75,000.00. The property is zoned R-1-R, Rural Residential and Plaintiffs submitted an application for a building permit to install a 2,116-foot premanufactured home on a new basement with a new garage. The application did not require, nor did Plaintiffs depict, that any grading or use of fill material would be used during construction. A permit was issued on November 13, 2017. **(Exhibit A)**. The permit issued to Plaintiffs and their contractor EBI Incorporated specifically noted that it was for only the work described and "does not grant permission for additional or related work which requires separate permits". **(*Id.*)**. Pursuant to the permit, a structure was moved on to the property. In June 2018, the Township received notice that Plaintiffs were bringing fill material on site in order to construct the driveway. The portion of the property between Plaintiffs' house and Pearson Road is in a low-lying area. According to Plaintiffs' Complaint, the area where the driveway is proposed to be located is covered by water approximately 90% of the year. **(Doc. # 1, Pg. ID 25)**. During heavy rains, the water can be several feet deep. **(*Id.*)**. An adjoining property owner complained regarding the grading occurring on Plaintiffs' property because he believed that it directed water onto his land. On June 13, 2018, Township Building Administrator Timothy Brandt issued a cease and

desist letter to Plaintiffs' builder EBI Incorporated indicating that a permit was required to place any additional fill on the property. **(Exhibit B)**. Along with Mr. Brandt's letter, he enclosed a standard Township form for an application for permit to dredge and/or fill. The requirement for a permit is established by Section 32-583 of the Township's Zoning Ordinance. **(Exhibit C)**.

In order to obtain a permit, Plaintiffs were required to submit an application along with plans showing the proposed area where fill was to be placed, the existing and proposed final elevations, location of existing drainage course and the boundaries of wetlands. A topographical/grading survey was submitted by Plaintiffs' engineering consultant, Boss Engineering, on August 14, 2018. The Township's planning consultant, Hubbell, Roth & Clark ("HRC"), reviewed the proposed grading plan and issued a letter on August 24, 2018, and indicated that it did not object to the grading plan. **(Exhibit D)**. In its letter, HRC noted that it assumed the existing contours on the plan are from the pre-development of the property and accurately reflected the pre-development conditions. **(*Id*.)**. Notably, HRC was unaware that grading had been performed on site to accommodate the location of Plaintiffs' home.

During the Township Board meeting on September 19, 2018, the fill permit was discussed. David Mamo, the neighboring property owner who resides at 2488 Pearson Road, made a presentation regarding how the addition of fill dirt affected

his property and noted that there was seasonal ponding on Plaintiffs' land. Mr. Mamo presented evidence to the Township Board of flooding on his property since Plaintiffs' construction activity. **(Exhibit E)**. During the meeting, Township attorney, Jennifer Elowsky, indicated it would be appropriate for the Township Board to direct the issues raised by Mr. Mamo to the Township's engineer and building official. **(*Id.*)**. As a result, a motion was made to postpone a decision on the fill and grade permit until the Township Board received more information from the Township's engineer.

Pursuant to the motion by the Township Board, on October 8, 2018, Michael P. Darga of HRC, reissued a letter regarding the re-review of the fill and grade plans submitted on behalf of Plaintiffs. **(Exhibit F)**. In the review letter, it was noted that the grading plans submitted with Plaintiffs' initial application appeared to have presented different pre-development conditions than what was originally present. **(*Id.*)**. Mr. Darga recommended the fill and grade permit be conditioned on the following:

> 1. The applicant must submit to the Township a drainage area map showing the entire tributary area to 2610 Pearson Road, determine the retention volume created a 10-year storm, and calculate the pre-construction area of the low spot that contained this volume. This information can be used to determine if additional retention volume needs to be provided with the proposed grading plan and if additional topographic information needs to be shown on adjacent properties.
>
> 2. The applicant must improve the proposed swales, according to Township standards, to divert water from behind the home to the low

> area. It appears that the current site grading may be impeding the flow of water from the east and not allowing it to make it to the low area.
>
> 3. The plans should include calculations to verify that any proposed culvert is properly sized to facilitate drainage to the low point west of the driveway. **(*Id.*)**.

The application for the fill permit was to be considered at the Township Board's October 17, 2018 meeting.

On October 17, 2018, *prior to* the Township Board's meeting, Plaintiffs filed this lawsuit in the Oakland County Circuit Court. In their 122-paragraph Complaint, Plaintiffs alleged that the Township's decision to request HRC to revisit its review of the fill permit was the result of a relationship between Township Supervisor Don Green and Plaintiffs' neighbor. It is incorrectly claimed that a fill and grading permit is not required by ordinance and that the Township already approved the driveway when it issued the building permit.

The Township Board held a public hearing regarding Plaintiffs' application for a grade and fill permit on the evening of October 17, 2018 – *after* Plaintiffs' lawsuit was filed. Plaintiffs were present at the meeting and represented by Counsel. The Township Board voted to approve the permit subject to the three conditions recommended by the Township's engineering consultant. **(Exhibit F; Exhibit G)**. Since the filing of this lawsuit, Defendants have sought to accommodate Plaintiffs in their effort to construct a driveway. Plaintiffs' Counsel was informed that the pre-conditions outlined above do not require a great deal of labor, nor should it be

expensive to accomplish. **(Exhibit H)**. Unfortunately, this proposal was roundly rejected by Plaintiffs' Counsel and the decision was made to pursue litigation. **(*Id.*)**. Defendants now file the present Motion for Summary Judgment because Plaintiffs cannot come forward with any evidence to sustain their claims.

STANDARD OF REVIEW

A motion brought under FED. R. CIV. P. 56 can be supported with affidavits, depositions, or other factual material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252; 106 S.Ct. 2505; 91 L.Ed.2d 202 (1986). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327; 106 S.Ct. 2548; 91 L.Ed.2d 265 (1986) [quotations omitted].

A motion under this rule tests whether there is a genuine issue of material fact for trial. The party opposing the motion may not merely "rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact," but must make an affirmative showing with proper evidence in order to defeat the motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). If the non-moving party, after sufficient opportunity for discovery, is unable to meet his or her burden of proof, summary judgment is clearly proper. *Celotex, supra,* 477 U.S. at 322-23.

LAW & ARGUMENT

I. PLAINTIFFS' TAKINGS CLAIM MUST FAIL BECAUSE IT IS NOT RIPE FOR REVIEW AND BECAUSE NO UNLAWFUL TAKING HAS OCCURRED.

A. Plaintiffs' Takings Claim Is Not Ripe For Judicial Review.

This Court lacks jurisdiction over Plaintiffs' unconstitutional takings claim because Plaintiffs' claim is not ripe for review. "Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *Texas Gas Transmissions, LLC v. Butler Cty. Bd. of Comm'rs*, 625 F.3d 973, 976 (6th Cir. 2010) [quotations omitted].

By filing their lawsuit *prior to* the Township's October 17, 2018 decision regarding their property and by failing to bring the issue before the Zoning Board of Appeals, Plaintiffs have not satisfied the finality requirement of *Paragon Properties Co. v. City of Novi*, 452 Mich. 568; 550 N.W.2d 772 (1996) and *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172; 105 S. Ct. 3108; 87 L. Ed. 2d 126 (1985). Further, the failure to petition the Zoning Board of Appeals represents a failure to exhaust administrative remedies.

Prior to obtaining a final decision from an administrative agency, a claim is not ripe for review. *Paragon*, 452 Mich. at 578-79**.** This is because a landowner's claim "simply cannot be evaluated until the administrative agency has arrived at a

final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 579**.** As the U.S. Supreme Court has noted, a challenge to an agency's decision turns in large part upon the effect that decision has on the property in question, and that effect "cannot be measured until a final decision is made as to how the regulations will be applied . . . " *Williamson*, at 200.

The ripeness doctrine has been applied in the context of land use regulation by the U.S. Supreme Court in *Williamson*. Here, developers brought an action against a planning commission, alleging that the planning commission's disapproval of their subdivision plat constituted a taking. The planning commission determined that the subdivision plat did not comply with density requirements. The Board of Zoning Appeals was empowered to grant variances from the requirements, but plaintiffs never sought a variance. Rather, plaintiffs challenged the planning commission's decision in federal court. A jury found that plaintiffs had been denied the economically viable use of their property and awarded damages. *Id.* at 183. The trial court entered a judgment notwithstanding the verdict in favor of the planning commission, and the Sixth Circuit reversed, finding that a taking had occurred. *Id.* at 184.

The Supreme Court again reversed, finding that the claim was not ripe because the plaintiffs did not seek a variance. *Id.* at 191. In applying the ripeness doctrine, the Court articulated a test for determining ripeness in cases involving the alleged

taking of a property interest: 1) the governmental entity must have reached a final decision regarding the application of the regulations to the property; and 2) the plaintiff must have sought compensation using the procedures implemented by the state. *Id*. at 186, 194. In *Williamson,* so long as the issuance of a variance was possible, the commission's disapproval of the plat did not "conclusively determine whether respondent will be denied all reasonable beneficial use of its property," and was therefore "not a final, reviewable decision." *Id.* at 194.

The claim presented by Plaintiffs in the case at bar is similarly premature. Like in *Williamson,* Plaintiffs here argue that the economically viable use of their property has been denied by an administrative agency. **(Doc. # 1, Pg. ID 31)**. However, they do so without having received a final reviewable decision. Plaintiffs filed suit *prior to* the Township's decision regarding the construction of their driveway. Moreover, just as the plaintiffs in *Williamson* had the option of appealing the determination or applying for a variance, the Plaintiffs here have the option of petitioning the Zoning Board of Appeals for redress. **(Exhibit I)**. Section 32-65 of Milford Township's Zoning Ordinance authorizes the Board of Appeals "[t]o hear and decide appeals where it is alleged there is an error of law in any order, requirement, decision or determination made by township officials in the enforcement of this chapter, and to hear and decide appeals where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of

this chapter so that the spirit of this chapter shall be observed, public health and safety secured, and substantial justice done." **(*Id.*)**.

In both cases, further administrative action could cure the alleged deprivation; in *Williamson* the variance could have allowed plaintiffs to develop their plat despite the commission's objections, while here the Zoning Board of Appeals could have reviewed the Township's decision. In fact, the claims presented in the case at bar are even more premature than those raised in *Williamson* because our Plaintiffs skipped the preliminary step of waiting for the Township to make its decision.

The Michigan Supreme Court followed *Williamson* when it applied the finality requirement in *Paragon*, 452 Mich. at 578-79. In *Paragon*, a landowner purchased a seventy five-acre vacant parcel in the City of Novi which was zoned for large-lot, single-family residential use. The landowner submitted a request to the City of Novi Planning Board to rezone the property from a single-family residential zone to a mobile home district. The rezoning request was denied. The landowner then filed suit, alleging that the property had no economic value as zoned. Novi's Zoning Ordinance authorized the Zoning Board of Appeals to grant a land use variance, but the Landowner filed suit without having filed for a use variance. The trial court found that the zoning classification rendered an unconstitutional taking, and the City appealed. *Id.* at 573. The Court of Appeals reversed, finding that the landowner's failure to apply for a use variance rendered the claim not ripe. *Id.* The

Supreme Court affirmed, finding that the landowners' failure to file for a use variance barred the action as unripe. *Id.* at 583. In reaching this conclusion, the Court quoted *Williamson's* finding that a property owner's claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 579.

Again, the facts underlying the case at bar are very similar to those presented in *Paragon* and *Williamson.* Plaintiffs have not pursued administrative channels to their completion because they filed suit *before* the Township rendered a decision and because they have failed to appeal that decision to the Zoning Board of Appeals. Thus, a full factual record has not been developed. In light of these precedents, the claim as presented now is unripe and must be dismissed.

B. Plaintiffs Cannot Establish A Claim For Regulatory Taking.

Both the United States Constitution, Amendment V and the Michigan Constitution 1963, art. X, § 2, prohibit the taking of private property for public use without just compensation. *Dorman v Clinton Twp,* 269 Mich. 638, 645; 714 N.W.2d 350 (2006). The government is not constitutionally prohibited from taking private property for public use but is only required to pay property owners just compensation when it does so. The governmental normally "takes" private property through the power of eminent domain in formal condemnation proceedings. *Id.* at

645. However, governmental regulations that overburden a property may also constitute a compensable taking. *K & K Construction, Inc. v Dep't of Natural Resources*, 456 Mich. 570, 576-577; 575 N.W.2d 531 (1998) (hereinafter "*K & K I*"). A land use regulation such as a zoning ordinance may amount to a regulatory "taking" if, as applied, it denies an owner economically viable use of his land. *Nollan v CA Coastal Comm'n*, 483 U.S. 825, 834; 107 S.Ct. 3141; 97 L.Ed.2d 677 (1987); *Bevan v Brandon Twp*, 438 Mich. 385, 391, 397-398; 475 N.W.2d 37 (1991). A regulatory taking is divided further into categorical takings, which apply to regulations that deprive an owner of "all economically beneficial or productive use of land," (*Lucas v South Carolina Coastal Council*, 505 U.S. 1003, 1015; 112 S.Ct. 2886; 120 L.Ed.2d 798 (1992)), or a taking on the basis of the traditional balancing test established by *Penn Central Trans'p Co v New York City*, 438 U.S. 104; 98 S.Ct. 2646; 57 L.Ed.2d 631 (1978) and *K & K I*, 456 Mich. at 576-577. Michigan takings jurisprudence follows United States Supreme Court decisions. *Id.*

1. The Preconditions To The Construction Of Plaintiffs' Driveway Does Not Deprive The Subject Property Of *All* Economic Benefit.

As discussed above, a categorical taking cannot be established absent government action that *completely deprives the land of all value*. *Schmude Oil, Inc v Dept of Envtl Quality*, 306 Mich. App. 35, 51; 856 N.W.2d 84 (2014); *Dorman v. Twp of Clinton*, 269 Mich. App. 638, 646; 714 N.W.2d 350 (2006). "When the government action in question diminishes the value of the land, but does not

completely deprive the land of all value, the landowner cannot establish a categorical taking." *Schmude Oil, supra*.

In this case, the Township's decision to impose preconditions to the construction of a residential driveway does not render the property devoid of all value. As admitted by Plaintiffs, they spent approximately $330,000.00 to construct the home and paid 75,000.00 for the land. **(Doc. # 1, Pg. ID 20)**. The lack of driveway does not completely negate this intrinsic value. The land alone, without the home or the driveway, is worth at least $75,000.00 because that is what Plaintiffs purchased it for in 2016. **(*Id*.).** Accordingly, the lack of driveway cannot be said to completely deprived Plaintiffs of *all economically beneficial use* of their property. Even in the absence of a driveway, Plaintiffs still have a 3.15-acre parcel of land together with a $330,000.00 home.

Moreover, Milford Township has not interfered with the use or occupancy of the property. A temporary occupancy permit was issued to the Hacks which permitted them to live in the home at 2610 Pearson Road. **(Exhibit J).** Without a grading permit, Plaintiffs have been able to access their home and occupy it. This is evidenced by photographs taken of the subject property in December of 2018 showing the property to be occupied. **(Exhibit K)**.

2. Defendants Actions Do Not Amount To A Taking Under *Penn Central*.

In *Penn Central*, the U.S. Supreme Court identified three particularly significant criteria as part of its "ad hoc" factual inquiry to assist in determining whether government regulation may constitute a taking. These include an analysis of (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government's action. *Penn Central*, 438 U.S. at 124. The Michigan Supreme Court has employed the same analysis. Applying these factors to Plaintiffs' takings claim, it is clear that no such taking has occurred.

i. Economic Impact

As to the first factor in *Penn Central*, it has been recognized that "a mere diminution in property value . . . does not amount to a taking." *Bevan*, *supra*, 438 Mich. at 402-403; 475 N.W.2d 37 (1991). In other cases, the U.S. Supreme Court has held that no taking occurred despite a 75% diminution in value in one case, *Euclid v Ambler Realty Co*, 272 U.S. 365; 47 S.Ct. 114; 71 L.Ed. 303 (1926), or an 87.5% diminution in value in another, *Hadachek v Sebastian*, 239 U.S. 394; 36 S.Ct. 143; 60 L.Ed. 348 (1915). Plaintiffs must show something more – "that the property was either unsuitable for use . . . or unmarketable. . . . *Dorman*, 269 Mich. App. at 647. Here, even assuming, *arguendo*, the present lack of driveway deprived the property of *some* value, Plaintiffs are still able to access the property and have lived

there pursuant to a temporary use permit. The mere lack of a driveway does not render the property unsuitable for use or unmarketable. Moreover, the Township has made very clear they are willing to work with Plaintiffs in order to construct their driveway subject to a few preconditions that are neither onerous nor burdensome. The first *Penn Central* factor weighs strongly in favor of Defendant and precludes Plaintiffs; taking claim.

ii. Investment-Backed Expectations

The second *Penn Central* factor requires an analysis of the extent to which the regulation has interfered with distinct investment-backed expectations. To support a claim for a regulatory taking, an investment-backed expectation must be "reasonable." *Palazzolo v Rhode Island*, 533 U.S. 606, 618; 121 S.Ct. 2448; 150 L.Ed.2d 592 (2001). A key factor in whether a regulation has interfered with reasonable investment-backed expectations "is notice of the applicable regulatory regime." *K & K II*, 267 Mich. App. at 555. Moreover, while notice is not an absolute bar it "does help shape the analysis of whether expectations were reasonable." *Id*. at 557.

In this case, Plaintiffs were clearly aware, or should have been aware, of the regulatory regime requiring they obtain a fill and grade permit as it was in existence when they acquired the subject property. Plaintiffs were also aware of the need to change the elevation in order to construct the driveway because, as acknowledged

in the Complaint, the area where the driveway is proposed to be located is covered by water approximately 90% of the year. "This knowledge . . . logically must be taken into account when determining what plaintiffs' reasonable investment-backed expectations were" with respect to the development of the property. *Id.* at 556. Under the "reasonable investment-backed expectation" factor, a party's expectation regarding use of its property must be "reasonable . . . [and] must be more than a unilateral expectation or an abstract need." *Ruckelshaus v Monsanto Co*, 467 U.S. 986, 1005-1006; 104 S.Ct. 2862; 81 L.Ed.2d 815 (1984) (quotations omitted). Plaintiffs' subjective expectations are irrelevant to the reasonableness of these expectations. See *Cienega Gardens v United States*, 311 F.3d 1319, 1346 n 42 (Fed. Cir. 2003) ("we of course agree that a party's subjective expectation is irrelevant to whether that expectation is reasonable."). Plaintiffs had no reasonable – that is objective – expectation that it would be allowed to alter the grading of their property without obtaining authorization from the Township pursuant to the Township's Ordinance. More importantly, Plaintiffs have not been precluded from constructing their driveway – thus their investment-backed expectations have not been frustrated. On October 17, 2018, the Township Board voted to *approve* the construction of the driveway subject to three reasonable preconditions designed to address flooding in the area**. (Exhibit G)**.

iii. Character Of Governmental Action

The third factor of *Penn Central* – addressing the character of the governmental action – also weighs heavily in favor of Defendants. "*Penn Central* provides that the central question in analyzing the character of the governmental action is whether that action constituted a physical invasion." *Grand/Sakwa of Northfield, LLC v Northfield Tp*, 304 Mich. App. 137, 146; 851 N.W.2d 574 (2014); *Tennessee Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 455 (6th Cir. 2009). Where it does, the factor weighs in favor of finding a taking. *Id.* Here, however, the character of Defendants' actions is not a physical invasion; it is merely the imposition of preconditions prior to the issuance of a fill and grade permit pursuant to Township Ordinance. The Township's action is akin to the enforcement of a zoning ordinance and the "*Penn Central* Court cited zoning ordinances as 'the classic example' of governmental action affecting land interests and stated that such regulations are generally permissible." *Grand/Sakwa*, *supra*. Defendants have not "physically invaded" Plaintiffs' property. In fact, Defendants have not even prohibited Plaintiffs from constructing their driveway or residing in their home. The sole action that Defendants have taken with respect to Plaintiffs is the imposition of three reasonable preconditions to the construction of their driveway. Under *Penn Central*, this cannot constitute a taking.

II. PLAINTIFFS' CANNOT ESTABLISH A VIOLATION OF THEIR DUE PROCESS RIGHTS BASED ON DEFENDANTS' DECISION TO IMPLEMENT REASONABLE PRECONDITIONS TO THE CONSTRUCTION OF A RESIDENTIAL DRIVEWAY.

Both the federal and state constitutions provide that no one may be deprived of property without due process of law. *U.S. Constitution Am. XIV; Const. 1963, art. 1, § 17*; *People v Sierb,* 456 Mich. 519, 522; 581 N.W.2d 219 (1998). The Michigan Constitution's due process clause is co-extensive with the United States Constitution's due process clause. *Cummins v Robinson Twp.,* 283 Mich. App. 677, 700-701; 770 N.W.2d 421 (2009).

A. Plaintiffs' Remedy, If Any, Is Under The Taking Clause Rather Than The Substantive Due Process Clause Where Plaintiffs' Complaint Alleges An Unconstitutional Taking.

Plaintiffs cannot succeed on a generalized notion of substantive due process where a particularized constitutional amendment applies. Plaintiffs' substantive due process claim is based on the same governmental action that gave rise to their takings claims. The United States Supreme Court has held, "where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Sacramento Co. v. Lewis*, 523 U.S. 833, 842; 118 S. Ct. 1708; 140 L. Ed. 2d 1043 (1998). This concept has been applied to regulatory taking claims, which fall under the Fifth Amendment. *See U.S. Const., Am. V*; *Cummins*, *supra,* at 705.

The takings clause provides "an explicit textual source of constitutional protection" against the government's regulatory taking of property, so Plaintiffs' due process claim is more properly analyzed under the takings clause. See *Id.* at 704-705*;* see also *Sacramento Co.*, 523 U.S. at 842. Pursuant to Section I, *supra*, Plaintiffs' cannot establish a takings claim. Accordingly, since Plaintiffs' specific constitutional remedy is without merit, Plaintiffs should not be allowed to succeed by arguing the more generalized concept of substantive due process.

B. Plaintiffs Cannot Establish A Violation Of Due Process Where They Lacked A Protected Property Interest In The Construction Of Their Residential Driveway.

"To state a substantive due process claim in the contest of zoning regulations, a plaintiff must establish that (1) a constitutionally protected property or liberty interest exists, and (2) the constitutionally protected interest has been deprived through arbitrary and capricious action." *Braun v Ann Arbor Charter Twp,* 519 F.3d 564, 573 (6th Cir. 2008) quoting *Tri-Corp Mgmt Co v Praznik,* 33 Fed.Appx. 742, 747 (6th Cir. 2002).[1]

Braun considered whether plaintiffs had a protected property interest in a rezoning petition. Plaintiffs requested the township to rezone property from

[1] As with Plaintiffs' substantive due process allegations, the threshold inquiry regarding Plaintiffs' procedural due process claim is whether at the time of the alleged deprivation, Plaintiffs possessed a liberty or property interest protected by the Constitution. *Mettler Walloon, LLC v Melrose Twp,* 281 Mich. App. 184, 209; 761 N.W.2d 293 (2008)

agricultural to mobile home park residential. The planning commission recommended denial of rezoning and the township board denied the application for rezoning. 519 F.3d at 567-568. Plaintiffs eventually filed suit in federal court alleging deprivations of procedural due process, substantive due process, equal protection, a takings claim and violation of 42 U.S.C. § 1983, which were dismissed by the lower court. On appeal, the Court determined that plaintiffs had no property right to trigger due process protections. *Id.* at 573-574. "Property rights are created and defined by independent sources such as state law and not by the Constitution." *Id.* at 573 citing *Thomas v Cohen*, 304 F.3d 563, 576 (6th Cir. 2002). "In order to have a property interest in a benefit, a person must have more than a desire for it or unilateral expectation of it; rather, he must have a 'legitimate claim of entitlement to it. . . .'" *Id.*, quoting *R.S.W.W., Inc v City of Keego Harbor,* 397 F.3d 427, 435 (6th Cir. 2005) (citing *Bd. of Regents v Roth*, 408 U.S. 564, 577; 92 S.Ct. 2701; 33 L.Ed.2d 548 (1972).

Federal law is clear that no property right exists in land use unless there is "some policy, law, or mutually explicit understanding that both confers the benefits and limits the discretion of the city to rescind the benefit." *R.S.W.W.*, 397 F.3d at 435. In *Braun*, because the township had the right to deny the rezoning request there was no cognizable property right. Under these circumstances, plaintiffs had no protected property interest in future rezoned use of their land for a trailer park and

therefore no right to substantive due process. See also, *Mettler Walloon, LLC v Melrose Twp*, 281 Mich. App. 184, 208-209; 761 N.W.2d 293 (2008) ("it is worth noting that a developer does not always have a protected property interest in a particular outcome of land use planning . . . there must be a reasonable expectation of entitlement.") (citation omitted).

Ultimately, "a party cannot possess a property interest in the receipt of a benefit when the state's decision to award or withhold the benefit is wholly discretionary." *Med Corp, Inc v City of Lima*, 296 F.3d 404, 409 (6th Cir. 2002). In *Silver v Franklin Twp Bd of Zoning Appeals*, 966 F.2d 1031 (6th Cir. 1992), the Court concluded plaintiff failed to establish violation of any substantive due process right. It noted that plaintiff was required to demonstrate a property interest in the use of his property before he could establish a violation of substantive due process. If the township board had discretion to deny a conditional zoning certificate then plaintiff would not have a "legitimate claim of entitlement" or a "justifiable expectation in the approval of his plan." *Id.* at 1036. Therefore, he would have no property interest that could support a substantive due process claim." See also *Brown v. City of Ecorse*, 322 F. App'x 443, 445 (6th Cir. 2009) ("If a zoning authority retains discretion to issue or deny a building permit, an individual whose permit application has been rejected has no protected property interest.") **(Exhibit L)**.

Likewise, Plaintiffs were required to first establish the existence of a constitutionally protected property or liberty interest in the proposed construction of their residential driveway. Pursuant to Ordinance 32-583, "[i]t shall be unlawful for any person to use land for filling with materials of any kind without approval of the township board ***and subject to requirements as may be appropriate***." **(Exhibit C)**. This provision grants the Township authority to either grant, deny, or – as here – impose conditions to Plaintiffs' request. This discretion precludes Plaintiffs establishing a justifiable expectation that their fill and grade permit would be approved. Without such a property right the claim fails.

C. Plaintiffs Cannot Establish That The Township's Decision to Impose Preconditions To The Construction Of The Driveway Was Unreasonable Or That It Failed To Advance A Legitimate Governmental Interest In Violation Of The Substantive Due Process Clause.

If an executive action is challenged - that of a municipal authority's application of an ordinance to plaintiff's property - the focus is on "whether there was egregious or arbitrary government conduct." *Mettler Walloon*, 281 Mich. App. at 197. Then, the conduct is evaluated by a "shocks the conscience" standard. ("[W]hen evaluating municipal conduct vis-à-vis a substantive due process claim, only the most egregious official conduct can be said to be arbitrary in the constitutional sense," that is, "when executive action is challenged in a substantive due process claim, the claimant must show that the action was so arbitrary (in the

constitutional sense) as to shock the conscience." *Id.* at 197, 200. Accord**,** *Cummins, supra*, 283 Mich. App. at 701.

In *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992), the Court rejected plaintiff's claims against city officials, concluding that the denial of plaintiff's application for a zoning change withstood substantive due process attack. The Court reasoned that "it is extremely rare for a federal court properly to vitiate the action of a state administrative agency as a violation of substantive due process. The vast majority of such attacks may readily be disposed of on summary judgment. . . ." *Id.* at 1222

Similarly, in *Mongeau v. City of Marlborough*, 492 F.3d 14 (1st Cir. 2007), a developer brought a state-court § 1983 action against the city and city officials following denial of a building permit alleging substantive due process violation. In dismissing the plaintiff's claim, the Court reiterated the "conscious-shocking" standard and further noted that "the substantive due process doctrine may not, in the ordinary course, be invoked to challenge discretionary permitting or licensing determinations of state or local decisionmakers, whether those decisions are right or wrong." *Id.* at 17; see also *G.M. Engineers & Assocs., Inc. v. West Bloomfield Twp.*, 922 F.2d 328, 332 (6th Cir. 1990) (concluding that Township's disapproval of proposed lot split did not "shock the conscience" of the Court).

In this case, it is clear that Defendants' conduct does not "shock the conscience", nor is it arbitrary or capricious. Defendants imposed reasonable preconditions to the construction of a residential driveway following concerns of flooding raised by concerned citizens. Defendants acted reasonably to protect the health, safety and welfare of the public and property located in flood-prone areas. Further, Defendants' conduct is even less "conscious shocking" considering they have not denied Plaintiffs in the construction of their driveway.

D. Plaintiffs Cannot Establish A Violation Of Their Right To Procedural Due Process.

Both the United States and Michigan Constitutions guarantee that a person may not be deprived of life, liberty or property without due process of law. *U.S. Constit., Am. XIV; Constit. 1963, art. I § 17. In re Parole of Hill,* 298 Mich. App. 404, 412; 827 N.W.2d 407 (2012). To succeed on a procedural due process claim under federal law, certain requirements are necessary:

> To establish a procedural due process claim pursuant to § 1983, plaintiffs must establish three elements: (1) that they have a life, liberty or property interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, (2) that they were deprived of this protected interest within the meaning of the Due Process Clause, and (3) that the state did not afford them adequate procedural rights prior to depriving them of their protected interest. *Hahn v Star Bank,* 190 F.3d 708, 716 (6th Cir. 1999).[2]

[2] As set forth above in Section II. B., *supra,* Plaintiffs fail the threshold inquiry because they lacked a constitutionally protected property interest.

Under Michigan law, "procedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to be heard by an impartial decision-maker at a meaningful time and in a meaningful manner." *Mettler Walloon, supra,* at 213-214, citing *Reed v Reed,* 265 Mich. App. 131, 159; 693 NW2d 825 (2005).

Here, there is no dispute that Plaintiffs received both notice and an opportunity to be heard. The Township held public hearings on Plaintiffs' request for a fill permit. First on September 19, 2018 where Plaintiffs' builder (the applicant for the permit) was present and again on October 18, 2018 where Plaintiff and his attorney were present. **(Exhibit E; Exhibit G).** As such, Plaintiffs' procedural due process claim must fail. Moreover, the decision to impose preconditions to the construction of Plaintiffs' residential driveway was well-reasoned based upon concerns of flooding in neighboring areas. Public opposition or concern is a relevant and proper consideration. See *A & B Enterprises v Madison Twp*, 197 Mich. App. 160, 164; 494 NW2d 761 (1992).

WHEREFORE, Defendants respectfully request that this Honorable Court grant the present Motion for Summary Judgment, enter an Order dismissing, with prejudice, Plaintiffs' Complaint, and to aware such other relief as this Court deems appropriate.

Respectfully submitted,

O'CONNOR, DEGRAZIA, TAMM & O'CONNOR, P.C.

BY:/s/ James E. Tamm

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Dated: December 12, 2018

PROOF OF SERVICE

Jemmis F. Lawrence states that on December 12, 2018, on behalf of Defendants she served the attached *Defendants' Motion for Summary Judgment*, *Brief in Support* and *Proof of Service* upon counsel of record via e-filing with the ECF Filing system to their e-mail addresses of record.

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