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.

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

I. Plaintiffs Were Not Denied Access To Their Property Nor Did The Actions Of Defendants Impact A Particular Constitutional Guarantee.

In response to Defendants' Second Motion for Summary Judgment, Plaintiffs inaccurately claims that imposing conditions of their driveway construction project deprived them of a particular Constitutional guarantee. Plaintiffs cite to *Michigan State Highway Comm'n v. Sandberg*, 383 Mich. 144; 174 N.W.2d 761 (1970) apparently to support the claim that a "right of access" to their home is a particularized Constitutional guarantee subject to substantive due process protection. However, this argument fails because Plaintiffs' have not been denied a right of access to their property. *Sandberg* was a condemnation action wherein the Michigan Supreme Court was tasked with determining the appropriate amount of compensation for land taken by the highway commission. In making this determination, the Court needed to consider whether the owners of the 2.7 acre piece of land had a right of access thereto when it was separated from the highway by a fence. The Court ultimately answered this question in the negative but also held that generally "the right of access ordinarily attaches to property abutting a public highway and the constitutes a property right[.]" *Id*. at 149.

Unlike *Sandberg*, where the plaintiffs were physically prevented from accessing their property, the Defendants have not taken any action to preclude Plaintiffs from access to their property. Moreover, the Township granted Plaintiffs a temporary occupancy permit specifically to allow occupancy of the home while

the fill and grade permit was pending review. Thus thee Plaintiffs have presented no evidence that they were ever denied "access" to their property. Plaintiffs' claim that they were denied the right to construct a driveway is likewise unsupported by the evidence. The Township has not denied Plaintiffs' the right to construct a driveway. In fact, a driveway was constructed and, but for flooding issues caused by the low lying topography of the property, would not have required any additional construction according to Plaintiffs' excavator. (**Boutell, dep. Tr. p. 54, lines 9-11, ECF No. 52-5, Page ID 1583, p. 96, lines 10-16, ECF No. 52-5, Page ID 1593**). Thus, the Plaintiffs have failed to establish that the Defendants in any way interfered with a constitutional or statutory right to access to their property.

Moreover, the mere denial of the construction of the driveway does not impact any constitutional guarantee. The facts of this case are akin to those of *Hussein v. City of Perrysburg*, 617 F.3d 828, 832 (6th Cir. 2010) (**Attached as Exhibit A**). In *Hussein*, the plaintiffs were issued a "stop work" order for the construction of their residential driveway, but as winter approached, plaintiffs sought to have a temporary layer of asphalt installed over the top of their otherwise-gravel driveway in order to make it safer. The plaintiffs claimed that they were given verbal permission to proceed with their plan. Nevertheless, while the subcontractor was installing the asphalt, the city inspector arrived with two police officers and threatened litigation unless the subcontractor cease asphalt

installation and remove what asphalt had already been laid. The plaintiffs subsequently filed suit alleging that defendants violated their substantive due process rights by ordering them to remove the asphalt. The Sixth Circuit dismissed this claim noting:

> ***The asphalt driveway incident did not implicate specific constitutional guarantees, denial of a driveway does not shock the conscience, and an asphalt driveway is not an interest so rooted in the traditions and conscience of our people as to be fundamental. Thus, the defendants did not violate the Husseins' substantive due process rights.***

Id. at 833 [emphasis added].

The *Hussein* court determined that denial of a paved driveway did not implicate a constitutional guarantee and therefore dismissed the substantive due process claim. Because the Hacks have not been denied access to their property and they have no constitutional guarantee to ignore Township ordinances to improve their driveway, Defendants are entitled to a grant of summary judgment.

II. Defendants Actions Do Not "Shock The Conscience" As Required To Sustain A Substantive Due Process Claim.

As recognized in *Hussein*, *supra*, the construction of a driveway does "not implicate specific constitutional guarantees." *Id*. Accordingly, Plaintiffs must proceed under the "shocks the conscience" standard applicable to non-specific constitutional guarantees. See *Valot v. Se. Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1228 (6th Cir. 1997) ("Substantive due process claims may be loosely

divided into two categories: (1) deprivations of a particular constitutional guarantee; and (2) actions that 'shock the conscience'"). Conduct that "shocks the conscious" for purposes of a substantive due process claim is governmental action that "was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency[.]" *Breithaupt v. Abr*am, 352 U.S. 432 (1957); see also *Range v. Douglas*, 763 F.3d 573, 589 (6th Cir. 2014) ("Conduct shocks the conscience if it violates the decencies of civilized conduct.").

In this case, Plaintiffs allege that Defendants deprived them of substantive due process rights by imposing safety risks. Plaintiffs do not meaningfully address these "safety risks", other than to state that they cannot safely access their property. However, this argument is belied by the evidence in record showing Plaintiffs living in their home without issue or incident. Moreover, the "shocks the conscious" standard requires far more egregious conduct than the mere imposition of pre-conditions to the construction of a residential driveway. To hold otherwise would effectively constitutionalize every municipal decision where the homeowner did not get the precise result he or she requested. See *Hussein*, 617 F.3d at 832-833, *supra* ("Not all arbitrary and capricious state action amounts to a violation of substantive due process; otherwise judicial review for compliance with substantive due process would become the equivalent of a typical state or federal Administrative Procedure Act.").

Consistently, in *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992), the Sixth Circuit recognized that "[w]here a substantive due process attack is made on state *administrative* action, the scope of review by the federal courts is extremely narrow." *Pearson v. City of Grand Blanc*, 961 F.2d at 1221. [emphasis in original]. "To prevail, a plaintiff must show that the state administrative agency has been guilty of arbitrary and capricious action in the *strict* sense, meaning that there is no rational basis for the administrative decision." *Id*. [quotations omitted]. In other words, the "administrative action will withstand substantive due process attack unless it is not supportable on any rational basis or is willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case." *Id*. [quotations omitted]. *Pearson* further mandates that this Court's review "is limited to determining whether the agency has paid attention to the evidence adduced and acted rationally upon it" and the "state decision may not be set aside as arbitrary and capricious if there is some factual basis for the administrative action." *Id*. at 1222. Plaintiffs have not satisfied this burden.

Plaintiffs apparently desire to have a jury review three administrative actions. The first is Administrator Brandt's determination that dirt brought onto Plaintiffs' property constituted "fill material" under the Township Ordinance Sec. 32-583. Such review would be improper under the principles set forth in *Pearson*

as Brandt's determination was both reasonable and rational given the flooding concerns expressed by the neighboring property owner.[1] Not to mention that Plaintiffs' own contractor described the dirt as "fill material." (Boutell, dep. Tr. p. 67, lines 8-14, ECF No. 52-5, Page ID 1586). Because Plaintiffs have not shown that there was no rational basis for Brandt's determination, Defendants are entitled to Summary Judgment on that issue. See *Pearson, supra* at 1221.

The second action Plaintiffs challenge is the action of the Township Board tabling the approval of the fill and grade permit. Similar to Brandt's determination, the Township Board's action is clearly supported by a rational basis. The Township engineer recommended approval of the fill and grade permit based on assumptions. At the Board meeting the neighboring property owner appeared and challenged those assumptions alleging that the constructing caused his property to flood. The Township Board did not deny the permit, but merely tabled the request until the Township Engineer could address the neighbor's concerns. Under *Pearson*, this does not rise to the level of a substantive due process violation.

Finally, Plaintiffs allege that the imposition of additional requirements to provide information was arbitrary and capricious. Again, under *Pearson*, this does

[1] It is worth noting that Plaintiffs did not challenge the fill and grade permit requirement at the time the cease and desist letter was issued. Instead, Plaintiffs complied and submitted a fill and grading plan to the Township Engineer.

not rise to the level of a substantive due process violation. The Township did not prevent Plaintiffs from constructing their driveway, it merely requested additional information to ensure that grading activities did not cause flooding on adjacent property.[2] Plaintiffs have cited no cases in which a jury was permitted to review such an administrative determination by a municipality where the actions taken are clearly supported by a rational basis to protect property rights. Because the Plaintiffs have failed after the completion of discovery to establish that the Defendants' actions lacked a rational basis, their substantive due process claim must be dismissed.

Because Plaintiffs have presented no evidence of religious discrimination, there is likewise no basis for individual capacity claims against Defendants Brandt and Green as they are barred by qualified immunity.

Respectfully submitted,

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

BY:/s/ Richard V. Stokan, Jr.

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[2] The cost of providing the additional information is $720.00 according to Plaintiffs' Engineer.

CERTIFICATE OF SERVICE

Richard V. Stokan, Jr. states that on July 12, 2019, on behalf of Defendants he served the attached *Reply* and *Certificate of Service* upon counsel of record via e-filing with the ECF Filing system to their e-mail addresses of record.

/s/ *Richard V. Stokan, Jr.*
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