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## 3rd Circuit Rules Township's Conduct Does Not Shock the Conscience

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Most developers would rather have root canal surgery without Novocain than deal with local governments during the planning stages of a development project. These late-night public meetings are commonly filled with the "not in my backyard" folks who are determined to block the project at whatever cost. In the end, many development plans are altered not because of the planning ordinances on the books, but rather fear of public backlash.

In *Blain v. Township of Radnor*, the 3rd U.S. Circuit Court of Appeals refused to allow a property owner's lawsuit to proceed to trial on a 42 U.S.C.S. Section 1983 claim against the township arising from a zoning dispute that significantly delayed the completion of a subdivision project.

### Subdivision Application

In *Blain*, the property owner submitted a preliminary subdivision plan for government approval. The property owner's neighbors protested the plan, even though the acreage for each lot exceeded the minimum required by the township ordinance. The township's planning commission recommended denial of the plan based upon its engineer's opinion that two other provisions of the township ordinance were not satisfied. The property owner then sought the opinion of the township solicitor, who in a voicemail message to her stated that the plan conformed to the relevant ordinances. In the voicemail message, the solicitor conveyed to the property owner that he had advised the engineer accordingly.

The township's board of commissioners nonetheless denied the plan based upon the ordinance provisions cited by the engineer.

The property owner then filed an appeal in the Delaware County Court of Common Pleas. The trial court subsequently ordered the board to approve the preliminary plan on the basis that the denial was legally insufficient. Although the township appealed the trial court's ruling, the appeal was withdrawn before briefing.

After the appeal was withdrawn, the property owner submitted a final plan for township approval. During planning commission meetings, the commissioners proposed three changes: "adding a sewer line benefiting homes outside the subdivision property; limiting construction on Saturdays; and creating walking paths across the property." A commissioner even threatened to condemn some of the land for walking paths if the property owner did not acquiesce to the requests. Despite the proposed changes and condemnation threats, the plan was approved without amendment.

### Section 1983 Claim

The property owner then filed a Section 1983 claim in federal court against the township and the other related government entities.

On summary judgment, the district court dismissed the action, finding that no violation of substantive due process occurred because the township's conduct did not rise to the level of shocking the conscience. The property owner then appealed the dismissal of the case to the 3rd Circuit.

The 3rd Circuit reiterated that “[i]n land-use cases, only executive action that ‘shocks the conscience’ constitutes a substantive due process violation.”

In a theme running throughout *Blain*, the 3rd Circuit found that “application of the ‘shocks the conscience’ standard in this context ... prevents [federal courts] from being cast in the role of a ‘zoning board of appeals.’”

The 3rd Circuit also warned that “‘the kind of disagreement that is frequent in planning disputes’ would not be the kind of disagreement leading to a substantive due process violation,” such as “applying requirements to [the burdened] property not applied to other properties, making unannounced and unnecessary inspections and enforcement actions, delaying permits and approvals, improperly increasing tax assessments, and ‘maligning and muzzling’ the burdened property owners.”

The 3rd Circuit then listed the following land use activities that would actually shock the conscience: “corruption or self-dealing, hampering development to interfere with otherwise constitutionally protected activity, bias against an ethnic group, or a ‘virtual taking.’”

In *Blain*, the 3rd Circuit believed that the zoning dispute fell into the former category in that the “frivolous or nonmeritorious appeal, condemnation threat, conflict of interest, and improper denial of a subdivision plan alleged ... d[id] not rise to the level of impropriety to shock the conscious.”

The 3rd Circuit first rejected the property owner’s contention that the township’s board of commissioners “were merely faced with performing a ministerial act, and ‘failure to perform a ministerial act is per se improper.’”

Citing provisions of the Municipal Planning Code (MPC), the property owner believed that “the statute make[s] approval of subdivision plans that conform to an applicable ordinance mandatory.” The 3rd Circuit rejected this narrow interpretation of the MPC, noting that the cited provisions only created the manner by which and the time in which a zoning authority may perform its statutory obligations under the MPC (i.e., “written communication to the applicant and adherence to ordinance provisions”).

In contrast, the 3rd Circuit found that the township ordinances cited by the engineer during the zoning dispute actually “grant[ed] the discretion that the MPC does not limit,” in that the ordinances “mandate[d] that, ‘in interpreting and applying the provisions’” thereof, the “provisions will ‘be held to be the minimum requirements for the promotion of the public health, safety, comfort, convenience and general welfare.’” The 3rd Circuit noted that “the explicit reference to ‘minimum requirements’ suggest[ed] the [b]oard may be guided by considerations of ‘the promotion of the public health, safety, comfort, convenience and general welfare.’” The 3rd Circuit ultimately found that the ordinances allowed the zoning board to “‘consider’ and ‘weigh’ the impact of a particular subdivision plan.”

The 3rd Circuit’s refusal to overrule the district court’s findings of facts also evidenced the 3rd Circuit’s reluctance to intrude upon the zoning board’s discretion.

The 3rd Circuit first discussed the findings of fact surrounding the township solicitor’s interpretation of the ordinances that were left on the property owner’s voicemail. The 3rd Circuit agreed with the district court’s determination that the township’s decision to ignore its solicitor’s legal advice and failure to seek any formal professional advice was improper and rose to the level of negligence, but did not shock the conscience.

The 3rd Circuit then rejected the property owner’s contention that the appeal of the state trial court’s ruling was ‘admittedly frivolous.’” The 3rd Circuit pointed out that the property owner’s argument “center[ed] not on whether the appeal itself was frivolous, but rather on the motive for appealing, and bases its understanding of the [t]ownship’s motivation primarily on its withdrawal of the appeal before briefs were due and on the township’s failure to write a brief.” In accepting the district court’s finding of fact, the 3rd Circuit ruled that that “[t]he standard for determining whether an appeal is frivolous is an objective one, and motivation is not an issue.”

The 3rd Circuit also refused to give much credence to “the board’s attempts to exact the addition of a sewer line and to limit Saturday construction,” concluding instead that “the final approval did not include these restrictions” and that the proposed restrictions were not so patently egregious that there could not be a legitimate reason for their imposition.

The 3rd Circuit finally sidestepped the board’s threat to condemn portions of the property for walking trails because the “[b]oard ha[d] the power of eminent domain, and was not threatening action outside the scope of its own authority.

## Lessons Learned

The 3rd Circuit in *Blain* ultimately refused to lower the due process standard to punish local governments that sometimes act irrationally and recklessly. By doing so, the federal courts allow local governments to continue this

type of behavior without repercussion.

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