

United Artists: Reviewing the Conscience Shocking Test Under Section 1983

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I. INTRODUCTION

It is a well settled principle of law that one must demonstrate the deprivation of a federally protected right, whether it be a constitutional or federal statutory right,² to establish a claim under 42 U.S.C. § 1983.³ In the land use context, plaintiffs generally bring section 1983 claims based on the deprivation of the constitutional right to receive substantive due process.⁴ This article reviews and explores the implications of the Third Circuit's recent decision in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003), which proposes a deviation from the judicial standard applicable to establish the deprivation of substantive due process for a section 1983 claim in the context of land use challenges. The proposed "shocks the conscience" standard, with its genesis in non-deliberative governmental contexts, may prove difficult to apply in the traditional land use setting.

II. *UNITED ARTISTS* AND THE STANDARD TO ESTABLISH DEPRIVATION OF SUBSTANTIVE DUE PROCESSA. *The Established Standard*

Until *United Artists*, the Third Circuit's test to establish the deprivation of substantive due process in the land use context was well settled; the plaintiff need only demonstrate that the municipal land decision was "arbitrary, irrational, or tainted by improper motive."⁵ The

² Not all claims of constitutional and federal statute violations are actionable under a section 1983 claim. See *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989) (holding that the Constitution's supremacy clause does not create actionable rights enforceable under section 1983); see also *Blessing v. Freestone*, 520 U.S. 329 (1997) (holding that federal statutes are not actionable under a section 1983 claim unless the federal statute creates an enforceable right).

³ The United States Congress enacted 42 U.S.C. § 1983, a federal civil rights statute, on April 20, 1871 to act as a guardian of people's federal rights, and thus protect people from unconstitutional action under color of state law, whether the action is executive, legislative, or judicial. See *Mitchum v. Foster*, 407 U.S. 225 (1972); see also *Richardson v. McKnight*, 521 U.S. 399 (1997); *Dist. of Columbia v. Carter*, 409 U.S. 418 (1973). Essentially, section 1983 creates a private right of action to seek redress for the deprivation of federal rights. See *Mitchum*, 407 U.S. 225.

⁴ This constitutional right arises from the Due Process Clause of the Fourteenth Amendment. In pertinent part, the Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

⁵ *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988) (seminal case); see also *Khodara Envtl., Inc. v. Beckman*, 237 F.3d 186 (3d Cir. 2001) (citing *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 139 (3d Cir. 2000)) (recognizing "improper motives" as valid due process test); *Woodwind Estates Ltd. v. Gretkowski*, 205 F.3d 118

Third Circuit based this test on the U.S. Supreme Court's conclusion that the Due Process Clause of the Fourteenth Amendment was "intended to secure the individual from the arbitrary exercise of the powers of government."⁶ In applying this test, the Third Circuit routinely vacated the issuance of summary judgments "where the evidence at least plausibly showed that a government took actions against the developer for indefensible reasons unrelated to the merits of the zoning dispute."⁷

For example, in *Bello v. Walker*, the plaintiffs obtained the municipality's approval for their five-stage subdivision building plan.⁸ After receiving building permits for and completing stage one of the plan, the plaintiffs submitted an application to the municipality's code enforcement officer (the "Official") by which they requested the issuance of building permits to allow them to commence construction of stage five of the plan.⁹ The Official, however, denied the plaintiffs' application, alleging that it was improper because the plaintiffs sought to construct stage five of the plan prior to the construction of stages two through four.¹⁰ The Official asserted this as the basis of his decision despite the fact that the plaintiffs had never agreed to develop the plan in numerical order.¹¹

In response, the plaintiffs filed a section 1983 action against the municipality and the Official (collectively, the "Defendants") claiming that, *inter alia*, the deprivation of substantive due process because a number of municipal officials improperly influenced the Defendants' decision to deny the building permits.¹² Thereafter, the Defendants filed, and the district court granted, a motion for summary judgment.¹³

On appeal, the Third Circuit reversed the district court's decision, holding that substantive due process is violated where the denial of a building permit is based upon arbitrary, irrational or improperly motivated governmental action, such as a deliberate indifference to the

(3d Cir. 2000) (holding that § 1983 claim for deprivation of substantive due process is established where the denial of a development plan was "made in bad faith or was based on improper motive.").

⁶ *Bello*, 840 F.2d at 1128 (quoting *Daniels v. Williams*, 474 U.S. 327 (1986)); *see* *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (holding that the Due Process Clause provides the "right to be free of arbitrary or irrational zoning actions.").

⁷ *Woodwind Estates, Ltd.*, 205 F.3d at 124.

⁸ *Bello*, 840 F.2d at 1126.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 1127.

¹³ *Id.*

law.¹⁴ Specifically, the court stated that the plaintiffs presented sufficient evidence from which a jury could reasonably conclude that certain municipality council members “improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for permits.”¹⁵ The court concluded that “[t]hese actions can have no relationship to any legitimate governmental objective, and [accordingly], are sufficient to establish a substantive due process violation actionable under § 1983.”¹⁶

B. *The United Artists Standard*

In its recent decision in *United Artists*, the Third Circuit appeared to stray from the established “arbitrary or improper motive” test by applying a new, more stringent “shocks the conscience” test.¹⁷

1. An Analysis of *United Artists*

In *United Artists*, a movie theater owner and developer (“United Artists”), attempting to develop a movie theater in an area that could only support one theater, filed a section 1983 claim with the district court against Warrington Township (the “Township”) and the Warrington Township Board of Supervisors in both their official and personal capacities (the “Supervisors”) (collectively, the “Defendants”) alleging that the Defendants violated the Due Process Clause by intentionally delaying the development approval process in order to obtain an impact fee offered by a competing movie theater developer (“Regal Cinema”).¹⁸ To establish its claim, United Artists provided evidence demonstrating that: (1) the Township attempted to unlawfully change the terms of its approval of United Artists’ preliminary development plan which forced United Artists to file suit in the Court of Common Pleas to have the unlawful condition stricken and (2) the Supervisors took fourteen months to approve the United Artists’ preliminary development plan, tabling its vote on three separate occasions because United Artists refused to pay an impact fee, while only taking one month to approve the Regal Cinema

¹⁴ *Id.* at 1129.

¹⁵ *Id.*

¹⁶ *Id.* at 1129-30.

¹⁷ *United Artists Theatre Circuit v. Township of Warrington, PA*, 316 F.3d 392, 400 (3d Cir. 2003).

¹⁸ *Id.* at 396.

preliminary development plan, a plan offered by a developer willing to pay the impact fee.¹⁹

In response, the Supervisors asserted qualified immunity defenses and moved for summary judgment.²⁰ The district court denied the Supervisors' motion with respect to the substantive due process claim and an appeal to a panel of the Third Circuit followed.²¹ The panel vacated the district court's order and remanded the case instructing the district court to analyze each of the Supervisors' qualified immunity defenses individually. In a footnote, the panel stated that it was expressing no opinion at that time as to whether a recent Supreme Court decision, *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), required United Artists to establish that the Supervisors' conduct "shocked the conscience" to demonstrate the deprivation of substantive due process in the land use context.²²

On remand, and after individually analyzing each of the Supervisors' qualified immunity defenses, the district court again denied the Supervisors' motion for summary judgment.²³ Additionally, the district court responded to the panel's reference to the "shock the conscience" test stating that "the shocks the conscience and arbitrary or improper motive tests are essentially the same."²⁴ The district court further noted that a recent Third Circuit opinion, *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118 (3d Cir. 2000), suggested that *Lewis* did not alter the well established "arbitrary or improper motive" test.²⁵ Thereafter, the Supervisors again appealed to the Third Circuit.²⁶

The Third Circuit, in a two-to-one decision authored by the Honorable Samuel A. Alito,²⁷ remanded the case to the district court, holding that *Lewis* superseded the "arbitrary or improper motive" test and that prior to its determination of whether the Supervisors may assert qualified immunity defenses, the district court must determine whether United Artists had alleged the deprivation of substantive due process

¹⁹ *Id.* at 395.

²⁰ *Id.* at 396.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* (citing *Woodwind Estates, Ltd.*, 205 F.3d at 118 (Sloviter, Roth and Cowen, JJ.)); see *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

²⁶ *United Artists*, 316 F.3d at 396.

²⁷ The *United Artists* panel consisted of the Honorable Samuel A. Alito, Robert E. Cowen and Alan D. Lourie. Judge Louire, a Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation, joined Judge Alito in the decision and Judge Cowen dissented.

under the new “shocks the conscience” test.²⁸ The court stated that *Lewis* mandated the application of the “shocks the conscience” test by holding that executive action violates substantive due process “only when it ‘can properly be characterized as . . . conscience shocking, in a constitutional sense.’”²⁹ The court further ratified the *Lewis* Court’s position that “only the most egregious official conduct” violates the “shocks the conscience test.”³⁰

The court rejected the district court’s argument that the “arbitrary or improper motive” and “shocks the conscience” tests were essentially the same, stating that “shocks the conscience” test encompasses only “the most egregious conduct” while the term “improper” sweeps much more broadly. Additionally, the court rejected the district court’s position that, in *Woodwind Estates*, the Third Circuit held that *Lewis* had not altered prior Third Circuit law.³¹ The court reasoned that because *Woodwind Estates* makes no mention of *Lewis*, the fact that it applied the “arbitrary or improper motive” test cannot alone establish the Third Circuit’s rejection of *Lewis* in the land use context.³²

The court concluded that the determination of whether conduct “shocks the conscience” will depend on the facts of the particular case because “deliberate indifference that shocks in one environment may not be so patently egregious in another.”³³

2. An Analysis of the Rationale Underlying *United Artists*

a. *The Unique Circumstances in Lewis*

The *United Artists* court concluded that the U.S. Supreme Court’s opinion set forth in *Lewis* provided the basis for its decision to replace the “arbitrary or improper motive” test with the “shocks the conscience” test in the land use context.³⁴ Specifically, the *United Artists* court stated that “[the] cases [applying the “arbitrary or improper motive” test] . . . cannot be reconciled with *Lewis*’s explanation of substantive due process analysis.”³⁵ Accordingly, it is prudent to analyze the U.S. Supreme

²⁸ *United Artists*, 316 F.3d at 400.

²⁹ *Id.* (quoting *Lewis*, 523 U.S. at 850).

³⁰ *Id.* at 399-400.

³¹ *Id.* at 400.

³² *Id.*

³³ *Id.* at 399 (quoting *Lewis*, 523 U.S. at 850).

³⁴ *United Artists*, 316 F.3d at 400.

³⁵ *Id.*

Court's decision in *Lewis*³⁶ to understand the rationale behind the adoption of the "shocks the conscience" test.

Lewis, in fact, involved very different circumstances of alleged municipal improprieties. In *Lewis*, the U.S. Supreme Court "granted *certiorari* . . . to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating due process in a pursuit case."³⁷ Specifically, *Lewis* involved a section 1983 claim by which the parents of a decedent alleged that a police officer unconstitutionally deprived the deceased's substantive due process right to life as the result of a high speed police chase.³⁸ The U.S. Supreme Court examined the appropriate standard to apply to allegations that an executive branch official violated substantive due process and determined that the fundamental principle of due process was "protection against arbitrary action."³⁹

The Court stated that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"⁴⁰ The Court considered the "arbitrary or improper motive" test in the context of a "deliberate indifference" and found the term "deliberate indifference" an inappropriate concept in the context of a situation where actual deliberation was not practical, such as where a municipal official was found to make a split-second decision while chasing another vehicle.⁴¹ The *Lewis* Court, under these circumstances, concluded that "the substantive component of the Due Process Clause is violated by executive action only where it is 'conscience shocking in a constitutional sense.'"⁴²

b. The Extension of the Lewis Standard in United Artists

The Third Circuit's extension of the *Lewis* "shocks the conscience" test to the land use context is potentially far reaching and, at least in the opinion of Judge Cowen's ardent dissent, unwarranted. The majority opinion in *United Artists* expressed its conclusion that it is appropriate to apply the same culpable standard applied to an executive official in exigent circumstances where the official could not deliberate to

³⁶ Opinion by Souter, J., in which Rehnquist, C.J., O'Connor, Kennedy, Breyer and Ginsburg, JJ., joined. Stevens, J., filed an opinion concurring in the judgment. Scalia, J., filed an opinion concurring in the judgment, in which Thomas, J., joined.

³⁷ *Lewis*, 523 U.S. at 839.

³⁸ *Id.* at 837.

³⁹ *Id.* (quoting *Wolff v. Mc Donnell*, 418 U.S. 539 (1974)).

⁴⁰ *Id.* at 846 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)).

⁴¹ *Id.* at 851 n.11.

⁴² *Id.* at 847 (quoting *Collins*, 503 U.S. at 128).

situations where, after consideration, an executive official has issued a calculated and deliberate decision, stating “[o]n the merits, we hold that *Lewis* has superseded prior decisions of our Court holding that a plaintiff asserting that a municipal land-use decision violated substantive due process need only show that the municipal officials acted with an ‘improper motive.’”⁴³

The extension of the “shocks the conscience” test may actually be inconsistent with the carefully worded limitations noted by the U.S. Supreme Court in *Lewis*.⁴⁴ Indeed, the *Lewis* Court expressly stated: “[t]he issue in this case is whether a police officer violates the Fourteenth Amendment’s guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender.”⁴⁵ In reaching its decision, the *Lewis* Court carefully pointed out that although the “shocks the conscience” test is appropriate for situations where the state actor does not have time to deliberate, the deliberative indifference (“arbitrary or improper motive”) test is “*sensibly employed . . . when actual deliberation is practical.*”⁴⁶ Furthermore, the *Lewis* Court’s application of the “shocks the conscience” test to exigent situations, where deliberation was not practical, was consistent with Third Circuit precedent, which also applied the “shocks the conscience” test to exigent situations while applying the “arbitrary or improper motive” test to the land use context.⁴⁷

The *United Artists* court’s expansion of the application of the “shocks the conscience” test to the land use context was inconsistent with not only Third Circuit precedent *prior* to *Lewis* but also to Third Circuit decisions rendered *subsequent* to *Lewis*, which not only acknowledged *Lewis*, but appeared to harmonize the two standards. In *Nicholas v. Pennsylvania State University*, a post-*Lewis* Third Circuit decision, Judge Alito, the same judge who subsequently authored the *United Artists* decision, authored a unanimous decision by which the Third Circuit concluded that the “arbitrary or improper motive” and “shocks the conscience” tests are appropriate substantive due process

⁴³ *United Artists*, 316 F.3d at 394.

⁴⁴ *Lewis*, 523 U.S. at 836.

⁴⁵ *Id.*

⁴⁶ *Id.* at 851 (emphasis added).

⁴⁷ *Brown v. Commonwealth of Pennsylvania*, 2003 U.S.App. LEXIS 953, at *13-17 (3d Cir. 2003) (applying the “shocks the conscience” test where a state actor had to act with urgency); *see Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988) (recognizing the “improper motive” test as valid Due Process standard in the land use context).

tests.⁴⁸ Further, in *Khodara*, Judge Alito again authored a unanimous decision by which the Third Circuit⁴⁹ expressly acknowledged *Lewis* and concluded that the “arbitrary or improper motive” test was the proper standard to determine a substantive due process violation in the land use context.⁵⁰ In *Woodwind Estates*, a case also decided after *Lewis*, the Third Circuit concluded that the “arbitrary or improper motive” test was the proper standard to determine the deprivation of substantive due process in the land use context.⁵¹

Given the limiting language in *Lewis*, and the Third Circuit’s initial recognition that distinct standards were appropriate based on whether the governmental actor had time to deliberate, Judge Cowen’s strongly worded dissent is not surprising. Judge Cowen, anticipating the inherent difficulty in applying the “shocks the conscience” test in the land use context, noted:

[T]ossing every substantive Due Process egg into the nebulous and highly subjective “shocks the conscience” basket is unwise. It leaves the door ajar for intentional and flagrant abuses of authority by those who hold the sacred trust of local public office to go unchecked. “Shocks the conscience” is a useful standard in high speed police misconduct cases which tend to stir out emotions and yield immediate reaction. But it is less appropriate, and does not translate well, to the more mundane world of local land use decisions, where lifeless property (as opposed to bodily invasions) are involved. In this regard, it appears rather difficult to analogize the intentional and illegal denial of a building permit to the forced pumping of the human stomach, the infamous fact pattern that begat “shocks the conscience” as a term of constitutional significance.⁵²

Judge Cowen further warned:

[Applying the “shocks the conscience” test in the land use context] is the jurisprudential equivalent of a square peg in a

⁴⁸ See *Nicholas v. Pa. State Univ.*, 227 F.3d 133 (3d Cir. 2000). The *Nicholas* panel consisted of Judges Alito, McKee and Fullam. Judge Fullam, a Senior Judge of the United States District Court for the Eastern District of Pennsylvania, was sitting by designation.

⁴⁹ In addition to Judge Alito, the *Khodara* panel consisted of Judges Stapleton and Pollack. Judge Pollack, a Senior Judge of the United States District Court for the Eastern District of Pennsylvania, was sitting by designation.

⁵⁰ *Khodara Envtl., Inc. v. Beckman*, 237 F.3d 186, 197 (3d Cir. 2001).

⁵¹ *Woodwind Estates Ltd. v. Gretkowski*, 205 F.3d 118, 124 (3d Cir. 2000).

⁵² *United Artists Theatre Circuit v. Township of Warrington, PA*, 316 F.3d 392, 406-07 (3d Cir. 2003) (Cowen, J. dissenting).

round hole. Yet, under the Majority opinion, it is with this awkward analogy that our district courts will now struggle. The confusion and potential for disparate results across the districts will haunt us for years to come.⁵³

A post-*United Artists* district court opinion further highlights the difficulty in applying the “police chase” standard in the land use context. In *Levin v. Upper Makefield Tp.*, the court stated that “*Lewis* addressed the substantive due process culpability of a law enforcement officer [in exigent circumstances which resulted in death] and therefore could conceivably be distinguishable from other species of substantive due process claims,” such as in the land use context.⁵⁴ In fact, in *Fuentes v. Wagner*, 206 F.3d 335 (3d Cir. 2000), a post-*Lewis* decision, the Third Circuit acknowledged this distinction, stating that the “shocks the conscience” test “may only apply” to law enforcement officers in exigent circumstances because “[t]he [*Lewis*] Court’s analysis of the police [chase] clarifies that the “shocks the conscience” standard of culpability applies in those instances where the police officer must instantaneously respond to a situation without opportunity for reflection on his or her actions.”⁵⁵

3. The Third Circuit’s Inconsistent Application

The *Levin* court pointed out the difficulty in applying the “shocks the conscience” test in the land use context, stating: “[w]e are only guided by rough contours” because “the Supreme Court has not provided a precise formula for determining what actions specifically constitute conscience shocking behavior.”⁵⁶ As a result of the difficulty in applying this somewhat vague standard, courts within the Third Circuit have reached inconsistent decisions of what is conscience shocking.

For example, in some applications of the test, the district courts have concluded that situations which typically constituted a “deliberate indifference” constitute “conscience shocking” conduct.⁵⁷ In *Nicolette v.*

⁵³ *Id.*

⁵⁴ *Levin v. Upper Makefield Township*, 2003 WL 21652301 at *5 n.15 (E.D. Pa. 2003).

⁵⁵ *Fuentes v. Wagner*, 206 F.3d 335, 348 (3d Cir. 2000) (Mansman, Greenberg and McKee, JJ.) (emphasis added) (concluding that the “shocks the conscience” test applies in a prison riot situation because, similar to the police chase in *Lewis*, the officers have no time to deliberate).

⁵⁶ *Levin*, 2003 WL 21652301 at *8.

⁵⁷ See *Nicolette v. Caruso*, 315 F. Supp. 2d 710, 715 (W.D. Pa. 2003); see also *The Development Group, LLC v. Franklin Township Board of Supervisors*, 2003 WL 22358440 at *6 (E.D. Pa. 2003).

Caruso, the court concluded that the plaintiff satisfied the “shocks the conscience” test where the plaintiff alleged that the township officials engaged in a course of conduct designed to restrict plaintiff from developing his property.⁵⁸

The plaintiff in *Nicolette* was the owner of a business that disposed of construction and demolition waste. After the plaintiff discontinued waste disposal in the township, township officials allegedly embarked on a “retaliatory campaign of unrelenting harassment and abuse,” by selectively enforcing regulations against the plaintiff and arbitrarily denying his plans to construct a parking facility, golf driving range and recycling facility.⁵⁹ The plaintiff claimed to have spent thousands of dollars in attempting to comply with the township’s requests regarding the projects.⁶⁰ The court accepted, for purposes of summary judgment, that the township officials had engaged in a “course of conduct designed to restrict plaintiff from developing the property he leased,” which sufficiently implicated the “shocks the conscience” test.⁶¹

Similarly, in *The Development Group*, the district court concluded that the plaintiffs satisfied the “shocks the conscience” test on a motion to dismiss where they pled that “Defendants gave contradictory indications about what kind of submission would be approved, attempted to persuade Plaintiffs to withdraw the submissions through unlawful means, and caused Plaintiffs to incur great expense in revising the plans.”⁶²

However, in other applications of the test, courts in the Third Circuit have upheld a more restrictive standard that appears to lessen the protection that individuals had against arbitrary government conduct under the “arbitrary or improper motive” test.⁶³ For instance, in *Levin*, the district court found that: (1) the township intentionally delayed the issuance of a final building permit to the plaintiff, even after the Pennsylvania Supreme Court denied allocatur on the township’s appeals; (2) the township’s act of cashing plaintiff’s permit fee before issuance of any of the permits was “dubious”; and (3) that the township officials’ proposed ordinance was drafted with the sole intent of restricting the plaintiff from building on his property.⁶⁴ Although this conduct likely

⁵⁸ *Nicolette*, 315 F. Supp. 2d at 723.

⁵⁹ *Id.* at 715.

⁶⁰ *Id.*

⁶¹ *Id.* at 723.

⁶² *The Development Group, LLC*, 2003 WL 22358440 at *6.

⁶³ *Levin*, 2003 WL 21652301 at *8; *Corneal v. Jackson Township*, 313 F. Supp. 2d 457, 465-67 (M.D. Pa. 2003).

⁶⁴ *Levin*, 2003 WL 21652301 at *9.

would have satisfied the “arbitrary or improper motive” test, the court held that it was insufficient to satisfy the “shocks the conscience” test.⁶⁵ The court summarily concluded that “[t]his chain of events strongly points to a bad motive and purposeful intention to delay issuing the Plaintiff a building permit, but it does not foster a finding that Defendants’ behavior shocked-the-conscience.”⁶⁶

Another district court applied a similarly harsh standard in *Corneal*, concluding that “the totality of the facts, when viewed in the light most favorable to the [plaintiffs], establishes that the Board may have acted with [improper] motives . . . related to illegitimate personal animus. This is not enough to establish a violation of substantive due process [under the new standard].”⁶⁷

C. Applicable Land Use Review Standards in Other Circuits

Given the inconsistency within the Third Circuit of the “shocks the conscience” test, the impact of the new test remains uncertain. Some guidance is provided in reviewing decisions in other circuits, although the majority of circuits continue to apply the “arbitrary or improper motive” test. Only two other circuits have adopted the “shocks the conscience” test and, of these two, one circuit’s application appears to gravitate toward the “arbitrary or improper motive” test.

1. Most Circuits Continue to Apply the “Arbitrary or Improper Motive” Test

After the Supreme Court’s issuance of *Lewis*, it appears that most circuits have concluded that *Lewis* does not mandate the application of the “shocks the conscience” test in the land use context. For example, prior to *Lewis*, the Sixth Circuit expressly rejected the “shocks the conscience” test in the land use context, stating:

Not only are there fewer instances in case law, but the “shock the conscience” test is not as uniformly applied to cases where excessive force or physical brutality is not the basis of the claim. The “shocks the conscience” standard, fuzzy under the best of circumstances, becomes fuzzy beyond a court’s power to interpret objectively where there is a dearth of previous decisions on which to base the standard. We doubt the utility of such a standard outside the realm of physical abuse, an area in which the

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Corneal v. Jackson Township*, 313 F. Supp. 2d 457, 468 (M.D. Pa. 2003).

consciences of judges are shocked with some degree of uniformity.⁶⁸

After *Lewis*, the Sixth Circuit continued to apply the “arbitrary or improper motive” test, concluding that “citizens have a substantive due process right not to be subjected to arbitrary or irrational zoning decisions.”⁶⁹

Similarly, the Fourth, Fifth, Seventh, Tenth and D.C. Circuits have apparently concluded that *Lewis* does not mandate the application of the “shocks the conscience” test in the land use context because each of these circuits issued decisions subsequent to *Lewis* by which each refrained from applying the “shocks the conscience” test in the land use context. For example, to determine the deprivation of substantive due process in the land use context subsequent to *Lewis*, the Fourth Circuit applied an “arbitrary and irrational” test;⁷⁰ the Fifth Circuit applied an “arbitrary or capricious” test;⁷¹ the Seventh Circuit applied an “arbitrary and unreasonable” test;⁷² the Tenth Circuit concluded that if there was a property interest, the claim was ripe and not subsumed within the Takings Clause, an “arbitrary” test would apply;⁷³ and the D.C. Circuit has defined the substantive due process test as “grave unfairness” or “egregious government misconduct,” not conscience shocking.⁷⁴

⁶⁸ *Brale v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990).

⁶⁹ *Tri-Corp Mgmt. Co. v. Praznik*, 33 Fed. Appx. 742, 747 (6th Cir. 2002); *see also* *Bowers v. City of Flint*, 325 F.3d 758, 763 (6th Cir. 2003) (concluding that the “arbitrary or improper motive” test is the appropriate standard in the land use context because it “[i]s simply another formulation” of the “traditional ‘shocks the conscience’” test).

⁷⁰ *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002).

⁷¹ *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 253 (5th Cir. 2000).

⁷² *Centres, Inc. v. Town of Brookfield*, 148 F.3d 699, 704 (7th Cir. 1998).

⁷³ *Signature Props. Int'l Ltd. P'ship v. City of Edmond*, 310 F.3d 1258, 1267 (10th Cir. 2002).

⁷⁴ *George Washington Univ. v. Dist. of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003) (concluding that the “substantial infringement of state law prompted by personal or group animus” constitutes a substantive due process violation).

2. A Minority of Circuits Apply the “Shocks the Conscience” Test⁷⁵

Only the First, Second and Third Circuits hold that the “shocks the conscience” test is the appropriate standard to determine a section 1983 violation in the land use context.⁷⁶ However, of these three circuits, only the Second and Third Circuits replaced their respective “arbitrary or improper motive” tests with the “shocks the conscience” test after concluding that *Lewis* mandated the application of the “shocks the conscience” test.⁷⁷ The First Circuit, on the other hand, applied the “shocks the conscience” test as early as 1982, well before *Lewis*.⁷⁸ Indeed, in 1988, ten years prior to *Lewis*, while deciding the appropriate test to determine the deprivation of substantive due process in the land use context, the Third Circuit considered and rejected the First Circuit’s

⁷⁵ The Eighth, Ninth and Eleventh Circuits have not been included as either circuits that apply or refuse to apply the “shocks the conscience” test for the following two reasons. First, it is unclear which test the Eighth Circuit applies because it has not expressly adopted the “shocks the conscience” test and in a recent case has concluded that, under *Lewis*, it is appropriate to apply the deliberate indifference (“arbitrary or improper motive”) test to non-exigent situations where the state actor had time to deliberate. *Terrell v. Larson*, 371 F.3d 418, 425 (8th Cir. 2004) (applying the deliberate indifference standard where a police officer had time to deliberate before acting). However, the Court of Appeals for the Eighth Circuit recently granted a rehearing *en banc* and vacated the *Terrell* opinion. *Terrell v. Larson*, 396 F.3d 975 (8th Cir. 2005). Second, neither the Ninth or Eleventh Circuits reach the application of the standard. The Ninth Circuit does not reach the application of the standard because, in the Ninth Circuit, claims for substantive due process violations are barred by the *Graham* Doctrine which provides that a plaintiff cannot assert substantive due process claims instead of, or in addition to, takings claims. *Macri v. King County*, 126 F.3d 1125, 1128 (9th Cir. 1997). The Eleventh Circuit does not reach the standard because it recently concluded that “constitutional due process is satisfied ... when proper procedures are employed.” *Greenbriar Village, L.L.C. v. Mt. Brook, City*, 345 F.3d 1258, 1263 (11th Cir. 2003). Note that prior to this decision, the Eleventh Circuit had traditionally applied the “arbitrary or improper motive” test to substantive due process claims. *Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989).

⁷⁶ *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 (1st Cir. 1982); *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999); *United Artists Theatre Circuit v. Township of Warrington, PA*, 316 F.3d 392, 400 (3d Cir. 2003).

⁷⁷ Compare *United Artists*, 316 F.3d at 400 (expressly following *Lewis* in applying the “shocks the conscience” test which overruled Third Circuit precedent that previously applied the “arbitrary or improper motive” test), and *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999) (expressly following *Lewis* by overruling Second Circuit precedent that previously applied an “arbitrary or irrational” test), with *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992) (pre-*Lewis* precedent by which the Second Circuit applied the “arbitrary or improper motive” test).

⁷⁸ *Estabrook*, 680 F.2d at 832.

“shocks the conscience” test and concluded that the “arbitrary or improper motive” test was the appropriate test in the land use context.⁷⁹

3. The First and Second Circuits’ Inconsistent Application of the “Shocks the Conscience” Test

Similar to the Third Circuit’s inconsistent application of the “shocks the conscience” test, the First and Second Circuits have inconsistently applied the test because the First Circuit’s application creates a more stringent standard while the Second Circuit’s application parallels the “arbitrary or improper motive” test.

Consistent with the Third Circuit’s decisions in *Corneal* and *Levin*, the First Circuit took a very stringent approach that appears to lessen the protection that individuals have against arbitrary government conduct.⁸⁰ Indeed, despite the fact that the Supreme Court has repeatedly held that the Due Process Clause was intended to secure individuals from the arbitrary exercise of state action, the First Circuit concluded that even if the state action is arbitrary, there is no violation unless the conduct is “shocking or violative of universal standards of decency.”⁸¹

For example, in *Collins*, the First Circuit expressly concluded that regardless of whether state action may have been arbitrary, there is no violation of substantive due process in the land use context unless the conduct is “truly horrendous.”⁸² The *Collins* court concluded that evidence that a zoning board member’s rejection of the plaintiff’s application was motivated by personal animus did not constitute “conscience-shocking” behavior and thus, was not a violation of substantive due process.⁸³

The First Circuit has consistently applied this stringent standard. For instance, the First Circuit concluded that the denial of an application for approval of a development plan in contravention of state statute;⁸⁴ the

⁷⁹ *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988); see *DeMutis v. Borough of Phoenixville*, 1990 WL 96100 (M.D. Pa. 1990) (acknowledging that “[t]he court in *Bello* did not follow the approach of the First Circuit.”).

⁸⁰ Compare *Estabrook*, 680 F.2d at 832, and *Licari v. Ferruzzi*, 22 F.3d 344, 349-50 (1st Cir. 1994), and *Nestor Colon Medina & Successors, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992), and *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991), with *Levin v. Upper Makefield Township*, 2003 WL 21652301 at *8 n.15 (E.D. Pa. 2003), and *Corneal v. Jackson Township*, 313 F. Supp. 2d 457, 468 (M.D. Pa. 2003).

⁸¹ *Collins v. Nuzzo*, 244 F.3d 246, 250-51 (1st Cir. 2001) (quoting *Amsden v. Moran*, 904 F.2d 748 (1st Cir. 1990)).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982).

revocation of a special permit out of animus toward the plaintiff;⁸⁵ the denial of a permit in retaliation for plaintiff's political views⁸⁶ and the denial of an application for approval of construction drawings in violation of agency regulations⁸⁷ *do not* constitute conscience shocking behavior.

Unlike the First Circuit and similar to the Third Circuit's decisions in *Nicolette* and *Development Group*, a district court in the Second Circuit concluded that situations which typically constitute arbitrary or improperly motivated conduct constitute "conscience shocking" conduct.⁸⁸ For example, the Second Circuit concluded that, under the "shocks the conscience" test, the plaintiffs stated a claim for the deprivation of substantive due process where the plaintiffs alleged that the denial of the permit was improperly motivated.⁸⁹

In *T.S. Haulers*, the plaintiff purchased unimproved property in an industrially zoned district.⁹⁰ The plaintiffs applied for a special permit to operate a non-nuisance industry, which would allow them to operate a sand mining facility.⁹¹ The town denied the permit allegedly under "political pressure from various civil and environmental associations that are opposed to sand mining."⁹² The plaintiffs then obtained a permit from the New York State Department of Environmental Conservation, which allegedly foreclosed the town's ability to deny the use of the land for mining.⁹³ In response, the town amended its Code to prohibit sand mining in the area in which the plaintiffs' property was located.⁹⁴ In ruling on the town's motion to dismiss, the district court found that because the town denied the plaintiffs' application for a special permit due to political pressure from environmental and conservation groups and amended its Code to specifically exclude the plaintiffs, the plaintiffs

⁸⁵ *Licari v. Ferruzzi*, 22 F.3d 344, 349-50 (1st Cir. 1994).

⁸⁶ *Nestor Colon Medina & Successors, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992).

⁸⁷ *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991).

⁸⁸ *Compare T.S. Haulers, Inc. v. Town of Riverhead*, 190 F. Supp. 2d 455 (E.D.N.Y. 2002), with *Nicolette v. Caruso*, 315 F. Supp. 2d 710, 715 (W.D. Pa. 2003), and *The Development Group, LLC v. Franklin Township Board of Supervisors*, 2003 WL 22358440 at *6 (E.D. Pa. 2003).

⁸⁹ *See T.S. Haulers*, 190 F. Supp. 2d 455.

⁹⁰ *Id.* at 456-57.

⁹¹ *Id.* at 457.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

had alleged a denial of substantive due process sufficient to withstand the motion to dismiss.⁹⁵

III. CONCLUSION

The rationale set forth in *United Artists* may lend itself to critical reevaluation because, as the dissenting opinion suggested, land use decisions are deliberate in nature and not issued in exigent circumstances such as the police chase discussed in *Lewis*. Furthermore, given the varying results of the application of the “shocks the conscience” test, one is unable to determine whether the “shocks the conscience” test is, as *Nicolette, Development Group* and a district court in the Second Circuit suggest, simply a dressed-up “arbitrary or improper motive” test or, as *Levin, Corneal* and the First Circuit suggest, a more stringent test affording less protection against arbitrary government action.⁹⁶

If the “shocks the conscience” test is construed to create a more stringent test, permitting arbitrary government conduct to proceed unchecked unless the conduct is deemed “conscience shocking,” the new test may be challenged as being inconsistent with the historically stated principles of substantive due process protection. The U.S. Supreme Court said that, “[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.”⁹⁷ The U.S. Supreme Court has repeatedly held that the “[the Due Process Clause] was intended to *secure individuals from the arbitrary exercise of the powers of government.*”⁹⁸ Indeed, in *Lewis*, the Court stressed the intent of the Due Process Clause when determining to apply the “shocks the conscience” test in the police-chase context, stating that “[s]ince the time of our early explanations of due process, we have understood *the core of the concept to be protection against arbitrary action.*”⁹⁹ Clearly, a deliberate decision indifferent to the law by a governmental official sworn to uphold the law should constitute “an arbitrary exercise of the powers of government” and thus violate the Due Process Clause regardless of the fact that it may not be

⁹⁵ *Id.* at 462.

⁹⁶ Compare *Nicolette v. Caruso*, 315 F. Supp. 2d 710, 722-23 (W.D. Pa. 2003), and *The Development Group, LLC v. Franklin Township Board of Supervisors*, 2003 WL 22358440 at *6 (E.D. Pa. 2003), with *Levin v. Upper Makefield Township*, 2003 WL 21652301 at *8 (E.D. Pa. 2003), and *Corneal v. Jackson Township*, 313 F. Supp. 2d 457, 468 (M.D. Pa. 2003).

⁹⁷ *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (emphasis added).

⁹⁸ *Id.* at 331 (emphasis added).

⁹⁹ *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (emphasis added).

“conscience shocking” because people have become desensitized to corrupt and/or arbitrary government action.¹⁰⁰

The ultimate application of *United Artists* and its “shocks the conscience” test likely will remain uncertain until the Third Circuit or the U.S. Supreme Court provide clarification by determining that: (1) the extension of the “shocks the conscious” standard in the land use context was inappropriate given the vastly differing circumstances surrounding police chases and land use development deliberations; (2) the “shocks the conscience” test in the land use context is nothing more than a heightened “arbitrary or improper motive” test; *or* (3) the “shocks the conscience test” is a more stringent test which can also be reconciled with the historic principles of substantive due process protection.

Until such a clarification is provided, either through expressed legal standards or a case-by-case analysis of various factual circumstances, the courts likely will struggle with determining exactly what federal protections are afforded to property owners and land developers from arbitrary government conduct.

¹⁰⁰ The potential vagueness of the standard also may create vastly different standards within the same region, because what “shocks the conscience” in one municipality may be considered routine behavior in another. Ironically, the more nefarious a government’s reputation, the more immune it may be from challenge.