IP 01-0844-C T/G Morrison v. O'Hair [2]
Judge John D. Tinder Signed on 4/17/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MORRISON, WILLIAM E, MORRISON, SONYA R, Plaintiffs, vs. O'HAIR, DENNIS D* DISMISSED 3/29/02, WALTON, DONALD T* DISMISSED 3/29/02, MCFARLAND, GENE INDIVIDUALLY AND AS BOARD OF COMMISSIONERS OF PUTNAM COUNTY INDIANA* DISMISSED 3/29/02, MOORE, DAVID, DAVIS, JOHN K, PUFFERS, TERRY, WALTERS, STEVE INDIVIDUALLY AND AS BOARD OF TRUSTEES OF THE TOWN OF CLOVERDALE INDIANA, HARRISON, LISA INDIVIDUALLY AND AS ENVORONMENTAL ENFORCEMENT OFFICER OF PUTNAM COUNTY* DISMISSED 3/29/02, PEARSON, DON INDIVIDUALLY AND AS CHIEF OF POLICE OF THE TOWN OF CLOVERDALE INDIANA, MCFADDEN, PAT INDIVIDUALLY AND AS INVESTIGATOR OF THE TOWN OF CLOVERDALE INDIANA, JONES, BRICE, Defendants.	CAUSE NO. IP01-0844-C-T/K

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

WILLIAM E. MORRISON and SONYA R. MORRISON, Plaintiffs, vs. DENNIS D. O'HAIR; DONALD T. WALTON; GENE McFARLAND, Individually and as Board of Commissioners of Putnam County, Indiana; DAVID MOORE, JOHN K. DAVIS, BRICE JONES, TERRY PUFFER, STEVE WALTERS, Individually and as Board of Trustees of the Town of Cloverdale, Indiana; LISA HARRISON, Individually and as Environmental Enforcement Officer of Putnam County; DON PEARSON, Individually and as Chief of Police of the Town of Cloverdale, Indiana; PAT McFADDEN, Individually and as Investigator of the Town of Cloverdale, Indiana, Defendants.	)	IP 01-0844-C-T/G

Entry On Motion For Judgment On The Pleadings[1]

[1] This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

This cause comes before the court on the Motion For Judgment On The Pleadings filed by Defendants David Moore, John K. Davis, Brice Jones, Terry Puffer, and Steve Walters, individually and as Board of Trustees of the Town of Cloverdale ("Town"), Don Pearson, individually and as Chief of Police of the Town, and Pat McFadden, individually and as Investigator of the Town (collectively the "Town Defendants"). The court rules as follows.

I. The Allegations Against the Town Defendants

Plaintiffs, William E. Morrison and Sonya R. Morrison, husband and wife, brought this action under § 1983 against the Board of Trustees ("Trustees") of the Town, allegedly acting as the Town Council and the final policymakers of the Town in making decisions affecting the private use of Plaintiffs' real and personal property within the Town and within a two-mile fringe area outside the Town. (Compl. ¶¶ 1, 2.) Plaintiffs seek to recover compensatory damages, jointly and severally, against all Defendants to redress alleged deprivations of their rights, privileges and immunities protected by the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution and federal law, allegedly denied by Defendants by the adoption and enforcement of certain Ordinances and Regulations. (*Id.* ¶ 2.)

Plaintiffs are residents of the County and own a 35 acre farm located at 2741 E. State Road 42 within the two-mile fringe area of the Town, and currently reside at 202 Doe Creek Drive in the Town. (Compl. ¶¶ 4, 14.) In addition to their farm and residence, they

own a dwelling unit apartment at 154 North Grant Street, their home at 202 Doe Creek Drive, their 35 acre farm at 2741 East State Road 42, and a 3.25 acre commercial site located at the "Cloverleaf Interchange" at Interstate I-70 at its intersection with Highway 231, two miles from downtown Cloverdale, and an additional 4.483 acres. (*Id.* ¶ 14 & 14(i).) On their commercial site at 2007 North Main Street, Plaintiffs caused to be constructed the Midway Motel, a restaurant named the Long Branch Saloon, and their trucking business known as the "Blue Lightning Express, Inc." (*Id.* ¶ 14(e)-(g).) The local newspaper on August 12, 1999, published an article estimating that the land at the Cloverleaf Interchange, without any improvements thereon, would bring at least $200,000 an acre. (*Id.* ¶ 14(j).) Plaintiffs invested $160,000 in the purchase of tractors and trailers for their trucking business. (*Id.* ¶ 14(k).) Plaintiffs' use of their real estate was the highest and best use reasonably adapted to the market place and their use was compatible with similar uses by their neighbors, and no neighbor ever complained with an enforcement officer. (*Id.* ¶ 15.)

The Town is incorporated and chartered by the State of Indiana. The Trustees act as the Town Council and adopt Town ordinances. On July 25, 1994, the Trustees, in their official capacities, adopted Ordinance 1994-10, entitled, "An Ordinance Concerning Nuisances" with the stated purpose "that nuisances be defined and controlled within the community." (Compl. ¶ 10 & Ex. 2 at 1.) Ordinance 1994-10 allegedly authorizes Town officers to trespass upon private property where in their opinion a nuisance exists and to abate such nuisance by providing that "all necessary officers, agents, and employees of

the Town of Cloverdale may enter onto the property upon which such nuisance exists, [and] take any and all appropriate, necessary and convenient action to abate said nuisance." (*Id.* ¶ 11 & Ex. 2, § V(d).) Defendant Don Pearson is the Chief of Police of the Town to whom was delegated the right to enter onto the private property of Plaintiffs, without permission or a search warrant to determine whether a nuisance exists, regardless of whether anyone complained, and to take all action to abate said nuisance. (Compl. ¶ 12.) Under Ordinance 1994-10, the expense of abating a nuisance is to be payable to the Town "by the persons responsible for the nuisance and shall be a lien against the property, including the entire lot, parcel or tract of real estate, upon which said nuisance existed." (*Id.* ¶ 13 & Ex. 2, § V(d).)

Count One of the Complaint purports to allege a conspiracy against Defendants. "Beginning on or about 1988-1989. . ., two or more of the individual Defendants conspired, directly or indirectly, and induced the other Defendants to conspire with them to harrass (sic) and injure the Morrisons, with the object of said conspiracy being the economic destruction of the Morrisons. . . ." (*Id.* ¶ 16.) The Complaint alleges the following as overt acts of the conspiracy: (1) Defendants and their enforcement officers including the Town Police Department began parking at the entry way of the Long Branch Saloon to harass its customers by stopping them for sobriety checks; (2) the Town police trespassed to park in the driveway of Plaintiff's farm to issue traffic citations to those who ran a stop sign and told one person that Plaintiffs were complaining about their neighbors who failed to stop at the stop sign, which was false and fabricated by the police department; (3) Defendant Pat

McFadden, a Police Investigator for the Town, on or about January 2001, confronted one or more drivers of Plaintiff's business and told him that he should not work for Plaintiffs because they were hauling drugs from Laredo, Texas, which was false and known to be false, libelous and malicious and adversely impacted Plaintiffs' ability to recruit drivers (Compl. ¶ 18(a)-(d)); (4) on June 1, 1994, the Town by Jack R. Woodruff, an attorney, sent a zoning violation notice to William Morrison, giving notice to "remove the disabled and abandoned milk truck and all other junk from your property situate (sic) north of interstate 70 on the west side of highway 231" (*id.* ¶ 18(e) & Ex. 4.); (5) on February 27, 1995, the Town Council sent a notice to Mr. Morrison stating violations of Ordinance # 1994-10 were found on the property at 154 North Grant Street and giving notice that the failure to respond would result in the Town taking action pursuant to the penalty section of the Town Ordinance (*id.* ¶ 18(f) & Ex. 5.); (6) on May 15, 1995, the Town Council sent a notice to Mr. Morrison stating that violations of Ordinance # 1994-10 were found on the property at 154 North Grant Street (*id.* ¶ 18(g) & Ex. 6); (7) on December 1 and 12, 1997, the Town by its Clerk-Treasurer sent notices of violations of Ordinance No. 1994-10 as to apartment at 154 North Grant, 4 South Lafayette (*id.* ¶ 18(h) & Ex. 7); (8) on May 29, 2001, the Town ran a Public Notice in "The Hoosier Topics" that "Beginning June 1, 2001, the Cloverdale Police Department will be making inspections of properties in the corporate limits that are currently in violation of Nuisance Ordinance #1994-10 (Compl. ¶ 18(j) & Ex. 9); and (9) on June 7, 2001, the Town by its Clerk-Treasurer sent a notice of violations of Ordinance No. 1994-10 as to nuisance violations at 2007 North Main Street, where the Midway Motel, Long Branch Saloon and Plaintiffs' trucking company are located. (*Id.* ¶ 18(k) & Ex. 10.)

Beginning in 1994 and continuing to the present, the Town Marshal and the Town Chief of Police, allegedly trespassed upon Plaintiffs' property without a search warrant to look for violations in order to issue citations to levy fines and expenses, and to impose liens against Plaintiffs' property, and engaged in a pattern of continuing harassment of Plaintiffs. (Compl. ¶ 19.)

Ordinance No. 1-1994 adopted by the Trustees was based on an Indiana statute which has been repealed. (*Id.* ¶ 20.) By implication of the repealing of the statutory authority, the Ordinance of the Trustees was repealed, which was or should have been known to Defendants. (*Id.* ¶ 22.) "As a direct and proximate result of the tortious and unauthorized acts of the Defendants," (*id.* ¶ 23), as well as the alleged violation of their constitutional rights (*id.* ¶ 24), Plaintiffs suffered damages, namely the destruction of the Midway Motel, loss of their 4.483 acres, loss of the fair and reasonable market value of the 4.483 acres, diminution in value of their trucking business, and loss of rentals from the Long Branch Saloon. (*Id.*(a)-(e).)

II. Applicable Standard Under Rule 12

Resolution of the case pursuant to Rule 12(c) is appropriate only if 'it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief[,]'" *Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000) (citation omitted) (quoting *Thomason v. Nachtrieb*, 888 F.2d 1202, 1204 (7th Cir. 1989)), and the moving party shows that "there are no material issues of fact to be resolved." *Brunt v. Serv.*

Employees Int'l Union, No. 01-2791, 01-2307, — F.3d ----, 2002 WL 435836, at *2 (7th Cir. March 21, 2002); *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998).

Town Defendants have not shown that there are no material issues of fact. Their motion, though styled as a Rule 12(c) motion, challenges the sufficiency of Plaintiffs' pleading rather than the substantive merits of their claims. Rule 12(h)(2) provides that a defense of failure to state a claim may be raised in a Rule 12(c) motion for judgment on the pleadings. Fed. R. Civ. P. 12(h)(2). When this procedure is utilized, however, courts treat the motion as a motion to dismiss. *See Leather v. Eyck*, 180 F.3d 420, 423 n.4 (2nd Cir. 1999). Therefore, the court treats the Town Defendants' Rule 12(c) motion as a motion under Rule 12(b)(6) to dismiss for failure to state a claim.

When ruling on a motion to dismiss under Rule 12(b)(6), the court accepts all the factual allegations in the complaint and draws all reasonable inferences from the facts in favor of the plaintiffs. *See Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001). The motion may be granted only if the plaintiffs could prove no set of facts in support of their claims that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Sanville v. McCaughtry*, 266 F.3d 724, 732 (7th Cir. 2001).

III. Analysis

Plaintiffs allege § 1983 claims against the Town Defendants. To sufficiently state a claim under § 1983, Plaintiffs must allege that they were "deprived of a federal right and that the deprivation was imposed upon [them] by a person acting under color of state law." *Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701, 704 (7th Cir. 2002) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)); *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001). "These elements may be put forth in a 'short and plain statement of the claim showing that the pleader is entitled to relief. . . .'" *Alvarado*, 267 F.3d at 651 (quoting Fed. R. Civ. P. 8(a)(2)).

The Town Defendants move for judgment on the pleadings on several grounds, among them, that: (1) Plaintiffs failed to allege that they are policy-makers as required for an official capacity claim; (2) Plaintiffs failed to allege a municipal custom or policy to demonstrate liability on the part of the Town; (3) Plaintiffs failed to allege any facts indicating that the searches conducted by the Town police were in violation of the Fourth Amendment; (4) no personal participation is alleged against the Trustees, Chief Pearson or Inspector McFadden in any constitutional deprivation; (5) the Town cannot be held liable for the acts of its employees under respondeat superior; (6) state law claims are insufficient to serve as a basis for § 1983 liability; (7) Plaintiffs lack standing to assert a claim for the lost profits of the Long Branch Saloon; (8) Plaintiffs failed to sufficiently allege a conspiracy under § 1983; and (9) the Fifth Amendment Takings Claims are unripe.

The court addresses the ripeness argument first because it challenges the court's subject matter jurisdiction over this action. *See Forseth v. Village of Sussex*, 199 F.3d

363, 368 (7th Cir. 2000). The Fifth Amendment, applicable to the states through the Fourteenth Amendment, states in pertinent part: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V, § 4. Plaintiffs' takings claims are not ripe and should be dismissed.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the Supreme Court held that a takings claim under the Fifth Amendment was unripe unless the plaintiff avails himself of an adequate state procedure for seeking just compensation but is denied just compensation. *Id.* at 915; *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999) ("A federal court . . . cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy."); *Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701, 704 (7th Cir. 2002); *Forseth v. Village of Sussex*, 199 F.3d 363, 368, 372-73 (7th Cir. 2000). The Complaint makes no allegation that Plaintiffs have availed themselves of any state procedure and that they were denied just compensation under such procedure. Thus, Plaintiffs' takings claims should be dismissed as unripe.

But for a few exceptions discussed below, all of Plaintiffs' claims are takings claims and, therefore, subject to dismissal for lack of ripeness. The Complaint alleges that the Defendants affected Plaintiffs' real and personal property, and other allegations reveal that the essence of Plaintiffs' claims are the alleged adverse impact on their property. (*See*

Compl. ¶¶ 14, 15, 18(b)-(k), 24.) The only claims against the Town Defendants that are not takings claims are the claims that Defendants and their enforcement officers parked at the entry way of the saloon to harass customers, Town police trespassed to park on Plaintiffs' driveway and told one person Plaintiffs had complained about their neighbors failing to stop at a stop sign, and Investigator McFadden's alleged statement about drugs. These claims are subject to dismissal for other reasons.

Plaintiffs lack standing to assert a claim that "enforcement officers" or the "sheriff's deputies" parked their cars at the entryway to the saloon to harass customers by stopping them for sobriety checks. *Estate of Johnson by Castle v. Village of Libertyville*, 819 F.2d 174, 178 (7th Cir. 1987) ("Plaintiffs must assert their own legal rights and interests.") (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

The claim that Town police trespassed on Plaintiffs' driveway fails to state a claim upon which relief can be granted. The Seventh Circuit has rejected the argument that all trespasses constitute Fourth Amendment violations. *United States v. Tolar*, 268 F.3d 530, 532 (7th Cir. 2001) (holding that agents did not violate the fourth amendment by entering onto defendant's business premises to find the owner and ask permission to search), *cert. denied*, 122 S. Ct. 1174 (2002). The court said that a "trespass is neither necessary nor sufficient for constitutional purposes." *Id.*; *see also Andree v. Ashland County*, 818 F.2d 1306, 1315 (7th Cir. 1987) (stating that a trespass by itself does not necessarily constitute a § 1983 violation) (citing *Oliver v. United States*, 466 U.S. 170

(1984)). The Fourth Amendment focuses on whether there is a "'constitutionally protected reasonable expectation of privacy.'" *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). The Amendment does not protect what a person "knowingly exposes to the public," *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)), or that which is within an "open field." *Oliver v. United States*, 466 U.S. 170 (1984); *Andree*, 818 F.2d at 1315. Thus, mere allegation of trespass by Town police, without more, is insufficient to state a deprivation of a Fourth Amendment right. The Complaint fails to allege anything more which would show that the Plaintiffs are entitled to relief against the Town police under § 1983 for their alleged trespass. Therefore, the claims arising from this alleged trespass should be dismissed for failure to state a claim.

As for the alleged statement by Town police that Plaintiffs had complained about their neighbors failing to stop at a stop sign and Investigator McFadden's alleged statement about drugs, these are allegations of defamation. State law violations are insufficient to support a § 1983 claim. *Martin v. Tyson*, 845 F.2d 1451, 1455 (7th Cir. 1988) ("a violation of state law does not create liability under § 1983"); *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 434 (7th Cir. 1986) ("In a suit under § 1983 the plaintiff must show a violation of the Constitution or laws of the United States, not just a violation of state law."). The claims are therefore subject to dismissal.

There are other compelling reasons why the claims against the Town Defendants should be dismissed. As for the official capacity claims against the Trustees, those claims are effectively claims against the Town. *See Kentucky v. Graham*, 473 U.S. 159, 169, (1985); *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 690 (1978).[2] "A municipality may not be held vicariously liable, under § 1983, for the unconstitutional acts of its employees." *Billings v. Madison Metro. Sch. Dist.*, 259 F.3d 807, 817 (7th Cir. 2001); *Monell*, 436 U.S. at 694. To allege municipal liability under § 1983, a plaintiff must allege that "(1) the [municipality] had an express policy that, when enforced, causes a constitutional deprivation; (2) the [municipality] had a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage within the force of law; or (3) plaintiff's constitutional injury was caused by a person with final policymaking authority." *McCormick v. City of Chicago*, 230 F.3d 319, 324 (7th Cir. 2000); *see also Billings*, 259 F.3d at 817.

Plaintiffs allude to an unexpressed municipal policy, but the Complaint lacks any allegation of such a policy. Though the policy itself may be unexpressed, the allegation of an unexpressed municipal policy must be made. *Warner v. City of Terre Haute, Ind.*, 30 F. Supp. 2d 1107 (S.D. Ind. 1998), upon which Plaintiffs rely, is inapposite as that case was decided on a motion for summary judgment rather than a motion to dismiss.

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[2] Plaintiffs correctly assert that municipalities and other local government units are "persons" within the meaning of § 1983, *Monell*, 436 U.S. at 690, but Defendants have not disputed that they may be sued under § 1983.

Recognizing that a plaintiff can show municipal liability by proving that injury resulted from enforcement of an unexpressed municipal policy is one thing; requiring that a complaint state a claim upon which relief can be granted is another. Plaintiffs correctly maintain that a municipality may be held liable where the final policymaker's acts cause the alleged constitutional harm. *See*, *e.g.*, *McCormick*, 230 F.3d at 324. However, merely alleging that a defendant is a final policymaker is not enough, the complaint must allege a causal connection between the final policymaker's alleged act and the alleged harm.

The Complaint fails to sufficiently plead a § 1983 claim against the Town as it contains no allegation of a policy or custom of the Town or that the Trustees caused any alleged constitutional injury. Therefore, the claims against the Trustees in their official capacities should be dismissed. With respect to the official capacity claims against Chief Pearson and Investigator McFadden, Plaintiffs have not alleged that they are final policy-makers, and Plaintiffs' claims are really claims against the Town. *Monell*, 436 U.S. at 690 n.55. Thus, these official capacity claims must be dismissed.

Plaintiffs have failed to allege any facts indicating that any searches conducted by the Town police or Chief Pearson were in violation of the Fourth Amendment. "To invoke Fourth Amendment protection for a search, a person must demonstrate a 'legitimate expectation of privacy.'" *Nadell v. Las Vegas Metro. Police Dep't*, 268 F.3d 924, 928 (9th Cir. 2001) (district court properly granted judgment as a matter of law where it found based on complaint's allegations that plaintiff had no legitimate expectation of privacy in another's home where she was not an overnight guest), *petition for cert. filed*, (U.S. Mar. 18, 2002)

(No. 01-1416); *Rakas v. Ill.*, 439 U.S. 128, 138-48 (1978). The Complaint makes no claim from which it could be inferred that Plaintiffs had a legitimate expectation of privacy in any area searched. Therefore, Plaintiffs have not stated a claim of an unreasonable search in violation of the Fourth Amendment.

No personal involvement is alleged against the Trustees, Chief Pearson or Inspector McFadden in any constitutional deprivation. An individual cannot be held liable in a § 1983 action unless he caused or participated in, or is directly responsible for an alleged constitutional deprivation. *Rascon v. Hardiman*, 803 F.2d 269, 273 (7th Cir. 1986); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983). Therefore, the claims against these Defendants in their individual capacities should be dismissed. In addition, none of the Town Defendants can be held liable for the actions of other Town employees because there is no respondeat superior liability under § 1983. *Monell*, 436 U.S. at 691.

Lastly, Plaintiffs fail to sufficiently allege a conspiracy under § 1983. In *Kunik v. Racine County, Wisconsin*, 946 F.2d 1574 (7th Cir. 1991), the Seventh Circuit held that to state a conspiracy claim under 1983, a complaint must contain "allegations that the defendants directed themselves toward an unconstitutional action by virtue of a mutual understanding." *Id.* at 1580 (quotation omitted). In addition, such allegations "must further be supported by some factual allegations suggesting a meeting of the minds." *Id.* (quotation omitted). Thus, a complaint must specifically allege the "who, what, when, why, and how" of the alleged conspiratorial agreement. *See Brokaw v. Mercer County*, 235

F.3d 1000, 1016 (7th Cir. 2000). Vague and conclusory allegations of a conspiracy are insufficient to state a claim. *See Amundsen v. Chicago Park Dist.*, 218 F.3d 712, 718 (7th Cir. 2000).

The Complaint alleges: "Beginning on or about 1988-1989, the exact date not known to the Morrisons but well known to the Defendants, two or more of the individual Defendants conspired, directly or indirectly, and induced the other Defendants to conspire with them to harrass (sic) and injure the Morrisons, with the object of said conspiracy being the economic destruction of the Morrisons as herein alleged." (Compl. ¶ 16.) This conspiracy allegation is vague and conclusory. It fails to sufficiently allege the who, what, when, why and how of the alleged agreement, and fails to allege a "meeting of the minds". The allegations of overt acts do not fill in the blanks of this conspiracy claim. Therefore, the Complaint fails to state a conspiracy claim under § 1983 and should be dismissed.

IV. Conclusion

For the foregoing reasons, the Town Defendants' motion to dismiss will be GRANTED and the Complaint against the Town Defendants will be DISMISSED.

The Town County Defendants' motion has been pending for some months now. Though the motion pointed out the clear legal deficiencies in the Complaint (and the deficiencies were pointed out in an earlier motion to dismiss filed by other Defendants), Plaintiffs made no effort to correct those deficiencies. They did not and have not sought leave to amend their Complaint to sufficiently state a claim. Their memorandum opposing

the Town Defendants' motion has given the court no reason to believe that Plaintiffs would be able to sufficiently state a claim against the Town Defendants. Accordingly, the court finds that but for the takings claims, the dismissal should be with prejudice; the takings claims will be dismissed without prejudice under Rule 12(b)(1) for lack of subject matter jurisdiction.

ALL OF WHICH IS ORDERED this 17th day of April 2002.

John Daniel Tinder, Judge
United States District Court

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