
Shari K. Gekoski

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Administrative Law Commons, and the Property Law and Real Estate Commons

Recommended Citation


This Issues in the Third Circuit is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
LOCAL GOVERNMENTS THAT PURPOSELY DELAY LAND USE PROJECTS; WHAT LAW APPLIES? AN ANALYSIS OF *UNITED ARTISTS THEATRE CIRCUIT, INC. v. TOWNSHIP OF WARRINGTON* AND THE SUBSTANTIVE DUE PROCESS TESTS AS APPLIED BY THE THIRD CIRCUIT

I. INTRODUCTION

"In the land development process, public opposition, public pressure, and sometimes just plain animosity or ill-will can lead a municipality or other local government to deny [a qualified landowner] a permit... for a land use project[.]"\(^1\) In response, irritated developers usually seek relief in federal court claiming a violation of substantive due process pursuant to 42 U.S.C. § 1983.\(^2\) This Casebrief explores the appropriate legal standards applicable to substantive due process claims in land use cases, specifically addressing the "improper motive" test and the "shocks the conscience" test.\(^3\) If courts apply a standard that is too burdensome for landowners and developers to meet, "it leaves the door ajar for intentional and flagrant abuses of authority" by local public officials.\(^4\) If the standard is too low, local officials will face increased challenges on zoning decisions and, consequently, courts will be "cast into the role of a 'zoning board of appeals.'"\(^5\)

This Casebrief focuses specifically on the development of the law in the United States Court of Appeals for the Third Circuit regarding sub-

---


2. *See id.* (describing type of relief sought). Section 1983 of Title 42 of the United States Code, entitled "Civil action for deprivation of rights," states:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.


3. For a further discussion of the tests applicable to substantive due process claims, see *infra* notes 21–36 and accompanying text.


5. *See id.* at 402 (mentioning reason for preventing lower standard of review).
stantive due process claims.6 Part II provides an overview of the substantive due process theory under the Fourteenth Amendment of the United States Constitution, which includes the two applicable legal standards: the improper motive test and the shocks the conscience test.7 Part III examines the common defense of qualified immunity.8 Part IV analyzes the Third Circuit’s approach to substantive due process by reviewing the court’s most recent decisions in United Artists Theatre Circuit, Inc. v. Township of Warrington (“United Artists I”)9 and United Artists Theatre Circuit, Inc. v. Township of Warrington (“United Artists II”)10 (collectively referred to as “United Artists”).11 Part V summarizes the overall effect of United Artists and its future impact on landowners, developers and local government officials.12

II. FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS THEORY

A. Substantive Due Process Theory

The Fourteenth Amendment provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”13 The United States Supreme Court has held that this clause contains both a procedural and a substantive component.14 Procedural due process requires that government entities grant individuals certain procedural formalities, such as notice and an opportunity to be heard,
before taking away a protected property or liberty interest. On the other hand, substantive due process prohibits deliberate and arbitrary abuse of government power.

Under the substantive due process theory in land use cases, a plaintiff must prove that the "land use regulation was arbitrary or irrational." Likewise, in evaluating whether a substantive due process claim exists, a court will determine: (1) if a protected property interest is at issue; and (2) if the government's action was "sufficiently arbitrary or wrongful to constitute a violation." The Third Circuit has taken a liberal view of property interests by establishing that land ownership, in and of itself, is a property interest entitled to constitutional protection from arbitrary and capricious zoning regulations. Recently, however, the Third Circuit has sent mixed signals concerning the proper test to apply in land use cases when reviewing whether the government's actions were sufficiently arbitrary or wrongful.

15. See id. (describing procedural due process).
17. See Bello, 840 F.2d at 1129 (describing elements necessary to prove substantive due process claims).
19. See id. at 1476 (citing DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 600-01 (3d Cir. 1995)) (noting Third Circuit's view of property interests). "[T]he issue of whether and when state-created property interests invoke substantive due process concerns has not been decided by the Supreme Court." Woodwind Estates v. Gretkowski, 205 F.3d 118, 123 (3d Cir. 2000). In the Third Circuit, "not all property interests worthy of procedural due process protection are protected by the concept of substantive due process." Id. (quoting DeBlasio, 53 F.3d at 598). In DeBlasio, the Third Circuit rejected the requirement that a landowner demonstrate a "legitimate claim of entitlement" before a protected property interest could be established. See Wiener, supra note 18, at 1483 (discussing holding in DeBlasio). Alternatively, the Third Circuit recognized the "right to be free from arbitrary and capricious government action affecting [a landowner's] interest in use and enjoyment of property." See id. (same). Consequently, the Third Circuit has eliminated substantial barriers to substantive due process claims in land use cases because it recognizes land ownership as a protected property interest. See id. at 1476 (noting Third Circuit's expansive view of civil liberties regarding property); see also Brian W. Blaesser, Substantive Due Process Protection at the Outer Margins of Municipal Behavior, 3 Wash. U. J.L. & Pol'y 583, 583-601 (2000) available at http://law.wustl.edu/journal/3/pg583t601.pdf (discussing substantive due process protection).
20. For a further discussion of the two substantive due process tests, see infra notes 21-36 and accompanying text.
B. Substantive Due Process Tests

1. Improper Motive

Courts have applied two standards in evaluating substantive due process claims.\(^{21}\) The first is the improper motive test.\(^{22}\) The Third Circuit first applied the improper motive test in *Bello v. Walker*,\(^{23}\) a case in which the municipality improperly interfered with the issuance of building permits.\(^{24}\) Over the past decade, the Third Circuit consistently applied this test in land use cases such as *Parkway Garage, Inc. v. City of Philadelphia*,\(^{25}\)

\(^{21}\) For a further discussion of the two tests courts use to evaluate substantive due process, see infra notes 22–36 and accompanying text.

\(^{22}\) For a further discussion of the requirements needed to prove improper motive, see infra notes 28–29 and accompanying text.

\(^{23}\) 840 F.2d 1124, 1129 (3d Cir. 1988) (setting Third Circuit precedent for applying improper motive test). In *Bello*, plaintiff Dino Bello, sole stockholder of Simmons Park Properties, Inc., applied to the Bethel Park municipality for review and approval of a subdivision plan. See *id.* at 1126 (describing facts of case). The subdivision plan outlined five phases of development and was eventually approved. *See id.* (same). Bello had no difficulty obtaining building permits for phase I of the project, which was completed in May of 1979. *See id.* (same). Next, Bello applied for building permits for phase V of the project, but Norman Walker, Bethel Park’s Code Enforcement Officer, denied the permits because Bello tried to construct phase V before phases II–IV had been completed. *See id.* (same). Bello, however, never agreed to complete the project in the order suggested by the phases. *See id.* (same).

\(^{24}\) *See id.* at 1124 (noting holding from case). The court held:

The plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of the municipality 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 the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983. While the defendants claim that the building permit was denied because of plaintiffs’ failure to build in numerical sequence, thus presenting an arguably rational ground for the denial of the permit, it is the factfinders’ role to resolve this factual dispute. We will reverse the district court’s grant of summary judgment on this claim.

*Id.* at 1129–30 (footnote omitted).

\(^{25}\) 5 F.3d 685, 699–700 (3d Cir. 1993) (holding jury could reasonably find that denial of permit by government official was motivated by improper economic reasons). The City of Philadelphia ("City") was the owner of land at 15th and Arch Streets that it leased to the Philadelphia Parking Authority ("Authority"). *See id.* at 688–89 (describing facts of case). In 1963, the Authority entered into a 36 year sublease with John McShain, Inc. for an underground parking garage. *See id.* at 689 (same). McShain built and operated the garage until 1972 when Parkway Garage, Inc. ("Parkway") purchased the assignment of the construction and lease agreement for $4,575,000. *See id.* (same). "Over the years, the market value of the property increased substantially, as did the fees for parking. Consequently, Parkway’s income stream from the garage increased to $1.25 million by 1980 and reached $2.4 million by 1990." *Id.* In 1987, the City hired First Boston to prepare a report on the feasibility of selling the parking garages owned by the City. *See id.* (same). The report advised that Parkway’s lease at the garage would limit the sale price. *See id.* (same). The garage was suffering from spalling and needed to be
DeBlasio v. Zoning Board of Adjustment\textsuperscript{26} and Blanche Road Corp. v. Bensalem Township.\textsuperscript{27}

...
To establish a substantive due process violation under the improper motive test in land use cases, plaintiffs must prove that they were "deprived of a protected property interest by the actions of a government official and that the actions of the official were either: (1) not rationally related to a legitimate government interest; or (2) motivated by bias, bad faith or improper motives." Additionally, evidence of improper government action for reasons unrelated to the application's merits may support a finding that government officials arbitrarily or irrationally abused their power.

2. Shocks the Conscience

The second test courts use to evaluate substantive due process claims is the shocks the conscience test. Although the Supreme Court first applied this test in Rochin v. California, a case involving an individual's right to privacy under substantive due process, it has subsequently applied this standard in many other contexts. Most recently, the Supreme Court applied this test in County of Sacramento v. Lewis, a case involving a high-
speed police chase that resulted in the suspect’s death.\textsuperscript{34} The shocks the conscience standard finds only “the most egregious executive action \ldots to be arbitrary in the constitutional sense.”\textsuperscript{35} Nevertheless, the Court has stated, “[w]hile the measure of what is conscience shocking is no calibrated yard stick, it does, \ldots 'point the way.’”\textsuperscript{36}

\textbf{C. Confusion Within the Third Circuit}

Since 1988, as a result of \textit{Bello}, the Third Circuit had consistently applied the improper motive test when evaluating substantive due process claims in land use cases.\textsuperscript{37} Even after the Supreme Court ruled in favor of the shocks the conscience test in \textit{Lewis}, the Third Circuit continued to apply the improper motive test in land use cases such as \textit{Woodwind Estates},

cars to swerve off the road. \textit{See id.} at 837 (same). After reaching speeds over 100 miles per hour, the chase ended when the motorcycle flipped over. \textit{See id.} (same). The police car, driven by officer Smith, was less than 100 feet behind the motorcycle and tried to stop but skidded into Lewis causing his death. \textit{See id.} (same).

\textsuperscript{34}. \textit{See id.} at 836-40 (describing issue in case). The issue in \textit{Lewis} was "whether a police officer violate[d] 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." \textit{Id.} at 836. The Court held:

Smith was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause Willard's high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed forcing other drivers out of their travel lanes. Willard's outrageous behavior was practically instantaneous, and so was Smith's instinctive response. While prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to induce Willard's lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing enforcement considerations, and while Smith exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive on his part.

Regardless whether Smith's behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under § 1983. The judgment below is accordingly reversed.

\textsuperscript{35}. \textit{Id.} at 855 (applying shocks the conscience standard in determining liability of police officer).


\textsuperscript{36}. \textit{See Lewis,} 523 U.S. at 847 (defining shocks the conscience standard) (quoting Judge Friendly from \textit{Johnson v. Glick}, 481 F.2d 1028, 1033 (2d Cir. 1973))).

\textsuperscript{37}. For a further discussion of the Third Circuit's history of applying the improper motive test, \textit{see supra} notes 23-29 and accompanying text.
38. 205 F.3d 118 (3d Cir. 2000). Woodwind Estates, Ltd. ("Woodwind") was awarded $1.1 million in federal low-income housing tax credits by the Pennsylvania Housing Finance Agency to develop affordable housing. See id. at 120–22 (describing facts of case). Woodwind was supposed to build 100 single family homes by December 31, 1997. See id. (same). At a March 18, 1996 meeting, Woodwind submitted a preliminary development plan to Stroud Township. See id. at 121 (same). At a March 27, 1996 meeting, the attorney for the Planning Commission said that the plan met the necessary requirements for approval, but the planning commission denied its review claiming that it was an "incomplete submission" lacking certain technical information. See id. (same). During this same meeting, a citizens group called "Concerned Neighbors of Woodwind Estates" opposed the project and urged the planning commission to deny the preliminary plan. See id. (same). Woodwind submitted a revised preliminary plan and at a meeting on April 24, 1996, the planning commission took no action. See id. (same). Six months later, the commission voted to deny the revised plan. See id. (same). Woodwind determined that it was impossible for it to meet the building deadline and, as a result, the $1.1 million grant was withdrawn and the project was cancelled. See id. at 122 (same).

39. 274 F.3d 109 (3d Cir. 2001). Herr, a land developer, put together a plan to construct an industrial park in Pequea Township. See id. at 110 (describing facts of case). Herr applied to the Lancaster County Planning Commission for approval prior to the Commission adopting a restricted land use and sewer facility plan. See id. (same). Because Herr sought approval before the new plan was adopted, his project was grandfathered under the prior land use plan for five years. See id. (same). Yet, the Township argued that Herr had no vested right to municipal sewer services under the old sewer facilities plan. See id. (same). After an eleven year delay, Herr finally secured the necessary authority from multiple government agencies to develop the industrial park. See id. (same). Herr claimed "that his right to substantive due process was violated by an eleven year campaign of the Township and its officers to delay and obstruct his development of an industrial park." Id. He further asserted that Pequea Township "conspired to prevent him from securing the necessary approvals from other government agencies, or to delay the receipt of those approvals until his project would no longer be grandfathered under the prior ordinance." Id. at 111. The court found that Herr had a protected property interest that was entitled to protection under "the substantive due process element of the Fourteenth Amendment." Id. at 115. The court, however, ruled that:

Unlike the defendants in the cases cited by Herr [Woodwind Estates v. Gretkowski, 205 F.3d 118, 124–25 (3d Cir. 2000), DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 601–02 (3d Cir. 1995), Blanche Rd. Corp. v. Bensalem Township, 57 F.3d 253, 267–68 (3d Cir. 1995), Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 696–97 (3d Cir. 1993), Bello v. Walker, 840 F.2d 1124, 1129–30 (3d Cir. 1988)]; however, the Township and its supervisors were not authorized to issue permits for Herr’s industrial park. The LCPC [Lancaster County Planning Commission] alone had that authority. Herr’s claim is thus not that the defendants subverted a decision making process by taking irrelevant considerations into account. It is rather that the defendants contested issues before the bodies authorized to resolve various permitting issues because they wished to defeat or delay the approval of Herr’s project by those bodies. This claim is materially different from the claims asserted in Bello and its progeny.

We conclude that there is evidence from which a trier of fact could conclude that the Township’s challenged conduct was motivated by a desire to stop Herr’s development. At the same time, we conclude that there is no evidence from which a trier of fact could conclude that the
disagreement within the Third Circuit, specifically between the two different panels of judges who have reviewed *United Artists*, as to which test applies. The first panel agreed with the district court’s application of improper motive; whereas the second panel claimed that the first panel did not make a distinctive ruling on what law applies. Therefore, the second panel denied applying law of the case doctrine, and instead ruled that shocks the conscience was the appropriate test.

III. THE QUALIFIED IMMUNITY DEFENSE

Generally, qualified immunity shields a government official who performs discretionary functions from liability for civil damages. Qualified immunity usually applies as long as the government official’s “conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” In substantive due process cases, the defendant has the burden of proving entitlement to qualified immunity. To defeat a qualified immunity defense, the plaintiff must show not only that the right at issue is clearly established, but also, that the public official’s *specific conduct* violated the established right.

When considering a qualified immunity claim, a court must determine: “(1) whether the actions of the defendant violated a constitutional

Township took frivolous positions or otherwise unreasonably delayed the proceedings before the various state bodies. We hold that where a township participates in proceedings before other governmental agencies authorized to resolve issues like those here presented, the township and its supervisors are not subject to liability for delay occasioned by those proceedings solely because their participation was motivated by a desire to delay or prevent the project for which approval is sought.

Id. at 111-12; see also *United Artists Theatre Circuit, Inc. v. Township of Warrington* (United Artists II), 316 F.3d 392, 406 (3d Cir. 2003) (Cowen, J., dissenting) (highlighting cases decided after *Lewis* that applied improper motive test).

40. For a further discussion on the split within the Third Circuit, see infra notes 71-106 and accompanying text.

41. For a further discussion of the Third Circuit’s difference of opinion in ruling on what test to apply, see infra notes 71-96 and accompanying text.

42. For a further discussion of the second panel’s denial of law of the case doctrine, see infra notes 97-106 and accompanying text.

43. For a further discussion of the second panel’s ruling in *United Artists II*, see infra notes 107-111 and accompanying text.


45. *Id.*; see also *Sterling v. Borough of Minersville*, 232 F.3d 190, 193 (3d Cir. 2000) (describing reasonable person standard).


right; and if so, (2) whether the right was clearly established at the time plaintiff alleges the violation." If qualified immunity is pleaded in a motion for summary judgment, a court, in answering the question posed by the first prong, uses the summary judgment standard. In answering the question posed by the second prong, the court "ensures that public officials are not held liable for actions they could not have reasonably known were unlawful." To satisfy the first prong, which requires proving that there was no constitutional violation, the defendant must show that there was no protected property interest at issue and that the government official's action was not arbitrary or wrongful. Because the Third Circuit has previously ruled that ownership of property is always a protected property interest, the first prong is almost always met by the plaintiffs. The determining factor, therefore, is whether the official's action was arbitrary or wrong.

48. See United Artists I, 2001 WL 936638, at *2 (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)) (describing elements of qualified immunity claim). In Saucier, the Court stated:

In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable. Saucier, 533 U.S. at 201.

49. See United Artists I, 2001 WL 936638, at *3 (describing first prong of qualified immunity defense). "Summary judgment may be granted only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Id. (quoting FED. R. CIV. P. 56(c)). "In order to survive a motion for summary judgment, the non-moving party 'must set forth specific facts showing that there is a genuine issue for trial.'" Id. (quoting FED. R. CIV. P. 56(e)). The court then determines whether the non-moving party offered sufficient evidence for the jury to find in its favor. See id. (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)) (describing process used to determine if summary judgment should be granted).

50. Id. at *8 (citing Saucier, 533 U.S. at 201).

51. For a further discussion of the requirements for substantive due process, see supra notes 17-20 and accompanying text.

52. See Wiener, supra note 18, at 1476 (noting Third Circuit took different approach from other circuits in ruling that property interest is protected).
The court evaluates this factor using the proper substantive due process test: either the improper motive test or the shocks the conscience test.\(^{54}\)

The test that the court applies in evaluating the substantive due process claim is critical because qualified immunity is typically a defense that is pleaded in land use cases.\(^{55}\) If the improper motive test is used, then it is easier for the plaintiff to survive the summary judgment motion and, therefore, more difficult for government officials to obtain qualified immunity.\(^{56}\) Conversely, if the shocks the conscience test is used, then the plaintiff faces a higher burden, making it easier for government officials to obtain summary judgment based on qualified immunity.\(^{57}\)

IV. ANALYSIS OF UNITED ARTISTS

A. Facts

In 1995, two companies, United Artists and Regal Cinema, were competing to construct a multiplex movie theater and entertainment complex in Warrington Township, Pennsylvania ("Township").\(^{58}\) The Township's Board of Supervisors ("Board") was aware of the developers' interest in building a movie complex and wanted to profit from this retail venture.\(^{59}\) The Board knew, however, that it could neither require collection of an amusement tax nor payment of an impact fee.\(^{60}\) Despite this knowledge,
the Board determined that it was "'critical . . . [to] try to get some impact fee or amusement taxes from these [developers].'"61

In January 1996, United Artists submitted a building proposal to the Board for approval.62 One year later, Regal Cinema's developer, Bruce Goodman ("Goodman"), submitted a similar proposal to build a theater complex on a piece of land directly adjacent to United Artists's proposed site.63 The Board requested each developer to voluntarily pay an impact fee to the Township.64 United Artists refused, but Goodman offered to pay $100,000 per year.65

On February 4, 1997, one month after Goodman submitted his original proposal, the Board unanimously granted him preliminary approval, and three months later, on May 21, 1997, it gave Goodman final approval.66 Meanwhile, United Artists, which submitted its proposal one year prior to Goodman, did not receive preliminary approval by the Board until March 18, 1997.67 The Board then delayed final approval three times, each time requesting payment of an impact fee.68 Only after United Artists agreed to pay the Township $25,000 annually did the Board grant final approval on September 16, 1997, twenty months after its original proposal date.69 Furthermore, while Regal Cinema completed its mul-


62. See id. (providing factual details). The Warrington Township Board of Supervisors analyzes and evaluates all proposals for land development in the Township to make sure the proposals comply with the zoning and development ordinances. See id. (describing Board's role). "The review process consists of two phases, preliminary approval and final approval. At each phase, the plans for the proposed development must be reviewed by the Township Engineer and the Township Planning Commission before the Board votes on whether to grant the requested approval." Id. (citing P. Ex. A. at 86-91, United Artists I (No. CIV.A.98-5556)).

63. See id. (citing P. Ex. 6, 12, United Artists I (No. CIV.A.98-5556)) (describing Regal Cinema's proposal).

64. See id. (noting Township's request for payment of impact fee); see also United Artists Theatre Circuit, Inc. v. Township of Warrington (United Artists II), 316 F.3d 392, 394-95 (3d Cir. 2003) (discussing facts of case).

65. See United Artists II, 316 F.3d at 395 (noting United Artists's refusal to pay impact fee after Township's repeated requests).


67. See id. (indicating United Artists's timeline for approval).

68. See id. (noting Board's insistence on payment of impact fee).

69. See id. (describing difficulty in obtaining Board approval). United Artists was not able to begin building immediately because the Board had altered some of the conditions for approval. See id. (noting change in conditions). After granting preliminary approval, the Board changed the terms of the approval "requiring United Artists to obtain an easement for the road improvement and to complete the installation of signals before construction could begin, rather than before the time of occupancy . . . ." See United Artists II, 316 F.3d at 395 (detailing changes). United Artists brought suit against the Township in the Court of Common Pleas of Bucks County. See id. (noting lawsuit).
tiplex in 1999, United Artists never built its theater complex in the Township.\footnote{70}

Consequently, United Artists brought suit in the Federal District Court for the Eastern District of Pennsylvania alleging that the Township and the Board "violated its right to substantive due process by arbitrarily subjecting their land development project to heightened scrutiny and intentionally delaying approval of the project in order to receive an ‘impact’ fee from a competing developer."\footnote{71} The Board members moved for summary judgment based on qualified immunity, but this motion was denied.\footnote{72} On appeal, the Third Circuit held that "the District Court properly analyzed the supervisors' request for qualified immunity on summary judgment" but remanded the case, instructing the district court "to address each supervisor’s request for immunity on an individual basis or explain why the supervisors should be considered collectively."\footnote{73}

On remand, the district court held that, under the circumstances, it was appropriate to address qualified immunity for the Board as a whole.\footnote{74} First, it found that the Board members referred to themselves as a group and took their actions collectively.\footnote{75} As evidence, the Board members stated that they had discussed all aspects of the theater development projects as a group.\footnote{76} Additionally, all Board members who were present unanimously agreed on their decisions regarding the theater projects and those that were not present were known to generally have the same views.\footnote{77} Second, the district court found that the same counsel repre-

Commonwealth Court agreed that the change in conditions was unlawful and the building permit condition was eliminated. \footnote{Commonwealth Court agreed that the change in conditions was unlawful and the building permit condition was eliminated. See id. (describing holding of suit).}

\footnote{70. See United Artists II, 316 F.3d at 395–96 (describing outcome of developers’ competition to build multiplex).}

\footnote{71. See United Artists I, 2001 WL 936638, at *1 (discussing grounds for suit in federal court).}

\footnote{72. See id. at *2 (noting denial of motion for summary judgment). The court denied the defendants' motion for summary judgment because "plaintiff produced evidence from which a reasonable fact finder could conclude defendants acted with improper motive." Id. The court said that if United Artists could prove their allegations, then the court could find that the Board's actions "violated clearly established substantive due process rights of which reasonable public officials would have been aware." Id.}

\footnote{73. See id. (discussing holding on appeal) (quoting court of appeals’ unpublished decision to remand matter to district court following appeal of December 7, 1999 Order). The first Third Circuit panel said, "the District Court should have considered each supervisor's request for qualified immunity individually rather than as a group." Id. (referencing ruling from Grant v. City of Pittsburgh, 98 F.3d 116, 126 (3d Cir. 1996)). For a further discussion of the legal standard for qualified immunity, see supra note 48 and accompanying text.}

\footnote{74. For a further discussion of the district court’s reasoning for addressing the Board as a whole, see infra notes 75–79 and accompanying text.}

\footnote{75. See United Artists I, 2001 WL 936638, at *3 (discussing district court’s findings of collective board action).}

\footnote{76. See id. (citing P. Ex. A–E, United Artists I (No. CIV.A.98-5556)) (highlighting evidence of addressing Board as whole).}

\footnote{77. See id. (same).}
presented all Board members and counsel referred to them collectively. 78 Finally, both the original motion for summary judgment based on qualified immunity and the amended motion referred to the Board members as a collective group. 79

Nevertheless, to avoid any further delay in the litigation, the district court also addressed qualified immunity for each Board member individually. 80 The district court found that United Artists offered sufficient evidence for a reasonable fact finder to conclude that each Board member individually subjected the development project to an increased level of scrutiny and intentionally delayed approval in order to obtain an impact fee. 81

78. See id. (citing Mot. for Summ. J., United Artists I (No. CIV.A.98-5556)) (same).
79. See id. (same).
80. For a further discussion of the court’s analysis of each Board member’s qualified immunity claim, see infra note 81 and accompanying text.
81. See United Artists I, 2001 WL 936638, at *7 (finding violation of substantive due process by Board Chairman and four Board Supervisors on individual basis); see also id. at *6–7 (identifying individual Board members and specific reasons for violations of substantive due process). Chairman Gerald Anderson was present at all meetings (formal and informal) in which the development projects were discussed; he had knowledge of the $100,000 impact fee offered by Goodman; he voted to approve the Goodman project even though there were engineering concerns and voted to table final approval of United Artists’s project three times pending reconsideration by United Artists of paying an impact fee. See id. (noting Chairman Anderson’s presence at meetings and voting history). The court determined that “a reasonable fact finder could conclude that Chairman Anderson subjected [United Artists’s] project to heightened scrutiny and purposefully delayed the project’s progression in order to obtain the impact fee offered by Goodman for the Township.” Id. Supervisor Joseph Lavin was present at all meetings (formal and informal) in which the Board members discussed the theater projects; he had knowledge of Goodman’s offer to pay the $100,000 impact fee and requested, approximately nine times, that United Artists pay an impact fee. See id. (noting Supervisor Lavin’s presence at Board meetings and his knowledge of impact fee payment). Supervisor Lavin voted to approve Goodman’s project and voted three times to table United Artists’s final approval. See id. (noting Supervisor Lavin’s voting history). The court determined that “a reasonable fact finder could conclude that Supervisor Lavin subjected [United Artists’s] project to heightened scrutiny and purposefully delayed the project’s progression in order to obtain the impact fee offered by Goodman for the Township.” Id. Supervisor Wayne Bullock was present at each of the formal meetings at which the Board discussed the two projects and the impact fees and he had knowledge of Goodman’s offer to pay the $100,000 impact fee to the Township. See id. (noting Supervisor Bullock’s presence at Board meetings and his knowledge of impact fee payment). Supervisor Bullock voted to approve Goodman’s project and voted three times to table the vote on final approval of United Artists’s project pending agreement to pay an impact fee. See id. (noting Supervisor Bullock’s voting history). The district court found that “a reasonable fact finder could conclude that Supervisor Bullock subjected [United Artists’s] project to heightened scrutiny and purposefully delayed the project’s progression in order to obtain the impact fee offered by Goodman for the Township.” Id. Supervisor Katharine Watson was present at each of the formal meetings where the Board discussed the two projects and the impact fees and she had knowledge of Goodman’s offer to pay the $100,000 impact fee to the Township. See id. (noting Supervisor Watson’s presence at Board meetings and
The Board urged the district court to apply the shocks the conscience standard instead of the improper motive standard when analyzing the Board as a whole, or individually, for the substantive due process claim. The district court, however, declined to do so. The district court stated that it found few differences between the Lewis shocks the conscience standard and the improper motive standard. Additionally, the court believed that arbitrary use of power by a governmental official for economic or political gain would similarly shock the conscience. Furthermore, the district court said that because the “Court of Appeals continued to apply the improper motive standard to determine whether a party’s substantive due process rights had been violated in land-use disputes,” it was more appropriate to apply the improper motive standard.

Moreover, the district court ruled that the improper motive test was the proper test to use in analyzing the Board’s qualified immunity defense. The court determined that a fact finder could reasonably conclude that the Board intentionally delayed United Artists’s theater project and held it to a higher standard of scrutiny than Goodman’s project because of the Board’s desire to receive an impact fee, a clear indication of improper motive. The district court rejected the Board’s arguments.

her knowledge of impact fee payment). Supervisor Watson, although not present for the vote, supported the decision to approve Goodman’s project and voted three times to table the vote on final approval of United Artists’s project pending agreement to pay an impact fee. See id. (noting Supervisor Watson’s voting history). The district court found that “a reasonable fact finder could conclude that Supervisor Watson subjected [United Artists’s] project to heightened scrutiny and purposefully delayed the project’s progression in order to obtain the impact fee offered by Goodman for the Township.” Id. Although Supervisor Douglas Skinner was absent for three of the meetings in which the Board discussed the two projects and the impact fees, Chairman Anderson sought his opinion in advance. See id. (noting Supervisor Skinner’s attendance record at Board meetings). Supervisor Skinner had knowledge of Goodman’s offer to pay the $100,000 impact fee to the Township. See id. (noting Supervisor Skinner’s knowledge of impact fee payment). Supervisor Skinner voted two times to table the vote on final approval of United Artists’s project pending agreement to pay an impact fee. See id. (noting Supervisor Skinner’s voting history). The district court found that “a reasonable fact finder could conclude that Supervisor Skinner subjected [United Artists’s] project to heightened scrutiny and purposefully delayed the project’s progression in order to obtain the impact fee offered by Goodman for the Township.” Id.

82. See id. at *3 n.5 (discussing ruling on remand).
83. See id. at *3 (stating district court’s reasons for rejecting shocks the conscience standard).
84. See id. (same).
85. Id. (same).
86. See id. (same).
87. See id. at *4–5 (noting district court specifically ruled that improper motive was correct test to apply to qualified immunity defense).
88. See id. at *4 (stating specific reasons why district court denied Board’s motion for summary judgment based on qualified immunity). “[United Artists] provided evidence that (1) the Board had a strong desire to obtain an ‘impact fee’ or otherwise generate revenue for the Township from the movie theaters; (2) Goodman immediately complied with the Board’s request to pay a fee; and (3) [United
that: (1) Goodman had received approval faster because there were fewer problems with his plan; and (2) that the Board was not aware of the competition between the two developers. 89

Ultimately, the district court denied the Board’s motion for summary judgment for the second time. 90 The Board appealed. 91 In finding that the district court applied the wrong standard of review for United Artists’s substantive due process claim, the second panel remanded the case, again, to the district court. 92 On remand, the district court was to determine whether United Artists could survive the Board’s motion for summary judgment under the shocks the conscience standard from Lewis as op-

Artists] resisted the Board’s request to volunteer a fee.” Id. Plaintiff also offered evidence that could be used to conclude that paying the impact fee was a quid pro quo for favorable treatment from the Township. See id. (identifying why Board’s requirement of impact fee was improperly motivated). Because Goodman was in discussions with Regal Cinemas during this time, it can be inferred that Regal was assured “favorable treatment from the Township in exchange for payment of the fee.” Id.

89. See id. (discussing district court’s rejection of Board’s arguments). The district court rejected the argument that there were fewer problems with one project’s plan because this “legitimate reason” is insufficient to justify granting summary judgment. See id. (providing reasons for rejection of arguments). The district court said that even if it were assumed that Goodman’s project had less technical problems than United Artists’s, the motivation behind the approval would be a finding of fact for the jury. See id. (same). United Artists also argued that the “legitimate reason” offered by the Board was pretextual because a letter from one of the engineer’s stated concerns about Goodman’s project and found fewer outstanding issues with United Artists’s plan. See id. (citing P. Ex. 36, 37, United Artists I (No. CIV.A.98-5556)) (same). The district court rejected the Board’s argument that it was unaware of the competition between the developers because the Board knew that only one theater would be built: “All the movie theaters made it known that they’d probably like to be first but flat out said that that didn’t matter because they were going to build anyway and we at the Board found that hard to believe.” Id. (citing P. Ex. B at 90, United Artists I (No. CIV.A.98-5556)) (emphasis added).

90. See id. at *2 (discussing ruling on remand). On remand, the district court pointed to the following as evidence of addressing qualified immunity collectively. See id. (outlining evidence for judging Board as whole). The district court found that:

[T]he Board members speak of themselves as a group and speak of their actions as taken collectively. According to the Board members, they discussed all aspects of the applications to develop land, and made decisions as a group. Each of Board’s decisions on the two theater projects was unanimously agreed upon by all Board members present, and the feelings of those absent generally were known to accord with the vote. The Board members each took the same actions with regard to the theater projects. The Board members are represented by the same counsel, and their counsel addresses them as a group. Their original motion for summary judgment addressed their entitlement to qualified immunity as a group, and the amended motion for summary judgment based on qualified immunity largely does the same.

Id. at *3 (citations omitted).


92. See id. at 402 (stating holding from Court of Appeals).
posed to the improper motive standard from Bello. The second panel divided its analysis into two distinct discussions. The first part of the analysis discussed the legal reasoning for denying United Artists’s argument for application of the law of the case doctrine. The second part discussed the legal reasoning for adopting the shocks the conscience standard.

B. Legal Reasoning for Denying Law of the Case Doctrine

Under the law of the case doctrine, “one panel of an appellate court generally will not reconsider questions that another panel has decided on a prior appeal in the same case.” The law of the case doctrine is used to preclude review of legal issues “that the court, in a prior appeal, has actually decided, either expressly or by implication; it does not apply to dicta.” The court, however, is permitted to reconsider previously decided issues in extraordinary circumstances including when: (1) new evidence is available; (2) a new supervening law is announced; or (3) the prior decision is clearly erroneous and would create manifest injustice.

On the second appeal, United Artists argued that the law of the case doctrine limited the present Third Circuit panel’s authority. United Artists argued that the doctrine precluded the current panel from determining that the shocks the conscience standard was appropriate for reviewing its substantive due process claim because the prior Third Circuit panel had already rejected it and ruled that the improper motive standard applied. The prior panel had stated that:

Under existing case law, we believe the District Court properly analyzed the supervisors’ request for qualified immunity on summary judgment, having found that United Artists at this stage sufficiently alleged a violation of a clearly established constitutional right. Nonetheless, we believe the District Court should have considered each supervisor’s request for qualified immunity indi-

93. See id. (discussing Third Circuit’s instructions to district court).
94. See id. at 397-403 (analyzing law of the case doctrine and substantive due process).
95. For a further discussion of the court’s legal reasoning for denying law of the case doctrine, see infra notes 97-106 and accompanying text.
96. For a further discussion of the court’s legal reasoning for adopting the shocks the conscience standard, see infra notes 107-111 and accompanying text.
98. Id. at 718.
100. See United Artists Theatre Circuit, Inc. v. Township of Warrington (United Artists II), 316 F.3d 392, 397 (3d Cir. 2003) (presenting argument for preclusion by law of the case doctrine).
101. See id. (same).
Conversely, the second panel ruled that the first panel left open the issue of what law applied because the first panel stated in a footnote that it expressed no opinion as to whether the standard announced in *Lewis* was applicable. The footnote specifically stated:

> At oral argument this Court, sua sponte, raised two issues: . . . (2) whether the "shocks the conscience" standard announced by the Supreme Court in County of Sacramento v. Lewis . . . is applicable to substantive due process claims like the one at issue here. At this time, we express no opinion whether these matters are appropriate in determining the merits of the substantive due process claim.

The second panel thus concluded that the prior panel did not decide whether the *Lewis* decision superseded prior circuit case law. The second panel justified its denial of the law of the case doctrine by commenting that, in the presence of substantial doubt as to whether the issue was decided by a prior panel, the subsequent panel should not be precluded from considering the issue.

### C. Legal Reasoning for Adopting Shocks the Conscience Standard

The Third Circuit reasoned that the shocks the conscience standard is the appropriate test to apply when evaluating substantive due process

---


103. See id. at 398 (noting that second panel relied on footnote to determine whether first panel made definitive ruling on what law to apply in evaluating substantive due process claims in land use cases).

104. Id. (citing United Artists Theatre Circuit, Inc. v. Township of Warrington, No. 00-1064, 2000 U.S. App. LEXIS 38737, at *3 n.2 (3d Cir. Nov. 29, 2000)). The dissent argued that the statement made by the first panel in its footnote is dicta. See id. at 404 (Cowen, J., dissenting) (describing footnote as dicta). The dissent argued:

> The holding of the case and the instructions to the District Court were to apply the same 'improper motive' standard to the supervisors individually. Even if one were not to accept the express holding of the prior panel in light of this footnote, it is quite clear that the 'improper motive' issue was decided by 'necessary implication' and therefore also subject to the law of the case doctrine.

Id. (Cowen, J., dissenting).

105. See id. at 397 (stating reasons for second panel ruling that first panel left open issue of what law applies).

106. See id. at 398 (noting court is not precluded from deciding what law applies).
claims because to hold otherwise would be inconsistent with the Third Circuit's other substantive due process jurisprudence. The court stated that "we see no reason why the present case should be exempted from the Lewis shocks the conscience test simply because the case concerns a land use dispute." The court further explained that the term "improper" under the improper motive test was too broad. The court also justified its ruling by concluding that the shocks the conscience standard "prevents us from being cast in the role of a 'zoning board of appeals.'" Finally, the Third Circuit noted that, by adopting the shocks the conscience standard, the court aligned itself with several other courts of appeals.

D. Conceptual Problems with Shocks the Conscience Standard

Several problems exist with the Third Circuit's shocks the conscience standard in substantive due process claims relating to land use cases. First, the standard "which has been applied in other substantive due process situations, . . . is not particularly helpful in a land use context." Specifically, this heightened standard—by requiring only the most egregious conduct to be classified as shocking the conscience—only tempts government officials to disobey or ignore legal requirements, instead of deterring their misconduct. Consequently, such a high standard may
lead to abuse of power by local government officials who know that only the worst conduct will warrant judicial review. 115

Second, the dissent noted that the majority’s reliance on Lewis is mis-directed. 116 The Court in Lewis was never given a choice between applying the improper motive test and the shocks the conscience test. 117 Instead, the Supreme Court reviewed the case to “resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case.” 118

Third, the Third Circuit overruled well-established case law in its circuit in which local government officials were held liable for acting with improper motives. 119 The Third Circuit had consistently applied the improper motive test even after the Supreme Court issued its decision in Lewis, thereby confirming that Lewis did not alter prior circuit law. 120 For example, in Woodwind Estates, a land use case decided two years after Lewis, Stroud Township failed to approve Woodwind’s development plans for a low-income subdivision because the project was opposed by a neighborhood citizens group. 121 The court held that Woodwind had a protected property interest and showed sufficient evidence of arbitrary, irrational

115. See id. (stating potential consequences of applying shocks the conscience test).

116. See United Artists II, 316 F.3d at 405 (Cowen, J., dissenting) (discussing reasons for finding Lewis standard inapplicable to land use cases).

117. See id. (Cowen, J., dissenting) (noting issue before Supreme Court in Lewis was different than in United Artists). “The issue in this case [Lewis] 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.” Id. (Cowen, J., dissenting).

118. Id. (Cowen, J., dissenting).

119. See id. at 405 (Cowen, J., dissenting) (noting majority opinion gives little weight to precedent). “The cases are legion.” Id. (Cowen, J., dissenting) (citing Herr v. Pequea Township, 274 F.3d 109 (3d Cir. 2001); Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118 (3d Cir. 2000); Blanche Rd. Corp. v. Bensalem Township, 57 F.3d 253 (3d Cir. 1998); DeBlasio v. Zoning Bd. Of Adjustment, 53 F.3d 592 (3d Cir. 1995); Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685 (3d Cir. 1993); Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988)).

120. See id. at 406 (Cowen, J., dissenting) (proving improper motive test did not alter prior circuit precedent because test continued to be applied after decision in Lewis was handed down). In dissent, Justice Cowen stated: Unlike the majority, I am fully comfortable assuming that this Court in Woodwind and Nicholas (as in any other case it decides) was completely aware of the content of all published Supreme Court case law that may bear on the case at hand, especially in such a fundamental area as Due Process. Had the Woodwind or Nicholas Courts felt that Lewis precluded the use of the improper motive standard of constitutionally tortious conduct, they surely would have expressed that point. They did not do so.

Id. (Cowen, J., dissenting).

121. See Woodwind Estates v. Gretkowski, 205 F.3d 118, 120 (3d Cir. 2000) (describing facts of case). For a further discussion of the facts in Woodwind Estates, see supra note 38 and accompanying text.
and improper government action.122 Similarly, in *Herr*, the Third Circuit applied the improper motive test when it determined that although there was sufficient evidence to conclude that the Township’s conduct was motivated by a desire to stop the development project, there was no evidence to conclude that this local action unreasonably delayed approval of the project from the state agency.123 Last, the Third Circuit’s justification for adopting the shocks the conscience standard to avoid becoming a local zoning board of appeals should “take[ ] a permanent back seat to the federal Judiciary’s obligation to protect the core constitutional freedoms . . . from deliberate and intentional governmental deprivation.”124

**E. Argument for Application of Law of the Case Doctrine**

There is a strong argument that the second panel of the Third Circuit erred when it denied application of the law of the case doctrine.125 Judge Cowen, writing the dissenting opinion in *United Artists II*, argued that the first panel of the Third Circuit expressly approved the use of the improper motive test.126 He pointed out that the first panel only found error with the district court’s failure to apply the qualified immunity analysis to the supervisors individually.127 Therefore, it only tasked the district court with addressing each individual claim, not altering or reconsidering its analy-

122. See *Woodwind Estates*, 205 F.3d at 124–26 (describing Third Circuit’s holding based on improper motive standard). The court explained in its holding that: Woodwind presented the following evidence at trial: (1) the defendants had no legitimate basis under the ordinance for demanding information about the socioeconomic background and income-levels of prospective tenants as a condition of subdivision approval; (2) the defendants denied approval for the plan by adopting significant portions of a letter drafted by the private attorney for the citizens group which vigorously opposed the development for improper reasons; and (3) the defendants intentionally blocked or delayed the issuance of the permit for subdivision approval because they were aware that by doing so the developer would be unable to meet the building deadline for financing the project. All of this in combination could provide a jury with a basis from which it could reasonably find that the decision of the defendants to deny approval was made in bad faith or was based upon an improper motive. *Id.* at 125.


124. See *United Artists II*, 316 F.3d at 407 (Cowen, J., dissenting) (noting federal courts’ obligation to protect constitutional rights).

125. See *id.* at 402 (Cowen, J., dissenting) (discussing potential Third Circuit error in denying law of the case doctrine).

126. See *id.* at 403 (Cowen, J., dissenting) (discussing express holding by first panel). “The previous panel’s statement that ‘United Artists at this stage sufficiently alleged a violation of a clearly established constitutional right’ constitutes a holding.” *Id.* (Cowen, J., dissenting).

127. For a further discussion of the first panel’s holding, see *supra* note 102 and accompanying text.
As a result, it seemed clear that the first panel made a definitive ruling on the correct law to apply. Furthermore, there were no exceptional circumstances to warrant the second panel's reconsideration of the first panel's decision.

Accordingly, if the Third Circuit reverts back to the improper motive standard to evaluate substantive due process claims in land use cases, landowners and developers will be able to meet the burden of proof in uncovering and disclosing abuses of power by local government officials. The Third Circuit should have followed its long history of applying the improper motive test because the Supreme Court has not ruled on the proper test to apply when evaluating substantive due process claims in land use cases.

V. CONCLUSION

The Third Circuit, in United Artists, adopted the more stringent legal standard for analyzing substantive due process violations. Consequently, if the Third Circuit reverts back to the improper motive standard to evaluate substantive due process claims in land use cases, landowners and developers will be able to meet the burden of proof in uncovering and disclosing abuses of power by local government officials. The Third Circuit should have followed its long history of applying the improper motive test because the Supreme Court has not ruled on the proper test to apply when evaluating substantive due process claims in land use cases.
quently, landowners and developers who make substantive due process claims must be able to satisfy the shocks the conscience standard instead of the more lenient improper motive standard. In conclusion, if landowners and developers are victims of substantive due process violations by local government officials, even the most improper behavior may not be enough to satisfy the new requirement adopted by the Third Circuit.

After fifteen years of applying the improper motive test set forth in *Bello*, the Third Circuit, in *United Artists*, eroded what appeared to be a well-established standard. Instead of defaulting to its own precedent, the Third Circuit relied on the Supreme Court's decision in *Lewis*, a case that was radically different and did not squarely address the issue of substantive due process in a land use context. As a result, there is confusion not only within the Third Circuit, but also in the district court as to what law applies. Therefore, it will take further rulings by the court to clarify whether the improper motive test or the shocks the conscience test should be applied in analyzing substantive due process claims in land use cases.

Shari K. Gekoski

*Developers to Successfully Pursue Claims Against Municipalities, Real Est. Fin. J., Summer 2003*, at 1 (same).


135. For a further discussion of the requirements under the shocks the conscience standard, see *supra* notes 30–36 and accompanying text.

136. *See United Artists II*, 316 F.3d at 392 (describing second panel's decision to overrule district court's and first panel's application of improper motive test).

137. For a further discussion of the *Lewis* case and the Supreme Court's holding, see *supra* notes 33–34 and accompanying text.


139. *See United Artists II*, 316 F.3d at 407 (Cowen, J., dissenting) (noting necessity of further court review to set definite standard).