In The

United States Court of Appeals

for the

Third Circuit

Case No. 11-4175

MICHAEL MARCAVAGE,

Appellant

v.

BOROUGH OF LANSDOWNE, PENNSYLVANIA;
MICHAEL J. JOZWIAK, BOROUGH CODE OFFICER,
IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES

Appeal from an Order entered from the
United States District Court for the Eastern District of Pennsylvania

BRIEF AND APPENDIX FOR APPELLANT
VOLUME I OF II (Pages A1-A29)

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Jurisdictional Statement

(A) The United States District Court for the Eastern District of Pennsylvania possessed subject matter jurisdiction of this case pursuant to 28 U.S.C. § 1331, which provides that the district courts shall have original jurisdiction of all civil actions arising under the Constitution of the United States. This case involves claims of violations of Plaintiff's rights under the Fourth and Fourteenth Amendments to the United States Constitution.

(B) On October 19, 2011, the United States District Court for the Eastern District of Pennsylvania granted Defendants' motion for summary judgment on all claims. The court entered judgment in favor of Defendants on October 24, 2011. This Court thus has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

(C) The United States District Court for the Eastern District of Pennsylvania entered judgment in favor of Defendants on October 24, 2011. On November 16, 2011, Plaintiff Marcavage timely filed his notice of appeal of the judgment.

(D) This appeal is from a final order or judgment that disposes of all parties' claims.

Statement of Issues Presented for Review

I. Does Ordinance 1251 (and its predecessor), on its face, violate the Fourth Amendment by requiring citizens to waive their Fourth Amendment rights and consent to a warrantless search of their private residences as a condition of enjoying their right to rent real property?
(Issue raised in Amended Complaint, A255, A259; Ruled upon in Opinion, A16).

II. Does Ordinance 1251 (and its predecessor), on its face, violate the Fourteenth Amendment by mandating official interference with a landlord's property and liberty interests solely because of his refusal to waive his own Fourth Amendment rights and to compel his tenants to waive their Fourth Amendment rights?
(Issue raised in Amended Complaint, A255; Ruled upon in Opinion, A16).

III. Did Lansdowne officials violate Marcavage's Fourth Amendment rights by effecting a seizure of his personal residence because of his refusal to consent to a warrantless search of said residence?
(Issue raised in Amended Complaint, A 256, 259, 261; Ruled upon in Opinion, A23).

IV. Did Lansdowne officials violate Marcavage's Fourteenth Amendment rights to procedural and substantive due process by evicting him from his personal residence and interfering with his ability to rent his real property based solely on his refusal to waive his civil rights guaranteed by the Fourth Amendment?
(Issue raised in Amended Complaint, A256, 259, 261; Ruled upon in Opinion, A24).

Statement of the Case

This case is a civil rights action under 42 U.S.C. § 1983, which centers on the facial constitutionality and application of Lansdowne Ordinance 1188 and its successor, Lansdowne Ordinance 2151 (hereinafter "the Ordinance")[1]. The Ordinance requires any person owning rental properties in Lansdowne to obtain an annual rental license (§ 265-4, A59). In order to obtain a license, a property owner is required to arrange for a rental license inspection by Lansdowne's Code Enforcement Division (under the Ordinance applied to Marcavage) or a private agency (under the current version of the Ordinance)(Id.). The inspection must include the interior of owner-occupied (non-rental) portions of the real estate.(§ 265-7(E), A62).

On October 5, 2009, after this Ordinance was applied to Marcavage to evict him from his home for failure to obtain the required inspection, he filed the instant lawsuit in The United States District Court for the Eastern District of Pennsylvania to vindicate his Fourth Amendment right to be free from unreasonable searches

[1] The court below noted that "no material differences exist between the two Ordinances that would alter the constitutional analysis."(Opinion, FN3, A7). For purposes of this case, the only important difference between the two Ordinances is that the current version, Ordinance 1251, allows landlords to obtain inspections by private contractors rather than government officials. However, because a hypothetical private contractor would still be performing the inspection at the behest of government, Marcavage agrees that the difference does not affect the constitutional analysis. See Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602, 615 (1989)(The Fourth Amendment protects against intrusions "if the private party acted as an instrument or agent of the Government.").

and seizures and his Fourteenth Amendment right to be free from deprivations of his liberty or property without adequate procedural safeguards(A31). In a hearing on Marcavage's Motion for a Temporary Restraining Order on October 5, 2009, the Defendants agreed to refrain from taking any further action against Marcavage while the case was pending, thus enabling Marcavage to return to his home on that date (Opinion, A6).

On October 19, 2011, the court granted summary judgment in favor of the Defendants, Borough of Lansdowne and Lansdowne Code Enforcement Officer Michael J. Jozwiak (hereinafter "Jozwiak") and denied Marcavage's motion for partial summary judgment as to the facial unconstitutionality of the Ordinance (A2). Final judgment in favor of Defendants was entered on October 24, 2011 (A27).

Statement of Facts

Marcavage owns two parcels of real estate in Lansdowne that include rental properties: a two-unit apartment house at 62 East Stewart Avenue and another two-unit apartment house at 34 East Stratford Avenue (Verified Declaration of Michael Marcavage, ¶ 4-11, A43-44). Marcavage's personal residence is one of the two units in the Stewart Avenue property (Id.). The other three units are leased to tenants (Id.). Marcavage's home is on the first floor of the Stewart Avenue apartment house, and the rental unit is on the second floor (Opinion, A4). Each

unit has a separate entrance, and there are no interior common areas (Verified Declaration, ¶ 7, A44).

On May 7, 2003, Lansdowne adopted Ordinance 1188, which provided, in pertinent part:

> It shall be unlawful for the owner of any premises or any agent acting for such an owner to operate, rent or lease any premises or any part thereof, whether granted or rented for profit or nonprofit, or to represent to the general public that a premises or any part thereof is for rent, lease or occupancy without first acquiring [a rental license] issued by the Code Department in the name of the owner, local agent or operator and for the specific rental unit.

(§ 265-4 (2003), A59). In order to obtain the rental license, an owner was required to arrange for an inspection by Lansdowne's Code Enforcement Division (Id.). This inspection must include not only those portions of real estate operated as rental units, but also any owner-occupied portion of a structure containing rental property (Id., §§ 265-4(D), 265-7(E), A60, A62).

Since 2003, Marcavage has received annual notices from Lansdowne that he must obtain a rental license and arrange for the required inspection (Opinion, A5). However, Marcavage objected to this requirement based on his belief that the Borough was in direct violation of the Fourth Amendment by purporting to require him to waive his Fourth Amendment right to be free from warrantless, unreasonable searches, and to compel his tenants to do so also, as a condition of

enjoying his property right to contract for and receive rents (Verified Declaration, ¶ 19, 20, A46).

Despite his objections to the requirement for warrantless inspections, Marcavage did comply with the Ordinance in all other regards (Verified Declaration, pp 5-6, A47-48). Marcavage also expressed to Code Enforcement officials his desire to have one of his rental units inspected at a time when it was vacant, so as to avoid interfering with his tenant's Fourth Amendment rights (Marcavage Deposition, pp30-31, A157). In fact, Marcavage even paid for the inspection service at this time, but due to reasons unknown to Marcavage, the inspection was not performed (Id. at 29-32, A157).

Each year since the enactment of the Ordinance, including 2009, upon receiving notification that he must arrange for the required inspections pursuant to the Ordinance, Marcavage has responded by phone, writing or e-mail to explain the constitutional basis for his objection to this requirement (Id., pp 51, A162). Upon receiving the notification in 2009, Marcavage spoke with Jozwiak to again explain his position, and sent, via e-mail, case law authority supporting his position in an attempt to appeal the warrantless inspection requirement (Id., pp 51-52, A162; Marcavage E-mail, A280). Jozwiak promised to respond to Marcavage's concerns, but made no further contact with Marcavage prior to September 30, 2009, in response thereto (Id., p. 52, A162).

On September 30, 2009, Jozwiak posted notices on the common exterior door of Marcavage's Stratford Avenue property, and on the door of Marcavage's home (Opinion, A5). Both notices read:

NOTICE

This Structure has been Declared an
Unlawful Rental Property
For failure to obtain the required rental license.
It is unlawful for Landlord to collect any Rent, Use, or
Occupy This Building After 9/30/09 or until a rental license has been
Obtained from the Borough of Lansdowne.
Any Unauthorized Person Removing This Sign
WILL BE PROSECUTED.

(Id.). The Notices contained no information as to any means of appeal (Id.).

Upon finding this Notice on the door of his home, Marcavage concluded that it would be unlawful for him to continue to occupy the premises (Verified Declaration, ¶ 31-35, A48). Marcavage contacted Jozwiak immediately to inquire as to whether the Notice did, in fact, forbid him to occupy his own home (Marcavage Deposition, pp 71-72, A167). Jozwiak confirmed that Marcavage must comply with the requirements stated in the posted Notice (Id.). Marcavage therefore spent the nights of October 1 and October 2, 2009 in a hotel, and the nights of October 3 and October 4, 2009 in the homes of acquaintances (Opinion, A6).

Summary of the Argument

The Ordinance, on its face, violates the Fourth Amendment's guarantee that citizens shall be free from unreasonable searches and seizures, for it requires landlords to submit to warrantless searches of their private residences absent any showing of probable cause. Pursuant to the Ordinance, landlords who refuse to waive their Fourth Amendment rights are subject to criminal penalties (§ 265-14, A83-84). They also are subjected to interference with fundamental property rights by Borough Code Enforcement officers who post signs that purport to evict both landlords and tenants from the quiet possession of their real property (§ 265-10, A83). This regulatory scheme is in direct conflict with the United States Supreme Court's holding in Camara v. Mun. Court of City & County of San Francisco, 387 U.S. 523, 534, 539-40 (1967).

By the same token, the Ordinance, on its face, violates the Fourteenth Amendment by imposing an unconstitutional condition (the waiver of Fourth Amendment rights) on the enjoyment of property rights protected by the Fourteenth Amendment. The Ordinance criminalizes a landlord's enjoyment of his fundamental liberty and property rights to quietly possess his own home and to enter contracts with tenants and receive rents for the use of his real property unless he agrees to both forfeit his own Fourth Amendment right to be free from

unreasonable searches and seizures and to compel his tenants to do the same (§ 265-4, A59).

Finally, Lansdowne and Jozwiak violated Marcavage's Fourth Amendment rights by effectively seizing his personal residence through an eviction based solely on his refusal to waive his Fourth Amendment rights and to compel his tenants to do the same. This seizure also violated Marcavage's Fourteenth Amendment due process rights, as it deprived him of his use of real property absent any advance notice or hearing.

Argument

I. Standard of Review

Because this case comes to the Court on a grant of summary judgment in favor of the Defendants, this Court must review all Marcavage's claims *de novo*. See Barefoot Architect, Inc. v. Bunge, 632 F.3d 822, 826 (3rd Cir. 2011)(citing Giles v. Kearney, 571 F.3d 318, 322 (3rd Cir. 2009)).

II. The Ordinance, on its face, violates the Fourth Amendment by requiring citizens to waive their Fourth Amendment rights and consent to a warrantless search of their private residences as a condition of enjoying their fundamental property rights.

The basic purpose of the Fourth Amendment to the United States Constitution is to protect citizens from arbitrary invasions of privacy by the government. Camara, 387 U.S. at 528. This right is considered to be "basic to a

free society." Id. (quoting Wolf v. People of State of Colorado), 338 U.S. 25, 27 (1947)).

In the landmark case of Camara v. Municipal Court of City and County of San Francisco, the United States Supreme Court considered the implications of the Fourth Amendment for local regulatory schemes designed to protect the public interest in health and safety by mandating periodic inspections of residential rental properties. 387 U.S. at 523. The case required the Court to revisit an earlier decision, Frank v. State of Md., 359 U.S. 360 (1959), where it had specifically upheld a Baltimore ordinance permitting warrantless inspections when a health inspector had cause to suspect that a public nuisance existed inside the structure. After a careful review of the competing interests at stake, the Court overruled Frank, concluding as follows:

> In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in Frank v. State of Maryland and in other cases for upholding these searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections.

Camara, 387 U.S. at 534.

In light of the Supreme Court's clear denunciation of warrantless administrative searches of this kind in Camara, Lansdowne faces a difficult task in defending its Ordinance's constitutionality. Marcavage submits that the court

below committed a glaring error in upholding the Ordinance, as this holding is in obvious conflict with Camara.

The fact that the Ordinance here mandates that the inspections be scheduled by the landowner rather than the municipal officer is of no constitutional moment. As the Court explained in Camara, the existence of limitations or "reasonableness" requirements on the enforcement officers' authority to search private residences does not cure the unconstitutionality of a requirement that citizens submit to warrantless administrative searches. Id. at 531-32. Arguments to the contrary "unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment." Id. The judicial warrant procedure that has evolved in response to the dictates of the Fourth Amendment ensure that a citizen understands the basis for the search, the credentials of the official conducting it, and—perhaps most importantly—the proper scope and limitations of the search to be conducted. Id.

Moreover, the judicial warrant procedure ensures that the decision to intrude upon the sanctity of one's home is justified by some reasonable government interest that has been ratified by a neutral magistrate and is subject to accountability. Id. at 539. While there may, in fact, be valid governmental justifications for a search such as the one contemplated by the Ordinance, such as the passage of time, the nature of the structure, or the condition of a particular

residential area, the Fourth Amendment guarantees citizens who do not wish to invite officials into their homes that a neutral magistrate will ensure that any justified search be reasonable in scope and recurrence, and that it be performed for a proper, specifically defined purpose. To deprive citizens of that assurance, as the Ordinance purports to do, is to nullify the Fourth Amendment.

While the District Court cited the Seventh Circuit's decision in Platteville Area Apartment Ass'n v. City of Platteville as upholding "comparable provisions," the ordinance considered in that case cannot properly be considered "comparable" to the Ordinance at issue here with regard to constitutionally significant features. 179 F.3d 574 (7th Cir. 1999). In fact, the ordinance considered in Platteville *required* building inspectors to apply to a state court for a warrant pursuant to a statutorily prescribed procedure when a landlord or tenant refused to consent to the inspection. Id. at 577 (citing WIS. STAT. § 66.122 (1999)). It is also important to note that while Lansdowne's Ordinance specifically requires that owner-occupied portions of real estate be included in the required inspections, the Platteville ordinance *specifically excluded* owner-occupied housing. Id. at 578. Clearly, this Seventh Circuit decision does not provide any support for the constitutionality of Lansdowne's Ordinance, and in fact, these distinguishing features suggest that the Ordinance here is out of sync with those of other municipalities who are apparently

able to meet the same public interests in a manner that is far more respectful of citizens' civil rights.

Finally, the District Court below erred in holding that Wyman v. James, 400 U.S. 309 (1970), rather than Camara, is dispositive of Marcavage's claims. In Wyman, the Supreme Court considered a challenge to a New York statute requiring that a recipient of public money as part of the state's Aid to Families with Dependent Children program submit to in-home visitation by a social worker. The Court upheld the statute, finding that this type of visitation was not the type of "search" that triggers Fourth Amendment protections. 400 U.S. at 317 ("we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term.").

Among the factors that the Court considered in concluding that Fourth Amendment interests were not implicated were the fact that no criminal penalties attached to a beneficiary's refusal to allow the visit, and that the visit was made by a social worker assessing the use of and need for funds rather than by a law enforcement agent assessing compliance with laws. Id. at 317-25. The Court emphasized that the only consequence of a beneficiary's refusal to allow the visit was the cessation of benefits. Id. at 325.

Clearly, the Lansdowne Ordinance differs considerably and significantly from the statute upheld in Wyman. Marcavage and other landlords who refuse to

obtain the required inspection and are thus found to be in violation of the Ordinance are subject to criminal penalties (§ 265-14, A64-65). The Ordinance also purports to allow Code Enforcement officers to pursue "other remedies" to prevent landlords' continued violation, presumably including means such as those undertaken in this case, which interfere with core property rights such as the quiet enjoyment of one's own home and the ability to receive rents for the use of one's real property (§ 265-10(A), (C), A64). Also, the required inspections are conducted by Code Enforcement officers who seek to uncover regulatory violations rather than by social service workers who seek to assess the need for and stewardship of public financial aid (§ 265-4, A59). These momentous distinctions are inescapable.

In short, the Fourth Amendment's protection of citizens against unreasonable searches and seizures has been interpreted by the nation's highest Court to forbid warrantless administrative searches, even where the searches might ultimately be justified by important public interests. Camara, 387 U.S. at 534-35. The Fourth Amendment requires that government agents who wish to intrude upon the privacy of a citizen's home without his consent must comply with the reasonable, established procedure for doing so by obtaining a warrant from a neutral, detached magistrate. Id.

Because Lansdowne may not, consistently with the United States Constitution, compel any citizen to submit to a warrantless search without probable cause and without the existence of some exigent circumstance, its Ordinance effectively conditions landlords' enjoyment of their property rights on the forfeiture of Fourth Amendment rights. This is unconstitutional. Were it otherwise, "constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion." Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 593 (1926) (holding that state violated Due Process clause by imposing unconstitutional condition upon corporation's use of public highways).

III. The Ordinance, on its face, violates the Fourteenth Amendment by interfering with a landlord's property and liberty interests solely because of his refusal to waive his own Fourth Amendment rights and to compel his tenants to do the same

Just as the Ordinance violates the Fourth Amendment by requiring landlords to waive their rights thereunder as a prerequisite to enjoying their property rights, so it violates the Fourteenth Amendment by conditioning the enjoyment of a citizen's property rights on (a) the waiver of his own Fourth Amendment rights (with regard to his own residence) and (b) the requirement that he compel third party tenants to do the same.

It has long been recognized that among the valuable rights of owning property are the rights to unrestricted use and enjoyment of it and the right to receive rents. See, e.g., United States v. James Daniel Good Real Prop., 510 U.S. 43, 54 (1993). Laws that purport to interfere with one's enjoyment of these property interests trigger the requirements of due process. See, e.g., id.; Connecticut v. Doehr, 501 U.S. 1, 12 (1991).

To the extent that the Ordinance makes it unlawful for landowners to continue to receive rents unless they waive their Fourth Amendment rights by submitting to a warrantless inspection, it unconstitutionally deprives them of their property rights. Again, courts have recognized that a state cannot condition a privilege—much less a fundamental right—on the waiver of constitutional rights. See, e.g., Frost, 271 U.S. at 593; Smyth v. Lubbers, 398 F. Supp. 777, 788 (E.D. Mich. 1975)(citing Robinson v. Board of Regents of Eastern Kentucky Univ., 475 F.2d 707 (6th Cir. 1973)).

The United States Supreme Court has explained:

> (T)he rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution.

United States v. Chicago, M. St. P. & P. R. Co., 282 U.S. 311, 328-29 (1931).

Thus, by making it unlawful for a landlord to receive rents—and authorizing interference with his ability to receive them—if he steadfastly refuses to waive his

Fourth Amendment rights and those of his tenants, the Ordinance, on its face, represents a deprivation of Marcavage's liberty and property without due process of law.

A fortiori, Lansdowne cannot properly condition the enjoyment of basic property rights on the willingness of third party tenants to waive *their* Fourth Amendment rights, for this decision is not even the landlord's to make in the first instance. See Chapman v. United States, 365 U.S. 610, 616-17 (1961)(holding search and seizure unlawful where conducted under landlord's authority but without tenant's consent). The Supreme Court has explained, "[T]o uphold such an entry, search and seizure 'without a warrant would reduce the (Fourth) Amendment to a nullity and leave (tenant') homes secure only in the discretion of (landlords).'" Id., (quoting Johnson v. United States, 333 U.S. 10 (1948)).

While Lansdowne and Jozwiak have argued that the Ordinance allows for appeals of "decisions" made by Code Enforcement officer, it appears based on the facts of this case that where a landlord simply fails or refuses to arrange for a warrantless search of his home and/or those of his tenants, such appeals are available only after the liberty and property deprivations have occurred. This is insufficient.

The Due Process Clause requires that an individual be offered a hearing before he is deprived of any significant property interest. See Javinsky-Wenzek v.

City of St. Louis Park, 2011 WL 5244690, at *1, *7 (D. Minn. 2011)(quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541-42, 105 S.Ct. 1487 (1985)). Courts have recognized that in these situations, because adverse actions such as the imposition of fines and termination of rental licenses by local officials are likely to injure the landlord's reputational interests, hearings must be made available before such actions are taken. Javinsky-Wenzek, 2011 WL 5244690, at *10 (citing Paul v. Davis, 424 U.S. 693, 709 (1976)).

Moreover, it is unlikely that any available "appeal" would encompass consideration of the position Marcavage has argued for several years with Lansdowne to no avail: that municipal agents must obtain a valid warrant in order to conduct a search of his home without his consent. For this type of "appeal" would amount to a challenge to the basic regulatory scheme. Courts have considered the likely scope and impact of any available appeal in determining whether regulatory procedures have complied with the Due Process Clause. See Javinsky-Wenzek, 2011 WL 5244690, at *9 (noting that the scope of appeals offered to landlords would not have included re-visitation of the critical issue).

The Lansdowne ordinance is facially unconstitutional because it makes enjoyment of fundamental liberty and property rights unlawful unless landlords waive their own Fourth Amendment rights and compel their tenants to do likewise.

The Ordinance provides no meaningful "process" whereby this unconstitutional condition may be challenged.

IV. Lansdowne officials violated Marcavage's Fourth Amendment rights by effecting a warrantless, unreasonable seizure of his personal residence solely because of his refusal to consent to a warrantless search of said residence.

On September 30, 2009, Lansdowne Code Enforcement officials posted a "Notice" on the door of Marcavage's home and on the common exterior door of his Stratford Avenue Property, stating that the structures had been declared "Unlawful Rental Property," and that "It is Unlawful for Landlord to collect any Rent, Use, or Occupy This Building After 9/30/09 or until a rental license has been obtained from the Borough of Lansdowne." (Verified Declaration, ¶ 12-13, A44). Marcavage reasonably understood from this communication that he and his tenants had been evicted from their homes because of their refusal to submit to a warrantless search (Verified Declaration of Michael Marcavage, ¶ 22-24, A46).

For purposes of Fourth Amendment analysis, a "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." Soldal v. Cook County, Illinois, 506 U.S. 56, 63 (1992)(quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)). The posting of the notice in this case, clearly stating that Marcavage's use of his own home or continued rental to tenants, constitutes an unreasonable "seizure" of his property, as it interfered with his possessory interests in occupying his own home and

purported to forbid him from receiving rents from his other properties.[2] "[A]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home." Id. (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

The Supreme Court's jurisprudence is clear that seizures of property, such as this one, are subject to Fourth Amendment scrutiny even where no "search" has taken place. Id. at 68. What matters, for purposes of the Fourth Amendment analysis, is "the intrusion on the people's security from governmental interference." Id. at 69. In Soldal, the interference with the citizens' possessory interests was undeniable; law enforcement officers had physically removed the plaintiffs' mobile home from its foundation. But the interference with Marcavage's possessory interests in this case was just as meaningful, for the Notice informed Marcavage in no uncertain terms that he would be violating the law if he continued to occupy his home (Verified Declaration, ¶ 12-13, A44). This definite interference, though less dramatic, is no less cognizable under the Fourth Amendment. See U.S. v. James Daniel Good Real Property, 510 U.S. 43, 47 (1993)(finding that federal government had "seized" property within the meaning of the Fifth Amendment when, as part of drug forfeiture proceeding, it directed

[2] In fact, Marcavage did continue to receive rents after the Notices were posted, because he receives rents via automatic bank deductions, and he did not instruct his tenants to interrupt payments prior to filing this lawsuit (Marcavage Deposition, p. 77, A168). In light of the fact that the Borough agreed not to take further action against Marcavage pending the outcome of this suit, Marcavage has continued to receive rent as scheduled.

tenants to pay future rents to United States Marshal); Presley v. City of Charlottesville, 464 F.3d 480, 487 (4th Cir. 2006)(plaintiff's property was "seized" for purposes of Fourth Amendment when government officials published map erroneously showing part of plaintiffs' real estate as comprising a public trail). In the words of the Fourth Circuit, a government-occasioned interference with property that is "disruptive, stressful, and invasive" constitutes a Fourth Amendment seizure. Presley, 464 F.3d at 487.

Without a warrant or probable cause, the Fourth Amendment simply does not permit government officials to threaten a law-abiding citizen with potential arrest and criminal prosecution simply for occupying his own home. The actions of Lansdowne and Jozwiak were therefore in violation of Marcavage's Fourth Amendment rights.

V. Lansdowne officials violated Marcavage's Fourteenth Amendment rights to procedural and substantive due process by evicting him from his personal residence and interfering with his ability to rent his real property based solely on his refusal to waive his civil rights guaranteed by the Fourth Amendment, and to compel his tenants to do the same.

By summarily evicting Marcavage from his home and purporting to interfere with his right to continue to receive rents from his tenants, Lansdowne officials violated Marcavage's rights to procedural and substantive due process under the Fourteenth Amendment. In fact, Lansdowne officials' actions in this regard strike

at the very core of the Fourteenth Amendment's guarantee that states shall not deprive persons of life, liberty or property without due process of law. "[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

Despite the fact that Lansdowne officials were well aware of Marcavage's constitutional basis for refusing to consent to a warrantless inspection of his home and to compel his tenants to do likewise, officials gave him no advance notice of their intention to dispossess him of his home and interfere with his rental agreements (Verified Declaration of Michael Marcavage, ¶ 24-34, A47-A48). While the Ordinance does contain a provision permitting an appeal from "decisions" of Code Enforcement officers (§265-12, A83), the summary eviction notice posted on Marcavage's properties do not appear to be the type of "decision" that might be appealed. In fact, the notices gave no indication that any appeal or hearing whatever might be available (Opinion, A5).

It appears, instead, that the Notices were actually the final *response* of Jozwiak and the Borough to the appeals undertaken repeatedly by Marcavage in the form of phone calls and e-mails in which Marcavage expressed the constitutional basis for his objection to the warrantless inspection requirement, as

well as the legal authority supporting his position (Marcavage Deposition, pp 51-53, A162). Jozwiak had promised to "get back to" Marcavage regarding the e-mail in which Marcavage argued his position, but he made no further contact with Marcavage prior to posting the Notices (Id., at 52, A162). When Marcavage phoned Jozwiak after reading the Notice to clarify its meaning and ask Jozwiak to reconsider, Jozwiak refused to withdraw the Notices and their requirements (Id., p. 79, A169).

Moreover, a post-deprivation appeal or hearing would have been insufficient to safeguard Marcavage's liberty and property interests. The root requirement of the Due Process Clause is that a person be given the opportunity for a hearing *before* he is deprived of any significant property interest. Loudermill, 470 U.S. at 542. Because no advance notice or hearing was offered to Marcavage prior to the interference with his property, the actions of Lansdowne officials constituted a violation of Marcavage's core Fourteenth Amendment rights.

Conclusion

The Ordinance on its face, and the actions of Lansdowne and Jozwiak in applying to Marcavage, violate Marcavage's civil rights under the Fourth and Fourteenth Amendments. The Ordinance's scheme requires that Marcavage either sacrifice his Fourth Amendment right to be free from unreasonable searches (and compel his tenants to do the same) or his most basic property rights. This is impermissible under the Bill of Rights of the United States Constitution.

Marcavage prays that this Court reverse the judgment entered below, that it declare the Ordinance to be in violation of the Fourth and Fourteenth Amendments, that it enjoin Defendants from enforcing the Ordinance or otherwise interfering with Marcavage's Fourth and Fourteenth Amendment rights, that it enter judgment in favor of Marcavage, and that it award such amounts in compensatory damages and attorneys' fees as it may deem appropriate.

Respectfully submitted,

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CERTIFICATION OF ADMISSION TO BAR

I, Mark E. Jakubik, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

/s/ Mark E. Jakubik
Mark E. Jakubik

Date: January 17, 2012

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 31.1

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 5,384 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2008 version of Microsoft Word in 14 point Times New Roman font.

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/s/ Mark E. Jakubik
Mark E. Jakubik

Dated: January 17, 2012

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL MARCAVAGE, Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 09-CV-4569
BOROUGH OF LANSDOWNE, PENNSYLVANIA, MICHAEL J. JOZWIAK, Defendants.	:	

ORDER

AND NOW, this __19th ___ day of October 2011, it is **ORDERED** that:

- Defendants' Motion for Summary Judgment (ECF No. 39) is **GRANTED**, and
- Plaintiff's Motion for Partial Summary Judgment (ECF No. 40) is **DENIED**.

s/Anita B. Brody
_____
ANITA B. BRODY, J.

Copies **VIA ECF** on _____ to:

Copies **MAILED** on _____ to:

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL MARCAVAGE, Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
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BOROUGH OF LANSDOWNE, PENNSYLVANIA, MICHAEL J. JOZWIAK, Defendants.	:	

October 19__, 2011 **Anita B. Brody, J.**

MEMORANDUM

Plaintiff Michael Marcavage owns several rental properties in the Borough of Lansdowne ("Lansdowne" or the "Borough"). Defendant Lansdowne Code Enforcement Officer Michael J. Jozwiak posted notices on Marcavage's properties informing Marcavage that he was not in compliance with a Lansdowne ordinance that required Marcavage to obtain rental licenses for his properties. Marcavage has brought suit against Defendants Borough of Lansdowne and Jozwiak claiming that Lansdowne's original rental ordinance and amended rental ordinance are unconstitutional, and seeking relief under 42 U.S.C. § 1983. The parties have filed cross-motions for summary judgment. Defendants move for summary judgment against Marcavage's Amended Complaint on the basis that the rental ordinances are not unconstitutional, and that Jozwiak is entitled to qualified immunity. Marcavage moves for partial summary judgment in favor of his Amended Complaint on the basis that the rental ordinance is facially

unconstitutional. For the reasons that follow, I will grant Defendants' motion for summary judgment, and will deny Marcavage's cross-motion for partial summary judgment.

I. BACKGROUND[1]

The facts of this case are essentially undisputed. On May 7, 2003, Lansdowne adopted Ordinance 1188, which required anyone owning rental properties in Lansdowne to obtain an annual rental license. Specifically, Section 265-4 provided that:

> It shall be unlawful for the owner of any premises or any agent acting for such an owner to operate, rent or lease any premises or any part thereof, whether granted or rented for profit or nonprofit, or to represent to the general public that a premises or any part thereof is for rent, lease or occupancy without first acquiring [a rental license] issued by the Code Department in the name of the owner, local agent or operator and for the specific rental unit.

Lansdowne Code § 265-4 (2003). In order to obtain a license, a property owner had to, *inter alia*, arrange for a rental license inspection by Lansdowne's Code Enforcement Division. Id. The scope of the inspection included the exterior and interior areas of the rental unit. Id. § 265-7(D). Furthermore, in making such an inspection, a Lansdowne Code Enforcement Officer was to inspect any owner-occupied portion of a rental property (i.e., landlord-occupied unit within a larger apartment building of tenant-occupied units), including its interior. Id. §§ 265-4(D), 265-7(E).

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[1] For purposes of summary judgment, "the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in [that party's] favor." Hunt v. Cromartie, 526 U.S. 541, 552 (1999) (internal quotations omitted). "[W]here, as was the case here, the District Court considers cross-motions for summary judgment 'the court construes facts and draws inferences in favor of the party against whom the motion under consideration is made.'" J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., --- F.3d ---, 2011 WL 2305973, at *6 (3d Cir. 2011) (en banc) (quoting Pichler v. UNITE, 542 F.3d 380, 385 (3d Cir. 2008)) (internal quotation marks omitted). Because of my conclusion that Defendants' motion for summary judgment should be granted, all facts will be construed in favor of Marcavage.

An applicant for a rental license was responsible for "contact[ing] the Code Department [to] schedule all inspections" and making such inspection requests "no less than 48 hours prior to the time of inspection." Id. § 265-7(A)-(B). If, during an inspection, a Code Enforcement Officer found a code violation, Lansdowne would issue a notice of violation. Id. § 265-5. Any rental unit found to have code violations was to "be brought into compliance . . . within a time frame to be determined at the discretion of the Code Officer." Id. Additionally, "[i]f any building . . . [was] proposed to be . . . maintained or used in violation [of the Ordinance], the Code Enforcement Officer [could], in addition to other remedies, institute in the name of the Borough any appropriate action or proceedings to prevent, restrain, correct or abate such building . . . or to prevent . . . any act, conduct, business or use constituting such violation." Id. § 265-10(C). Upon receiving a notice of violation or decision of the Code Enforcement Officer, a property owner could appeal the decision or petition Lansdowne for a variance from the "strict letter" of the Lansdowne Code. Id. § 265-12. Anyone who violated or failed to comply with Ordinance 1188 would be subject to a fine or imprisonment, or both. Id. § 265-14.

Marcavage owns a two-unit apartment house at 62 East Stewart Avenue ("Stewart Avenue Property") in Lansdowne. Marcavage maintains his principal residence in one unit of the Stewart Avenue Property, and the other unit is leased to a tenant. The Stewart Avenue Property is a two-story building with the leased unit on the second floor above Marcavage's residence. Each unit has a separate entrance, and there are no interior common areas. Marcavage owns another two-unit apartment house at 34 East Stratford Avenue ("Stratford Avenue Property") in Lansdowne. Each unit at the Stratford Avenue Property is leased to a tenant. The units of the Stratford Avenue Property have separate entrances, but share a common exterior door.

Marcavage has owned these properties since the enactment of Ordinance 1188. Marcavage received yearly notices from the Borough that his properties needed a rental license inspection. Defs.' Mot. Summ. J. Ex. D, Marcavage Dep. 50:23-52:24. Over this time period, however, Marcavage never requested an inspection. Instead, he contacted the Borough on multiple occasions, by phone and by email, to express his objections with the rental inspection process—particularly the lack of a warrant requirement for the inspection. Id. at 50:3-52:18, 60:11-61:4. In one particular email, on August 15, 2008, Marcavage "urge[d]" Jozwiak "to cease and desist from pursuing legal action against landlords at this point for non-compliance to [Ordinance 1188] that is clearly unconstitutional." Am. Compl. Ex. D.

On September 30, 2009, identical notices (the "Notices") were posted at both the Stewart and Stratford Avenue Properties. One was posted on the common exterior door for the Stratford Avenue Property, and one was posted on the door of Marcavage's residence at the Stewart Avenue Property. Each notice stated the following:

NOTICE

This Structure has been Declared an
Unlawful Rental Property
for failure to obtain the required rental license.
It is Unlawful for Landlord to collect any Rent, Use, or
Occupy This Building After 9/30/09 or until a rental license has been
obtained from the Borough of Lansdowne.
Any Unauthorized Person Removing This Sign
WILL BE PROSECUTED.

Pl.'s Counter-Statement of Undisputed Facts ¶ 16. The Notices included Jozwiak's name and title. Id. The Notices did not inform Marcavage of how he might appeal or contest the Borough's decision.

Marcavage alleges that as a result of the Notice on the Stewart Avenue Property, he was forced from his home and spent the nights of October 1, 2009 and October 2, 2009 in a hotel, and the nights of October 3, 2009 and October 4, 2009 in the homes of acquaintances. Pl.'s Mot. TRO & Prelim. Inj., Marcavage Decl. ¶¶ 22, 23.

On October 5, 2009, Marcavage filed the instant suit, along with a motion for a temporary restraining order seeking to enjoin the Defendants from enforcing the Notices or commencing any process against him for residing at his home. ECF Nos. 1, 3. In a hearing on October 5, 2009, the Defendants agreed to refrain from taking any further action against Marcavage until the resolution of this case. ECF No. 5. As a result, Marcavage returned to his house on October 5, 2009. Defs.' Mot. Summ. J. Ex. D, Marcavage Dep. 87:10-13.

On April 21, 2010, Lansdowne passed Ordinance 1251 that amended Ordinance 1188.[2] Ordinance 1251 added a subsection clarifying certain rights and remedies of owners and occupants of property subject to the rental inspection requirement. Id. § 265-10(E). Specifically, subsection 10(E) provided for the following:

> The owner, occupant, tenant or person in charge of any property or rental unit possesses the right to deny entry to any unit or property by a Code Enforcement Officer for purposes of compliance with this chapter. However, nothing in this chapter shall prohibit a Code Enforcement Officer from asking permission from a owner, occupant, tenant or person in charge of property for permission to inspect such property or rental unit for compliance with this chapter and all other applicable laws, regulations and codes, to seek a search

[2]In his briefs, Marcavage refers to the new ordinance as "Ordinance 2151," while Defendants refer to the ordinance as "Ordinance 1251." Both parties provide copies of the amended Chapter 265 of the Borough Code, with one stating the ordinance is "Ordinance 1251," and the other stating the ordinance is "Ordinance 2151." See Defs.' Mot. Summ. J. Ex. D; Pl.'s Mot. Partial Summ. J. Ex. A. The difference is trivial. I will refer to the amended ordinance as "Ordinance 1251."

> warrant based on probable cause or to enter such property or rental unit in the case of emergency circumstances requiring expeditious action.

Id. After Ordinance 1251 was passed, Marcavage filed an Amended Complaint, seeking the following relief: (1) declaratory relief, declaring Ordinance 1251 unconstitutional, both facially and as applied; (2) injunctive relief under 42 U.S.C. § 1983 in the form of a permanent injunction against the Defendants from enforcing Ordinance 1251; and (3) damages under § 1983 against the Defendants resulting from their allegedly dispossessing Marcavage from his residence.[3]

II. LEGAL STANDARD

Summary judgment will be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is a "genuine" issue of material fact if the evidence would permit a reasonable jury to find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The "mere existence of a scintilla of evidence" is insufficient. Id. at 252.

The moving party must make an initial showing that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The nonmoving party must then "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322; see also Fed. R. Civ. P. 56(c)(1). The nonmoving party must "do more than simply show that there is some metaphysical

[3]Although in his Amended Complaint Marcavage attacks the application of Ordinance 1251 as a violation of his Fourth and Fourteenth Amendment rights, the only application to him was of Ordinance 1188, not Ordinance 1251. Therefore, in assessing the merits of Marcavage's as-applied claims, I will look to Ordinance 1188. The distinction ends up being irrelevant, however, as no material differences exist between the two Ordinances that would alter the constitutional analysis.

doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In determining whether the nonmoving party has established each element of its case, the court must draw all reasonable inferences in the nonmoving party's favor. Id. at 587.

III. DISCUSSION

Marcavage seeks a declaratory judgment that Ordinance 1251 is unconstitutional facially, and that Ordinance 1188 was unconstitutional as-applied to Marcavage, under the following constitutional provisions: (1) Fourth Amendment right to be protected from unreasonable searches and seizures, (2) Fourteenth Amendment right to procedural due process, and (3) the Fourteenth Amendment right to equal protection. He also requests a permanent injunction to prohibit the Defendants from enforcing the sections of Ordinance 1251 that require an inspection of his properties prior to his obtaining a rental license. Lastly, he seeks damages, under § 1983, from Defendants for their actions that allegedly evicted Marcavage from his home in violation of the Fourth and Fourteenth Amendments. Defendants deny that Ordinance 1251 violates any of these constitutional rights, and also argue that Jozwiak is protected by qualified immunity from liability for Marcavage's § 1983 claim.

A. Constitutional Claims

Before addressing the merits of a particular constitutional attack, a court must first address the nature of the constitutional claim—whether facial or as-applied. "A facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case." United States v. Marcavage, 609 F.3d 264, 273 (3d Cir. 2010). A party making a facial challenge "must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987).

Therefore, to establish a facial attack, Marcavage must demonstrate that the "[Ordinance] is unconstitutional in all its applications." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008) (citation omitted). Considering this burden, facial attacks are the "most difficult to mount successfully." Salerno, 481 U.S. at 745. On the other hand, an as-applied challenge "does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." Marcavage, 609 F.3d at 273. Marcavage brings a facial attack to Ordinance 1251 and an as-applied attack to Ordinance 1188 for violations of the Fourth Amendment right to be protected from unreasonable searches and seizures, Fourteenth Amendment right to procedural due process, and Fourteenth Amendment right to equal protection. I will first address Marcavage's facial challenges to Ordinance 1251, then turn to his as-applied challenges to Ordinance 1188.

1. Facial Challenges

i. Unreasonable Search and Seizure

Marcavage argues that Ordinance 1251, the amended ordinance, violates the Fourth Amendment because it requires a search of a landowner's private property—both a landlord's own residence (if attached to a rental unit) and other leased units—without a warrant based on probable cause.

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, states that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IV. "The touchstone of Fourth Amendment

analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" Calif. v. Ciraolo, 476 U.S. 207, 211 (1986). A party can challenge the search by a third party only if that party has a reasonable expectation of privacy in the area searched. Minnesota v. Olson, 495 U.S. 91, 95 (1990).

It is undisputed that the Fourth Amendment protects a person's privacy in her home. Silverman v. United States, 365 U.S. 505, 683 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."). Courts have also held, however, that a landlord does not have a reasonable expectation of privacy with respect to individual apartments leased to third parties, simply on the basis that the landlord owns the apartments. See Rozman v. City of Columbia Heights, 268 F.3d 588 (8th Cir. 2001) (holding that landowner lacked standing to assert his tenants' rights in seeking to challenge the searches of tenants' apartments, without their permission, pursuant to city ordinance requiring annual rental inspection); Miller v. Hassinger, 173 Fed. Appx. 948, 952 (3d Cir. 2006) (non-precedential) (finding that landlord had no privacy interest in the apartment searched, where it had been leased to third parties, and landlord did not have access to the apartment, did not have personal items in the apartment, and did not allege any access to the apartment); Mangino v. Incorporated Village of Patchogue, 739 F. Supp. 2d 205, 234 (E.D.N.Y. 2010) ("A landlord generally does not have a reasonable expectation of privacy with respect to property that he has rented to a tenant and that is occupied by that tenant"); Reedy v. Borough of Collingswood, No. 04-cv-4079, 2005 WL 1490478, at *5 (D.N.J. June 22, 2005) ("[T]here is a diminished nature of the landlord's privacy interest in an apartment which he is making available for rent.").

This distinction is blurred here, where of the four units in question, three have been made available for rent and one is being used by the landlord as a primary place of residence. In his motion for partial summary judgment, Marcavage asserts that Ordinance 1251 violates the Fourth Amendment because it compels a landlord to authorize entry by the Borough, without a warrant, into tenant-occupied residences. In response, Defendants argue that Marcavage has no standing to "assert[] causes of action on behalf of his tenants by stating that he cannot be compelled to authorize entry into his tenant-occupied residences." Defs.' Resp. 5. While Marcavage does correctly note that he has a privacy interest in his own residence, he fails to brief the issue of the appropriate expectation of privacy for his rental units. Marcavage has failed to offer any particular facts or circumstances to establish that he has a reasonable expectation of privacy in his rented units. Thus no genuine issue of material fact exists as to whether Marcavage has standing to bring causes of action based on Fourth Amendment violations with respect to his rental units or on behalf of his tenants.[4]

Even though Marcavage has a privacy interest in his own residence, he still must show that the law violated that interest. Marcavage bases his argument completely on the Supreme Court's ruling in Camara v. Municipal Court of City & County of S.F., 387 U.S. 523 (1967). At issue in Camara was the constitutionality of two San Francisco ordinances. The first ordinance

[4]To the extent Marcavage, in his Amended Complaint, further attacks the constitutionality of the Ordinances on behalf of his tenants or with regard to his tenant-occupied residences, he fails to brief the issue of his standing to bring such claims or the merits of such claims. Therefore, those arguments are deemed to have been waived. See, e.g., Hackett v. Cmty. Behavioral Health, No. 03-6254, 2005 WL 1084621, at *6 (E.D. Pa. May 6, 2005) (failure to address claims waives opportunity to contest summary judgment on that ground).

permitted city inspectors to enter any building for purposes of inspection. Specifically, it provided that:

> Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.

Camara, 387 U.S. at 526. A separate San Francisco ordinance set out criminal penalties for property owners who refused to permit city inspectors to enter a building to perform an inspection.[5] Plaintiff Camara was a San Francisco property owner who was prosecuted for failure to allow an inspector to enter his property, and who challenged the constitutionality of the ordinances on Fourth Amendment grounds. The Supreme Court struck down Camara's prosecution, holding that the San Francisco ordinances authorized warrantless searches in violation of the Fourth Amendment. Marcavage argues that for the same reason, Ordinance 1251 is facially unconstitutional under the Fourth Amendment. This is simply not so.

The San Francisco ordinances at issue in Camara empowered government employees to enter premises in the name of an inspection, subject to no limitations. Under the ordinances, an inspector was given the "right to enter, at reasonable times, any building . . . to perform any duty imposed upon them by the Municipal Code." Camara, 387 U.S. at 526. There was no limitation

[5] That Ordinance provided that: "[a]ny person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code . . . shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars ($500.00), or by imprisonment, not exceeding six (6) months or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue." Camara, 387 U.S. at 526.

on the number of inspections that could be made, nor any justification or cause that needed to be offered. An inspector could simply demand entrance into any city unit. Indeed, the second ordinance at issue prevented unit owners from excluding inspectors from entering by criminalizing the act of resisting entrance by an inspector. Under these ordinances, the city had unfettered discretion to enter any unit, and unit owners were powerless to stop them. In holding these ordinances unconstitutional, the Supreme Court emphasized that this discretion was problematic:

> [O]nly by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. . . . The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.

Id. at 532-33.

The Supreme Court also carefully noted that the San Francisco ordinances permitted searches without a property owner's consent, and that refusal to consent was actually criminalized. Specifically, the Court noted that "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant" and that "most citizens allow inspections of their property without a warrant." Id. at 528-29, 539. Indeed, in Wyman v. James, 400 U.S. 309 (1971), decided just five years after Camara, the Court upheld an ordinance that required a home inspection in order to investigate safety conditions for children on welfare because "the visitation in itself [wa]s not forced or compelled" and the only consequence of refusing to consent to an inspection was the loss of welfare funding. Id. at 317. Wyman is controlling.

Ordinance 1251 has neither of the defining features in Camara—Ordinance 1251 does not afford the Borough unfettered discretion in entering a unit, and there are no criminal penalties attached to a property owner's refusal to consent to a search. Section 265-10(E) of the Ordinance provides that a property owner has "the right to deny entry to any unit or property by a Code Enforcement Officer." Landsdowne Code § 265-10(E). Furthermore, it states that a Code Enforcement Officer may ask permission from a property owner to inspect such property, "seek a search warrant based on probable cause or [] enter such property . . . in the case of emergency circumstances requiring expeditious action." Id. As such, a property owner like Marcavage can easily refuse to consent to a search.[6] Like the ordinance in Wyman, Ordinance 1251 does not force or compel an inspection, as the only consequence of failing to consent to a search is the denial of a rental license.[7] Fines and criminal prosecution are only possible under Ordinance 1251 if a property owner, after having failed to obtain a rental license, leases his property to a third party or represents to the public that his property is for rent, use, or occupancy.

Additionally, the inspections provided for in Ordinance 1251 are more limited in scope and number than those found in the San Francisco ordinances. Under the San Francisco ordinances, an inspector was given the "right to enter, at reasonable times, any building . . . to

[6]Indeed, Marcavage did just that, and his property was never ultimately searched.

[7]Marcavage very briefly appears to argue that conditioning a property owner's ability to rent his property on obtaining a rental license and having a rental inspection, is a violation of the Takings Clause. Even if the Takings Clause were implicated in this case, the Supreme Court has made clear that in order to raise a Takings Clause argument, a Plaintiff must first exhaust all state court remedies available. Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). Here, Marcavage appears neither to have filed a case in state court nor to have administratively challenged his alleged eviction notice.

perform any duty imposed upon them by the Municipal Code." Camara, 387 U.S. at 526. Ordinance 1251, on the other hand, provides for periodic inspections of rental properties, or owner-occupied portions of rental properties. Those inspections are scheduled by a rental license applicant, not a Code Enforcement Officer, and require at least forty-eight hours notice. Lansdowne Code § 265-7(A)-(B). Furthermore, the purpose and justification behind the inspections (condition to receiving a rental license) are more narrow and specific than those supporting the inspections under the San Francisco ordinances.

Marcavage has not offered any reason why, despite lacking these two defining features, Ordinance 1251 violates the Fourth Amendment.[8] He does not explain why other courts that have considered comparable provisions have upheld them. See, e.g., Platteville Area Apartment Ass'n v. City of Platteville, 179 F.3d 574, 576-77, 582 (7th Cir. 1999) (upholding city ordinance authorizing periodic searches of rental properties to assess compliance with city's housing code); Rozman, 268 F.3d at 590-91 (finding city's decision to revoke a landlord's rental license "because he refused to notify his tenants of [an] upcoming inspection" in accordance with city ordinance to be constitutionally permissible). Marcavage has neither acknowledged nor

[8]Marcavage repeatedly argues that the Borough's inspection program is unconstitutional under Camara because it is based upon "appraisal of conditions in an area as a whole" and not on "knowledge of conditions in each particular building." Marcavage misunderstands and misquotes Camara in making this assertion. In Camara, the Court actually declared "area code-enforcement inspections" to be reasonable because of "a number of persuasive factors": their "long history of judicial and public acceptance," the public interest in preventing latent, dangerous conditions, and their "relatively limited invasion of the urban citizen's privacy." Camara, 387 U.S. at 537. Of course, probable cause to make such an administrative inspection is still necessary, but the Court noted such cause may exist "if based upon the passage of time, the nature of the building . . . , or the condition of the entire area, [and] will not necessarily depend upon specific knowledge of the particular dwelling." Id. at 538.

distinguished Wyman, which upheld an ordinance that appears to be more similar to Ordinance 1251 than the ordinances in Camara. In short, Marcavage has failed to demonstrate that Ordinance 1251 is facially unconstitutional under the Fourth Amendment.

ii. Procedural Due Process

Marcavage next attacks Ordinance 1251 on the ground that it is facially unconstitutional for violating "his right to freedom from denial of right to property without due process of law under the Fourteenth Amendment." Am. Compl. ¶ 45. "The fundamental requirement of [procedural] due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citations and internal quotation marks omitted). The text of Ordinance 1251 provides that "[t]he owner, applicant, or agent [of the property] may appeal a decision of the Code Enforcement Officer or request a modification of the strict letter of this chapter in accordance to the Borough Code." Lansdowne Code § 265-12. Defendants argue that this process is sufficient on its face to allow property owners to challenge or seek modifications of Borough decisions. In response, Marcavage essentially reargues his Fourth Amendment challenge to Ordinance 1251, relying on general statements of law that fail to advance his procedural due process claim. He fails to explain how Section 265-12 is "incapable of any valid application," and therefore facially unconstitutional for violating the Fourteenth Amendment's right to procedural due process. Steffel v. Thompson, 415 U.S. 452, 474 (1974). In fact, he even concedes that Ordinance 1251 provides for appeals of decisions by Code Enforcement Officers. Pl.'s Resp. 7. Therefore, Marcavage's facial challenge to Ordinance 1251 based on a "denial of right to property without due process" fails.

iii. Equal Protection

Finally, Marcavage asserts that Ordinance 1251 is facially unconstitutional on equal protection grounds, because it requires an inspection of owner-occupied residences in buildings also containing rental units, whereas owners of residences unattached to any rental property are not required to submit to an inspection.

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause "'requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.'" Engquist v. Oregon Dep't of Agric., 553 U.S. 591, 602 (2008) (quoting Hayes v. Missouri, 120 U.S. 68, 71-72 (1887)).[9]

Under rational basis review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Lawrence v. Texas, 539 U.S. 558, 579 (2003) (quoting Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985)). "Under rational-basis review, where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation. Such a

[9] Marcavage concedes that the law should be considered under rational basis review. ECF No. 43 at 19.

classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (quoting Cleburne, 473 U.S. at 441) (citation and internal quotation marks omitted).

"A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Heller v. Doe, 509 U.S. 312, 320 (1993) (citations and internal quotation marks omitted). "[T]he burden is upon the challenging party to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Garrett, 531 U.S. at 367 (quoting Heller, 509 U.S. at 320).

The Borough Council identified the legislative purpose for Ordinance 1251 in Section 265-1. It states that "[t]he purpose of this chapter . . . shall be to protect and promote the public health, safety and welfare of its citizens . . . and to encourage owners and occupants to maintain and improve the quality of rental units within the community." Lansdowne Code § 265-1. Marcavage does not explain why this offered basis is not rational; he simply states that it is not. This is not enough. Lansdowne's offered basis is conceivably rational; there may be code violations in a property owner's unit—for example, faulty electrical wiring or fire hazards—that could present health and safety concerns to the neighboring renter. Marcavage has not met his burden in showing that this basis is insufficient to survive rational basis review. Thus, Marcavage's facial attack to Ordinance 1251 on equal protection grounds fails.

2. As-Applied Challenges

i. Unreasonable Seizure

Although Marcavage does not clearly spell out his as-applied challenge under the Fourth Amendment, his briefings suggest that he believes the Defendants' application of Ordinance 1188, the original ordinance, violated his Fourth Amendment right against unreasonable seizures. Marcavage claims that although his property was never searched by Defendants, it was seized, as a result of his being dispossessed from his home by Jozwiak's posting of the Notice on the door of his residence.

Under the Fourth Amendment, a "seizure" of property "occurs when there is some meaningful interference with an individual's possessory interests in that property." Soldal v. Cook Cnty., 506 U.S. 56, 61 (1992) (citation and internal quotation marks omitted). "[S]eizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." Id. at 68. This Fourth Amendment right against unreasonable seizure is "transgressed if the seizure of [a person's] house was undertaken to . . . verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all." Id. at 69.

Marcavage claims that he was "seized' under the Fourth Amendment because the Defendants' application of Ordinance 1188—Jozwiak's posting the Notice on his door—constituted a summary eviction and dispossessed him from his home. The Notice that was posted on Marcavage's residence at the Stewart Avenue Property, on September 30, 2009, stated:

NOTICE

This Structure has been Declared an
Unlawful Rental Property
for failure to obtain the required rental license.
It is Unlawful for Landlord to collect any Rent, Use, or
Occupy This Building After 9/30/09 or until a rental license has been
obtained from the Borough of Lansdowne.
Any Unauthorized Person Removing This Sign
WILL BE PROSECUTED.

Pl.'s Counter-Statement of Undisputed Facts ¶ 16. Defendants argue that Marcavage's property was not seized as a result of this Notice because Marcavage was not forced off his property, but instead left voluntarily. Marcavage asserts that because the Notice states that "[i]t is Unlawful for Landlord to . . . Occupy This Building After 9/30/09," he was dispossessed from his home and forced to go to a hotel and then the house of some acquaintances over the course of five days.

A review of Marcavage's history with Ordinance 1188 will demonstrate that the true effect of this Notice was to formally notify Marcavage that, after many years of non-compliance, he was violating Ordinance 1188. It was not to evict him from or seize his property. Ordinance 1188, enacted in 2003, required owners of rental property to register and obtain a rental license for their properties through the Code Department. Lansdowne Code § 265-3, -4. A property owner's receipt of a rental license for a property was predicated on a Code Enforcement Officer's having inspected the owner's rental property. Id. § 265-4. The Ordinance defined "Rental Property" to include owner-occupied portions of rental property, like Marcavage's residence at the Stewart Avenue Property. See id. § 265-2 ("Owner Occupied Portions Rental Properties [sic] - Areas or portions of a rental property that are used or occupied primarily by the property owner."); id. ("Rental Property - A premises, property or portion thereof, that is under a rental

agreement and/or contains one or more rental units."). As such, the Ordinance conditioned receipt of a rental license not only on the inspection of rental units, but also on the inspection of owner-occupied portions of rental properties. Id. § 265-4(D). Without first obtaining a rental license from the Code Department, it was "unlawful for the owner of any premises . . . to operate, rent or lease any premises or any part thereof, whether granted or rented for profit or nonprofit, or to represent to the general public that a premises or any part thereof is for rent, lease or occupancy . . . ." Lansdowne Code § 265-4.

Marcavage has owned his properties since the enactment of Ordinance 1188, and admitted that he received yearly notices from the Borough that his properties needed inspection to comply with the Ordinance. Defs.' Mot. Summ. J. Ex. D, Marcavage Dep. 50:23-52:24. Over this time period, however, Marcavage did not request an inspection, and, in turn, did not receive a rental license. Instead, Marcavage contacted the Borough on multiple occasions, by phone and by email, to express his objections with the rental inspection process. Id. at 50:3-52:18, 60:11-61:4. In one particular email, on August 15, 2008, Marcavage "urge[d]" Jozwiak "to cease and desist from pursuing legal action against landlords at this point for non-compliance to [Ordinance 1188] that is clearly unconstitutional." Am. Compl. Ex. D. Marcavage, therefore, was openly non-compliant with Ordinance 1188 from 2003 until he received the Notice on September 30, 2009.

Given that Marcavage was maintaining his properties in violation of the Ordinance, Jozwiak could, "in addition to other remedies, institute in the name of the Borough any appropriate action or proceedings to prevent, restrain, correct or abate [any Building violating the Code] or to prevent . . . any act, conduct, business or use constituting such violation."

Lansdowne Code § 265-10(C). Jozwiak did act, in accordance with Sections 265-4 and 265-10(C), by posting Notices on both of Marcavage's properties, informing Marcavage that it would be "unlawful for [him] to collect any rent, use, or occupy" his properties after September 30, 2009 "or until a rental license has been obtained from the Borough of Lansdowne." Pl.'s Counter-Statement of Undisputed Facts ¶ 16. This Notice conforms with the language of Section 265-4 of the Code that declares it "unlawful for the owner of any premises . . . to operate, rent or lease any premises or any part thereof . . . or to represent to the general public that a premises or any part thereof is for rent, lease, or occupancy without first acquiring" a rental license for each rental unit. Lansdowne Code § 265-4.

Considering Marcavage's history of non-compliance with Ordinance 1188 and the language of the Ordinance, the Borough's action was modest and appropriate. Marcavage fails to explain how such an action constitutes a "seizure" under Fourth Amendment case law. In fact, courts have found similar actions not to constitute a seizure. See Nikolas v. City of Omaha, 605 F.3d 539, 544-47 (8th Cir. 2010) (placarding of landowner's garage as unfit for human occupancy, after city code inspector saw that garage was going to be used in violation of city's zoning ordinance, is not a seizure under Fourth Amendment); United States v. TWP 17 R 4, 970 F.2d 984, 989 (1st Cir. 1992) (posting warrant of arrest *in rem* on parcel of real estate did not constitute seizure of real estate). The Notice did not state that Marcavage would be removed from his home if he remained on the property. It did not order him to vacate the premises, nor did it cite or refer to any judicial order of eviction. Furthermore, Marcavage was not forced off his property by Code Enforcement Officers or in the presence of Code Enforcement Officers, but instead left voluntarily. In order for a person to be forced off his property, the action must be

much more significant. See, e.g., Soldal, 506 U.S. at 58-61 (holding that seizure occurred under Fourth Amendment when, in presence of deputy sheriffs lacking an eviction order, plaintiffs' mobile home was physically removed from the ground and moved to another location); Thomas v. Cohen, 304 F.3d 563, 572 (6th Cir. 2002) ("Escorting tenants from their residences in the course of effectuating an eviction . . . satisfies the requirement of 'meaningful interference' with their leasehold interest so as to amount to a seizure of their property.").

It is, therefore, an overstatement for Marcavage to claim this action to be a summary eviction order or seizure of his property. The Notice formally informed Marcavage that his properties were unlawful rental properties, and emphasized that he would be acting in violation of the Ordinance if he continued to occupy his residence and collect rent from his other units, without first obtaining a rental license for his properties. Thus Marcavage's as-applied challenge to Ordinance 1188 based on a violation of his Fourth Amendment rights fails.

ii. Procedural Due Process

The Fourteenth Amendment prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV. "In analyzing a procedural due process claim, the first step is to determine whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." Shoats v. Horn, 213 F.3d 140, 143 (3d Cir. 2000) (citing Fuentes v. Shevin, 407 U.S. 67 (1972)). "Once we determine that the interest asserted is protected by the Due Process Clause, the question becomes what process is due to protect to it. Id. (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). "The essence of due process is the requirement that a person

in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." Mathews, 424 U.S. at 349-50 (citation and internal quotation marks omitted).

Marcavage's right to due process protection is predicated upon the existence of a deprivation of property. To establish that such a deprivation occurred, Marcavage relies exclusively on the same argument he made as to how his property was seized in violation of the Fourth Amendment—that Jozwiak's posting of the Notice on his residence dispossessed him from his home. For the same reasons already noted with regard to Marcavage's "seizure" argument, Marcavage fails to show how he was deprived of being able to remain in his home. Therefore, Marcavage's as-applied challenge to the Ordinances under the Fourteenth Amendment fails.[10]

[10]Marcavage also fails to explain how the Defendants' application of the Ordinance denied him adequate due process, i.e. "the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews, 424 U.S. at 333 (citations and internal quotation marks omitted). Marcavage concedes that Ordinance 1188 provided for appeals of "decisions" by Code Enforcement Officers. See Lansdowne Code § 265-12 ("The owner, applicant or agent thereof may appeal a decision of the Code Enforcement Officer or request a modification of the strict letter of this chapter in accordance with the Borough Code."). He argues, however, that the Notice posted by Jozwiak was not a "decision" within the meaning of Ordinance 1188, but rather an ultra vires act outside the bounds of authority established by the Ordinance. Pl.'s Resp. 7. Marcavage complains that Ordinance 1188 did not allow him to appeal an action that the Ordinance did not permit. Id. at 7-8. The Supreme Court, though, has held that "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." Hudson v. Palmer, 468 U.S. 517, 533 (1984). Marcavage fails to explain how the procedures provided for in Section 265-12 are an inadequate post-deprivation remedy for any alleged property loss he may have suffered from Jozwiak's actions.

iii. Equal Protection

Marcavage fails to offer any explanation as to how his facial and as-applied challenges on equal protection grounds are different. Marcavage has already failed to demonstrate that Ordinance 1251 is facially unconstitutional on equal protection grounds, as discussed in Section A.1., supra. Therefore, as Ordinances 1251 and 1188 have no material differences, Marcavage has failed to establish that Ordinance 1188 violated his rights under the Equal Protection Clause.

Marcavage has failed to raise a genuine issue of material fact with respect to the constitutional invalidity of Ordinance 1251 or Ordinance 1188 under the Fourth or Fourteenth Amendments. Therefore, Defendants' motion for summary judgment as to Marcavage's facial and as-applied challenges to the Ordinances, seeking declaratory relief and a permanent injunction, is granted.

B. § 1983 Liability

Marcavage brings a § 1983 action against the Borough and Jozwiak for violations of the Fourth and Fourteenth Amendments, arising from the posted Notice on Marcavage's residence that allegedly dispossessed him from his home and failed to provide him any process by which he could challenge the action.

Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." Baker v. McCollan, 443 U.S. 137, 145 n.3 (1979). "To establish a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate a violation of a right protected by the Constitution or laws of the United States that was committed by a person acting under the color of state law." Nicini v. Morra, 212 F.3d 798, 806 (3d Cir. 2000) (en banc). Neither party

disputes that Jozwiak was acting under the color of state law. Therefore, the only question is whether the Defendants' actions violated Marcavage's constitutional rights under the Fourth and Fourteenth Amendments.[11]

Because Marcavage has failed to demonstrate that any violation of his constitutional rights occurred, there can be no liability for the Defendants under Section 1983. Therefore, Defendants' motion for summary judgement as to Marcavage's § 1983 claim against the Defendants is granted.

V. CONCLUSION

For the foregoing reasons, I will grant Defendants' motion for summary judgment, and I will deny Marcavage's cross-motion for summary judgment.

s/Anita B. Brody

_____

ANITA B. BRODY, J.

Copies **VIA ECF** on _____ to:

Copies **MAILED** on _____ to:

[11] Marcavage only alleges constitutional violations and does not claim that the Ordinances violated a right protected by federal statute.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL MARCAVAGE	:	CIVIL ACTION
v.	:	
BOROUGH OF LANSDOWNE, PENNSYLVANIA, MICHAEL J. JOZWIAK	:	NO. 09-4569

CIVIL JUDGMENT

Before the Honorable Anita B. Brody

AND NOW, this 21st day of October , in accordance with the Court's Memorandum and Order (Docs. #45 and #46),

IT IS ORDERED that Judgment be and the same is hereby entered in favor of Defendants and against Plaintiff.

BY THE COURT

ATTEST:

s/Marie O'Donnell

Marie O'Donnell, Civil Deputy/Secretary
to the Honorable Anita B. Brody

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL MARCAVAGE,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	No. 09-CV-4569
BOROUGH OF LANSDOWNE, PENNSYLVANIA, MICHAEL J. JOZWIAK,	:	
Defendants.	:	
	:	

NOTICE OF APPEAL

Notice is hereby given that MICHAEL MARCAVAGE, plaintiff in the above-named case, hereby appeals to the United States Court of Appeals for the Third Circuit from the order entered in this action on October 19, 2011 and the final judgment entered on October 24, 2011.

Respectfully submitted,

THE JAKUBIK LAW FIRM

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Date: November 16, 2011

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been filed electronically through the Court's ECF system and is available online for viewing, and that all counsel of record have been served electronically through the ECF system.

/s/ Mark E. Jakubik
Mark E. Jakubik

Date: November 16, 2011

AFFIDAVIT OF SERVICE

DOCKET NO. 11-4175

----------X
Michael Marcavage

vs.

Borough of Lansdowne
----------X

I, Elissa Matias , swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on January 17, 2012

I served the **Brief and Appendix Volume I for Appellant** within in the above captioned matter upon:

Christine E. Munion, Esq.
William J. Ferren & Associates
10 Sentry Parkway, Suite 301
Blue Bell, PA 19422
cmunion@travelers.com
(215) 274-1731

via **electronic filing and electronic service**, as well as, **Express Mail** by depositing **2** copies of same, enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by United States Postal Service.

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Express Mail.

Sworn to before me on January 17, 2012

/s/ Robyn Cocho
_____
Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2017

/s/ Elissa Matias
Elissa Matias

Job # 239943