HELD: The Fifth Circuit affirmed, finding no constitutionally-cognizable claim for expedited access to court records.

DISCUSSION: The Circuit Court reiterated much of the lower court's analysis. It looked to the Supreme Court's "experience and logic" test (*Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986): when dealing with First Amendment claims of right of access to criminal proceedings, courts look to whether they have traditionally been accessible to the press and public, and to what extent such access plays a significant positive role in the functioning of that process.

Here, Sullo had to allege more than a tendency of other Texas courts to afford rapid access to records—the firm had to allege that courts nationally (and not just in Texas) have historically given access to court records in the timeframe requested. "Because plaintiffs assert a constitutional right under the *United States* Constitution, they must make allegations or raise arguments that are sufficient to support a reasonable inference that courts throughout the United States have historically released citations or citation information to the public." Sullo had failed to allege even that a significant number of other jurisdictions outside Texas afforded such access. They therefore had no constitutional argument and no basis for a Section 1983 action.

http://www.ca5.uscourts.gov/opinions/unpub/13/13-10869.0.pdf (last accessed August 14, 2014)

Land Use: Town's Delay in Granting Building Permits Is Not Denial of Substantive Due Process

CEnergy-Glenmore Wind Farm #1, LLC v. Town of Glenmore, No. 12-C-1166 (7th Cir. August 7, 2014).

The Seventh Circuit has upheld a lower court decision finding that, where a town delayed granting permits to a wind farm company because of public opposition, resulting in the applicant's loss of a power purchase agreement, the delay did not constitute an actionable denial of substantive due process, particularly where the plaintiff had not first exhausted its state law remedies.

In 2007 Prelude Inc., which CEnergy-Glenmore ("CEnergy") later bought, contracted with a Glenmore, Wisconsin family to construct a wind farm on the family's property. Additionally, it contracted with the Wisconsin Public Service Corporation to sell the power generated at the wind farm for fixed rates for 20 years. Critically, however in order for the power purchase agreement with the Wisconsin Public Service Corporation to be binding CEnergy had to acquire all necessary permits by March 1, 2011.

Due to the wind farm's construction within Glenmore town limits, CEnergy had to obtain a building permit for each of seven planned turbines. The company began the process of acquiring permits in September 2010, but the permits were not forthcoming. The town sought supplemental information on the initial application. The company submitted the information quickly and asked that the item be added to both the January and February Town Board meetings, but to no avail. With public opposition to the farm increasing, the Town Board refused

to discuss the matter at either meeting, ostensibly because the town attorney needed more time with the documents. No public hearing was held until March 7, at which time the Town Board voted in favor of the project. However, as the meeting adjourned citizens became "accusatory and threatening" to town officials, leading the Board to reopen the meeting and rescind the permits.

A week later a special meeting was held wherein the Town Board reversed itself again, thereby approving the permits. Despite all these shenanigans and unbeknownst to the Town or CEnergy the wind farm project had died; on March 4 the Wisconsin Public Service Corporation cancelled the power purchase agreement because the company had failed to obtain the permits by March 1.

CEnergy filed suit against the Town, claiming the Town "deprived it of property without substantive due process of law when the Town Board delayed granting the building permits." It alleged it had "vested property rights granted to it in the CUP [conditional use permit] and the requested building permits," and that the Town's decision to delay the permit decision was "an arbitrary and egregious abuse of [the Board's] authority" that "shock[ed] the conscience." The District Court concluded CEnergy failed to state a viable substantive due process claim because the Board's delay of the permitting decision in the face of significant public opposition was not conscience-shocking and because CEnergy failed to avail itself of available state law remedies before making its substantive due process claim, which the Seventh Circuit requires. CEnergy appealed.

HELD: The Seventh Circuit affirmed, holding that CEnergy did not state a viable substantive due process claim because the Board's decision was not arbitrary and capricious and because CEnergy failed to seek state-law recourse before filing its claim.

DISCUSSION: The Circuit Court noted that almost all successful constitutional challenges to land-use decisions come under the Takings Clause or the Equal Protection Clause, and that substantive due process claims have thus far been merely a theoretical claim in the federal system. While both the Supreme Court and the Seventh Circuit have noted the hypothetical possibility of such a claim being successful, neither has ever concluded that a land-use decision actually amounted to such a deprivation.
The Appeals Court focused on two primary problems with the claim. For one, government action only violates a plaintiff's substantive due process right when it "shocks the conscience." Here, the Circuit Court refused to make such a finding. Town officials had faced public opposition to the permitting, which the court deemed a "rational and legitimate" reason a public body might delay making a land-use decision. Second, even if the Seventh Circuit did find that the Board's actions shocked the conscience, there was the outstanding procedural issue that CEnergy ignored potential state-law remedies before filing a substantive due process claim.

Specifically, the Town ordinances provided a process by which building permits may be sought without involving the Town Board at all, but are rather an administrative decision by the Town Zoning Administrator. CEnergy had made absolutely no attempt to follow this procedure, even after the delays by the Town Board. Since the Seventh Circuit has "repeatedly" held that plaintiffs "cannot state a substantive due process claim based on a state-created property right" before pursuing other remedies, CEnergy's claim was invalid.

http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D08-07/C:13-2633:J:Hamilton:aut:T:fnOp:N:1396060:S:0 (last accessed Aug. 14, 2014)