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# Sham Litigation in Zoning Challenges: Finding the Balance Between Protection of Constitutional Rights and Anti-competitive Business Practices

Brian Lanyon

## Introduction: Anti-competitive Zoning Challenges

Zoning developed out of the common law doctrine of nuisance.<sup>1</sup> The primary purpose of zoning is to limit nuisances by organizing communities so that compatible uses are located in appropriate areas.<sup>2</sup> Each municipality has a comprehensive plan, which “does not regulate or control the particular use of property; instead, a comprehensive plan sets goals for the development or redevelopment of a community.”<sup>3</sup> Guided by its comprehensive plan, a municipality enacts a zoning ordinance that geographically divides the municipality into particular use districts (i.e. residential, commercial, industrial), though the ordinance can further limit uses within these district.<sup>4</sup> For example, one commercial use district may allow “retail stores, hotels, clinics, broadcasting studios, garages, and other similar uses,” while another commercial use district allows for other types of business.<sup>5</sup> In the municipality’s zoning ordinance, a zone can also be drawn to restrict certain categories of businesses such as industrial and heavy commercial or adult businesses from specific locations.<sup>6</sup> An ordinance can regulate the types of businesses in each area, however, it cannot regulate the individual businesses themselves. In other words, it is not appropriate for boards to selectively pick and choose one business over another, if both are allowable. These actions would potentially lead to favoritism

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<sup>1</sup> Beverly J. Pooley, *Planning and Zoning in the United States* 40 (The University of Michigan 1961).

<sup>2</sup> *Id.* at 45 (citing *Euclid v. Ambler Realty Co.* 272 U.S. 365, 386-87 (1926) “[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities... In a changing world, it is impossible that it should be otherwise.”).

<sup>3</sup> Ronald S. Cope, *The Zoning and Land Use Handbook* 5 (American Bar Association 2016).

<sup>4</sup> *Id.* at 17.

<sup>5</sup> *Id.* at 18.

<sup>6</sup> *Id.* at 6.

and at a minimum the appearance of arbitrary decisions, which reduces public confidence in the zoning board.

Anti-competitive zoning challenges can arise in any industry where the potential addition of a nearby competitor poses a threat to the profitability of an existing business owner. This practice is common, especially between supermarkets.<sup>7</sup> For example, Supermarket A, or the developer of its future store, seeks approval from municipal boards and various permits in order to develop the new location. Supermarket B, a nearby grocery store, has a financial interest in preventing the new development project or, at a minimum, delaying the project for as long as possible. A significant delay might have the same effect as preventing the new development since the market might change or the future lessee might find another location, causing the developer to lose the entire project.

In rare cases, a developer might discover explicit evidence that the challenger's sole desire is to challenge a future competitor's entry into the market. However, it is more likely that the challenge is disguised under otherwise legitimate complaints. A challenger can oppose and delay a project in two primary ways: court challenges and permit challenges. Prior to building, developers need zoning variance approvals, which are challenged through the courts. Developers also need building permits and other approvals from local administrative bodies, which are opposed through permit challenges.<sup>8</sup> There are numerous times at which a challenger can oppose a project, which is how challenges can accumulate to cause significant delay. The challengers may oppose the developer's variance approval on the basis of traffic flow, parking

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<sup>7</sup> Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc., 806 F.3d 162, 175 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 2451(2016) (noting that supermarkets are an example of “an industry notorious for low profit margins, perhaps it is not surprising that this [case] is just the latest in a series of cases in which a supermarket allegedly employed anticompetitive tactics to keep a competitor out of the market.”).

<sup>8</sup> Myers, Gary. *Litigation as a Predatory Practice*, 80 Ky. L.J. 565, 593-94 (1992).

issues, landscaping compliance, lighting, and infrastructure demands. The challengers will also be able to oppose the building permits, environmental approvals, and other local discretionary approvals.

It is important for courts to recognize the sham exception in zoning challenges in order to protect developers from the costly effects of baseless zoning challenges. Courts should apply a more flexible standard when there is sufficient evidence to allege a pattern of baseless claims by the challenger.

An entity can generally sue to challenge a zoning approval or permit unless the challenge is brought solely to prevent a competing business from obtaining approval. This is the sham exception to the general rule allowing suits. The sham exception allows the developer to counter-sue the challenger to receive compensation for lost profits caused by delays or dissolution of the development project due to the challenger's baseless claims. Baseless challenges brought by a competitor can impose significant costs on a prospective developer. Redevelopment projects are extensive and costly ventures that typically require multiple appearances in front of the municipality's zoning board for variance approvals, as well as the use of experts to create plans for the development site.<sup>9</sup> There are costs associated with the attorney's fees for appearing at numerous hearings before the municipality's zoning board and for responding to the petitioner's appeal of a zoning approval. Additionally, challengers who have this anti-competitive strategy typically challenge every part of the development application process, including permit approvals.<sup>10</sup> These challenges may lead to various changes in the site plan. The site plan is a comprehensive drawing of the development lot and includes elevations,

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<sup>9</sup> See generally, American Planning Association, *Growing Smart Guidebook: Chapter 8 (part 2) Local Land Development Regulation, 8-302 Site Plan Review*. <https://www.planning.org/growingsmart/guidebook/eight02.htm#8302> (last visited Mar. 2, 2018).

<sup>10</sup> See generally, Myers, Gary. *Litigation as a Predatory Practice*, 80 Ky. L.J. 565, 594-95 (1992).

architectural features, landscaping, and other engineering plans.<sup>11</sup> It typically must include all necessary items required to explain elements of the project under review.<sup>12</sup> To create the site plan, a developer must engage numerous costly experts including an architect, engineer, traffic planner, and environmental expert.

Delays to the project can be expensive or even cause the development project to be terminated.<sup>13</sup> Frequently, sites targeted for redevelopment are vacant when the developer is seeking approval. Therefore, any delay to the project results in the developer's inability to collect rents. This situation may be made worse if the developer is required to make mortgage payments on the property. Additionally, significant delays could be destructive to the project since redevelopment projects are often sensitive to market conditions, changes of which could cause the economics of the project to worsen and make development no longer financially viable. The developer may also lose the prospective tenant to a nearby location as the tenant may not be willing to wait for several years before moving to the newly developed site.<sup>14</sup> Finally, courts have an interest in preventing overcrowded dockets, especially when claims are baseless.

*Landmarks Holding Corp. v. Bermant*<sup>15</sup> is a prime example of sham litigation. In *Bermant*, real estate developers sought approval for a shopping center in Hamden, Connecticut and claimed that two existing shopping centers conspired against their approval.<sup>16</sup> In order to delay the approval, the two existing shopping centers filed "fourteen (mostly baseless) lawsuits, multiple appeals from adverse decisions, [appeared] at zoning hearings, [and employed]

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<sup>11</sup> American Planning Association, *supra* note 9.

<sup>12</sup> American Planning Association, *supra* note 9.

<sup>13</sup> Myers, *supra*, note 8, at 594.

<sup>14</sup> See e.g., *Main St. at Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super 135, 152 (Super. Ct. App. Div. 2017).

<sup>15</sup> *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891 (2d Cir. 1981).

<sup>16</sup> *Id.* at 892.

litigation delaying tactics and [a] massive publicity campaign[.]”<sup>17</sup> Even if the challenger business owners lost their petitions, they believed they could delay development of the competing property for a minimum of three to five years.<sup>18</sup> One of the owners of the existing shopping centers admitted in a deposition that they “decided to oppose [the proposal] with every means, to either defeat or delay [it] for as many years as possible.”<sup>19</sup> In *Bermant*, the court of appeals ruled for the developer and reversed the district court’s grant of summary judgment on the sham litigation claim.<sup>20</sup> It held that these sham petitions were not protected by the First Amendment and remanded the case to the district court.<sup>21</sup> This case may seem like an obvious example of the sham exception due to the evidence of intended baseless litigation during the deposition, but these occurrences are common.<sup>22</sup> While this type of behavior is extreme, it shows how competitors can use “the courtroom as a sword to deter entry into a market.”<sup>23</sup>

This note is organized as follows. Part I will discuss the Noerr-Pennington doctrine and the sham litigation exception as it applies to zoning challenges. Part II will discuss the factors that courts use to determine whether the sham litigation exception applies including an analysis of the Third Circuit Court’s decision in *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*<sup>24</sup> and the Superior Court of New Jersey’s recent decision in *Main Street at Woolwich, LLC. v. Ammons Supermarket, Inc.*<sup>25</sup> Part III will discuss how courts should analyze these decisions and the importance of finding standing in these types of cases.

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<sup>17</sup> Myers, *supra*, note 8, at 594-95.

<sup>18</sup> *Bermant*, 664 F.2d at 892 (1981).

<sup>19</sup> *Id.* at 898.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Myers, *supra*, note 8, at 594-95.

<sup>23</sup> *Id.*

<sup>24</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162 (3d Cir. 2015).

<sup>25</sup> *Main St. at Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super 135 (Super. Ct. App. Div. 2017).

## I. Background: Noerr-Pennington Doctrine and Sham Litigation Exception Applied to Zoning Challenges

This section will discuss the Noerr-Pennington doctrine, which describes the general right to bring suit, and the reasoning behind its application. It will then discuss the sham litigation exception to the doctrine and the importance of this exception in zoning challenges, which is to combat baseless challenges that are used to delay the real estate development of a competitor.

### A. Anti-competitive Behavior is Not Permitted

In general, any business can legally oppose a decision by the zoning board to grant a site plan approval or challenge the grant of a permit, unless the challenge has no legitimate basis other than to deter the entry of a competitor into the market.

The First Amendment of the Constitution broadly gives citizens the right “to petition the Government for a redress of grievances.”<sup>26</sup> The First Amendment protects the foundation of a representative democracy by giving its citizens the right to “communicate their desires, anticompetitively motivated or otherwise, to government officials.”<sup>27</sup> However, court and permit challenges are not protected by antitrust law when a party solely intends to use the government for an anti-competitive outcome.<sup>28</sup>

Anti-competitive practices are prohibited under the Sherman Act and Clayton Act, which both restrict antitrust behavior. The Sherman Act prohibits any attempt “to monopolize any part of the trade or commerce.”<sup>29</sup> The Clayton Act defines a party eligible to bring a suit as “any person who [is] injured in his business or property by reason of anything forbidden in the

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<sup>26</sup> U.S. CONST. amend I.

<sup>27</sup> Lao, Marina, *Reforming the Noerr-Pennington Antitrust Immunity Doctrine*, 55 Rutgers L. Rev. 965, 966 (2003).

<sup>28</sup> *Id.*

<sup>29</sup> 15 U.S.C. § 2.

antitrust laws.”<sup>30</sup> The broad language of the Clayton Act demonstrates Congress’s intent to “create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.”<sup>31</sup> In order to satisfy the antitrust requirements of the Sherman and Clayton Acts, the party must be a consumer or competitor in the restrained market.<sup>32</sup> Additionally, the acts can be utilized by “those whose injuries are the means by which the defendants seek to achieve their anti-competitive ends.”<sup>33</sup> In these cases, real estate developers are the entities that the defendants seek to harm in order to delay the future competitor-tenant.

#### B. Noerr-Pennington Doctrine Provides Immunity from Antitrust Liability for Parties Who Petition the Government

The Noerr-Pennington doctrine limits the Sherman and Clayton Acts’ reach by relying on the guarantees provided by the First Amendment.<sup>34</sup> The doctrine derives its name from two United States Supreme Court cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*<sup>35</sup> and *United Mine Workers of America v. Pennington*.<sup>36</sup> Generally, the doctrine declares that petitioners for government redress are immune from antitrust liability unless their action falls under the “sham exception” because it is objectively baseless.<sup>37</sup> Under the Noerr-Pennington doctrine, a lawsuit is considered objectively baseless “if no reasonable litigant could realistically expect success on the merits.”<sup>38</sup> It provides immunity to those who petition for redress of their grievances to a variety of government bodies, including administrative agencies,

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<sup>30</sup> 15 U.S.C. § 15(a).

<sup>31</sup> *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 171 (3d Cir. 2015).

<sup>32</sup> *Id.* at 172.

<sup>33</sup> *Id.*

<sup>34</sup> *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993).

<sup>35</sup> *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

<sup>36</sup> *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

<sup>37</sup> *Prof'l Real Estate Investors*, 508 U.S. at 60.

<sup>38</sup> Ann K. Wooster, *Application of Noerr-Pennington Doctrine by State Courts*, 94 A.L.R. 5th 455, §3.



legislatures, executives, or the judiciary.<sup>39</sup> The doctrine has its foundations in antitrust law, but it has been extended to support challengers who object to zoning applications since these challenges are petitions to government bodies recognized by the Noerr-Pennington doctrine.<sup>40</sup> “The Noerr-Pennington Doctrine is not limited to federal antitrust actions... and may be invoked in other actions under state and federal law to protect the First Amendment right to petition the government.”<sup>41</sup> It has also been applied to protect against “common-law torts such as malicious prosecution and abuse of process,”<sup>42</sup> which are frequently the legal basis of claims brought in state courts by developers in response to the challenger’s objectively baseless opposition of their land development application.<sup>43</sup>

However, in *Noerr*, the Supreme Court recognized that there may be instances where the petition “is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.”<sup>44</sup> These instances justify applying the Sherman Act.<sup>45</sup> The sham exception exists to remove protection from meritless claims and ensures that Noerr-Pennington doctrine does not give petitioners an unchecked right to challenge competitors.<sup>46</sup>

### C. Sham Litigation as an Exception to Noerr-Pennington

The prototypical example of sham litigation “is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license, but

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<sup>39</sup> *Id.* at §2[a].

<sup>40</sup> *Main St. at Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super 135, 144 (Super. Ct. App. Div. 2017).

<sup>41</sup> *Wooster*, *supra* note 38, at §11-3.

<sup>42</sup> *Woolwich*, 451 N.J. Super at 144 (2017).

<sup>43</sup> *See e.g.*, *Alfred Weissman Real Estate, Inc. v. Big V. Supermarkets, Inc.*, 268 A.D.2d 101, 105-06 (App. Div. 2000) (Suing for “(1) tortious interference with a contract, (2) tortious interference with prospective economic advantage . . .”); *Main St. at Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super 135, 144 (Super. Ct. App. Div. 2017) (Suing for “malicious abuse of process, tortious interference with prospective business contracts, and civil conspiracy.”).

<sup>44</sup> *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961).

<sup>45</sup> *Id.*

<sup>46</sup> *See generally*, *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.* 508 U.S. 49, 60-61 (1993).

simply in order to impose expense and delay.”<sup>47</sup> The presumption of immunity under the doctrine is nullified when the challenger brings a frivolous claim that is considered sham litigation.<sup>48</sup>

In the zoning approval context, “[o]bjectors to land use applications are immune from tort liability under the Noerr-Pennington doctrine unless the conduct at issue is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.”<sup>49</sup> First Amendment protection is forfeited when the zoning challenge lacks the genuine and legitimate purpose of receiving a favorable decision by the government body.<sup>50</sup> The court first looks at whether the challenger has filed one or numerous filings.<sup>51</sup> This is done to determine whether the challenge has a legitimate basis or whether the filing is a disguised attempt to directly interfere with the business practices of a competitor.<sup>52</sup>

When courts decide whether a petition is sham litigation, a primary consideration should be whether there is a pattern of baseless claims against the application for an individual development project. In *California Motors*, the Supreme Court discussed how a pattern of sham litigation abuses the judicial process by unnecessarily overloading court dockets with baseless challenges.<sup>53</sup> In this way, sham challenges could be effectively wielded to restrain competition. This is because one claim may go unnoticed or receive leniency by a court, but “a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused.”<sup>54</sup> It may be difficult to determine how

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<sup>47</sup> Wooster, *supra* note 38, at §5[b].

<sup>48</sup> *Prof'l Real Estate Investors*, 508 U.S. at 60-61.

<sup>49</sup> Main St. at Woolwich v. Ammons Supermarket, Inc., 451 N.J. Super 135, 144 (Super. Ct. App. Div. 2017).

<sup>50</sup> Wooster, *supra* note 38, at §3.

<sup>51</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 180 (3d Cir. 2015).

<sup>52</sup> *Id.*

<sup>53</sup> *CA Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

<sup>54</sup> *Id.*

many baseless claims are needed or how to distinguish between what behavior is objectively baseless when the anti-competitive challenge is not overt.<sup>55</sup> The determination may be difficult, but once the court establishes that abuse of the judicial process has led to an illegal result, it should effectively bar petitioners from access to the courts and the municipal boards overseeing the zoning decision.<sup>56</sup>

When the court determines the challenges are objectively baseless and fall under the sham exception, a challenger's First Amendment rights are no longer protected since they have been abused. Further, the Ninth Circuit has held that, "[w]hen dealing with a series of lawsuits, the question is not whether any one of them has merit . . . but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival."<sup>57</sup> The challenger's appeals need to be viewed on the whole and one successful challenge does not support numerous baseless challenges.<sup>58</sup>

In *Hanover Realty*, the Third Circuit detailed the distinction between the standards applied in *California Motor* and *Professional Real Estate*.<sup>59</sup> Even though these two tests provide similar explanations of the sham exception, the analysis of sham litigation should be applied differently depending on the number of sham petitions filed by the petitioner with regard to the subject property of the litigation.<sup>60</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *USS-Posco Indus. V. Contra Costa Cty. Bldg.*, 31 F. 3d 800, 801 (9th Cir. 1994).

<sup>58</sup> *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.* 508 U.S. 49, 73 (1993) (concurring, J. Stevens stating "[r]epetitive findings, some of which are successful and some unsuccessful, may support an inference that the process is being misused.").

<sup>59</sup> *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 179-80 (3d Cir. 2015).

<sup>60</sup> *Hanover Realty*, 806 F.3d at 179-80 ("Three other Courts of Appeals have reconciled *California Motor* and *Professional Real Estate* by concluding that they apply in different situations: *California Motors* to a series of sham petitions and *Professional Real Estate* to a single sham petition.").

#### D. Analysis When There is a Single Sham Petition

When it is alleged that the defendant engaged in a single or limited number of sham petitions, the two-part test set forth in *Professional Real Estate* should apply to determine if the sham litigation exception applies. “First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.”<sup>61</sup> Second, it must be brought as “an attempt to interfere *directly* with the business relationships of a competitor,<sup>62</sup> through the use of the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.”<sup>63</sup> This test should apply when there is evidence of sham litigation regarding a single suit or legal appeal by the challenging party.<sup>64</sup> Part two of the test can otherwise be stated that the applicant is “subjectively motivated by bad faith.”<sup>65</sup> Further, “[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Neorr*.”<sup>66</sup> Only after the challenged litigation is determined to be objectively meritless will the court receive the litigants subjective motivation under the second prong.<sup>67</sup> Because there is only one or a limited number of challenges, the analysis is more strict than if there is evidence of numerous filings, which is more likely to indicate sham litigation. Courts have reasoned that “with only one ‘data point’ it is difficult to determine with any precision whether the petition was anticompetitive.”<sup>68</sup> It is also possible that courts may be unwilling to limit First Amendment protections when a single suit is filed against the developer.

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<sup>61</sup> *Prof'l Real Estate Investors*, 508 U.S. at 60.

<sup>62</sup> *Id.*

<sup>63</sup> *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.* 508 U.S. 49, 60 (1993).

<sup>64</sup> *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 180 (3d Cir. 2015).

<sup>65</sup> *Wooster*, *supra* note 38, at §3.

<sup>66</sup> *Prof'l Real Estate Investors*, 508 U.S. at 60.

<sup>67</sup> *Id.* at 60-61.

<sup>68</sup> *Hanover Realty*, 806 F.3d at 180.

#### E. Analysis When There is a Series of Sham Petitions

The standard in *California Motor Transport* should apply when the defendant files numerous challenges or legal proceedings with regard to the prospective development project.<sup>69</sup> There is no required number of petitions needed to apply the *California Motor Transport* analysis rather than the *Professional Real Estate* test.<sup>70</sup> The Court held that the complaint sufficiently alleged a sham litigation since the aggrieved party claimed that the challengers “sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process.”<sup>71</sup> Additionally, the affected party alleged that the “petitioners instituted the proceedings and actions with or without probable cause, and regardless of the merits of the case.”<sup>72</sup> The Ninth Circuit discussed that *California Motor Transport* “recognized that the filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action.”<sup>73</sup> This standard triggers a fluid review weighing the facts of the case, in comparison to the strict two-part test in *Professional Real Estate*.<sup>74</sup>

When reviewing cases where a challenger has brought multiple lawsuits or attempts to delay the developer’s project, “the question is not whether any one of them has merit . . . but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.”<sup>75</sup> The review is prospective and considers whether the numerous filings were intended to harass the developer.<sup>76</sup> In order to determine if

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 180-81.

<sup>71</sup> *CA Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972).

<sup>72</sup> *Id.*

<sup>73</sup> *USS-Posco Indus. V. Contra Costa Cty. Bldg.*, 31 F. 3d 800, 811 (9th Cir. 1994).

<sup>74</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 181 (3d Cir. 2015).

<sup>75</sup> *Id.* at 180.

<sup>76</sup> *Id.* at 181.

the filings were without merit, the court must look at all the facts and circumstances of the case.<sup>77</sup> The court “should perform a holistic review that may include looking at the defendants filing status (i.e. win-loss percentage) as circumstantial evidence of the defendant’s subjective motivations.”<sup>78</sup> Included in these considerations should be evidence of bad-faith, as well as the magnitude and nature of the harm caused by the challenger’s petitioning activity.<sup>79</sup> The court must weigh the wins and losses for each side since the challenger may succeed on some proceedings simply as a matter of chance.<sup>80</sup> In other words, “[t]he fact that there may be moments of merit within a series of lawsuits is not inconsistent with a campaign of sham litigation.”<sup>81</sup>

The sham exception is still considerably narrow as courts are often worried about infringing on a petitioner’s right to bring a claim before the courts.<sup>82</sup> The exception frequently involves complicated questions of fact and the burden is on the party “opposing [the] application of the Noerr-Pennington doctrine to prove that the [challenger] comes within the sham exception.”<sup>83</sup> Further, it is complicated by the fact that more is needed to prove sham litigation than anti-competitive intent.<sup>84</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 181 (3d Cir. 2015).

<sup>80</sup> *Id.* at 179-80.

<sup>81</sup> *Id.* at 182.

<sup>82</sup> *Wooster*, *supra* note 38, at §5[b].

<sup>83</sup> *Wooster*, *supra* note 38, at §5[b].

<sup>84</sup> *Alfred Weissman Real Estate, Inc. v. Big V. Supermarkets, Inc.*, 268 A.D.2d 101, 107-108 (App. Div. 2000) (stating “[c]itizens who petition for governmental action favorable to them cannot be prosecuted under the antitrust laws, even though their petitions are motivated by anticompetitive intent.”).

## II. Applying the Standard in Recent Decisions

Part II will discuss the Third Circuit’s analysis in *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.* and review how this reasoning was applied by the Superior Court of New Jersey in *Main St. at Woolwich, LLC v. Ammons Supermarket, Inc.*

### A. Third Circuit’s analysis in the *Hanover Realty*

In *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, a developer sought zoning approval to improve its property with a commercial building that would be occupied by a Wegmans<sup>85</sup> supermarket.<sup>86</sup> The owner of a nearby ShopRite<sup>87</sup> supermarket filed numerous administrative and court challenges to the developer’s permit applications.<sup>88</sup> In response, the developer sued the challenger, the ShopRite group, alleging violations of the Sherman Act; they argued that the petitioner’s filings were baseless since they were only an attempt to stop the entry of a competitor into their market.<sup>89</sup>

These cases can become complicated because the challenger’s actions impact the developer, who is not necessarily a direct competitor. The challenger is typically a supermarket and the ownership group that owns the numerous supermarkets,<sup>90</sup> whereas the aggrieved party is a real estate developer. The prospective tenant at the newly developed location—in this case Wegmans—may not want to be involved in the sham litigation lawsuit.<sup>91</sup> Therefore, some anti-

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<sup>85</sup> Wegmans is a supermarket chain based out of the Northeast with ninety-five locations in Maryland, Virginia, Pennsylvania, New Jersey, New York, and Massachusetts. WEGMANS, <https://www.wegmans.com/about-us/company-overview.html> (last visited Feb. 28, 2017).

<sup>86</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 167 (3d Cir. 2015).

<sup>87</sup> ShopRite is a cooperative with fifty members “who individually own and operate under the ShopRite banner.” The company has locations throughout the Northeast in Maryland, Delaware, Pennsylvania, New Jersey, New York, and Connecticut. SHOPRITE, <http://www.shoprite.com/about-us/> (last visited Feb. 28, 2017).

<sup>88</sup> *Hanover Realty*, 806 F.3d at 167.

<sup>89</sup> *Id.*

<sup>90</sup> In *Hanover Realty*, the defendants “owned twenty-six ShopRites in New Jersey including one in Hanover about two miles from the site of the proposed Wegmans. *Hanover Realty*, 806 F.3d at 168.

<sup>91</sup> Wegman’s “site development agreement placed the burden on Hanover Realty to obtain all necessary governmental permits prior to beginning construction. If Hanover Realty was unable to secure the required permits within two years of the agreement, Wegmans could walk away from the deal.” *Hanover Realty*, 806 F.3d at 168.

competitive claims do not survive the question of standing. In *Hanover Realty*, the Third Circuit held that Hanover Realty did not have standing for a “claim for the attempted monopolization of the market for rental space” because Hanover Realty does not compete with ShopRite in that market.<sup>92</sup> However, this did not eliminate the possibility that the developer could seek legal action against ShopRite for anti-competitive behavior. The court stated that “[t]he end goal of [ShopRite’s] alleged anticompetitive conduct was to injure Wegmans, a prospective competitor.”<sup>93</sup> However, to keep Wegmans from entering their market, two miles from their ShopRite location, the challengers sought to impose costs on the developer of the property, and not directly on Wegmans.<sup>94</sup> This is because the developer was the party who needed to obtain the appropriate approvals and permits before beginning construction of the new development.<sup>95</sup> “[I]njuring Hanover Realty was the very means by which the defendants could get to Wegmans” thus ShopRite is trying to remove themselves from liability on a technicality.<sup>96</sup> Therefore, “Hanover can establish that its injury was ‘inextricably intertwined’ with the defendant’s anticompetitive conduct” and thus have standing to sue the defendants.<sup>97</sup>

After realizing that Wegmans would be leasing commercial space at the proposed development site and entering their market, ShopRite filed numerous administrative and court challenges to Hanover Realty’s applications.<sup>98</sup> This “petitioning campaign was designed to block Hanover Realty from obtaining the permits and approvals it needed to proceed with the project.”<sup>99</sup>

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<sup>92</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 167 (3d Cir. 2015).

<sup>93</sup> *Id.* at 174.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 168 (3d Cir. 2015).

<sup>98</sup> *Id.* at 166.

<sup>99</sup> *Id.* at 168.



The challengers appealed Hanover Realty’s project in four major phases. First, they sought to vacate the Flood Hazard Area Permit already granted to Hanover Realty.<sup>100</sup> However, their claim was dismissed because their “general property rights” and claim of “greater competition” from the proposed site was not sufficient to prove they were an aggrieved party.<sup>101</sup> Second, the challengers hired an ecological consultant to submit a letter on their behalf opposing the granting of various wetlands permits from the New Jersey Environmental Department.<sup>102</sup> In an email, the ecological consulting firm was proud of its ability to “delay the issuance of the Wetlands approvals based on a technicality” and that its additional objections may be able to further delay the project.<sup>103</sup> Ultimately, the Environmental Department issued the Wetlands permit, but it was subject to various conditions including one that required the developers to survey the property for the presence of Indiana bats<sup>104</sup> prior to construction, a condition with which the developers ultimately had to comply.<sup>105</sup> Third, the challengers submitted a letter to the Department of Transportation (“DOT”) objecting to Hanover Realty’s application for a street permit, which contained road improvement conditions in the development agreement.<sup>106</sup> The DOT stated that Hanover Realty would need additional improvements after it considered all relevant data and arguments submitted by third parties.<sup>107</sup> The final formal objection was that the challengers filed an action in New Jersey State Court seeking to nullify the Zoning Board’s site plan approval.<sup>108</sup> The New Jersey State Court dismissed the challengers’ claim both on the

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc., 806 F.3d 162, 168 (3d Cir. 2015).

<sup>103</sup> *Id.*

<sup>104</sup> Hanover Realty conducted the Indiana bat survey and reported that no bats were found. Additionally, “Indiana bats may be found over a broad swath of the United States, including New Jersey. But true to name, half of this bat population does, in fact, hibernate in Indiana.” *Hanover Realty*, 806 F.3d at 168.

<sup>105</sup> *Id.* at 168.

<sup>106</sup> *Id.*

<sup>107</sup> Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc., 806 F.3d 162, 169 (3d Cir. 2015).

<sup>108</sup> *Id.* at 170.

standing issue and also on the merits of the case.<sup>109</sup> This objection was perhaps the most telling of subjective evidence of bad faith, because the challenger did not have any objections to Hanover Realty’s application to rezone the property for retail use until after the Zoning Board approved the site plan.<sup>110</sup> At this point, the challenger likely knew that a Wegmans supermarket would be occupying the new retail development.

The time sensitive nature of these approvals is shown by that fact that the development contract between Hanover Realty and their prospective tenant, Wegmans, included a provision that if “Hanover Realty was unable to secure the required permits within two years of the agreement, Wegmans could walk away from the deal.”<sup>111</sup>

The Third Circuit reconciled *California Motor Transport* and *Professional Real Estate* “by concluding that they apply to different situations: *California Motor Transport* applies to a series of sham petitions and *Professional Real Estate* applies to a single sham petition.”<sup>112</sup> Here, since the ShopRite group filed four challenges with numerous sub-challenges against the developer, the more holistic and less strict review under *California Motor Transport* should apply.<sup>113</sup> Hanover Realty can establish that the ShopRite group filed a pattern of objectively baseless administrative and court challenges to the developer’s project.<sup>114</sup> Even though the challenger succeeded on parts of their challenges to the Environmental Department and DOT, “the fact that there may be moments of merit within a series of lawsuits is not inconsistent with a campaign of sham litigation.”<sup>115</sup> Further, the court looked at the subjective intent of the challengers and stated that they have not “articulated any genuine interest in flooding or traffic

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 169.

<sup>111</sup> *Id.* at 166.

<sup>112</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 179 (3d Cir. 2015).

<sup>113</sup> *Id.* at 180.

<sup>114</sup> *Id.* at 182.

<sup>115</sup> *Id.*

near the proposed Wegmans, which is two miles from ShopRite, or in protecting the Indiana bat.”<sup>116</sup> Therefore, there are sufficient facts to conclude that the ShopRite group may have engaged in a pattern of sham litigation and would be not entitled to protection under the Noerr-Pennington doctrine.<sup>117</sup> The court did not discuss potential damages, but in Hanover’s brief to the district court they stated that their damages included “lost rent, increased expenses and carrying changes and diminution of value resulting from [Shop Rite’s] sham petitioning.”<sup>118</sup>

Also, it is important to note the dissent in this case because it may be difficult to find standing in these types of cases. The dissent believed that Hanover Realty did not suffer an antitrust injury because it does not compete in the supermarket business with ShopRite.<sup>119</sup> As the dissent noted, Hanover supplied commercial space to full-service supermarkets, but the market for grocery stores, and not the real property market, was the market that was allegedly restrained.<sup>120</sup>

#### B. Standard as Applied in *Woolwich*

In *Main Street at Woolwich, LLC. v. Ammons Supermarket, Inc.*, a developer owned a significant amount of land in Woolwich Township, which it planned to improve with a shopping center.<sup>121</sup> In 2007, the developer, Woolwich, began the approval process to obtain government approval to develop the land.<sup>122</sup> The process required approval from the New Jersey State Planning Committee and numerous approvals from the Woolwich Township Joint Land Use

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<sup>116</sup> *Id.*

<sup>117</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 182 (3d Cir. 2015).

<sup>118</sup> Plaintiff’s Brief in Opposition to Motion to Dismiss at 39, *Hanover 3201 Realty v. Village Supermarkets, Inc.*, 2014 U.S. Dist. LEXIS 140286 (D.N.J. Oct. 2, 2014) (No. 14-1327(SRC)(CLW)), 2014 U.S. Dist. Ct. Briefs LEXIS 1472.

<sup>119</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 186 (3d Cir. 2015) (J. Ambro, dissenting in part).

<sup>120</sup> *Id.*

<sup>121</sup> *Main St. at Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super 135, 141 (Super. Ct. App. Div. 2017).

<sup>122</sup> *Id.*

Board.<sup>123</sup> In 2010, the Woolwich Township Joint Land Use Board (“Board”) approved the developer’s general development plan (“GDP”), which permitted a project that allowed for 1.5 million square feet of commercial and retail space to be developed in three phases.<sup>124</sup> At this point it was unknown which stores would occupy the proposed development site.<sup>125</sup> In April 2012, the developer submitted an application for site plan approval to develop phase one of the project, which included a Wal-Mart.<sup>126</sup> In October 2013, the Board approved the developer’s final site plan, which went unopposed.<sup>127</sup>

Following the Board’s approval, an owner of a nearby ShopRite challenged the approval for “improper change of the phasing dates of the Complex, inadequate water and sewer resources, improper addition of acreage to the parcel, violations of the Municipal Land Use Law (“MLUL”) . . . inadequate proof to support the variances and waivers, [and] failure to comply with notice requirements.”<sup>128</sup> However, the challengers lost these zoning petitions and the developers filed a complaint against the challengers alleging malicious abuse of process, tortious interference, and civil conspiracy.<sup>129</sup> Developers claimed the challengers’ filings amounted to sham litigation because they were intended solely to interfere with approval for the prospective supermarket.<sup>130</sup>

The New Jersey Superior Court held that there were sufficient facts alleged to suggest the challengers “engaged in sham litigation for the sole purpose of impeding the development of plaintiffs’ shopping center and to stifle competition.”<sup>131</sup> The court adopted the holding of

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<sup>123</sup> *Id.* at 141-43.

<sup>124</sup> *Id.* at 141-42.

<sup>125</sup> *Id.* at 142.

<sup>126</sup> *Main St. at Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super 135, 142 (Super. Ct. App. Div. 2017).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 140, 143.

<sup>130</sup> *Id.* at 140.

<sup>131</sup> *Main St. at Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super 135, 141 (Super. Ct. App. Div. 2017).

*Hanover Realty* and concluded that “the motion judge was required to consider the allegations in the plaintiff’s complaint that the [challengers’] action was part of a pattern of sham litigation brought by defendants for the purpose of injuring market rivals rather than to redress actual grievances.”<sup>132</sup>

Under the *California Motor* standard, the court first reviewed the number of baseless and repetitive claims brought by the challengers.<sup>133</sup> First, the court did not find support that the challengers’ original appeals raised real concerns about the validity of the Woolwich GDP ordinance.<sup>134</sup> The challengers’ appeal of the Board’s determination was without merit and their challenge to the water and sewer issues was “not supported by the MLUL or the case law.”<sup>135</sup> Therefore, the developer had successfully defended against litigation brought by the defendants.<sup>136</sup> In addition to challenging the development project at issue, the developer alleged that between the challengers themselves and their associated entity, Wakefern,<sup>137</sup> the parties had “engaged in an extensive course of conduct, including sham litigation, to interfere with the development of supermarkets that would compete with ShopRite stores.”<sup>138</sup> The developer’s allegation included a list of seventeen sites with which they claim the challenger and Wakefern had attempted to interfere.<sup>139</sup> The list contained alleged challenges to projects across New Jersey for prospective sites for Wal-Mart, Stop & Shop, Aldi, Kings, and Wegmans Supermarkets.<sup>140</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 145-147.

<sup>134</sup> *Id.* at 149.

<sup>135</sup> *Id.*

<sup>136</sup> *Main St. at Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super 135, 149 (Super. Ct. App. Div. 2017).

<sup>137</sup> Wakefern is “the merchandising and distribution arm for ShopRite.” It is a retailer-owned cooperative owned by the approximately fifty owners of the individual ShopRite stores. SHOPRITE, <http://www.shoprite.com/about-us/> (last visited Feb. 28, 2018).

<sup>138</sup> *Woolwich*, 451 N.J. Super at 147.

<sup>139</sup> *Id.* at 147-48.

<sup>140</sup> *Id.*

The court included the numerous alleged challenges of other sites in their analysis in addition to the multiple petitions against the subject property.<sup>141</sup>

As the court noted in *Hanover Realty*, a holistic review including all the facts and circumstances should be performed.<sup>142</sup> Therefore, in *Woolwich*, it may be relevant that there is specific evidence of anti-competitive behavior between the challengers and developer. The court noted that while the challengers' appeal was pending, the developer alleged that someone with a connection to the challenger called the developer's representatives and "inquired whether plaintiffs would be willing to lease space at the [proposed] Complex to the [challengers]."<sup>143</sup> If these allegations are true, it would provide additional evidence of anti-competitive behavior beyond the zoning appeals themselves.

Applying the appropriate standard is especially important because the lower court found that the challengers' actions to petition against "the GDP [were] protected by the Noerr-Pennington doctrine and [were] not objectively baseless."<sup>144</sup> The New Jersey Superior Court noted that the motion judge misapplied the standard and provided no support for her conclusion that the challengers' actions were not objectively baseless.<sup>145</sup>

The developer brought the anti-competitive allegations of malicious abuse of process, tortious interference, and civil conspiracy after it successfully defended against the litigation brought by the challengers.<sup>146</sup> Unlike *Hanover Realty*, the developer did not bring the case in federal court based on antitrust claims, but brought the case in state court with allegations of these common law tort violations. However, the Noerr Pennington doctrine also applies to

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<sup>141</sup> Main St. at Woolwich v. Ammons Supermarket, Inc., 451 N.J. Super 135, 147-48 (Super. Ct. App. Div. 2017).

<sup>142</sup> Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc., 806 F.3d 162, 180 (3d Cir. 2015).

<sup>143</sup> *Woolwich*, 451 N.J. Super at 143.

<sup>144</sup> *Id.* at 140.

<sup>145</sup> *Id.* at 140-41.

<sup>146</sup> Main St. at Woolwich v. Ammons Supermarket, Inc., 451 N.J. Super 135, 140-41 (Super. Ct. App. Div. 2017).

common law tort claims brought in state court.<sup>147</sup> The court noted the Fourth Circuit’s application of *California Motor Transport in Waugh Chapel South, LLC. v. United Foods & Commercial Workers Union Local 27*.<sup>148</sup> The Fourth Circuit held that “the subjective motive of the litigant and objective merits of the suit are relevant, but other signs of bad-faith litigation . . . may also be probative of abuse of the adjudicatory process.”<sup>149</sup> In this case, the court found sham litigation “where only one of fourteen proceedings were successful.”<sup>150</sup>

### C. Malicious Abuse of Process

Malicious abuse of process is a tort claim where “the misuse, or misapplying process justified in itself for an end other than that which it was designed to accomplish.”<sup>151</sup> The developer must show that the challenger “performed further acts after the issuance of process which represents the perversion or abuse of the legitimate purposes of that process.”<sup>152</sup>

In *Woolwich*, the developer argued that filing an appeal of the developer’s approval and subsequently reaching out to a representative of the developer to lease the proposed space may be a sufficient “further act after the issuance of process.”<sup>153</sup> Additionally, the challengers did not oppose the zoning approval until they discovered that a ShopRite competitor would be a tenant at the site.<sup>154</sup> These two arguments undermine the challengers’ claim that they opposed the development “in good faith.”<sup>155</sup>

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<sup>147</sup> Wooster, *supra* note 38, at §11-3.

<sup>148</sup> *Waugh Chapel South, LLC. v. United Foods & Commercial Workers Union Local 27*, 728 F.3d 354, 364 (4<sup>th</sup> Cir. 2013).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Main St. at Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super 135, 150 (Super. Ct. App. Div. 2017).

<sup>152</sup> *Id.* at 151.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

#### D. Tortious Interference

Tortious interference must “rest on facts plausibly supporting a conclusion that defendant’s actions were ‘improper’ or ‘wrongful.’”<sup>156</sup> In order to determine whether either of these conditions were met, the court must evaluate “the nature of and motivation behind the conduct, the interest advanced and interfered with, societal interests that bear on the rights of each party, the proximate relationship between the conduct and interference, and the relationship between the parties.”<sup>157</sup> Here, the court again looked at the timing of the challenges and noted that no appeals followed the original GDP approval.<sup>158</sup> However, once it was identified that a Wal-Mart would be occupying the commercial space, the challengers hired a lawyer to appeal the second GDP approval.<sup>159</sup>

This case—whose litigation ran for two and a half years—is another example of how zoning petitions can be an effective tool against a competitor, if left unchecked.<sup>160</sup> The developers stated that during the pending litigation, “they were unable to proceed with the development of the property, could not enter into leases with prospective tenants, and lost credibility in the marketplace.”<sup>161</sup>

There is a delicate balance between enacting stricter laws to stop anti-competitive zoning challenges and infringing on the First Amendment right to petition the government for redress of grievances. Using a fact-sensitive, open-ended rule allowed the *Woolwich* court to review the fact that the challengers had filed numerous similar anti-competitive petitions across New Jersey.

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<sup>156</sup> *Main St. at Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super 135, 152 (Super. Ct. App. Div. 2017).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Main St. at Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super 135, 152 (Super. Ct. App. Div. 2017).



### III. Conclusion

#### A. Appropriate Analysis for Reviewing Sham Litigation in Zoning

In *Hanover Realty*, the Third Circuit reconciled *California Motor Transport* and *Professional Real Estate* “by concluding that they apply to different situations: *California Motor Transport* applies to a series of sham petitions and *Professional Real Estate* applies to a single sham petition.”<sup>162</sup> First, the court should determine whether the challenging party has issued one or a few filings against the prospective development or whether it has filed numerous meritless filings.<sup>163</sup> Where there is only one alleged sham petition, *Professional Real Estate*’s more rigorous two-step test properly tilts the scale in favor of the defendant.<sup>164</sup> Courts should be wary of limiting First Amendment freedom of speech protections when there is only one petition. Additionally, “with only one data point, it is difficult to determine with any precision whether the petition was anticompetitive.”<sup>165</sup> However, when it is sufficiently alleged that the defendant interfered by filing a pattern of baseless appeals against the developer’s project, the more flexible application in *California Motor Transport* should apply.<sup>166</sup> In this case, a court “should perform a holistic review that may include looking at the defendant’s filing status (i.e. win-loss percentage) as well as circumstantial evidence of the defendant’s subjective motivations.”<sup>167</sup> “Courts should consider evidence of bad-faith as well as the magnitude and the nature of the collateral harm imposed on the plaintiffs by the defendants’ petitioning activity (i.e. abuses of the discovery process and interference with access to governmental agencies).”<sup>168</sup> Courts must also

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<sup>162</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 179 (3d Cir. 2015).

<sup>163</sup> *Id.* at 180.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 180-81 (stating “a more flexible standard is appropriate when dealing with a pattern of petitioning”).

<sup>167</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 180 (3d Cir. 2015).

<sup>168</sup> *Id.* at 181.

be careful not to let a defendant's campaign of sham litigation be overlooked if they win one or only a few challenges.<sup>169</sup>

Further, in *Woolwich*, the New Jersey Superior Court highlighted evidence provided by the developer that the challenging party had conducted the same or similar anti-competitive actions in other projects.<sup>170</sup> When determining if the challenger has engaged in a pattern of baseless claims, it may be relevant to include the challengers' alleged sham litigations in other locations and not only the number of challenges filed in the case at issue.

#### B. Standing Requirement

We do not always get to a just result where an aggrieved party is made whole with a counter-suit because a developer may be shut out of court for lack of standing. As the dissent in *Hanover* discusses, standing often keeps the developers from suing the parties who opposed numerous permits and court challenges delaying their development project. There is irony in the fact that a party that weathered allegedly baseless court and administrative challenges is then shut out from appealing to the courts to make themselves whole for lost profits from the failed development project. It is difficult enough that the developer lost the development project due to the expenses and delay imposed on the project by the challenger, but there should be an appropriate cause of action.

The standing question is raised for cases in federal court because to have standing for an antitrust claim the party must be "injured in his business or property by anything forbidden in antitrust laws."<sup>171</sup> In *Hanover*, the court ruled that the developer had standing to sue because its

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<sup>169</sup> *Id.* at 182.

<sup>170</sup> *Main St. at Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super 135, 147-48 (Super. Ct. App. Div. 2017).

<sup>171</sup> 15 U.S.C. § 15(a). *See also*, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 467, (1982) (stating "[t]he Clayton Act (Act) does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.").

actions were “inextricably intertwined” with the challengers’ objectively baseless conduct intended to prohibit access by the prospective tenant.<sup>172</sup> Defendants may look to bring an antitrust case in federal court because it is able to receive treble damages and reimbursement for the lawsuit’s cost, including attorney’s fees.<sup>173</sup> However, if antitrust standing cannot be established in federal court, an alternative is to bring causes of action for tortious interference and malicious abuse of process through state courts.<sup>174</sup>

The sham exception was created to allow for fair competition. To combat these sham challenges that lead to an unfair outcome for the developers and overwhelm the court dockets with baseless claims, the more flexible standard outlined in *Hanover Realty* should be applied when there is sufficient evidence to allege a pattern of baseless claims by the challenger.

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<sup>172</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 168 (3d Cir. 2015).

<sup>173</sup> 15 U.S.C. § 15(a).

<sup>174</sup> *See e.g., Main St. at Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super 135 (Super. Ct. App. Div. 2017).