

**SHAM LITIGATION IN ZONING CHALLENGES: FINDING  
THE BALANCE BETWEEN PROTECTION OF  
CONSTITUTIONAL RIGHTS AND ANTICOMPETITIVE  
BUSINESS PRACTICES**

*Brian P. Lanyon\**

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I. INTRODUCTION: ANTICOMPETITIVE ZONING CHALLENGES

The concept of zoning developed from the common law nuisance doctrine.<sup>1</sup> The primary purpose of zoning is to organize communities so that compatible property uses are located in appropriate areas, thus limiting nuisances.<sup>2</sup> Each municipality has a comprehensive plan which “does not

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\*J.D. Candidate, 2019, Seton Hall University School of Law.

<sup>1</sup> BEVERLY J. POOLEY, PLANNING AND ZONING IN THE UNITED STATES, 40 (1961) (ebook).

<sup>2</sup> *Id.* at 45 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–87 (1926) (“[W]ith

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 such a plan, a municipality enacts a zoning ordinance that geographically divides the municipality into particular use districts (i.e. residential, commercial, industrial), with further limits within each 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 might allow for other types of businesses.<sup>5</sup> In a municipality’s zoning ordinance, zones can also be drawn to restrict certain categories of businesses, such as heavy commercial or adult businesses, from specific locations.<sup>6</sup> While an ordinance can regulate the types of businesses in each area, it should not regulate the individual businesses themselves.<sup>7</sup> For example, an ordinance can even prohibit a “big box retailer,” but it cannot individually prohibit Target or Wal-Mart.<sup>8</sup>

Anticompetitive zoning challenges can arise in any industry where the potential addition of a local competitor poses a threat to the profitability of an existing business owner. This practice is common, especially between supermarkets.<sup>9</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 Supermarket A’s project, or at least delaying the project for as long as possible.

In some cases, a developer might discover explicit evidence that the

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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.

<sup>7</sup> *Wal-Mart Stores, Inc. v. City of Turlock*, 41 Cal. Rptr. 420, 423, 440 (Ct. App. 2006) (upholding City of Turlock’s Ordinance that “require[d] a [Conditional Use Permit] for the development of certain large-scale retail stores and would prohibit ‘discount superstores,’ which are defined as retail stores of greater than 100,000 square feet that devote more than 5 percent of sales-floor area to nontaxable items such as groceries.” However, the court did not find that “the Ordinance was enacted for the purpose of targeting Wal-Mart. The Ordinance [did] not single out Wal-Mart but, instead, prohibit[ed] all discount superstores within [the] City’s boundaries.”).

<sup>8</sup> *Id.* at 440.

<sup>9</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.”).

challenger's sole desire is to hamper a prospective competitor's entry into the market.<sup>10</sup> However, in such a case, it is more likely that the challenge would be disguised under otherwise legitimate complaints.<sup>11</sup> There are two primary methods in which a challenger can oppose and delay a project: judicial challenges and administrative challenges.<sup>12</sup> Both of these instruments can be used at many steps along a developer's path to beginning its business. Prior to building, developers need zoning variance approvals, which can be appealed through courts.<sup>13</sup> The challengers may oppose the variance's approval, for example, on the basis of traffic flow, parking issues, landscaping compliance, lighting, and infrastructure demands. Developers may also need building permits, environmental approvals, and other approvals from local governing bodies, which may also be opposed through administrative challenges.<sup>14</sup> Given the many instances where challengers can oppose a project, such challenges can accumulate to cause significant delay.

An entity can sue to challenge a zoning approval, unless the challenge is brought solely to prevent a competing business from obtaining approval.<sup>15</sup> This is the sham exception to the general rule allowing parties to bring forth lawsuits.<sup>16</sup> The sham exception allows the developer to counter-sue the challenger and potentially receive compensation for lost profits caused by delays in or dissolution of the development project due to the challenger's baseless claims.<sup>17</sup> Such spurious challenges brought by a competitor can impose significant costs on a prospective developer.<sup>18</sup> Redevelopment projects are extensive and costly ventures that may require multiple appearances before the municipality's zoning board for variance approvals. There are costly 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. Further, the developer may be required to create an extensive site plan, which is "a detailed depiction of the uses, buildings,

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<sup>10</sup> See, e.g., *id.* at 168 (noting that Challenger's ecological consultant "praised itself for 'manag[ing] to delay the issuance of the [Wetlands] approvals based on a technicality' and said that its substantive objections 'may delay things a bit longer.'").

<sup>11</sup> See, e.g., *Main St. Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super. 135, 142 (App. Div. 2017), *cert. denied*, 231 N.J. 335 (2017).

<sup>12</sup> Gary Myers, *Litigation as a Predatory Practice*, 80 KY. L.J. 565, 593–94 (1992); see, e.g., *Hanover Realty*, 806 F.3d at 166–70.

<sup>13</sup> Myers, *supra* note 12, at 593–94.

<sup>14</sup> *Id.*

<sup>15</sup> See generally, *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993); *Hanover Realty*, 806 F.3d at 182–83.

<sup>16</sup> *Prof'l Real Estate Inv'rs*, 508 U.S. at 60.

<sup>17</sup> See generally *Main St. Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super. 135, 152 (App. Div. 2017).

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

utilities, and infrastructure on a particular parcel of land.”<sup>19</sup> The site plan includes all information necessary to explain elements of the project under review.<sup>20</sup> To create the sophisticated site plan, a developer may need to engage numerous experts, including a planner, architect, engineer, and environmental expert.<sup>21</sup> Challengers guided by an anticompetitive strategy frequently challenge every part of the development application process, including variance and permit approvals, in order to avoid the threat of outside competition.<sup>22</sup>

Delays to the project can be expensive or even cause the development project to be terminated.<sup>23</sup> Sites targeted for redevelopment may be vacant while the developer seeks approval. Therefore, any delay to the project renders the developers unable to collect the rent necessary to offset its overhead costs. This situation may be fatal if the developer is relying on rent income to make mortgage payments on the property. Additionally, significant delays could be destructive to the developer’s project. Since redevelopment projects are often sensitive to market conditions, delays could lead to the worsening of a project’s economic condition and make development no longer financially viable.<sup>24</sup> The developer may also lose prospective tenants to nearby locations if the tenants are unwilling to wait several years before moving to the newly-developed site.<sup>25</sup>

*Landmarks Holding Corp. v. Bermant*<sup>26</sup> deals with a prime example of sham litigation. In *Bermant*, real estate developers seeking approval for a shopping center in Hamden, Connecticut claimed that the owners of two existing shopping centers conspired against the approval of their project.<sup>27</sup> In order to delay the approval, the challengers filed “fourteen (mostly baseless) lawsuits, multiple appeals from adverse decisions, [appeared] at zoning hearings, [and employed] litigation delaying tactics and [a] massive publicity campaign . . . .”<sup>28</sup> Even if the challenger business-owners lost their petitions, they believed their challenges could delay the development of the competing property for a minimum of three to five years.<sup>29</sup> One of the

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<sup>19</sup> Michael C. Spata, *Decision-Makers and the Administrative Decisions*, HOW TO LITIGATE A LAND USE CASE: STRATEGIES AND TRIAL TACTICS 55, 99 (Larry J. Smith ed., 2000).

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

<sup>21</sup> *Id.* at 60, 99.

<sup>22</sup> See generally, Myers, *supra* note 12, at 593–94.

<sup>23</sup> See, e.g., *Main St. Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super. 135, 152 (App. Div. 2017).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 664 F.2d 891 (2d Cir. 1981).

<sup>27</sup> *Id.* at 892.

<sup>28</sup> Myers, *supra* note 12, at 594–95 (citing *Bermant*, 664 F.2d at 89 (2d Cir. 1981)).

<sup>29</sup> *Bermant*, 664 F.2d at 892 (1981).

owners of the existing shopping centers conceded 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>30</sup> In *Bermant*, the Second Circuit held for the developer, reversing the District of Connecticut’s initial grant of summary judgment on the sham litigation claim.<sup>31</sup> The Second Circuit ruled that these sham petitions were not protected by the First Amendment and remanded the case to the district court.<sup>32</sup> While this case may seem like an obvious example of the sham exception, due to the evidence of intended baseless litigation during the deposition, these occurrences are hardly uncommon.<sup>33</sup> While this type of anticompetitive strategy may at first be considered extreme, it shows how competitors can use “the courtroom as a sword to deter entry into a market.”<sup>34</sup>

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. However, courts should apply a more flexible standard when there is sufficient evidence to allege a pattern of baseless claims by the challenger.

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 review 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.*, and the Superior Court of New Jersey’s recent decision in *Main Street at Woolwich, LLC. v. Ammons Supermarket, Inc.*<sup>35</sup> Part III will discuss how courts should analyze these decisions and the importance of finding standing in these types of cases. Part IV will conclude.

## II. BACKGROUND: NOERR-PENNINGTON DOCTRINE AND SHAM LITIGATION EXCEPTION AS APPLIED TO ZONING CHALLENGES

This section discusses the Noerr-Pennington doctrine, which establishes the general right to bring a lawsuit in the antitrust context, and the reasoning behind its application. The doctrine has an important application to zoning challenges, as the sham exception to the doctrine is used to combat baseless challenges that are brought to delay the real estate

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 896–98.

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

<sup>33</sup> Myers, *supra*, note 12, at 594–95.

<sup>34</sup> *Id.*

<sup>35</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 175 (3d Cir. 2015) *Main St. Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super. 135, 142 (App. Div. 2017).

development of a competitor.

*A. Anticompetitive 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 is deemed to have no legitimate basis other than to deter the entry of a competitor into the market.<sup>36</sup>

The First Amendment gives citizens broad rights “to petition the Government for a redress of grievances.”<sup>37</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>38</sup> However, judicial and administrative challenges are not protected by antitrust law when a party’s “efforts to influence government action are considered ‘sham.’”<sup>39</sup>

Federal antitrust law is primarily established the Sherman Act.<sup>40</sup> Section 2 of the Sherman Act prohibits any attempt “to monopolize any part of the trade or commerce.”<sup>41</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 antitrust laws.”<sup>42</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>43</sup> In order for the plaintiff’s injury to satisfy the antitrust requirements of the Sherman and Clayton Acts, they must be a consumer or competitor in the restrained market.<sup>44</sup> Additionally, the Acts are utilized by “those whose injuries are the means by which the defendants seek to achieve their anti-competitive ends.”<sup>45</sup> In the zoning cases at issue, real estate developers are the entities that the defendants seek to harm in order to delay the future competitor-tenant.

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<sup>36</sup> See generally *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993); *Hanover Realty*, 806 F.3d at 182–83.

<sup>37</sup> U.S. CONST. amend I.

<sup>38</sup> Marina Lao, *Reforming the Noerr-Pennington Antitrust Immunity Doctrine*, 55 RUTGERS L. REV. 965, 966 (2003).

<sup>39</sup> *Id.* at 966–67.

<sup>40</sup> *Id.* at 966 n.3.

<sup>41</sup> 15 U.S.C. § 2 (2018).

<sup>42</sup> 15 U.S.C. § 15(a) (2018).

<sup>43</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 171 (3d Cir. 2015) (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982)).

<sup>44</sup> *Hanover Realty*, 806 F.3d at 172 (quoting *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 102 (3d Cir. 2010)).

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

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

The Noerr-Pennington doctrine limits the Sherman Act's reach by relying on First Amendment guarantees.<sup>46</sup> The doctrine derives its name from two United States Supreme Court cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*<sup>47</sup> and *United Mine Workers of America v. Pennington*.<sup>48</sup> Generally, the doctrine establishes that petitioners for government redress are immune from antitrust liability unless their action falls under the doctrine's "sham exception" and deemed objectively baseless.<sup>49</sup> Under the Noerr-Pennington doctrine, a lawsuit is considered objectively baseless "if no reasonable litigant could realistically expect success on the merits."<sup>50</sup> The doctrine provides immunity to petitioners for redress of their grievances to a variety of government bodies, including administrative agencies, legislatures, executives, or the judiciary.<sup>51</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>52</sup> "The Noerr-Pennington [d]octrine 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>53</sup> It has also been applied to protect against "common-law torts such as malicious prosecution and abuse of process," 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>54</sup>

However, in *Noerr*, the Supreme Court recognized that the application of the Sherman Act is justified in instances where the petition "is a mere

<sup>46</sup> *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993).

<sup>47</sup> *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

<sup>48</sup> *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

<sup>49</sup> *Prof'l Real Estate Inv'rs*, 508 U.S. at 60.

<sup>50</sup> Ann K. Wooster, Annotation, *Application of Noerr-Pennington Doctrine by State Courts*, 94 A.L.R. 5th 455, §3 (2018) (citing *CSX Transp., Inc. v. Peirce*, 974 F. Supp. 2d 927 (N.D. W.Va. 2013)).

<sup>51</sup> *Id.* at §2(a).

<sup>52</sup> *Main St. Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super. 135, 144 (App. Div. 2017).

<sup>53</sup> Wooster, *supra* note 50, at §3 (citing *Arim v. General Motors Corp.*, 520 N.W.2d 695 (Mich. Ct. App. 1994)).

<sup>54</sup> *Woolwich*, 451 N.J. Super at 144 (suing for "malicious abuse of process, tortious interference with prospective business contracts, and civil conspiracy."); *see, e.g.*, *Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*, 707 N.Y.S.2d 647 (App. Div. 2000) (suing for "(1) tortious interference with a contract, (2) tortious interference with prospective economic advantage . . .").

sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.”<sup>55</sup> The sham exception exists to remove protections from meritless claims and ensures that the Noerr-Pennington doctrine does not give petitioners an unchecked right to challenge competitors.<sup>56</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 simply in order to impose expense and delay.”<sup>57</sup> When the challenger brings a frivolous claim, the presumption of immunity under the doctrine is nullified, and the party can be held liable under the exception.<sup>58</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>59</sup> A challenger forfeits its First Amendment protections when the party’s zoning challenge lacks the genuine and legitimate purpose needed for a favorable decision.<sup>60</sup> Courts first look at whether the challenger has made one or multiple filings.<sup>61</sup> This is done to determine whether the challenge has a legitimate basis or whether it is a disguised attempt to directly interfere with the business practices of a competitor.<sup>62</sup>

When courts decide whether a petition is a “sham,” a primary consideration is whether a pattern of baseless claims exists against the application for an individual development project. In *California Motor*,<sup>63</sup> the Supreme Court discussed how a pattern of sham litigation abuses the judicial process. Used this way, sham challenges could be effectively wielded to restrain competition. While one claim may go unnoticed or receive leniency by a court, “a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and

<sup>55</sup> E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961).

<sup>56</sup> See generally, *Prof'l Real Estate Inv'rs*, 508 U.S. at 60–61.

<sup>57</sup> Wooster, *supra* note 50, at §6 (citing *Ex parte Simpson*, 36 So. 3d 15 (Ala. 2009)).

<sup>58</sup> *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993).

<sup>59</sup> *Woolwich*, 451 N.J. Super. at 144 (citing *Fraser v. Bovino*, 721 A.2d 20 (N.J. App. Div. 1998) (quoting *Prof'l Real Estate Inv'rs*, 508 U.S. at 60–61)).

<sup>60</sup> Wooster, *supra* note 50, at §3 (citing *Cordova v. Cline*, 396 P.3d 159 (N.M. 2017)).

<sup>61</sup> *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162,180 (3d Cir. 2015).

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

<sup>63</sup> *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).



judicial processes have been abused.”<sup>64</sup> While it may be difficult to determine what actions qualify as baseless or how many of such actions constitute a pattern, 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>65</sup>

When the court determines that the challenges are objectively baseless and fall under the sham exception, a challenger’s First Amendment right to petition the government is no longer protected, since the party has sought to abuse that right for their own gain.<sup>66</sup> Further, the Ninth Circuit 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>67</sup> The challenger’s appeals need to be viewed as a whole, and one successful challenge does not support numerous baseless challenges.<sup>68</sup>

In *Hanover Realty*, the Third Circuit detailed the distinction between the standards applied in *California Motor* and *Professional Real Estate*.<sup>69</sup> Even though these two tests provide similar explanations of the sham exception, they highlight that sham litigations should be analyzed differently depending on the number of sham petitions filed by the petitioner with regard to the subject property of the litigation.<sup>70</sup>

#### *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 be used 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>71</sup> Second, challenger’s claims must be brought as “an attempt to interfere

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*; *Prof’l Real Estate Inv’rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993).

<sup>67</sup> *USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Constr. Trades Council*, 31 F. 3d 800, 811 (9th Cir. 1994).

<sup>68</sup> *Prof’l Real Estate Inv’rs*, 508 U.S. at 73 (Stevens, J., concurring) (stating that “[r]epetitive findings, some of which are successful and some unsuccessful, may support an inference that the process is being misused.”).

<sup>69</sup> *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 179–80 (3d Cir. 2015).

<sup>70</sup> *Id.* at 179 (stating “[t]hree 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.”).

<sup>71</sup> *Prof’l Real Estate Inv’rs*, 508 U.S. at 60.

*directly* with the business relationships of a competitor,’ through the ‘use of the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.’”<sup>72</sup> This test should apply when there is evidence of sham litigation regarding a single suit or legal appeal by the challenging party.<sup>73</sup> Part two of the test can otherwise be stated that the applicant is “subjectively motivated by bad faith.”<sup>74</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 Noerr.”<sup>75</sup> Only after the challenged litigation is determined to be objectively meritless will the court receive the litigant’s subjective motivation under the second prong.<sup>76</sup> Because there is only a single or limited number of challenges, the courts are less suspicious of the challenge than if there is evidence of numerous filings, which often indicates 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>77</sup> It is also possible that courts have been unwilling to limit First Amendment protections on the basis of a single suit filed against a developer.

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

The standard in *California Motor* should apply in cases where the defendant files numerous challenges or legal proceedings with regard to the prospective development project.<sup>78</sup> There is no required number of petitions needed to apply the *California Motor* analysis rather than the *Professional Real Estate* test.<sup>79</sup> The Supreme Court in *California Motor* held that a complaint sufficiently alleged a sham litigation when the aggrieved party established that the challengers “sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process.”<sup>80</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>81</sup> The Ninth Circuit

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<sup>72</sup> *Id.* (quoting *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 380 (1991); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127–144 (1961)).

<sup>73</sup> *Hanover Realty*, 806 F.3d at 179–80.

<sup>74</sup> *Wooster*, *supra* note 50, at §3 (citing *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, Inc.*, 896 N.W. 2d 156 (Neb. 2017)).

<sup>75</sup> *Prof'l Real Estate Inv'rs*, 508 U.S. at 60.

<sup>76</sup> *Id.* at 60–61.

<sup>77</sup> *Hanover Realty*, 806 F.3d at 180.

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

<sup>79</sup> *Id.* at 180–81.

<sup>80</sup> *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972).

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

discussed that *California Motor* in *USS-POSCO Industries*, and “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>82</sup> This standard triggers a holistic review weighing the facts of the case, in comparison to the two-part test in *Professional Real Estate*, where the court is less likely to scrutinize the single challenge.<sup>83</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>84</sup> The review is prospective and considers whether the numerous filings were intended to harass the developer.<sup>85</sup> In order to determine if the filings were without merit, the court must look at all the facts and circumstances of the case.<sup>86</sup> The court “should perform a holistic review that may include looking at the defendant’s filing status (i.e., win-loss percentage) as circumstantial evidence of the defendant’s subjective motivations.”<sup>87</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>88</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>89</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>90</sup>

The sham exception is considerably narrow.<sup>91</sup> The exception frequently involves complicated questions of fact and places the burden of proof on the party “opposing [the] application of the Noerr-Pennington Doctrine to prove that the [challenger] comes within the sham exception.”<sup>92</sup> The analysis is further complicated by the fact that more is needed to prove sham litigation than anticompetitive intent.<sup>93</sup>

<sup>82</sup> *USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Constr. Trades Council*, 31 F. 3d 800, 811 (9th Cir. 1994).

<sup>83</sup> *Hanover Realty*, 806 F.3d at 180–81.

<sup>84</sup> *Id.* at 180.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 180–81.

<sup>88</sup> *Id.* at 181.

<sup>89</sup> *Hanover Realty*, 806 F.3d at 180.

<sup>90</sup> *Id.* at 182 (quoting *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 363–64 (4th Cir. 2013)).

<sup>91</sup> *Wooster*, *supra* note 50, at §6 (citing *United States v. Brown*, F. Supp. 3d 697 (N.D. Ohio 2016)).

<sup>92</sup> *Wooster*, *supra* note 50, at §6 (*Brown*, F. Supp. 3d 697).

<sup>93</sup> *Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*, 707 N.Y.S.2d 647,

## III. 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 the Superior Court of New Jersey—within the state court system—applied the Third Circuit's reasoning in *Main St. at Woolwich, LLC v. Ammons Supermarket, Inc.*

A. Third Circuit's Analysis in the *Hanover Realty*

In *Hanover Realty*, a developer sought zoning approval to improve its property by constructing a commercial building that would become a Wegmans supermarket.<sup>94</sup> The owner of a nearby ShopRite supermarket filed numerous administrative and legal challenges to the developer's permit applications.<sup>95</sup> In response, the developer sued the challenger, the ShopRite group, alleging violations of the Sherman Act and arguing that the petitioner's filings were baseless attempts to keep out a potential market competitor.<sup>96</sup>

Cases like *Hanover Realty* are complicated because the challenger's actions impact the developer, who is not necessarily a direct competitor. The challenger is typically a supermarket ownership group that owns numerous supermarkets, whereas the aggrieved party is a real estate developer.<sup>97</sup> The prospective tenant at the newly developed location—in this case Wegmans—may not want to be involved in the sham litigation lawsuit.<sup>98</sup> Therefore, some anticompetitive claims do not survive the question of standing.<sup>99</sup> In *Hanover Realty*, the Third Circuit held that Hanover Realty did not have standing to bring a “claim for the attempted monopolization of the market for rental space” because Hanover Realty itself does not compete

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652 (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.”).

<sup>94</sup> *Hanover Realty*, 806 F.3d at 167; *Company Overview*, WEGMANS, <https://www.wegmans.com/about-us/company-overview.html> (last visited Dec. 20, 2018) (explaining that Wegmans is a supermarket chain based in the Northeast with ninety-eight locations in Maryland, Virginia, Pennsylvania, New Jersey, New York, and Massachusetts).

<sup>95</sup> *Hanover Realty*, 806 F.3d at 167; *About Us*, SHOPRITE, <https://shop.shoprite.com/globaldata/banner-pages/about-us> (last visited Dec. 20, 2018) (detailing that 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).

<sup>96</sup> *Hanover Realty*, 806 F.3d at 164.

<sup>97</sup> *Id.* at 167 (stating that the defendants owned twenty-six Shop Rites in New Jersey including one in Hanover about two miles from the site of the proposed Wegmans).

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

<sup>99</sup> See, e.g., *Hanover Realty*, 806 F.3d at 187 (Ambro, J., dissenting in part) (citing *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983); *Serfecz v. Jewel Food Stores*, 67 F.3d 591 (7th Cir. 1995)).

with ShopRite in that market.<sup>100</sup> However, this did not eliminate the possibility that the developer could seek legal action against ShopRite for anticompetitive behavior altogether. The court stated that “[t]he end goal of [ShopRite’s] alleged anticompetitive conduct was to injure Wegmans, a prospective competitor.”<sup>101</sup> In order to indirectly keep Wegmans from operating a competing business just two miles from their ShopRite location, the challengers sought to impose costs on the developer of the property, and not directly on Wegmans.<sup>102</sup> The challengers proceeded in this manner because the developer was the party who needed to obtain the appropriate approvals and permits before beginning construction of the new development.<sup>103</sup> “[I]njuring Hanover Realty was the very means by which Defendants could get to Wegmans” and thus ShopRite tried to remove themselves from liability on a technicality.<sup>104</sup> Therefore, “Hanover Realty can establish that its injury was ‘inextricably intertwined’ with Defendants’ anticompetitive conduct,” and thus they have standing to sue the defendants.<sup>105</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>106</sup> This “petitioning campaign was designed to block Hanover Realty from obtaining the permits and approvals it needed to proceed with the project.”<sup>107</sup>

The challengers disputed the Hanover Realty project in four major phases.<sup>108</sup> First, they sought to vacate a Flood Hazard Area Permit already granted to Hanover Realty.<sup>109</sup> However, their appeal was dismissed because their claims of “general property rights” and the new development causing “greater competition” were not sufficient to prove that the challengers were an aggrieved party.<sup>110</sup> Second, the challengers hired an ecological consultant to submit a letter on their behalf, opposing the various wetlands permits granted by the New Jersey Environmental Department.<sup>111</sup> The developer uncovered an email from the challenger’s ecological consulting firm, which

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<sup>100</sup> *Id.* at 167.

<sup>101</sup> *Hanover Realty*, 806 F.3d at 174.

<sup>102</sup> *Id.*

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

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 166–67.

<sup>106</sup> *Id.* at 166.

<sup>107</sup> *Hanover Realty*, 806 F.3d at 167.

<sup>108</sup> *Id.* at 166–70.

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

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

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

claimed it was proud of its ability to “delay the issuance of the Wetlands approvals based on a technicality,” and the fact that its additional objections may be able to further delay the project.<sup>112</sup> Ultimately, the Environmental Department issued the Wetlands permit, but with several conditions, including one requiring the developers to survey the property for the presence of Indiana bats prior to construction, a condition with which the developers ultimately had to comply.<sup>113</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>114</sup> The DOT stated that Hanover Realty would need to perform additional improvements after it considered all relevant data and arguments submitted by third parties.<sup>115</sup> The challengers’ final formal objection came in the form of an action brought before New Jersey State Court, which sought to nullify the Zoning Board’s site plan approval.<sup>116</sup> The New Jersey State Court dismissed the challengers’ claim, both on the standing issue and the merits of the case.<sup>117</sup> This objection was perhaps the most telling piece evidence establishing challengers’ bad faith. 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>118</sup> After the zoning board approval, the challenger likely knew that a Wegmans’ supermarket would be occupying the new retail development, spurring him to lodge the challenge with the court.

The time-sensitive nature of these approvals is shown by the fact that the development contract between Hanover Realty and their prospective tenant, Wegmans, included a provision that, in the event “Hanover Realty was unable to secure the required permits within two years of the agreement, Wegmans could walk away from the deal.”<sup>119</sup>

The Third Circuit reconciled *California Motor* and *Professional Real Estate* “by concluding that they apply to different situations: *California Motor* [applies] to a series of sham petitions and *Professional Real Estate*

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<sup>112</sup> *Id.* at 168.

<sup>113</sup> *Hanover Realty*, 806 F.3d at 168 (asserting that 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.”).

<sup>114</sup> *Id.* at 169.

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

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

<sup>117</sup> *Id.* at 170.

<sup>118</sup> *Hanover Realty*, 806 F.3d at 169.

<sup>119</sup> *Id.* at 167.

[applies] to a single sham petition.”<sup>120</sup> Here, since the ShopRite group filed four challenges with numerous sub-challenges against the developer, the more holistic and scrutinized review under *California Motor* should apply.<sup>121</sup> Hanover Realty can establish that the ShopRite group filed a pattern of objectively baseless judicial and administrative challenges to the developer’s project.<sup>122</sup> Even though the challenger succeeded on parts of their challenges before 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>123</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 near the proposed Wegmans (which is two miles [away] from [the] ShopRite), or in protecting the Indiana bat.”<sup>124</sup> Therefore, there are sufficient facts to conclude that the ShopRite group may have engaged in a pattern of sham litigation and would thus not be entitled to protection under the Noerr-Pennington doctrine.<sup>125</sup> The court did not discuss potential damages, but Hanover’s brief to the district court listed its damages as “lost rent, increased expenses and carrying charges and diminution of value resulting from [ShopRite’s] sham petitioning.”<sup>126</sup>

It is also important to address the dissent in this case, due to the difficulty of establishing standing in such cases. The dissent believed that Hanover Realty was not the victim of an antitrust violation because the company does not compete in the supermarket business with ShopRite.<sup>127</sup> As the dissent noted, Hanover supplied commercial space to full-service supermarkets, however, the court ultimately ruled that it was the market for grocery stores, rather than the real property market, that was allegedly restrained.<sup>128</sup>

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

In *Main Street at Woolwich, LLC. v. Ammons Supermarket, Inc.*, a developer planned to improve its land in Woolwich Township by building a

<sup>120</sup> *Id.* at 179.

<sup>121</sup> *Id.* at 180.

<sup>122</sup> *Id.* at 182–83.

<sup>123</sup> *Id.* at 182 (quoting *Waugh Chapel S. v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 365 (4th Cir. 2013)).

<sup>124</sup> *Hanover Realty*, 806 F.3d at 182.

<sup>125</sup> *Id.* at 182–183.

<sup>126</sup> Plaintiff’s Brief in Opposition to Motion to Dismiss, *Hanover 3201 Realty, LLC. v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 179 (3d Cir. 2015) (No. 14-1327), 2014 U.S. Dist. Ct. Briefs LEXIS 1472, at \*39.

<sup>127</sup> *Hanover Realty*, 806 F.3d at 186 (Ambro, J., dissenting in part).

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

shopping center.<sup>129</sup> In 2007, the developer, Woolwich, began the process of obtaining government approval to develop the site, which required the assent of the New Jersey State Planning Committee and numerous authorizations from the Woolwich Township Joint Land Use Board.<sup>130</sup> In 2010, the Woolwich Township Joint Land Use Board (“Board”) approved the developer’s general development plan (“GDP”), which permitted the development of 1.5 million square feet of commercial and retail space in three phases.<sup>131</sup> At the time the GDP was approved, it was unknown which stores would occupy the proposed development site.<sup>132</sup> In April 2012, the developer submitted an application for site plan approval to develop phase one of the project, which included the building of a Wal-Mart.<sup>133</sup> In October 2013, the Board approved the developer’s final site plan, which went unopposed.<sup>134</sup>

Following the Board’s approval of the site plan, 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>135</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>136</sup> The developers claimed that the challengers’ filings amounted to sham litigation because they were filed with the sole intention of interfering with approval for a prospective competitor.<sup>137</sup>

The New Jersey Superior Court held that there were sufficient facts alleged to find that Shop Rite “engaged in sham litigation for the sole purpose of impeding the development of plaintiffs’ shopping center and to stifle competition.”<sup>138</sup> The court adopted the holding of *Hanover Realty*, concluding that “[t]he 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

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<sup>129</sup> *Main St. Woolwich v. Ammons Supermarket, Inc.*, 451 N.J. Super. 135, 142 (App. Div. 2017), *cert. denied*, 231 N.J. 335 (2017).

<sup>130</sup> *Id.* at 141–42.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 142.

<sup>133</sup> *Id.* at 142.

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

<sup>135</sup> *Woolwich*, 451 N.J. Super at 142.

<sup>136</sup> *Id.* at 140, 143.

<sup>137</sup> *Id.* at 140.

<sup>138</sup> *Id.* at 141.



rivals rather than to redress actual grievances.”<sup>139</sup>

Under the *California Motor* standard, the court first reviewed the number of the challengers’ claims that were baseless and repetitive.<sup>140</sup> The court did not find support for the challengers’ original appeals, raising concerns about the validity of the Woolwich GDP ordinance.<sup>141</sup> Further, the court found 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>142</sup> Accordingly, the developer had successfully defended against litigation brought by the defendants.<sup>143</sup> In addition to challenging the development project at issue, the developer alleged that between the challengers themselves and their associated entity, Wakefern, 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>144</sup> The developer’s allegation included a list of seventeen sites in which they claim the challengers and Wakefern had attempted to interfere.<sup>145</sup> The list contained challenges to projects across New Jersey for prospective sites for supermarkets like Wal-Mart, Stop & Shop, Aldi, Kings, and Wegmans Supermarkets.<sup>146</sup> The court included these challenges of other sites in their analysis, along with multiple petitions against the subject property.<sup>147</sup>

As the court noted in *Hanover Realty*, a holistic review including all the facts and circumstances surrounding the challenge should be performed.<sup>148</sup> Therefore, in *Woolwich*, it may be relevant that there is specific evidence of anticompetitive 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 challengers called the developer’s representatives and “inquired whether plaintiffs would be willing to lease space at the [proposed] complex to the [challengers].”<sup>149</sup> If these allegations are true, it would provide additional evidence of anticompetitive behavior beyond the zoning appeals themselves.

<sup>139</sup> *Id.*

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

<sup>141</sup> *Woolwich*, 451 N.J. Super at 149.

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

<sup>143</sup> *Id.* at 150.

<sup>144</sup> *Id.* at 147; *About Us*, SHOPRITE, <http://www.shoprite.com/about-us/> (last visited Dec. 20, 2018) (conveying that 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).

<sup>145</sup> *Woolwich*, 451 N.J. Super. at 147–48.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 143.

<sup>148</sup> *Hanover Realty*, 806 F.3d at 180.

<sup>149</sup> *Woolwich*, 451 N.J. Super. at 143.

Applying the appropriate standard is especially important in light of the lower court's ruling that the challengers' actions to petition against "the GDP [were] protected by the Noerr-Pennington doctrine and [were] not objectively baseless."<sup>150</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>151</sup>

The developer brought the anticompetitive allegations of malicious abuse of process, tortious interference, and civil conspiracy after it successfully defended against the litigation brought by the challengers.<sup>152</sup> Unlike in *Hanover Realty*, the developer did not bring the case in federal court based on antitrust claims, but instead brought the case in state court with allegations of these common law tort violations.<sup>153</sup> However, the Noerr-Pennington doctrine also applies to common law tort claims brought in state court.<sup>154</sup> The court noted the Fourth Circuit's application of *California Motor* in *Waugh Chapel South, LLC v. United Foods & Commercial Workers Union Local 27*.<sup>155</sup> In this case, 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>156</sup> In *Waugh Chapel South*, the court found sham litigation "where only one of fourteen proceedings were successful."<sup>157</sup>

### C. Malicious Abuse of Process

Malicious abuse of process is "[t]he improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope."<sup>158</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>159</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

<sup>150</sup> *Id.* at 140.

<sup>151</sup> *Id.* at 140–41.

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

<sup>153</sup> Compare *Hanover Realty*, 806 F.3d at 170, with *Woolwich*, 451 N.J. Super. at 143.

<sup>154</sup> *Wooster*, *supra* note 50 at §3 (citing *Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*, 707 N.Y.S. 2d 647 (App. Div. 2000)).

<sup>155</sup> *Waugh Chapel S. LLC v. United Food and Commercial Workers Union Local 27*, 728 F.3d 354, 364 (4th Cir. 2013).

<sup>156</sup> *Id.*

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

<sup>158</sup> *Abuse of Process*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>159</sup> *Woolwich*, 451 N.J. Super. at 151.

after the issuance of process.”<sup>160</sup> Additionally, the challengers did not oppose the zoning approval until they discovered that a ShopRite competitor would have been a tenant at the site.<sup>161</sup> These two arguments undermined the challengers’ claim that they opposed the development “in good faith.”<sup>162</sup>

#### *D. Tortious Interference*

Tortious interference claims must “rest on facts plausibly supporting a conclusion that defendants’ actions were ‘improper’ or ‘wrongful.’”<sup>163</sup> In order to determine if either of these conditions are met, the court must evaluate “the nature of and motivation behind the conduct, the interests 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>164</sup> Here, in *Woolwich*, the court again looked at the timing of the challenges and noted that no appeals followed the original GDP approval.<sup>165</sup> However, when it was later discovered that a Wal-Mart would be occupying the commercial space, the challengers hired a lawyer in order to appeal the second GDP approval.<sup>166</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>167</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>168</sup>

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

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

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 152 (quoting *Nostrame v. Santiago*, 213 N.J. 109, 123 (2013)).

<sup>164</sup> *Id.* at 152 (quoting *Nostrame*, 213 N.J. at 122).

<sup>165</sup> *Woolwich*, 451 N.J. Super. at 151.

<sup>166</sup> *Id.* at 152.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 152.

## IV. CONCLUSION

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

In *Hanover Realty*, the Third Circuit reconciled *California Motor* and *Professional Real Estate* “by concluding that they apply to different situations: *California Motor* [applies] to a series of sham petitions[,] and *Professional Real Estate* [applies] to a single sham petition.”<sup>169</sup> First, the court should determine (1) how many filings the challenging party has issued against the prospective development, or (2) whether the challengers have filed numerous meritless filings.<sup>170</sup> “Where there is only one alleged sham petition, *Professional Real Estate*’s exacting two-step test properly [tilts the scale] in favor of the defendant.”<sup>171</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>172</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* should apply.<sup>173</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>174</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>175</sup> Courts must also be careful not to let a defendant’s campaign of sham litigation be overlooked just because they have been successful in a limited number of challenges.<sup>176</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 anticompetitive actions in other projects.<sup>177</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.

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<sup>169</sup> *Hanover Realty*, 806 F.3d at 179.

<sup>170</sup> *Id.* at 180.

<sup>171</sup> *Id.*

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

<sup>173</sup> *Id.* at 180–81 (stating “a more flexible standard is appropriate when dealing with a pattern of petitioning”).

<sup>174</sup> *Id.* at 180.

<sup>175</sup> *Hanover Realty*, 806 F.3d 162 at 181.

<sup>176</sup> *Id.* at 182.

<sup>177</sup> *Woolwich*, 451 N.J. Super. 135 at 147–48.

*B. Standing Requirement*

A just result is not always achieved 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 Realty* discusses, standing often keeps the developers from suing the parties who opposed numerous permits and presented court challenges delaying their development project.<sup>178</sup> There is irony in the fact that a party that weathered allegedly baseless judicial and administrative challenges is then prevented from appealing to the courts to make themselves whole for lost profits from the failed development project. It is problematic that the developer lost the development project due to the expenses and delay imposed on the project by the challenger, so the developer should have a cause of action.

The standing question is raised for cases in federal court because obtaining standing for an antitrust claim requires that the party be “injured in his business or property by anything forbidden in antitrust laws.”<sup>179</sup> In *Hanover Realty*, the court ruled that the developer had standing to sue because its actions were “inextricably intertwined” with the challengers’ objectively baseless conduct intended to prohibit access by the prospective tenant.<sup>180</sup> Defendants may look to bring an antitrust case in federal court because they are able to receive treble damages and reimbursement for the lawsuit’s costs, including attorney’s fees.<sup>181</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 in state courts.<sup>182</sup>

To combat sham challenges that lead to unfair outcomes for 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>178</sup> *Hanover Realty*, 806 F.3d at 187 (Ambro, J., dissenting in part) (citing *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983); *Serfecz v. Jewel Food Stores*, 67 F.3d 591 (7th Cir. 1995)).

<sup>179</sup> 15 U.S.C. § 15(a); *see also*, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (“The 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.”).

<sup>180</sup> *Hanover Realty*, 806 F.3d 162 at 168.

<sup>181</sup> 15 U.S.C. § 15(a).

<sup>182</sup> *See e.g.*, *Woolwich*, 451 N.J. Super. at 153.