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Real Estate

**USING ANTITRUST LAW TO PREVENT LAND USE 'SLAPP SUITS'**

Bruce D. Greenberg

Real estate developers who seek to intimidate objectors to their projects often use litigation against the objectors as a weapon. The usual claim in such cases is that, by the mere act of opposing the development, the objectors have tortiously interfered with the developer's contractual rights or prospective economic advantage. Such lawsuits have come to be known as "SLAPP (Strategic Litigation Against Public Participation) suits" since even the filing of such complaints, which generally seek huge compensatory and punitive damages, often forces objectors from the field.

Antitrust law has now given objectors a weapon with which to defend or even negate such "SLAPP suits," regardless of whether those suits include antitrust charges, as they sometimes do to invoke the statutory remedies of treble damages and attorneys' fees. In *Village Supermarket, Inc. v. Mayfair Super Markets*, 269 N.J. Super. 224 (Law Div. 1993), a New Jersey court for the first time employed those antitrust principles in favor of an objector in a common law tort case. Recently, an unpublished New Jersey federal case has done the same in a case involving both antitrust and common law claims. *Morris Pine Associates v. The Union Center National Bank*, No. 94-4399 (decided May 18, 1995).

For nearly 35 years, the Noerr-Pennington doctrine of federal antitrust law has held that the right to petition the government protects even business competitors who petition for the purpose of impeding competition. Beginning with *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the cases for which this doctrine is named, courts have frequently held that such parties have the absolute right to be heard in either a legislative or a judicial forum, unless the litigation or lobbying is a "sham."

The precise boundaries of that "sham exception" had been undefined until the U.S. Supreme Court decided *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 508 U.S. -- 123 L. Ed. 2d 611 (1993). There, the Court held that Noerr-Pennington immunity would apply unless the challenged litigation or lobbying is "objectively baseless." The Court specifically held that a party's subjective motivation was irrelevant unless the claim's objective meritlessness was first shown. 123 L. Ed. 2d at 624.

New Issue in N.J.

Although courts around the country had long applied Noerr-Pennington to common law tort claims as well as antitrust suits, New Jersey courts had never faced the issue. *Village*, which involved only tort claims, marked the first time that a published opinion in this state applied Noerr-Pennington to a purely common law case.

The plaintiff in *Village* operated a number of Shop-Rite supermarkets. It contracted to buy property that spanned

the Westfield-Garwood border, on which it then sought approval to construct a Shop-Rite supermarket. The application was made to the planning boards of both municipalities, which sat jointly for convenience.

Among the many objectors to the application was Reilly Oldsmobile, which was located within 200 feet of the proposed development. Reilly appeared at the joint board hearings through counsel. The defendant, Mayfair, operated a number of Foodtown supermarkets, one of which was located in Westfield about one mile from the proposed Shop-Rite site. Mayfair did not appear as an objector to Shop-Rite's proposed development and its status as a defendant gave Village an additional, unique wrinkle, since the case involved not a classic intimidation suit against an objector, but a claim against one allegedly merely assisting objectors.

#### Bankrolling an Objector?

Though the Planning Board hearings on Shop-Rite's application had not finished (in fact, Shop-Rite was still presenting its affirmative case), Shop-Rite filed a complaint for tortious interference with contract and prospective economic advantage against Mayfair alone. Shop-Rite claimed that Mayfair, though allegedly without standing to object on its own, was financing the objections of Reilly to protect Mayfair's own Westfield store against competition.

Mayfair moved to dismiss the complaint for failure to state a claim. Union County Superior Court Judge Barbara Byrd Wecker granted the motion. Judge Wecker held that the lawsuit was premature, since the joint Boards had not yet ruled on Shop-Rite's development applications. Likening the case to malicious prosecution claims, Judge Wecker held that Shop-Rite would not be permitted to discourage opposition to its application by pursuing its lawsuit while the Board hearings were ongoing, citing *Penwag Property Co., Inc. v. Landau*, 76 N.J. 595 (1978). 269 N.J. Super. at 228-29.

Judge Wecker went on to rule that Shop-Rite's complaint was also an improper attempt to chill Mayfair's right to petition the government, which was protected by the First Amendment. Mayfair's motion had relied upon both that constitutional provision and the Noerr-Pennington doctrine. In response, Shop-Rite relied on Noerr-Pennington's "sham exception."

According to Shop-Rite, since Mayfair did not own its Westfield store, but was a tenant under a tripartite lease, and its store was located about a mile from that of Shop-Rite, Mayfair had no right of its own to be heard. Thus, Shop-Rite cited as a "sham" Mayfair's alleged sponsoring of opposition to a development application that (according to Shop-Rite) Mayfair lacked standing to oppose directly.

#### Standing Issue

Mayfair made several arguments as to why it should have standing to object to Shop-Rite's application, even though it had not appeared as an objector. Without clearly accepting those contentions, Judge Wecker ruled that Mayfair's arguments were, at least, not "objectively baseless," so that, under *Professional Real Estate Investors*, there could be no finding of a "sham" that would deprive Mayfair of Noerr-Pennington immunity. 269 N.J. Super. at 232-35.

As Judge Wecker observed, even the case upon which Shop-Rite relied almost exclusively, *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), cert. denied, 484 U.S. 1007 (1988), acknowledged that "to the extent a litigant has a reasonable basis for believing that his claim of standing might be accepted by the court, and thus that he will have the right to participate in the litigation process and obtain relief, he will be protected by Noerr-Pennington even though he ultimately loses." *Id.* at 530. *Professional Real Estate Investors* similarly cautioned that a party's action is not a "sham" merely because that party lost its case. Rather, the unsuccessful action "must have been unreasonable or without foundation." 123 L. Ed. 2d at 624 n.5.

Finally, Judge Wecker addressed the issue of whether, regardless of whether Mayfair itself had standing to ob-

ject, it could sponsor opposition through a party such as Reilly, whose standing was not challenged. Citing several federal cases, and quoting at length from *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 791 P.2d 587 (1990), Judge Wecker found “no inherent evil in the fact” that a party, even one without standing of its own, could assist others in their opposition. 269 N.J. Super. at 235-36.

Though her decision permitted such sponsorship, Judge Wecker went on to state that such third party funding “is of course a factor available for the board’s consideration,” “not because third-party financing disqualifies the objector, but because it allows a full weighing of the evidence.” *Id.* at 236. She noted that the motive and bias of witnesses or cross-examiners may be relevant to the Board’s deliberations. *Id.*

#### Conventional Case

*Morris Pine Associates*, the recent federal case, was more conventional. There, the plaintiff had sought a conditional use approval for development that would have led to a lease to a bank. *Morris Pine* also procured the passage of an ordinance that purported to authorize a lease of municipal parking spaces for the benefit of *Morris Pine*’s proposed development, whose on-site parking was in question.

The defendants, including a bank already located in the community, objected on numerous substantive and procedural grounds. After the conditional use approval was granted, some of the defendants filed a complaint in lieu of prerogative writ, and succeeded in overturning the approval. Other defendants filed a separate action challenging the ordinance regarding the parking space lease.

In response to defendants’ summary judgment motion based on *NoerrPennington*, U.S. District Judge Nicholas Politan found that the conditional use approval litigation had been successful. Under Professional Real Estate Investors, that success rendered the defendants who had filed it absolutely immune from *Morris Pine*’s antitrust and common law tort claims. As to the litigation challenging the parking space ordinance, Judge Politan analyzed each of its counts, and held that, in light of the undisputed facts and the applicable law, none of them could be considered “objectively baseless.” He thus granted summary judgment for all defendants.

These cases aid objectors in several ways. First, development applicants may not intimidate objectors into withdrawing from the municipal arena by charging them with tortious interference even before the municipal board rules on the application, though such a claim would presumably be permitted later if justified by the facts, and if the objections were “objectively baseless.” Second, *Village* and *Morris Pine Associates* similarly limit “revenge” suits by disappointed development applicants, whether on antitrust or common law grounds. Finally, objectors who themselves lack the financial ability to oppose an applicant with vast resources may be assisted by someone with greater means.

More importantly, *Village* and *Morris Pine Associates* may aid the integrity of the approval process. Those decisions leave parties to battle before municipal agencies solely on the merits of the application, without regard to who has more resources to wage the fight.

The author is a partner at Greenbaum, Rowe, Smith, Ravin & Davis in Woodbridge, and a member of that firm’s Commercial Litigation and Land Use Practice Groups. He represented the successful defendants in *Village Supermarket v. Mayfair Super Markets, Inc.*, 269 N.J. Super. 224 (Law Div. 1993), and *Morris Pine Associates v. The Union Center National Bank*, No. 94-4399, discussed in the text.

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