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## When Land Use and Antitrust Collide: The Curious Case of Wegmans v. Shop Rite

On November 12, the U.S. Court of Appeals for the Third Circuit issued a decision reversing the U.S. District Court for the District of New Jersey, and holding that Village Supermarkets, Inc. (Village), which attempted to thwart the plans of Hanover Realty 3201 Realty LLC (Hanover Realty) to develop its property with a competitor supermarket, may be subject to an antitrust claim brought by Hanover Realty.

The case began when Village learned that Wegmans was looking to construct a supermarket on property owned by Hanover Realty approximately two miles from an existing Village-owned Shop Rite. Under Wegmans' agreement with Hanover Realty, Hanover Realty was to obtain the required permits for the construction of the Wegmans supermarket within two years, or Wegmans could terminate the contract. Hanover Realty initially applied for a flood hazard area permit from the NJDEP. Village filed numerous objections to Hanover Realty's application, which the NJDEP ultimately found were without merit. Hanover Realty likewise sought a wetlands permit from the NJDEP for the project. Village made numerous filings with the NJDEP and the U.S. Fish and Wildlife Service in opposition to Hanover Realty's wetlands permit. Ultimately, the NJDEP issued the requested permit subject to conditions. In addition, Hanover Realty sought a major street intersection permit from the NJDOT in connection with improvements to a nearby intersection in connection with the Wegmans' project. Village again objected to Hanover Realty's application. The NJDOT ultimately recommended that Hanover Realty negotiate a modification of an existing agreement with the NJDOT. Lastly, after Hanover Realty received approval of its final site plan and request for a bulk variance, Village contested the approval by filing an appeal in lieu of prerogative writs challenging the approval with the New Jersey Superior Court. Ultimately Village's complaint was dismissed on both standing and substantive grounds.

Hanover Realty then sued Village (and an affiliate) in the District Court for the District of New Jersey alleging violations of Section 2 of the Sherman Antitrust Act for "attempted monopolization of and conspiracy to monopolize the greater Morristown full-service supermarket market, and the greater Morristown full-service supermarket shopping center market" which was comprised of the market for supermarket rental space. The district court dismissed the complaint on the grounds that Hanover Realty did not have antitrust standing because it was neither a competitor nor a consumer in the constrained markets. Hanover Realty appealed the district court's dismissal to the Third Circuit.

The Third Circuit concluded that the district court took "too narrow a view of antitrust injury" in connection with Hanover Realty's claim for the attempted monopolization of the market for full-service supermarkets. It held that Hanover Realty "can establish that its injury was 'inextricably intertwined'" with Defendant's [Village's] anticompetitive conduct. The Third Circuit also found that Hanover Realty "sufficiently alleged that the ... activity here was undertaken without regard to the merits of the claims and for the purpose of using the governmental process to restrain trade," and therefore, Village was not entitled to immunity under the *Noerr-Pennington* doctrine, because its "conduct falls within the exception for sham litigation." As to the claim for attempted monopolization of the market for rental space, the Third Circuit held the district court was correct in

finding that Hanover Realty had no standing because "Hanover Realty does not compete with Defendants in that market." The matter was remanded to the district court.

This decision by the Third Circuit has broad implications for property owners who attempt to challenge developments or land use approvals obtained by business competitors where the clear basis for those challenges relates to anticompetitive purposes. Thus, if the motives of competitors are anticompetitive in nature, those motives may be actionable under an antitrust violation theory. The case is *Hanover 3201 Realty LLC v. Village Supermarkets, Inc.*, 2015 U.S. App. LEXIS 19694 (3d Cir. Nov. 12, 2015) (approved for publication).

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