UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Father Flanagan's Boys Home,	:	
Plaintiff,	:	Case No. 01 Civ. 1732 (JR)
v.	:	
The District of Columbia, Sharon Ambrose, Wilbert Hill, Southeast Citizens for Smart Development, Ellen Opper-Weiner, Andrew Altman, Ellen McCarthy, and the Department of Consumer and Regulatory Affairs,	:	
Defendants.	:	

MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT
BY DEFENDANTS OPPER-WEINER, HILL, AND SOUTHEAST CITIZENS FOR SMART DEVELOPMENT, INC.

Defendants Ellen Opper-Weiner, Wilbert Hill, and Southeast Citizens for Smart Development, Inc. (collectively, the "Citizen Defendants"), move to dismiss this action, and each of the claims asserted against them, pursuant to Rules 12(c) and 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment, pursuant to Rule 56 of the Federal Rules. In support of this motion, the Citizen Defendants rely upon the accompanying memorandum of law, and the statements of Ellen Opper-Weiner, Wilbert Hill, and Andrea Ferster.

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MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT BY DEFENDANTS OPPER-WEINER, HILL, AND SOUTHEAST CITIZENS FOR SMART DEVELOPMENT, INC.

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Preliminary Statement

This is a SLAPP suit: a Strategic Lawsuit Against Public Participation. Plaintiff wants to build a facility in Southeast Washington D.C. for troubled teenagers. The Citizen Defendants think this is a bad idea. They believe that an already-dangerous neighborhood is the wrong place for vulnerable youth, that the community would be better served by desperately-needed commercial development, and that plaintiff has dealt with its potential neighbors in Southeast Washington with an imperious and high-handed attitude, of which this lawsuit may be the best evidence. Statement of Wilbert Hill ("Hill St.") ¶ 7; Statement of Ellen Opper-Weiner ("Opper-Weiner St.") ¶ 7. They have tried to meet with representatives of plaintiff, have taken out ads in local newspapers to garner support, have circulated petitions, have held fundraisers to finance the cause, and have lobbied their representatives in the District government. Hill St. ¶ 8; Opper-

Weiner St. ¶ 8. In short, the Citizen Defendants have acted in the finest tradition of participatory democracy. Plaintiff, unhappy with the opposition, has fought back. Before this lawsuit, the battle had been fought on the stage of local politics, where it belonged.

Plaintiff has raised the stakes with this lawsuit. Breaking out the heavy artillery from the start, it tries to tar the Citizen Defendants with false charges of racism and prejudice against the handicapped. It accuses the Citizen Defendants of trying to manipulate city officials, and abusing the mechanisms of city government, for their purportedly racist/biased ends.

These are particularly pernicious accusations. (They are also absurd; defendant Wilbert Hill is an African American and plaintiff's pleadings offer no reason why he and the other African Americans who participate in defendant Southeast Citizens for Smart Development, Inc. would disfavor African American children because they are African Americans. Hill St. ¶ 9; Opper-Weiner St. ¶ 9.) As shown below, plaintiff's case now hangs on just one accusation: that the Citizen Defendants have abused the processes of city government by filing a frivolous "sham" appeal on a zoning issue. But it is not the Citizen Defendants' zoning appeal that is frivolous, it is plaintiff's allegation. It has no evidence to support its allegation, and the undisputed facts demonstrate that it is false. Plaintiff's efforts to chill democratic opposition to its development plans

should be dismissed.

Background

Plaintiff commenced this action on or about August 14, 2001, by filing the complaint. An amended, supplemented, and restated complaint (the "Amended Complaint") was filed with the permission of this Court on or about October 30, 2001. The Citizen Defendants have answered that complaint and denied many of the relevant allegations.

A. The Parties

Plaintiff is a Nebraska entity. Amended, Supplemented, and Restated Complaint ("Am. Compl."), p. 1. According to plaintiff's 2000 Annual Report, its assets at that time were in excess of $ 900 million, and its trust fund had assets in excess of $ 786 million. Opper-Weiner St. ¶ 6.

Plaintiff has purchased property fronting on the 1300 blocks of Pennsylvania and Potomac Avenues (the "Property"), in Southeast Washington. Am Compl. ¶ 2. Plaintiff wants to build a facility for teenagers on the Property. It has referred to that proposed facility as the Pennsylvania Avenue Campus. Statement of Andrea Ferster ("Ferster St."), Ex. 5.

Defendant Wilbert Hill is African American and the Chair of defendant Southeast Citizens for Smart Development ("SCSD"). He is also a Commissioner, elected to serve on ANC (Advisory

Neighborhood Commission) 6B, a body created to increase community input into decisions by the District of Columbia, and serves as Chair of the Citizens Advisory Council for the First District Metropolitan Police Department. Hill St. ¶ 2.

Hill also works with the Court Services and Offenders Supervision Agency for the District of Columbia and assists it in its efforts to maintain a good relationship with the general public and to keep the community informed of its programs. For example, he arranges tours of that agency's facilities on the grounds of D.C. General for members of the general public. Hill St. ¶ 3.

Defendant Ellen Opper-Weiner is Caucasian. She is the Vice-Chair of defendant SCSD. Opper-Weiner St. ¶ 2.

The non-profit defendant SCSD is a District of Columbia non-profit corporation. It was formed to deal with the development of the Property and to promote its view of intelligent development of the eastern end of Pennsylvania Avenue in Southeast Washington D.C. Opper-Weiner St. ¶ 3; Hill St. ¶ 4.

There are both African Americans and Caucasians among SCSD's officers and those who participate in its activities. Opper-Weiner St. ¶ 4; Hill St. ¶ 5.

SCSD relies on voluntary contributions to support its work. To date, SCSD and a separate legal fund have raised a little over $ 10,000. The legal fund is used to pay the expenses of this

lawsuit and the attorney's fees, expert fees, and expenses in a District administrative proceeding that is described below. Opper-Weiner St. ¶ 5; Hill St. ¶ 6.

B. The Original Complaint

The initial complaint in this action asserts that plaintiff has a right to build its proposed facility "as a matter of right" (Complaint ¶ 27), and accuses defendants of obstructing plaintiff's efforts to have this facility built.

The original complaint alleged that then-defendant Police Service Area 112 ("PSA 112"), an alleged organization in which defendant Hill was a "member," "conducted meetings, prepared petition drives, wrote letters, and made calls and visits to government officials, organized protests, organized the preparation and distribution of `Stop Boys Town' signs, and gave statements and interviews to various media" to prevent the issuance of building permits for the project. Complaint ¶ 42. (Defendant PSA 112 subsequently has been voluntarily dismissed from this lawsuit.) It alleged that defendant SCSD created a website in which it referred to potential residents as "troubled teenagers" and a "social burden," published "untrue accusations and insinuations," pilloried plaintiff for plaintiff's refusal to provide information requested by concerned neighbors, and encouraged people to pick up signs against the project, sign petitions in opposition to plaintiff, and write the mayor. Complaint ¶¶ 44, 45.

The Complaint also vaguely accused the Citizen Defendants of "inspir[ing]" and "encourag[ing]" the City's Department of Health, Environmental Protection Division, in an internal battle within city government with defendant Department of Consumer and Regulatory Affairs (the "DCRA"), to require plaintiff to submit an Environmental Impact Screening Form (a preliminary statement designed to ascertain whether a more complete Environmental Impact Statement is required). Complaint ¶ 53. It further accused them of "assist[ing]" and "encourag[ing]" another District employee, defendant McCarthy, in her efforts to delay plaintiff from obtaining permits (Complaint ¶ 58), by (1) investigating the history of police phone calls at another facility operated by plaintiff in Northeast Washington D.C. (Complaint ¶¶ 60, 61), (2) requiring an archeological evaluation of the Southeast site (Complaint ¶ 64), and perhaps, (3) ascertaining whether the project would be in violation of a District zoning regulation that it refers to as the "500 foot rule" (Complaint ¶ 71).

Incorporating all these allegations into various counts, and further alleging that the defendants "know that the children served by [plaintiff] are predominantly racial minorities, primarily African-American" (Complaint ¶ 88), the Complaint alleged that the Citizen Defendants engaged in both intentional and disparate impact discrimination on the basis of race and handicap in violation of the Fair Housing Act (42 U.S.C. §§ 3601 *et seq.*), and further that their actions "constitute coercion,

intimidation, threatening, and interference" in violation of Section 3617 of the Fair Housing Act. Complaint ¶¶ 84, 86, 89, 91, and 93.

C. The Amended Complaint

The Amended Complaint repeats the basic allegations of the Complaint, although the allegations related to PSA 112 were eliminated. The Amended Complaint also supplements the original complaint by referring to activity that occurred after filing. Specifically, paragraphs 3 and 82 of the Amended Complaint notes that defendant DCRA issued the building permits that plaintiff wanted on September 6, 2000. Paragraph 46 of the Amended Complaint alleges that the Citizen Defendants have filed an appeal of the granting of those permits that "is without legal merit and lacks any good faith basis, and has no support in the practice or precedent or laws and regulations governing permit issuance." Amended Complaint ¶ 46.

When asserting its Fair Housing Act claims against the Citizen Defendants, the Amended Complaint now relies *solely* on this allegation in paragraph 46. *See* Amended Complaint ¶¶ 87, 91, 96, 100, and 104.[1] That is, although the Amended Complaint repeats the allegations from the original complaint that the

[1] Thus, for example, paragraph 87 of the Amended Complaint alleges that "[t]he actions of defendants Weiner, Hill and SCSD *set forth in paragraph 46* constitute intentional discrimination on the basis of handicap, in violation of the provisions of the Fair Housing Act" (emphasis added).

Citizen Defendants have undertaken a campaign to stop plaintiff's project (Amended Complaint ¶ 36), have created a web site to oppose the project that encourages visitors to write the mayor (*id.*, ¶¶ 44, 45), and have encouraged city officials to require an environmental impact screening form and/or an archeological evaluation (*id.* ¶¶ 54, 65), to inquire into the police call history at plaintiff's Northeast facility (*id.*, ¶ 62), and to consider possible violation of a 500 foot rule (*id.*, ¶ 72), it no longer relies upon *any* of these allegations to assert claims against the Citizen Defendants under the Fair Housing Act. Remarkably, it relies solely on an allegation of conduct *that had not yet occurred* at the time that the original complaint against the Citizen Defendants was filed.

As with the original complaint, the Amended Complaint's first four counts allege violations of unidentified provisions of the Fair Housing Act, and Count Five alleges a violation of 42 U.S.C. § 3617.

D. The Citizen Defendants' Appeal To The Board of Zoning Adjustment

Some of the allegations in paragraph 46 are true. On September 12, 2001, non-profit defendant Southeast Citizens for Smart Development, Inc. ("SCSD") did, in fact, appeal DCRA's issuance of the building permits to the Board of Zoning Adjustment ("BZA"). *See* Ferster St. ¶ 4 & Ex. 4. The appeal (the "BZA Appeal") claims that DCRA mistakenly concluded that

plaintiff could obtain the permits "as a matter of right."

Because plaintiff's case against the Citizen Defendants now relies entirely upon SCSD's appeal to the BZA, we set forth the basis for that appeal in some detail. Plaintiff believes that it is entitled to the building permits "as a matter of right." SCSD believes that it is not, but that 11 DCMR § 732.1 is applicable. That section states:

> Community-based residential facilities in the following subcategories shall be permitted in a C-2 district if approved by the Board of Zoning Adjustment, in accordance with the conditions specified in § 3108 of chapter 31 of this title:
>
> (a) Youth residential care home or community residence facility for sixteen (16) to twenty-five (25) persons, not including resident supervisors or staff and their families, subject to the standards and requirements of § 358 of chapter 3 of this title; . . .

Section 358 of the zoning regulations permits youth residential care homes or community residence facilities in R-5 districts (and, through the reference in Section 732.1, in C-2 districts as well) with approval of the BZA. These types of facilities are considered community-based residential facilities ("CBRFs") under the District's zoning laws. 11 DCMR § 199 (1996). Section 358.3 precludes approval if there is another CBRF within 500 feet, but Section 358.7 states that the BZA may approve more than one CBRF "when the Board finds that the cumulative effect of the facilities will not have an adverse impact on the neighborhood because of traffic, noise or operations." 11 DCMR § 358.7.

Section 3108 of the District's zoning law permits the BZA to make "special exceptions" where, in its judgment, the exceptions "will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps." 11 DCMR § 3108 (1996).

The property in question is zoned C-2B. Am. Compl. ¶ 26; Ferster St. ¶ 7. The issue presented in the BZA Appeal is whether Section 732.1 is applicable. Ferster St. ¶ 11. If it is applicable, it would not necessarily mean that plaintiff will be unable to build its facility. Rather, BZA review of the project will ensure that the facility "will not have an adverse impact on the neighborhood because of traffic, noise or operations." 11 DCMR § 358.7. Often, facilities are approved under this provision subject to conditions that address legitimate neighborhood concerns. Applicability of Section 732.1 would mean, however, that plaintiff could not build its facility "as a matter of right," and that DCRA's decision to issue the building permits "as a matter of right" was erroneous. Ferster St. ¶ 12.

1. Section 732.1 And The Previous Dispute With The United States. -- In the mid-1990's, the United States investigated the propriety of D.C. zoning rules that it believed classified individuals on the basis of handicap. In 1997, the United States and the District reached an agreement (the "Agreement") in order to avoid litigation. Among other concerns were zoning

regulations "that prohibit housing for persons with handicaps from being located within five hundred feet or within the same square of other similar housing." Opper-Weiner St. Ex. 1, p. 2. The District "proposed to revise" some of its regulations pursuant to the agreement. *Id.*, pp. 2-3. Specifically, the District agreed to advise the D.C. Zoning Commission to initiate proposed rulemaking to amend 11 DCMR § 330.5, so that CBRFs were permitted as a matter of right in an R-4 district, provided that the D.C. Zoning Administrator concluded that the CBRF is intended as housing for the handicapped. *Id.*, Agreement, Part I.A.[2]

The Agreement provides that the District of Columbia was to submit a written report to counsel for the United States at the time that it believed that the Zoning Commission had passed all the amendments necessary for compliance with the Agreement. *Id.*, Agreement, Part V (p. 8). The United States then had sixty days in which to inform the District whether the United States agreed that the District had satisfactorily amended its zoning regulations. *Id.*

The Zoning Commission held hearings throughout 1998. Many community groups testified, and many objected to the proposals

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[2] D.C. Municipal Regulations define a "community-based residential facility" as a "residential facility for persons who have a common need for treatment, rehabilitation, assistance, or supervision" and identifies a wide variety of different kinds of group homes, including emergency shelters and youth residential care homes, as examples of CBRFs. 11 DCMR § 199 (1996); *Samaritan Inns v. District of Columbia*, 114 F.3d 1227, 1230 n.2 (D.C. Cir. 1997). Residents of CBRFs may or may not be "handicapped" as defined in the Fair Housing Act.

that DOJ wanted. *See, e.g.*, Opper-Weiner St. Ex. 2, p. 5 (D.C.'s Office of Planning "stated that the general position represented by DOJ . . . remain far apart from the position represented, essentially by the community. [The Office of Planning] believes that the hearing process did not provide any indication of a middle ground or way to bridge the gap that remains."). The Zoning Commission decided to interpret the proposal before it "on a very narrow basis, only dealing with issues that would satisfy DOJ's mandate to insure that the regulations would conform to the Fair Housing [Act] . . . at this time." *Id.*, p. 6. It issued a Notice of Rulemaking to amend Section 330.5 in December 1998, and adopted the order amending that section in February 1999.

No amendment to Sections 732.1 or 358 was proposed or effected by the Zoning Commission during 1998, or since then. Opper-Weiner St. ¶ 19 & Ex. 2. The United States has not sued the District for any failure to amend Sections 732.1 or 358. Opper-Weiner St. ¶ 20; Ferster St. ¶ 30. The United States has not asserted that the District has violated the Agreement by failing to amend Sections 732.1 or 358. Opper-Weiner St. ¶ 21; Ferster St. ¶ 31.

2. SCSD's Appeal. -- SCSD will rely upon Section 732.1 in the BZA Appeal. Its argument is simple and straightforward. D.C. Health Care, Inc. operates a residential program for eight developmentally challenged individuals at 901 14th Street, Southeast, and has done so since 1990. Opper-Weiner St. ¶ 11;

Hill St. ¶ 11; Ferster St. ¶ 13. It is a CBRF as the District's zoning laws defines that term. 11 DCMR § 199 (1996). The facility operated by D.C. Health Care, Inc. is within 500 feet of the Property. Opper-Weiner St. ¶ 12; Hill St. ¶ 12; Ferster St. ¶ 14.

Furthermore, plaintiff's proposed facility will be a CBRF and a youth residential care home as the District's zoning laws define those terms. Am. Compl. ¶ 20; 11 DCMR § 199 (1996); Ferster St. ¶ 15. The DCRA issued the building permits because the District's zoning administrator concluded that plaintiff will operate four separate community-based residential facilities ("CBRFs") with six children each (and two resident supervisors), and that Section 732.1 is thus inapplicable. Ferster St. ¶ 16.

In the BZA Appeal, SCSD argues that the ruling of the DCRA and the zoning administrator elevates form over substance. Its appeal is based upon its contention that plaintiff's plan to provide services on one contiguous property constitutes one large CBRF with 24 children and 8 adult supervisors, and that Section 732.1 is therefore applicable. Ferster St. ¶ 17.[3]

SCSD will proffer testimony about the manner in which

[3] In its initial appeal, before its current attorney was retained, SCSD referred to Section 721.5 of the zoning law, presumably because the District's zoning administrator referred to that section in his decision. For the reasons set forth in the text of this statement, SCSD's attorney concluded that Section 732.1 is the more relevant provision, but the issue under any circumstances is the same: whether plaintiff's proposed facility will be a community-based residential facility with more than six children. Ferster St. ¶ 5 & n.1.

plaintiff generally operates its facilities on contiguous land, and hopes to convince the BZA that they are not operated separately, but rather as one unit. Ferster St. ¶ 18.

SCSD will rely on a variety of plaintiff's own documents, including its Environmental Impact Screening Form ("EISF"), prepared by the architectural firm of Esocoff & Associates. Esocoff submitted one EISF for the entire "project," which it referred to as the Pennsylvania Avenue Campus. Ferster St. ¶ 19 & Ex. 5.

The EISF asserts that the campus will be built in two phases: Phase I will be the building of four identical group homes and Phase II will be the building of an administrative building and a short stay facility that will house 15 children on a short-term basis. Ferster St. ¶ 20 & Ex. 5; Am. Compl. ¶ 28. Plaintiff's plans call for a single administrative building that will provide administration for all the buildings on the Property and the services associated with them. Ferster St. ¶ 21.

SCSD has also told the BZA that it will submit expert testimony from a licensed professional social worker with knowledge and experience in group homes, who will describe the typical reasons why a number of group homes like those planned by plaintiff are built together and how the proximity of such buildings facilitates a unified structure (with clustered living arrangements) for the project. That witness will distinguish such unified facilities from independent stand-alone CBRFs, and

describe their different operational and programmatic characteristics. She will testify that, based upon her experience and knowledge, and the publicly-available documents she has reviewed, plaintiff intends to operate its Pennsylvania Avenue Campus as a single facility. Ferster St. ¶ 22.

An initial hearing on the BZA appeal was held on December 4, 2001. At that time, the BZA considered various evidentiary motions that plaintiff raised, granted some and denied others. Ferster St. ¶ 23. The BZA rejected plaintiff's argument that it simply should not hear any evidence (or view any documentary evidence) related to SCSD's contention that the Pennsylvania Avenue Campus will have a "unified structure." The BZA has ruled that it will hear such testimony. Ferster St. ¶ 24. A subsequent hearing has been scheduled for February 5, 2002. Ferster St. ¶ 25.

SCSD sought a stay of the execution of the issued building permits while its appeal is being heard. That request for a stay has not been granted. Ferster St. ¶ 26.

SCSD is represented by Andrea Ferster in the BZA Appeal. She has significant experience in zoning and land use matters. Ferster St. ¶ 4 & Exs. 1-3; Hill St. 13; Opper-Weiner St. ¶ 13.

Argument

I.

PLAINTIFF'S CLAIMS AGAINST THE CITIZEN DEFENDANTS SHOULD BE DISMISSED BECAUSE THE APPEAL TO THE BZA IS NOT A "SHAM"

The one operative factual allegation against the Citizen Defendants is that the BZA Appeal is a "sham." That allegation is false, and accordingly, the claims against the Citizen Defendants should be dismissed.

A. The First Amendment And Fundamental Principles Of Statutory Construction Preclude Liability From Being Imposed For Speech And Petitioning Activity

Plaintiff asserts that the Citizen Defendants have violated various sections of the Fair Housing Act. Those provisions must be read with fundamental First Amendment principles in mind, perhaps most importantly that political speech is at the heart of the First Amendment. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 483 (1988) ("Political speech, we have often noted, is at the core of the First Amendment").

1. First Amendment Protections. -- The Ninth Circuit has recently explained the First Amendment guarantees that protect citizens in a situation very much analogous to the one here. *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000). The citizens there objected to the conversion of a home in their neighborhood to housing for the homeless. They had organized against the

conversion, published a newspaper that included articles identifying the objections they had, and commenced a lawsuit in state court trying to reverse the vote of a zoning board on a conflict of interest ground. When federal officials in the Department of Housing and Urban Development received a complaint that the citizens' conduct violated the Fair Housing Act, they commenced an extensive investigation into the citizens' activities. *Id.* at 1221-24.

Although the administrative complaint against the citizens was eventually dismissed by HUD officials in Washington D.C., the citizens nonetheless sued the local HUD officials in a *Bivens* action. The district court granted the citizens' motion for partial summary judgment on liability, and the Ninth Circuit affirmed. It first held that the citizens' speech was activity "paradigmatically protected by the First Amendment." *Id.* at 1226. Even if the citizens had advocated an illegal act, like discrimination by a public entity, they had a right to do so as long as there was no advocacy directed to inciting imminent lawless action. *Id.* at 1227-28. Since nothing the citizens did came close to "inciting imminent lawless action," which the Ninth Circuit understood to mean violence or a riot, there was no loss of First Amendment protection. *Id.* at 1228. Neither the Fair Housing Act in general, nor a purported effort to investigate whether the citizens' state court lawsuit was filed with a discriminatory purpose, justified the local HUD officials' chilling investigation of the citizens' protest activities.

With respect to the lawsuit, the Ninth Circuit recognized that it, too, was part of the right to petition. *Id.* at 1231. *See also McDonald v. Smith*, 472 U.S. 479, 484 (1985) ("filing a complaint in court is a form of petitioning activity"). Since "the right of the people to petition their representatives in government `cannot properly be made to depend on their intent in doing so,'" *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), the Ninth Circuit also held that a lawsuit cannot fall outside of the First Amendment right to petition unless it is a "sham," *i.e.*, at least objectively baseless. *White v. Lee*, 227 F.3d at 1232. A lawsuit can violate the Fair Housing Act, the court ruled, only if it was objectively baseless and filed for the purpose of coercing, intimidating, threatening, or interfering with another's exercise of FHA rights. *Id.* The state lawsuit analyzed in *White* did not meet these criteria. *Id.* at 1232-33.

The Ninth Circuit concluded that the local HUD officials' investigation of the citizen-protesters not only violated the latter's First Amendment rights, but violated their clearly-established First Amendment rights, thus defeating the officials' claim of qualified immunity. *Id.* at 1238.

Other cases that have considered similar kinds of citizen protest activity have all arrived at the same conclusion: the First Amendment protects such activity. *See, e.g.*, *Christian Gospel Church v. San Francisco*, 896 F.2d 1221, 1226 (9th Cir.

1990) (affirming dismissal of church's civil rights lawsuit against neighborhood association that had opposed church's zoning permit application before the San Francisco Planning Commission because activities of "circulating a petition, testifying before the Planning Commission, and writing letters to the editor" were within the First Amendment right to petition); *Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643, 651 (7th Cir. 1983) (court affirms grant of summary judgment dismissing claim for tortious interference with a public offering based upon purportedly false and spurious claims to the SEC; "a plaintiff must do more than merely allege that defendant's petitioning activity was a sham in order to overcome the First Amendment privilege. Otherwise, the right to petition without fear of sanctions would become a mockery. The `sham' exception cannot be used to chill this constitutional right"); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 614 (8th Cir. 1980) (citizens who successfully petitioned zoning board to change a zoning ordinance and thus prevent developer from building a high-rise building for the elderly and/or handicapped not liable under 42 U.S.C. § 1983 for conspiracy to deprive developer of equal protection rights because citizens were "absolutely privileged by the First Amendment to petition for the zoning amendment that caused plaintiffs' damage"); *Hotel St. George Associates v. Morgenstern*, 819 F. Supp. 310, 320 (S.D.N.Y. 1993) (hotel owner's claim for tortious interference with business against neighborhood association based upon association's efforts to prevent an

increase in the number of AIDS patients at hotel, by, *inter alia*, writing to relevant government agency, dismissed; "[p]etitions to a governmental agency are privileged under the First Amendment and cannot form the basis of a claim for tortious interference"); *Weiss v. Willow Tree Civic Association*, 467 F. Supp. 803, 817-18 (S.D.N.Y. 1979) (where group trying to develop residential neighborhood for Hasidic Jews sues citizens' association under 42 U.S.C. §§ 1982, 1983, and 1985(3), alleging that citizens' association tried to intimidate a town board at a public meeting and filed a frivolous complaint with the New York Department of Environmental Conservation and a meritless and harassing court proceeding, court dismisses the complaint because "[t]he protection of the First Amendment does not depend on `motivation'"; even if the administrative complaint and lawsuit "both were groundless, they hardly amount to grave abuse of those processes as to bar plaintiffs from responding to the claims made before those bodies"); *Sierra Club v. Butz*, 349 F. Supp. 934, 938 (N.D. Cal. 1972) (where Sierra Club sought injunctive relief to temporarily prohibit logging, and logging company counterclaimed alleging that Sierra Club's lawsuit was an effort to induce a breach of its logging contract with the United States and interfere with its potential sales to others, court dismisses the counterclaim because "all persons, regardless of motive, are guaranteed by the First Amendment the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a

change in policy should they be successful"; a standard relying solely upon "malice" would "not supply the `breathing space' that First Amendment freedoms need to survive").

2. Liability Limits That Reflect First Amendment Values. -- In many instances, courts do not directly address the First Amendment question presented by claims that speech or petitioning activity caused damage to another. Instead, they interpret the statute or common law doctrine in question in light of First Amendment principles, and so as to avoid difficult First Amendment questions. The best known effort in this regard is the *Noerr-Pennington* doctrine in the antitrust field, named after the Supreme Court opinions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Under this doctrine, antitrust liability cannot extend to efforts to influence the government to pass anti-competitive (or anti-competitor) laws. The Court limited the doctrine for petitioning the judicial branch of government in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972), but the allegations in that case were that the defendant had "sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process." *Id.* at 512.[4] The Court concluded that

[4] The court distinguished petitioning the administrative or judicial branch from petitioning other parts of the government. *California Motor Transport*, 404 U.S. at 513 ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."). *See also Hahn v. Codding*, 615 F.2d (continued...)

"a pattern of baseless, repetitive claims" that constituted an "abuse of [judicial] processes" by "effectively barring [competitors] from access to the agencies and courts" could violate the antitrust laws. *Id.* at 513.

In two subsequent cases, the Court has underscored the limited nature of this "sham" exception to *Noerr-Pennington* immunity. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court held that a billboard advertising company with a 95% share of the relevant market could not be held liable under the antitrust laws for influencing city officials with whom they had close ties to pass zoning ordinances that harmed a new competitor. The Court held that the "sham" exception applied only where a competitor uses the process of petitioning itself as an anticompetitive weapon, and not as a means to obtain the hoped-for outcome of the petition. That is, if the competitor's conduct is genuinely aimed at achieving favorable government action, it is not a "sham" and immune from liability under the antitrust laws.

Finally, in *Professional Real Estate Investors, Inc. v.*

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[4](...continued)
830, 842 (9th Cir. 1980) ("Activity which is acceptable in the political area does not necessarily retain its *Noerr-Pennington* immunity when it is used in the judicial process"); *Sage International, Ltd. v. Cadillac Gage Co.*, 507 F. Supp. 939, 943 (E.D. Mich. 1981) ("Where the act of petitioning involves judicial action, the immunity may be somewhat circumscribed by reason of the fact that misrepresentation and unethical conduct in that arena is not tolerated as readily as in the political arena").

Columbia Pictures Industries, 508 U.S. 49 (1993), Columbia Pictures had sued hotel operators for copyright infringement for the operators' use of videodiscs of movies that Columbia had copyrighted. The hotel operators counterclaimed for antitrust violations. Although Columbia lost its copyright infringement suit, the Court held that its petitioning activity was nonetheless immune from antitrust liability. The Court held that litigation can only be deprived of its immunity if it meets a two-part test: first, that it is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and, second, that the lawsuit conceals an effort to interfere directly with a competitor by the use of a process (as opposed to the outcome of a process) as an anticompetitive weapon. *Id.* at 60-61. The mere fact that a litigant lost on his or her claim would be insufficient to conclude that a claim was objectively baseless, and the Court warned lower courts to avoid the temptation to reason *post hoc* that such losing lawsuits were unreasonable at the outset. *Id.* at 60 n.5.

Although *Noerr-Pennington* has developed in the antitrust context, it has been applied elsewhere, as has the general mandate to interpret statutes so as to avoid potential First Amendment right-to-petition problems. Many statutes and common-law torts use concepts like "interference" or "deprivation," but those concepts have not been used to restrain legitimate activity protected by the First Amendment. *See, e.g.*, *Herr v. Pequea*

Township, 2001 U.S. App. LEXIS 26401, *22 (3d Cir. Dec. 11, 2001) ("the courts of appeals have frequently held that the restrictions on liability [in *Noerr-Pennington*] are applicable to liability under state tort laws . . . and to liability under the Civil Rights Act"; dismissing Section 1983 claim against township officials based upon purported deprivation of due process resulting from officials' participation in various administrative and court proceedings); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 794 (5th Cir. 1989) (Court denies preliminary injunction sought in suit by women's clinic against abortion protesters, alleging violations of 42 U.S.C. §§ 1983, 1985(3), and 1986, because protesters' speech, even if hostile, did not deprive women of a right to an abortion; "[t]o argue any other theory of the case . . . would be to eviscerate the First Amendment"); *Suburban Restoration Co. v. ACMAT Corp.*, 700 F.2d 98, 101-02 (2d Cir. 1983) (avoiding the constitutional issue, but applying *Noerr-Pennington* to Connecticut state business law and its common law of tortious interference with business expectancy; court dismisses such theories where it was alleged that state lawsuit caused city to reverse its award of an asbestos-removal contract to plaintiff); *United States v. Robinson*, 3 Fair Housing Fair Lending (P-H) ¶ 15,979 at 15,979.8-15,979.9 n.25 (D. Conn. Jan. 26, 1995) (interpreting the Fair Housing Act "so as not to conflict with the Petition Clause" and dismissing purported FHA violation based upon filing of state court lawsuit); *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1137

(1990) (rejecting electric company's claim of tortious interference with business advantage based upon financial advisor's having induced state agency to sue to determine rights under contract between state agency and electric company for sale of hydroelectric power; to state such a claim, plaintiff "must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor"). *Cf. New York Times v. Sullivan*, 376 U.S. 254, 277 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute").

This Court has applied *Noerr-Pennington* to reject common-law claims of tortious interference with contract, abuse of process, and malicious prosecution. *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 829 F. Supp. 420, 426-27 (D.D.C. 1993) (rejecting common law claims by potential purchaser of apartment building against tenants who filed a Right of First Refusal Notice with the D.C. Recorder of Deeds despite the fact that they previously had failed to obtain the financing necessary to purchase the building). Indeed, this Court correctly noted that the effort to sue the tenants in *Edmondson & Gallagher* resembled a SLAPP suit "in which parties attempt to use litigation as a weapon to punish community activists for exercising their rights." *Id.* at 427.

B. The Activities Of The Citizen Defendants Are Protected Under The First Amendment

The activities of the Citizen Defendants in forming organizations, publishing advertisements, and speaking to their elected representatives are all protected by the First Amendment. Indeed, plaintiff seems to recognize this now; after basing its allegations solely on such privileged conduct in its original complaint, it now relies solely on the BZA Appeal in the Amended Complaint.

The Amended Complaint alleges that the BZA Appeal "is without any legal merit and lacks any good faith basis, and has no support in the practice or precedent or laws and regulations governing permit issuance." Amended Complaint ¶ 46. But the undisputed facts demonstrate that this allegation is false, and the BZA Appeal is also protected petitioning activity. First, the appeal is not baseless, but reasonable. Second, the appeal would be protected petitioning activity even if (contrary to law) it were baseless.

The facts here are not in dispute. That is, the fact that SCSD has appealed, and the basis for its appeal, is not (and cannot be) disputed. They are matters of public record. Under such circumstances, the question of whether the BZA appeal is a "sham" or reasonable is a question of law proper for summary judgment. *Professional Real Estate Investors*, 508 U.S. at 63 ("Where, as here, there is no dispute over the predicate facts of

the underlying legal proceeding, a court may decide probable cause as a matter of law"); *United States v. Robinson*, 3 Fair Housing Fair Lending (P-H) ¶ 15,979 at 15,979.2 n.4 (D. Conn. Jan. 26, 1995) (in Fair Housing Act case based upon defendant's purportedly discriminatorily-motivated state court lawsuit, court takes judicial notice of the proceedings in that lawsuit on Rule 12(b)(6) motion).[5]

1. The BZA Appeal Is Not Objectively Baseless. -- As described above, SCSD's appeal is based upon 11 DCMR § 732.1 Plaintiff's amended complaint lists various reasons why the 500-foot rule incorporated into that provision (through 11 DCMR § 358.3) should not apply, *viz.*, that it is unlawful, that the District agreed to repeal it, and that it is not applicable (because plaintiff is building four CBRFs with six children each). Amended Complaint ¶ 77. None of these reasons suggest that SCSD has *no* reasonable expectation of a successful result from the BZA.

With respect to the first two reasons, it should suffice to note that the Citizen Defendants are not responsible for

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[5] The Court in *Professional Real Estate Investors* borrowed the phrase "probable cause" from the tort of malicious prosecution, meaning a "reasonable belief that there is a chance that a claim may be held valid upon adjudication." *Professional Real Estate Investors*, 508 U.S. at 63. The question of probable cause under that common law tort is also generally considered a question of law or a mixed question of law and fact. *E.g.*, *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 875 (1989) (probable cause in a malicious prosecution action should not be decided by jury, but rather by court to "avoid improperly deterring individuals from resorting to the courts for the resolution of disputes").

determining the District's legal and contractual obligations, and Section 732.1 is not so obviously illegal that they should be on notice that it cannot be relied upon. (It does not, on its face, deal specifically with handicapped individuals or members of any particular race. See n.2, *supra*.) Indeed, according to the agreement between the United States and the District, the District was obligated to apprise the Department of Justice of the zoning amendments it had implemented to comply with the agreement, and the Department of Justice then had the opportunity to object if it considered those amendments insufficient. *Cf. United States v. Robinson*, 3 Fair Housing Fair Lending (P-H) ¶ 15,979 at 15,979.11 (D. Conn. Jan. 26, 1995) (Fair Housing Act claim based upon filing of state court lawsuit to preclude "family" in zoning ordinance from including foster families dismissed; "defendants reasonably relied on the validity of the New Haven Zoning Ordinance," and, "from the perspective of a reasonable litigant, the defendants' lawsuit presented a genuine issue of law").

Plaintiff's third reason is that Section 732.1 is inapplicable because each of the four buildings will only house six (6) minors. The Citizen Defendants already have noted that SCSD will rely upon its contention that plaintiff's "campus" on Pennsylvania Avenue is one CBRF with 24 children and eight supervisors. The evidence for that contention is set forth above. *See* discussion, *supra*, pp. 12-15. No one disputes that the proposed buildings will be on one contiguous area of land,

that there will be common areas, and just one administration building (to be built in Phase II).

There appear to be no precedents in decisions of the BZA on this question, and it is unclear whether the BZA is bound by precedent in any event. The municipal regulations provide no guidance one way or the other. SCSD is making, and will make, a perfectly reasonable argument that it will support with plaintiff's own documents and expert testimony. It may prevail, and it may not. The Zoning Commission might *sua sponte* reconsider the BZA's determination, as it is authorized to do, and reverse, modify, affirm, or remand it. 11 DCMR §§ 3103.1, *et seq.* (1996). Assuming an aggrieved party appeals, the District of Columbia Court of Appeals might reverse whatever conclusion the BZA (or Zoning Commission) draws, and it might not. But SCSD's arguments are hardly a "sham." They are sensible arguments that interpretation of Section 732.1 should not elevate form over substance.

2. Other Reasons Also Preclude Any Finding That The BZA Appeal Is A Sham. -- Two other reasons also militate strongly against any finding that the BZA Appeal is a sham. First, SCSD is not using the BZA Appeal *process* to injure plaintiff. At worst, it hopes that the *outcome* of the BZA Appeal will preclude plaintiff from proceeding with its project as of right. Indeed, no stay has been issued, and nothing prevents plaintiff from proceeding with the building of its project right now. (As far

as the Citizen Defendants are aware, it is so proceeding.) Under both *Omni Outdoor* and *Professional Real Estate Investors*, this precludes the BZA proceeding from being characterized as a sham. *See* discussion, *supra*, pp. 22-23. *See also Havoco*, 702 F.2d at 650 (where company alleges that stockholders filed SEC complaints solely to block public offering, court affirms grant of summary judgment to stockholders on tortious interference claim; the allegations have "no effect on the First Amendment's protection, as long as the activity represents a genuine attempt to influence governmental action").

Second, the single appeal by SCSD has not precluded plaintiff from resort to either the administrative process or, for that matter, this Court. To the contrary, plaintiff is well represented by counsel, has participated fully in the BZA Appeal, and seems fully capable of protecting itself. *California Motor Transport*, 404 U.S. at 513 (sham would "effectively bar . . . [competitors] from access to the agencies and courts"). *See also, e.g.*, *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1172 (10th Cir. 1982) ("the prosecution of a lawsuit, *albeit without probable cause and for an anticompetitive purpose*, is actively protected by the first amendment" (emphasis added)); *Weiss v. Willow Tree Civic Association*, 467 F. Supp. at 818 (even if the administrative complaint to environment conservation department and lawsuit "both were *groundless*, they hardly amount to grave abuse of those processes as to bar plaintiffs from

responding to the claims made before those bodies" (emphasis added)).

In fact, the Citizen Defendants believe that it is plaintiff that has abused the judicial system -- by filing this lawsuit. It has taken a local zoning dispute, and turned it into a federal case without warrant. It is trying, the Citizen Defendants believe, to cow its political opponents into silence. *E.g.*, *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 829 F. Supp. 420, 427 (D.D.C. 1993) ("To permit [developer] to pursue this action where it seeks $26 million against a tenants association for exercising rights conferred by law would ironically be a greater abuse of process than the one [developer] claims it has been subjected to in this case"); *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. at 819 (developers of residential community, "by their pleading have sought to transmute a zoning dispute, still pending, into assorted claims of violation of federally protected constitutional rights. To uphold the complaint would . . . `be inviting every party to a state proceeding angered at delay to file a complaint in this court reciting the history of his state case and concluding with a general allegation of conspiracy'" (citation omitted)). *See also Barnes Foundation v. The Township of Lower Merion*, 242 F.3d 151, 162 (3d Cir. 2001) (confirming that district court had properly dismissed claim of racial discrimination in violation of 42 U.S.C. §§ 1983 and 1985(3) by museum that sought to expand operations against neighbors who had objected by protesting and communicating with

elected officials; the availability of a First Amendment defense "is of particular importance in land-use cases in which a developer seeks to eliminate community opposition to its plans . . . [Our] opinion should make it clear that it will do so at its own peril").

II.

THE AMENDED COMPLAINT DOES NOT ALLEGE A VIOLATION OF THE FAIR HOUSING ACT

Aside from the fact that the Citizen Defendants' speech and petitioning activity is protected by the First Amendment, the Amended Complaint also fails to state a claim against the Citizen Defendants for a violation of the Fair Housing Act.

At the outset, it deserves mention that none of the first four "counts" in the Amended Complaint identify which sections of the Fair Housing Act the Citizen Defendants allegedly violated by their petitioning activity. Given the unusual facts of this case -- or, at least, the unusual fact that petitioning activity is the exclusive gravamen for a Fair Housing Act violation -- and the wide variety of prohibitions in the Fair Housing Act, this is a striking omission. Like the Amended Complaint's sole reliance on an event that first occurred after the filing of the original complaint (*viz.*, the BZA Appeal), this omission only confirms the suspicion that this is a lawsuit in search of a theory.

As best we can guess, plaintiff's first four counts must

rest on Section 3604, which in plausibly relevant part prohibits (1) discrimination in selling or renting a dwelling based upon certain prohibited criteria (such as race, sex, etc.), (2) discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling based upon those criteria, and (3) otherwise making unavailable a dwelling based upon those criteria. *See generally* 42 U.S.C. § 3604. Whatever else the Citizen Defendants may be doing, they are not discriminating in selling, renting, or providing services for a dwelling. *Cf. Tenafly Eruv Ass'n v. Tenafly*, 155 F. Supp. 2d 142, 187 (D.N.J. 2001) (although discriminatory zoning practices might come under the "otherwise make unavailable or deny" language of Section 3604(a), they "are not contemplated by the other provisions of the FHA").

Further, the Citizen Defendants are not making a dwelling "otherwise unavailable" in the fashion proscribed by the statute, even giving credence to the "sham" allegations in paragraph 46 of the Amended Complaint. True, zoning laws themselves can violate the Fair Housing Act by making dwellings unavailable. *Id.*; *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1209 (7th Cir. 1984) (the phrase "otherwise make unavailable or deny" includes exclusionary zoning decisions). But Section 732.1 does not make anything *unavailable*; it merely indicates that BZA approval is needed. Furthermore, the Citizen Defendants cannot enforce District zoning law themselves. In short, the Citizen Defendants have not violated any provision of

Section 3604 simply by *asserting* that plaintiff does not have an *unqualified* right to build its project because that assertion does not *directly* affect the availability of housing. *Michigan Protection And Advocacy Service, Inc. v. Babin*, 18 F.3d 337, 344 (6th Cir. 1994) (Section 3604(f)(1) limited to those who "directly affect the availability of housing for a disabled person").[6]

Nor have the Citizen Defendants violated Section 3617, the only provision of the Fair Housing Act specifically mentioned in any count against them in the Amended Complaint (Count 5). That statute provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protect by [the Act].

42 U.S.C. § 3617.

Thus, in order to state a claim under Section 3617,

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[6] Similarly, the District of Columbia itself has not made a dwelling *unavailable* by reason of Section 732.1 alone. If it does in the future, it will be *that* act, rather than the Citizen Defendants' BZA Appeal, that will be the proximate cause of any unavailability. *See The Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (dismissing claim by neighborhood association against federal and state agencies where association alleged that agencies sited proposed highway in an area that limited the growth of their African-American neighborhood, and made housing unavailable because that was the only neighborhood open to them; neighborhood association's argument "assumes the presence of an intervening discriminatory actor preventing them from settling elsewhere").

plaintiff must identify a statutory right with which the Citizen Defendants have interfered. But we have just demonstrated that no statutory right of plaintiff has been abridged. The Section 3617 claim thus fails as well.

Even if plaintiff could identify an applicable statutory right here, the Citizen Defendants have not "interfered" with that right. That word should be read to mean conduct akin to coercion, intimidation, or threats, for otherwise "a whole range of otherwise innocuous conduct would fall under § 3617. For example, a competing bidder could be seen as interfering with a plaintiff's right to enjoy housing." *Salisbury House, Inc. v. McDermott*, 1998 U.S. Dist. LEXIS 4371, *36, 1998 WL 195693, *12 (E.D. Pa. March 24, 1998) (dismissing claim under Section 3617 by crisis home operator against neighbors who protested the sale of a farmhouse to the operator through letter writing, leafletting and urging attendance at public meetings; court rules that such conduct does not constitute "interference" by considering potential First Amendment conflicts with such a broad definition and by interpreting "interference" in accordance with the doctrine of *ejusdem generis*, that is, in a manner consistent with the other terms used in Section 3617; court thus holds that "the term `interfere' . . . denote[s] conduct in which a defendant uses some type of force or compulsion to deprive an individual of his or her rights under the FHAA"). Since the Citizen Defendants did not use "force" or "compulsion" against plaintiff, or even anything that might fall under any but the loosest definition of

"interference," a claim under Section 3617 has not been stated and could not be proved.[7]

Conclusion

For the foregoing reasons, this Court should grant the Citizen Defendants' motion for summary judgment and/or dismissal.

Respectfully submitted,

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[7] As the D.C. Circuit has noted, the Fair Housing Act does not encompass every imaginable form of discrimination related to housing. *Clifton Terrace Associates v. United Technologies Corp.*, 929 F.2d 714, 720 (D.C. Cir. 1991) ("if a municipal government withholds or extends essential city services in a racially discriminatory manner, it violates the equal protection clause of the Fourteenth Amendment . . . The fact that such a discriminatory practice could have an impact on the use and enjoyment of residential property rights, however, does not necessarily mean that it will also be redressable under [the FHA]").