BETHANY BUILDING, INC., et al.	:	COURT OF COMMON PLEAS
Plaintiffs,	:	PHILADELPHIA COUNTY
	:	Commerce Program
	:	
v.	:	March Term, 2001
	:	
DUNGAN CIVIC ASSOCIATION, et. al.	:	No. 002043
Defendants.	:	Control Nos. 080803, 080804
	:	091444, 092922,
	:	092923, 100147

ORDER and MEMORANDUM

AND NOW, this 13th day of March, 2003, upon consideration of the separate Preliminary Objections of Defendants Dungan Civic Association, Inc., Wanda Exline, Albert Chernoff and Wendy Troester (Control Nos. 080803, 080804), all responses in opposition, the respective memoranda, all matters of record, and in accordance with the contemporaneous Memorandum Opinion, it hereby is **ORDERED** and **DECREED** that said Preliminary Objections are **SUSTAINED** and Plaintiffs' Second Amended Complaint **DISMISSED with prejudice**.

In addition, upon consideration of Plaintiffs' Preliminary Objections to the foregoing Preliminary Objections (Control Nos. 091444, 092922, 092923), all responses in opposition, the respective memoranda and all matters of record, it hereby is **ORDERED** and **DECREED** that said Preliminary Objections are **OVERRULED**.

Based on the foregoing, the Motion for Summary Judgment of Defendants Troester and Chernoff (Control No. 100147) is **DISMISSED** as moot.

BY THE COURT:

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GENE D. COHEN, J.

BETHANY BUILDING, INC., et al.	:	COURT OF COMMON PLEAS
Plaintiffs,	:	PHILADELPHIA COUNTY
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MEMORANDUM OPINION

GENE D. COHEN, J.

Before the Court are numerous motions, including the separate Preliminary Objections of Defendants Dungan Civic Association, Inc. ("Dungan"), Wanda Exline, Albert Chernoff and Wendy Troester (Control Nos. 080803, 080804), Plaintiffs' Preliminary Objections to the foregoing Preliminary Objections (Control Nos. 091444, 092922, 092923) and the Motion for Summary Judgment of Defendants Troester and Chernoff (Control No. 100147). For the reasons fully set forth below, Defendants' Preliminary Objections are **sustained**, Plaintiffs' Preliminary Objections are **overruled** and Troester and Chernoff's Motion for Summary Judgment is **dismissed as moot**.

BACKGROUND

The instant action was brought by Plaintiffs Bethany Building, Inc, Bethany Land Development, Inc., Thomas Clauss and Timothy Clauss (collectively "Bethany Building"), a developer of real property, against Defendants, a neighborhood civic association and several of its individual members. Plaintiffs' case centers around Defendants' opposition to Plaintiffs' proposed development in the Dungan neighborhood of Philadelphia.

Plaintiffs' Second Amended Complaint (the "Complaint") contains nine counts and purports to state causes of action for the following: 1) breach of contract (Count I); 2) violation of 42 U.S.C.A. § 1983 (Count II); 3) violation of the Pennsylvania Municipalities Planning Code and Philadelphia Zoning Code (Count III); 4) regulatory taking (Count IV); 5) "Intentional Interference with Contract Due to the Failure of Due Process Without Privilege and In Violation of the Due Process Rights of Plaintiff" (Counts V-VII); 6) "Creation of an Illegal and Unconstitutional Ex Post Facto Law" (Count VIII); and 7) "Due to the Failure of Due Process Without Privilege and In Violation of the Due Process Rights of the Plaintiff and the Creation of an Ex Post Facto Law Interference with Obligations of Contract" (Count IX).

DISCUSSION

The Complaint is poorly-drafted, disjointed and at times nearly incomprehensible. Rule 1019 requires that "material facts on which a cause of action is based...be stated in a concise and summary form." Pa.R.C.P. 1019. Contrary to this basic pleading requirement, much of the seventy-seven page document constitutes little more than a recitation of constitutional law principles that have no bearing on the case at bar. Adding to this confusion, throughout the Complaint, Plaintiffs refer to certain individuals as "defendants" who do not appear in the caption of this lawsuit and who, based upon review of the docket, have not been served with the Complaint. Moreover, each of the counts of the Complaint are stated against "Defendant", however in each instance, Plaintiffs have failed to identify to which specific Defendant(s) the counts are addressed.[1] Thus, for the purposes of the instant motion, this court will treat each

[1]Rule 3.1 of the Pennsylvania Rules of Professional Conduct state: "a lawyer shall not bring...a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes good faith argument for an extension, modification or reversal of existing law." Pa..R.P.C. 3.1. Plaintiffs' counsel in the instant matter is walking a fine line between that which is permissible under the Rules and that which constitutes sanctionable conduct. The Complaint filed in this

count as if it were brought against all Defendants.

However inartfully Plaintiffs' claims have been pled, this Court does not find that the Complaint should be stricken for these reasons alone. As to the merits of Plaintiffs' causes of action *vel non*, each will be addressed in turn.

A. Plaintiffs' Claims Are Barred By the First Amendment and the Noerr-Pennington Doctrine

Defendants argue that this court should dismiss the complaint because the conduct alleged is protected by the First Amendment to the U.S. Constitution and the Noerr-Pennington doctrine. This court agrees.

Pursuant to the First Amendment, "Congress shall make no law respecting an establishment in religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for the redress of grievances." U.S. Const. amend. I. The Noerr-Pennington doctrine originated with the United States Supreme Court's decisions in E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) ("Noerr"), and United Mine Workers v. Pennington, 381 U.S. 657 (1965) ("Pennington"). Under this doctrine, an individual is immune from liability for exercising his or her First Amendment right to petition the government. Pennington, 381 U.S. at 669-70; Noerr, 365 U.S. at 137-38. The Court made these rulings in an antitrust context where the defendants engaged in campaigns directed towards obtaining governmental action for the purpose of eliminating competition in their respective industries. Id. In Noerr and Pennington, the Court recognized that the "right of petition is one of

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matter appears more like the work of a *pro se* litigant rather than that of an officer of the court. Clearly, the interests of judicial economy and efficiency would be better served if counsel would adhere to the Pennsylvania Rules of Civil Procedure and other pertinent rules of court, as well as the basic rules of grammar and composition.

the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." Noerr, 365 U.S. at 138. The Court held such immunity existed "regardless of the defendants' motivations" in waging their campaigns, as it recognized that the right of individuals to petition the government "cannot properly be made to depend on their intent in doing so." Id. at 139.[2]

The sole exception to the Noerr-Pennington doctrine is the "sham exception" under which a defendant will not be protected if he or she is simply using the petition process as a means of harassment. Chantilly Farms Inc. v. West Pileland Twp., 2001 WL 290645 (E.D. Pa. 2001). In Chantilly, a developer sued the township and groups of individual citizens who opposed the plaintiff's proposed subdivision of land. Id. The plaintiff alleged that the private defendants petitioned members of the board of supervisors of the planning commission and made representations to these members, in both public and private meetings, which led to the denial of plaintiff's proposal. Id. The district court granted defendants' motion to dismiss the claims against them on the basis of First Amendment immunity and held that, because the individual defendants in Chantilly Farms petitioned their local government in order to influence policy and obtain favorable government action, the sham exception did not apply.[3] Id.

The same is true of the case at bar. Here, Plaintiffs seek to recover damages against these Defendants for actions they have taken to influence public bodies concerning their opposition to

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[2]The Noerr-Pennington doctrine has been extended well-beyond the antitrust context. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (Noerr-Pennington doctrine extended to a civil conspiracy claim by white merchants whose businesses were boycotted by the NAACP.); Barnes Found. v. Twp. of Lower Merion, 242 F.3d 151 (3d Cir. 2001)(applied Noerr-Pennington doctrine to causes of action arising under federal civil rights laws); Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155 (3d Cir.1988)(held that defendants were immune from conspiracy liability for damages resulting from inducing official action which lead to the state revoking plaintiff's nursing home license).

[3]The Chantilly court recognized that, under the Noerr-Pennington doctrine, a defendant's motive for his or her conduct is irrelevant.

Bethany Builders' development plans, conduct which clearly is protected under both the First Amendment and Noerr-Pennington. As aptly stated in Wawa, Inc. v. Alexander J. Litwornia & Assoc., 54 Pa. D. & C.4th 375 (2001):

> The ability to petition governmental entities, even for a selfish motive, must be protected if our democracy is to survive. Lawsuits that would stifle this ability must be dismissed upon their filing or the offending plaintiff will have succeeded in reducing the address of grievances in the next case, and the next, and the next.

Id. Should Plaintiffs believe that certain municipal bodies have inappropriately acted against its interests, it has other recourse available to it under the law; the instant lawsuit is not the appropriate means for seeking such redress.

Notwithstanding this court's conclusion with respect to the legal question of the applicability of the Noerr-Pennington doctrine to the case at bar, the factual sufficiency *vel non* of Plaintiffs' claims is quite another matter which will be considered separately and which is fully discussed *infra*.

B. Plaintiffs' Breach of Contract Claim (Count I) Fails As A Matter of Law

Count I of the Complaint purports to state a claim against all Defendants for breach of contract. However, to sustain a claim for breach of contract, Plaintiffs must prove: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. CoreStates Bank, Nat'l Assn. v. Cutillo, 723 A.2d 1053 (Pa. Super. 1999). Here, Bethany Builders has failed to plead facts sufficient to support the existence of an enforceable contract between itself and either Dungan or any of the individual Defendants. Accordingly, Count I fails as a matter of law.

C. Plaintiffs' § 1983 Claim Fails As A Matter of Law

Count II of the Complaint purports to state a claim against all Defendants for civil rights

violations pursuant to 42 U.S.C.A. § 1983. In order to state a claim for deprivation of rights under § 1983, a plaintiff must allege that the defendant: (1) acted under color of state law, and (2) caused an injury to the plaintiff's constitutional or federal rights. Daniels v. Williams, 474 U.S. 327 (1986). At bar, Plaintiffs have failed to demonstrate that Defendants - or any of them - were acting under the color of state law. As such, Count II fails as a matter of law.

D. No Private Cause Of Action Exists Under the Pennsylvania Municipalities Planning Code or the Philadelphia Zoning Code.

Count III of the Complaint purports to state a claim for violation of the Pennsylvania Municipalities Planning Code ("MPC") or the Philadelphia Zoning Code ("PZC"). This court is unaware of any authority - nor do Plaintiffs cite any specific provision of either Code - which permits them to bring a private cause of action against private individuals or entities for an alleged violation of either the MPC or the PZC. As such, Count III fails as a matter of law.

E. Plaintiffs Have Failed To State A "Regulatory Taking" Claim (Count IV)

Count IV of the Complaint purports to assert a claim against Defendants under a theory of "regulatory taking." Under both the Fifth Amendment to the U.S. Constitution and Art. 1, § 10 of the Pennsylvania Constitution, the taking of private property by the government is unconstitutional without payment of just compensation. U.S. Const. amend. 5; Pa. Const. art. 1, § 1. A taking occurs when an "entity clothed with the power substantially deprives an owner of the use and enjoyment of his property." Machipongo Land & Coal Co., Inc. v. Dep't of Envtl. Resources, 719 A.2d 19 (Pa. Commw. 1998). At bar, Plaintiffs have failed to plead facts in support of their claim of regulatory taking and has further failed to demonstrate that Defendants - or any of them - were acting under the authority of any governmental entity. Accordingly, Count IV fails as a matter of law.

F. Plaintiffs' Intentional Interference with Contractual Relations Claims Fail As A Matter of Law (Counts V, VI and VII)

Counts V through VII of the Complaint purport to state claims for intentional interference with contractual relations (which Plaintiffs' counsel has captioned "Intentional Interference With Contract Due to The Failure of Due Process Without Privilege and In Violation of the Due Process Rights of the Plaintiff"). The elements of a cause of action for intentional interference with contractual relations, whether existing or prospective, are as follows: (1) the existence of a contractual or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct. Al Hamilton Contracting Co. v. Cowder, 434 Pa. Super. 491, 497, 644 A.2d 188, 191 (1994).

As previously discussed *supra*, these claims are barred by the First Amendment and the Noerr-Pennington doctrine. Notwithstanding this court's conclusion with respect to the applicability of the Noerr-Pennington doctrine to the case at bar, Counts V, VI and VII are factually insufficient in and of themselves and do not state claims for interference with contractual relations upon which relief may be granted. In addition to the foregoing, Plaintiffs have failed to plead facts which demonstrate that Defendants - or any of them - "specifically intended to harm" Plaintiffs' relationship with the Waddingtons, or any other entity with whom Plaintiffs have allegedly contracted. Al Hamilton, 644 A.2d at 191. Accordingly, Counts V, VI and VII are dismissed.

G. Counts VIII and IX Do Not State Any Cause of Action Recognized Under Pennsylvania Law

Counts VIII and IX purport to state claims for some constitutional violation by creation of an *ex post facto* law. An "*ex post facto* law" is one which is "adopted after the complaining party committed criminal acts and inflicts a greater punishment than the law annexed to the crime, when committed." U.S. Const. Art. 1. § 10, cl. 1. First, no such cause of action exists which could remotely apply to the claims asserted by Plaintiffs. Moreover, even if such a private cause of action existed, Plaintiffs have not averred any fact to support such a claim. Accordingly, Counts VIII and IX are dismissed.

CONCLUSION

For the above-stated reasons, this court hereby finds as follows:

1. The separate Preliminary Objections of Defendants Dungan Civic Association, Inc., Wanda Exline, Albert Chernoff and Wendy Troester (Control Nos. 080803, 080804) are **sustained** and Plaintiffs's Second Amended Complaint **dismissed with prejudice**.

2. Plaintiffs' Preliminary Objections to the foregoing Preliminary Objections (Control Nos. 091444, 092922, 092923) are **overruled**.

3. The Motion for Summary Judgment of Defendants Troester and Chernoff (Control No. 100147) is **dismissed as moot**.

This Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

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GENE D. COHEN, J.

Dated: March 13, 2003