

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAMB FOUNDATION and : CIVIL ACTION  
DONNA MENGEL :  
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v. :  
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 :  
NORTH WALES BOROUGH et al. : NO. 01-950

**MEMORANDUM**

Giles, C.J.

November 16, 2001

**I. INTRODUCTION**

Plaintiffs filed this action on February 26, 2001, and an amended complaint on April 25, 2001, against North Wales Borough (“North Wales Borough” or “Borough”), together with the following North Wales Borough officials and former officials, sued in their individual and official capacities: Douglas T. Ross, Mayor of North Wales Borough; Doreen K. Ross, former Election Official; Frederick W. Goodhart, Jr., Constable and Councilman; Joan F. Goodhart, Judge of Elections; William J. Gontram, Alternate Member of the North Wales Borough Zoning Board; Pamela C. Gontram, Election Official; Albert Tenney, Member, North Wales Borough Water Authority; and Jocelyn Tenney, Borough Councilwoman.

Plaintiffs allege that defendants, pursuant to a systematic Borough policy, violated their First Amendment, Substantive Due Process, and Equal Protection rights, and they seek redress under 42 U.S.C. §§ 1983 and 1985(3). Plaintiffs also allege violations of the Fair Housing Act Amendments (“FHAA”), 42 U.S.C. §§ 3604(f)(1) (discrimination), 3604(f)(3)(b) (failure to accommodate), and make state law defamation and abuse of process claims. Plaintiffs seek

injunctive relief, compensatory and punitive damages, and attorneys' fees and costs.

Now before the court are eight motions to dismiss, each pursuant to Fed R. Civ. P. 12(b)(6), filed jointly and/or separately by each defendant. Since the vast majority of the issues presented apply to all defendants, they will be discussed together. Issues that apply to individual defendants will be treated accordingly. For the reasons below, the motions are granted in part and denied in part.

## **II. FACTUAL BACKGROUND**

Consistent with the review standards applicable to a motion to dismiss, Fed. R. Civ. P. 12(b)(6), the alleged facts, viewed in the light most favorable to the plaintiff, follow.

The Lamb Foundation is a non-profit corporation which provides housing and care of the elderly and special needs persons, including the mentally and physically disabled, in Montgomery County, Pennsylvania, which includes North Wales Borough. (Am. Compl. ¶ 15.) Plaintiff Donna Mengel ("Mengel") is the sole shareholder and director of the Lamb Foundation and serves as an appointee to the Board of the Montgomery County Office of Mental Health/Mental Retardation ("MH/MR Office"). (Am. Compl. ¶ 16.) Mengel owns various residential properties in North Wales Borough. She leases several of these to individuals without special needs. However, approximately thirty-one (31) of the Mengel properties are leased through the Lamb Foundation to mentally and physically disabled persons. (Am. Compl. ¶¶ 17, 18.) Approximately one hundred (100) mentally and physically disabled persons live within the Borough in housing provided through the Lamb Foundation. (Am. Compl. ¶ 19.)

Plaintiffs allege that, beginning in 1996, in response to the increased visibility and

presence of physically and mentally handicapped persons living in Lamb Foundation residences in the Borough, defendants, acting individually and in concert, without authority, but under color of law, and through a deliberate policy, custom, practice, and/or plan to drive the Lamb Foundation and mentally and physically disabled persons out of the Borough, have enacted discriminatory zoning ordinances and other land-use restrictions, have interfered with Lamb Foundation residents' voting rights, and have discriminated against, harassed, intimidated, and defamed Mengel, the Lamb Foundation, and the mentally and physically disabled. (Am. Compl. ¶¶ 21, 22.) It is alleged that these actions required Mengel and the Lamb Foundation to retain counsel and expend time, energy, and resources which would have been used normally for the benefit of disabled persons to whom the Lamb Foundation provides services. (Am. Compl. ¶¶ 29, 40, 44, 50, 71.)

#### A. Discriminatory Zoning and Other Land Use Regulations

Plaintiffs allege that, in 1996, intending to discriminate and harass the mentally and physically disabled and the Lamb Foundation, the Borough amended its zoning ordinances to provide under North Wales Borough Code Chapter 28 § 208-8, that no individuals unrelated by blood or marriage may live together in any dwelling in North Wales without authorization by special exception (Am. Compl. ¶ 22); that amendment was made with discriminatory intent, and knowledge of its illegality (Am. Compl. ¶ 23); and that at various times since the enactment of the discriminatory zoning restriction, the Borough threatened to enforce it exclusively against Mengel, the Lamb Foundation, and its residents, and not as to other similarly situated individuals or organizations. (Am. Compl. ¶¶ 24, 25.)

Plaintiffs also allege that, around the same time, and for the same motivation, the Borough established an historic district, specifically targeting the Lamb Foundation properties in order to prohibit Mengel and the Lamb Foundation from performing renovations or installing disability-related accommodations, such as wheelchair ramps facing any street, without permission from the Borough Historic Architectural Review Board (“HARB”). (Am. Compl. ¶ 26.)

On or about August 2, 2000, allegedly with discriminatory intent, the Borough singled out and issued Zoning Enforcement Notices to Mengel, claiming that her properties leased through the Lamb Foundation constituted “institutional” uses not permitted in a residential district. (Am. Compl. ¶¶ 27, 28.) These zoning enforcement actions were withdrawn by the Borough after an exhaustive investigation. (Am. Compl. ¶ 32.)

#### B. Interference with Voting Rights

Plaintiffs allege that, during and after the 1999 elections, defendants engaged in conduct intended to discriminate against, intimidate, and prevent mentally and physically disabled residents from voting, and to harass the Lamb Foundation. (Am. Compl. ¶34.)

Allegedly, during the May 1999 primary elections, Joan Goodhart, Judge of Elections, with the knowledge and consent of Constable Fred Goodhart and Pamela Gontram, an election official, required a mentally and physically disabled African-American resident of the Lamb Foundation to step out of line and wait while a non-disabled Caucasian voter behind him in line voted, on the pretext that she feared he “would take too long.” (Am. Compl. ¶ 35.)

Allegedly, during the April 2000 primary, Joan Goodhart, with the knowledge and

consent of Fred Goodhart and Pamela Gontram, attempted to make copies of the identifications provided by voting assistants who accompanied many of the Lamb Foundation residents to the polls. (Am. Compl. ¶ 36.)

Further, plaintiffs claim, Pamela Gontram, William Gontram, Frederick Goodhart, Joan Goodhart, Doreen Ross, and Douglas Ross also caused and participated in frivolous challenges to Lamb Foundation residents' votes cast in the November 1999 official elections. These actions were allegedly the culmination of several meetings held at the home of Doreen and Douglas Ross, which had been held for the purpose of determining "what to do about the Lamb Foundation." (Am. Compl. ¶ 37.) These defendants participated in challenges against all nineteen (19) absentee ballots cast by Lamb Foundation residents, with knowledge that these challenges were frivolous. (Am. Compl. ¶ 38.) Allegedly, no evidence was presented in support of these challenges characterized as frivolous. The challenges were denied by a judicial officer and the votes allowed. (Am. Compl. ¶ 39.)

On November 22, 1999, defendants allegedly caused the filing of a petition which contested the outcome of the election for certain Borough positions, and specifically sought to have stricken the votes cast by a number of Lamb Foundation residents. The petition claimed undue influence upon the residents by Mengel and the Lamb Foundation or, alternatively, that the residents were mentally incompetent to vote. After plaintiffs were required to expend considerable time and resources in responding to the petition, it was withdrawn. (Am. Compl. ¶ 40.)

Another allegedly frivolous petition was filed on March 28, 2000. It sought the appointment of Borough Mayor Ross as an overseer, and the monitoring of the votes of all Lamb

Foundation residents cast during the April 4, 2000, election. (Am. Compl. ¶ 41.) This petition was withdrawn when the presiding judge found that the petition lacked legal basis, and admonished defendants from the bench that “North Wales is not Haiti, for God’s sake.” (Am. Compl. ¶ 42.)

During the November 2000 election, Fred Goodhart and Pamela Gontram, with the knowledge and consent of Joan Goodhart, allegedly attempted to tape-record voters who were mentally or physically disabled residents of the Lamb Foundation who came to the polling place with voting assistants, in violation of the Pennsylvania Election Code, 25 P.S. § 3049(b)(6).<sup>1</sup> (Am. Compl. ¶ 43.)

### C. Intimidation, Harassment, and Defamation

Beginning sometime before February 2000, plaintiffs allege that all defendant officials, with malicious and discriminatory intent, caused frivolous complaints regarding the Lamb Foundation operations to be reported to various state and county agencies, including the Pennsylvania Department of Public Welfare and Department of Labor and Industry, Department of Mental Retardation, and Department of Aging and Adult Services. (Am. Compl. ¶ 46.) Allegedly, defendants also caused a frivolous report of abuse and neglect of Lamb Foundation

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<sup>1</sup>25 P.S. § 3049(b)(6) provides:

The election officers shall not themselves be, nor allow any other person to be, in any position that will permit any one to see or ascertain how an elector votes, or how he has voted. The election officers, or one of them, shall inspect the face of the machine at frequent intervals, to see that the ballot labels are in their proper places, and that the machine has not been injured or tampered with.

residents to be reported to a federally-funded advocacy agency, Pennsylvania Protection & Advocacy, Inc., located in Harrisburg. (Am. Compl. ¶ 47.) Although these complaints allegedly triggered exhaustive investigations, that caused embarrassment to Mengel and needless intrusions into residents' homes and privacy, no violations or improper conduct was found. (Am. Compl. ¶¶ 48, 49.)

Plaintiffs also allege that Mayor Ross, acting outside his proper authority but under color of law, solicited the filing of complaints concerning the Lamb Foundation. (Am. Compl. ¶ 51.) Moreover, he allegedly falsely advised Mengel that she was required by Borough ordinances to provide him with various information, including licensing, registration, and taxation materials. (Am. Compl. ¶ 52.) Plaintiffs allege that Mayor Ross knew that the information he requested was outside his authority as Mayor to demand. Allegedly, the Borough Solicitor, Joseph Kuhls, Esq., criticized Mayor Ross for acting beyond his legal authority by making these documentation requests. (Am. Compl. ¶ 54.) Allegedly, in an effort to silence Solicitor Kuhls, Mayor Ross instructed the Borough Manager, Susan Patton, not to refer Lamb Foundation matters to the Borough Solicitor. (Am. Compl. ¶ 55.)

On September 18, 2000, allegedly defendants Albert Tenney, Jocelyn Tenney, Fred Goodhart, and William Gontram appeared at a Lamb Foundation residence under the pretext of assisting Jeanne Bancroft, a former Lamb Foundation resident and staff member, in loading her personal belongings onto a U-Haul truck. (Am. Compl. ¶ 56.) While at the residence, and without authorization, it is claimed that defendants took pictures of the residents and their home. (Am. Compl. ¶ 57.) Prior to the arrival of the police at the residence, Constable Fred Goodhart allegedly threatened to handcuff and arrest Mengel and her son. (Am. Compl. ¶ 58.) When the

police did arrive, they allegedly instructed defendants to leave the property, but defendants refused to do so until they were under threat of arrest. (Am. Compl. ¶ 59.) On leaving, William Gontram allegedly handed the responding police officer Mayor Ross' cell phone number and told the officer that the dispute was to be referred to the Mayor. (Am. Compl. ¶ 60.) It is alleged that the U-Haul truck was rented by Mayor Ross and the other defendants in furtherance of a plan to harass and intimidate Mengel and the Lamb Foundation. (Am. Compl. ¶ 61.) In addition, plaintiffs allege that Albert Tenney, on repeated occasions, trespassed upon Lamb Foundation properties, residences, and offices, for the purpose of conducting unlawful surveillance. (Am. Compl. ¶ 62.)

Plaintiffs further allege that Mayor Ross, acting outside his proper authority but under color of law, directed the Borough Police Department to conduct unwarranted investigations of the Lamb Foundation residences and their mentally and physically disabled residents, and to report such information directly to him. (Am. Compl. ¶ 63.) Allegedly, Mayor Ross surreptitiously and illegally obtained private records concerning Mengel and the Lamb Foundation, including tax returns and other financial documents. (Am. Compl. ¶ 64.)

#### D. Defamation

On August 1, 2000, following a public Borough Council vote appointing Republican John Strobel to serve on the Council, Mayor Ross allegedly exclaimed, "Welcome to Mengelville, folks, the ghetto of Upper Gwynedd." (Am. Compl. ¶ 65.) Allegedly, the statement was not made in the course of Mayor Ross' duties or within the scope of his authority as mayor, nor did it relate to any matter pending in his office. (Id.) Plaintiffs aver that this statement was

understood by Borough residents as targeting, individually and directly, Mengel and the Lamb Foundation, and was deliberately made to defame both Mengel and the Lamb Foundation, and to drive them and their mentally and physically disabled tenants from the Borough. (Am. Compl. ¶ 66.) This statement allegedly was reported in the August 3, 2000 edition of North Penn Life, a periodic newspaper with distribution in Montgomery and Bucks counties. (Am. Compl. ¶ 67.)

In November 2000, allegedly defendants, with malicious intent and acting under the fictitious name of a group called “Dignity for All,” published a letter defaming Mengel and the Lamb Foundation. It is claimed that the letter made knowingly false allegations of abuse and neglect of Lamb Foundation residents, including, but not limited to, the statement, “Residents and their families report verbal and physical abuse of special needs residents by some other residents, some employees, and the owner/directors themselves.” (Am. Compl. ¶ 68.) Allegedly, defendants distributed this letter to the public, including to the campaign of United States Representative Joseph Hoeffel, the Pennsylvania State Director of Mental Retardation, the Montgomery County offices of Mental Health and Mental Retardation, the Montgomery Association of Retarded Citizens (“MARC”), and local newspapers. (Am. Compl. ¶ 69.) Plaintiffs allege that the letter has seriously damaged the reputation of Mengel and the Lamb Foundation. (Am. Compl. ¶ 70.)

### **III. DISCUSSION**

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is appropriate only if, accepting the well-pled allegations of the complaint as true, and drawing all reasonable inferences in the light most favorable to plaintiff, it appears that a plaintiff could prove no set of facts that would

entitle it to relief. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989); Weiner v. Quaker Oats Co., 129 F.3d 310 (3d Cir. 1997); Unger v. National Residence Matching Program, 928 F.2d 1392, 1394-95 (3d Cir. 1990).

#### A. Standing under Section 1983

All defendants argue that, under the facts as pled in the Amended Complaint, plaintiffs do not have standing to assert a cause of action under Section 1983. In order to have standing under Article III of the Constitution, a plaintiff must show (1) an actual injury that is (2) causally connected to the conduct complained of and (3) likely to be “redressed by a favorable decision.” Powell v. Ridge, 189 F.3d 387, 403 (3d Cir. 1999) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). The injury must consist of “an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” Id. (quoting Lujan, 504 U.S. at 560). The Supreme Court has recognized two types of standing for associations that sue to redress grievances such as those alleged by the Lamb Foundation and Mengel - representational and organizational. See Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977); Pennell v. City of San Jose, 485 U.S. 1 (1988).

In order to establish representational standing, also known as associational standing, on behalf of its members, a plaintiff must assert that (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members. Hunt, 432 U.S. at 343. Since plaintiffs, in their briefs

and in oral argument, aver only organizational standing, the court may only consider their claim of standing as organizational plaintiffs.

An inquiry into whether an association has organizational standing proceeds in the same manner as in the case of an individual, and requires the court to ask: Have the plaintiffs “‘alleged such a personal stake in the outcome of the controversy’ as to warrant [their] invocation of federal-court jurisdiction”? Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 261 (1977) (quoting Baker v. Carr, 369 U.S. 186 (1962)). Federal standing doctrine contains a “general prohibition on litigants phasing another person’s legal rights.” Allen v. Wright, 468 U.S. 737, 751 (1984).

Defendants argue that, because plaintiffs allege that defendants “only ‘threaten to enforce’” the zoning ordinances, which have been on the books for four years but have never been enforced, they have failed to demonstrate any injury under Section 1983. (Def. North Wales Borough, Frederick W. Goodhart, Jr., William J. Gontram, and Jocelyn Tenney to Dismiss Pls’ Am. Compl., at 9; Am. Compl. ¶ 23.) Plaintiffs respond that the Borough’s threatened enforcement of the ordinances constitutes an injury in fact. (Pls. Resp. at 15; Am. Compl. ¶ 24.) See Pennell v. City of San Jose, 485 U.S. 1 (1988); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999). If enforced, the ordinances would require plaintiffs to shut down their activities completely, which is the alleged objective intent of the defendants. (Pls. Resp. at 15.)

In Pennell, a landlords’ association challenged the constitutionality of a city rent control ordinance which allowed a hearing officer to consider, inter alia, “hardship to a tenant” when determining whether to approve a landlord’s proposed rent increases. Although the complaint

did not allege that the landlords had “hardship tenants” who might trigger the ordinance’s hearing process, or that they had been or would be aggrieved by a hearing officer’s determination that a certain proposed rent increase was unreasonable due to tenant hardship, the allegation that the landlords’ properties were subject to the ordinances, coupled with the statement at oral argument that the association represented most of the residential unit owners in the city, including many hardship tenants, raised the likelihood of enforcement of the ordinance. Thus, the Court found that the landlords sustained their burden of demonstrating realistic danger of direct injury as a result of the ordinance’s operation or enforcement. Id. at 855 (citing Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979)).<sup>2</sup>

Plaintiffs’ Amended Complaint alleges that the Borough attempted to enforce the “blood-relation” zoning ordinance on the Lamb Foundation exclusively, and further avers that the “historical district” ordinance was used to harass the Lamb Foundation, as well as its mentally and physically disabled members. According to the Amended Complaint, the Borough issued Zoning Enforcement Notices to Mengel, alleging that her properties leased through the Lamb Foundation constituted “institutional” uses not permitted in a residential district. (Am. Compl. ¶¶ 26-27.) Further, responding to these enforcement actions required plaintiffs to retain counsel and expend time, energy, and resources which would normally be used for the benefit of the

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<sup>2</sup>The Court in Pennell also provided a caveat to future litigants that the defendants argue qualifies its applicability to this case: “We strongly suggest that in future cases parties litigating in this Court under circumstances similar to those here take pains to supplement the record in any manner necessary to enable us to address with as much precision as possible any question of standing that may be raised.” 485 U.S. at 856. Defendants’ reliance on this dicta is misplaced. Pennell was decided on appeal from the merits, and this warning refers to the parties’ development of a record, during discovery, not to the allegations in plaintiffs’ complaint, and thus is irrelevant to a 12 (b)(6) motion to dismiss.

disabled persons to whom plaintiffs provide services. (Am. Compl. ¶ 29.)

Similarly, in Havens Realty, plaintiffs challenged a realty company's racial discrimination in providing information about housing. One of the plaintiffs was an organization dedicated to securing open housing. The organization claimed that the defendant's discriminatory practices undermined its ability to achieve its goals. The Court unanimously upheld standing for the organization, reasoning that the defendant's practices injured the organization's ability to accomplish its purpose and required it to spend a great deal of its resources investigating and handling complaints of housing discrimination. The Court concluded that these injuries to the organization were sufficient for standing, as the organization successfully alleged "far more than simply a setback to the organization's abstract social interests." 455 U.S. at 379; cf. Sierra Club v. Morton, 405 U.S. 727 (1972) (holding that absence of allegation that corporation or its members would be affected in any of their activities or pastimes by the proposed project, the corporation, which claimed special interest in conservation of natural game refuges and forests, lacked standing under Administrative Procedure Act to maintain the action).

Defendants also argue that because plaintiffs are "essentially only landlords" to the mentally and physically disabled, they have no prudential standing to sue on their behalf. In Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), a nonprofit real estate developer which had contracted to purchase a tract of land in order to build racially integrated low- and moderate-income housing filed suit, alleging that local authorities' refusal to change the tract from single-family to multi-family classification was racially discriminatory. The Court held that, while the plaintiff had constitutional standing in that it

suffered an economic injury from defendants' refusal to rezone, as well as injury to its interest in making suitable low-cost housing available in areas where such housing is scarce, whether the corporation had prudential standing was questionable. Id. at 263. The Court reasoned that, while the plaintiffs claimed that the village's refusal to rezone discriminated against racial minorities in violation of the Fourteenth Amendment, as a corporation, the Metropolitan Housing Development Corp. had no racial identity and thus could not be the direct target of the petitioners' alleged discrimination.<sup>3</sup> Id.

Plaintiffs allege in their amended complaint that "the Lamb Foundation is a duly licensed non-profit corporation providing housing and care of the elderly and special needs persons, including the mentally any physically disabled." (Am. Compl. ¶ 15.) In Arlington Heights, the purpose of the plaintiff construction company was only to build houses, not to further the civil rights of its customers.

In this case, as pled, the Lamb Foundation is an association organized for the purpose of furthering the interests of mentally and physically handicapped individuals. Therefore, discriminating against its members is akin to discriminating against the organization, and plaintiffs have prudential, as well as constitutional, standing. See also Powell v. Ridge, 189 F.3d 387, 404 (3d Cir. 1999) ("the standing of the plaintiff organizations to bring this suit [for racial discrimination in public school funding] is consistent with the long line of cases in which organizations have sued to enforce civil rights, civil liberties, environmental interests, etc.")

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<sup>3</sup>In Arlington Heights, the Court found that it was not necessary to resolve this standing problem because there was at least one individual plaintiff who had demonstrated standing to assert these rights as his own. 429 U.S. at 263 n.9. Here, the court must reach the standing question, since no mentally or physically handicapped member of the Lamb Foundation is a named plaintiff.

(citations omitted).

## B. Fair Housing Act

Defendants argue that because the ordinances in question have never been used against them, plaintiffs lack standing to bring a cause of action under the Fair Housing Act (“FHA”). Defendants further argue that the plaintiffs must ask for and then be denied a request for reasonable accommodations in order to have a viable claim under the FHA for failure to accommodate.

Plaintiffs contend that they have suffered a cognizable injury because “...the Lamb Foundation and Mengel were required to retain counsel and expend time, energy and resources which would normally be used for the benefit of the disabled persons to whom the Lamb Foundation provides services.” (Amended Complaint ¶ 71; Pls. Mot. in Opp. to Def. Mot. to Dismiss at 35). Because the discriminatory zoning ordinances do not exclude them from their application, plaintiffs argue, the ordinances are discriminatory and thus violate their rights under the FHA. (Pls. Mot. in Opp. to Def. Mot. to Dismiss at 37; Amended Complaint ¶ 22).

### 1. Standing under the FHA

The Supreme Court has held that an organization which provides services to a group has standing under the FHA in cases where the defendants’ discriminatory conduct becomes a drain on the organization’s resources. Havens Realty Co. v. Coleman, 455 U.S. 363, 377 (1982). The primary plaintiff in Havens, Housing Opportunities Made Equal (“HOME”), was a non-profit organization whose purpose was “to make equal opportunity in housing a reality in the Richmond

Metropolitan Area.” Id. at 363. HOME determined, through the use of testers, that the defendants were engaging in the practice of racial steering. The plaintiffs in Havens alleged that the defendants were forcing them to devote a significant amount of resources and effort, interfering with their ability to provide counseling and referral services to low- and moderate-income people seeking housing. The Court found that if the defendant was practicing racial steering, as alleged by HOME, then HOME had suffered an injury under the FHA.

If, as broadly alleged, petitioners’ steering practices have perceptibly impaired HOME’s ability to provide counseling and referral services for low- and moderate- income homeseekers, there can be no question that the organization has suffered injury. Such concrete and demonstrable injury to the organization’s activities—with the consequent drain on the organization’s resources—constitutes far more than simply a setback to the organization’s abstract social interests.

455 U.S. at 379 (citing Sierra Club v. Morton, 405 U.S. 727, 739 (1972)).

According to the facts as pled, plaintiffs were threatened with enforcement of the discriminatory zoning ordinances, impairing their organizational goals and forcing them to expend considerable resources trying to counteract defendants’ efforts. The court finds that plaintiffs’ allegations are sufficient to establish standing under the FHA.

## 2. Failure to Accommodate

In Remed Recovery Care Centers v. Township of Worcester, 1998 WL 437272, at \*4 (E.D. Pa. 1998), the court held that a plaintiff does not have to exhaust state remedies in order to state a viable claim under the FHA. In Remed, the plaintiff, an organization providing treatment and therapy to handicapped individuals, sought, and was denied, reasonable accommodations by the defendant, who argued that the plaintiff must first exhaust their claims at the state level

before they could bring an action in federal court. The court found that “[t]he FHA permits an ‘aggrieved person’ to commence a federal civil action whether or not a state complaint has been filed or state remedies have been exhausted.” 1998 WL 437272, at \*4; see also 42 U.S.C. § 3613(a)(2); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979).<sup>4</sup>

According to the facts as pled, plaintiffs were allegedly threatened with enforcement of discriminatory ordinances by local officials because of their animus toward individuals with disabilities. (Amended Complaint ¶ 24). Although the plaintiffs in the instant case did not apply for accommodations at the municipal level like the plaintiff in Remed, the court’s reasoning in Remed shows that the mere threat of enforcement of the ordinances constitutes a failure to accommodate. The court stated, “No present injury is necessary; the threat of future one is sufficient for adjudication. (citation omitted). The controversy would be ripe even if plaintiff had not applied to the Zoning Board for a variance or special exemption.” 1998 WL 437272, at \*4 (E.D. Pa. 1998) (citing Assisted Living Associates of Moorestown, 996 F. Supp. 409 at 423). Because of the Borough’s threatened enforcement of the zoning ordinances, both plaintiffs qualify under the FHA as “aggrieved persons” and do not have to exhaust state remedies in order to bring a cause of action in federal court.

In Assisted Living Association v. Moorestown Township, 996 F. Supp. 409, 427 (D.N.J. 1998), the court held that if a plaintiff believes that seeking reasonable accommodations from a zoning board or other state agencies would prove “futile” or “foredoomed,” then the plaintiff

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<sup>4</sup> Under the FHA, an “Aggrieved person” includes any person who-  
(1) claims to have been injured by a discriminatory housing practice; or  
(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.  
42 U.S.C. § 3602 (i).

may file an action in federal court. In Assisted Living, plaintiff sought, and was denied, a reasonable accommodation in the defendant's zoning ordinance that would have allowed construction of an assisted living facility for the handicapped and elderly. Id. at 410. After being denied a reasonable accommodation by the zoning board, the plaintiff filed an action in federal court. The defendant in Assisted Living argued that the plaintiff's claims were not ripe because they had not exhausted state remedies, which the defendant contended were available to the plaintiff. The court disagreed, and held that a plaintiff does not have to exhaust state remedies when doing so would be "an exercise in futility." Id. at 426-27 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (noting that the plaintiff's claim was not unripe where submission of a development plan to applicable state authority would have been pointless, as the defendant in that case stipulated that no building permit application would be issued); Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) ("where the inevitability of the operation of a statute against certain individuals is patent, particular future contingency was irrelevant to the existence of a justiciable controversy"); Doe v. City of Butler, Pennsylvania, 892 F.2d 315, 322 (3d Cir. 1989) (holding that plaintiffs' challenge to zoning provisions was not unripe where certain zoning application had not been rejected, since application would have been futile); Easter Seals Soc'y of New Jersey v. Township of N. Bergen, 798 F. Supp. 228, 236 (D.N.J. 1992) ("Any further efforts by plaintiffs to work within the municipal administrative apparatus would be an exercise in futility.")).

Viewing plaintiffs' allegations of a conspiracy in part on behalf of the zoning board as true for the purposes of a motion to dismiss, it would have been futile for the Lamb Foundation and Ms. Mengel to have exhausted administrative remedies. The threatened enforcement of

allegedly discriminatory zoning ordinances against the plaintiffs, plus their status as “aggrieved person(s)” under the FHA, clearly states a valid cause of action under the Act.

### C. Official Immunities

Defendant officials argue that they are protected in all the alleged acts in their individual capacities by absolute legislative immunity and, in the alternative, by good faith immunity,. The court finds that none of the defendants is entitled to absolute legislative immunity because none of the acts alleged against defendants is legislative in nature. Further, whether defendants enjoy good faith immunity for particular acts is a question of fact that cannot be resolved in a motion to dismiss.

#### 1. North Wales Borough is not immune.

Municipalities cannot possess good faith immunity, even when alleged constitutional violations are the result of actions taken in good faith. Owen v. City of Independence, 445 U.S. 662 (1980). Therefore, if Borough officials acted pursuant to a policy, custom, or practice that violated plaintiffs’ rights, then the Borough could be held monetarily liable.

#### 2. No Absolute Legislative Immunity for Defendant Officials under Section 1983.

Defendants Mayor Douglas Ross, Frederick W. Goodhart, Jr., William J. Gontram, and Jocelyn Tenney argue that they are entitled to absolute legislative immunity in their individual capacities for all violations alleged under Section 1983. Legislative immunity provides absolute immunity from Section 1983 liability for both monetary and equitable relief for official conduct

taken within the “steer of legitimate legislative authority.” Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

Absolute legislative immunity under Section 1983, derived from the Speech and Debate Clause, Article I, § 6, is afforded to an official based upon function, as opposed to title. See Gravel v. United States, 408 U.S. 606, 625 (1972). For example, even though Mayor Ross is not a legislative official, he is entitled to immunity for all acts committed in a legislative capacity. See Bogan v. Scott-Harris, 523 U.S. 44 (1998) (finding that mayor as well as city council had absolute immunity for maliciously eliminating a particular position as part of the budget process, which was legislative in nature). However, because legislative immunity follows function, not position, legislators who violate rights in the course of performing non-legislative, albeit official, tasks, are not entitled to absolute immunity. See Gravel, 408 U.S. at 625 (holding that a Congressman who arranges for public printing and distribution of committee materials - the Pentagon Papers - could not invoke absolute immunity).

The above-mentioned defendants all argue that they enjoy absolute immunity for acts surrounding the enactment of the allegedly discriminatory zoning ordinances.

The allegations related to the enactment of the zoning ordinances contained in Count X of the Amended Complaint are averred against only the defendant. (Am. Compl. ¶¶ 22, 26, 104.) Therefore, defendants’ contention that they are absolutely immune from such allegations is moot since it does not apply to the facts alleged in the pleadings.

### 3. Absolute Immunity for High Public Officials under Pennsylvania Law

Defendants Douglas Ross, Frederick Goodhart, William Gontram, and Jocelyn Tenney argue that they are entitled to absolute immunity afforded to high public officials under Pennsylvania law, from plaintiffs' claims of defamation.

Pennsylvania common law recognizes the doctrine of absolute immunity for high public officials. See Lindner v. Mollan, 677 A.2d 1194 (Pa. 1996). In Lindner, the court held that high public official immunity is an unlimited privilege that exempts high public officials from defamation lawsuits, provided that the statements made by the official are made in the course of his official duties and within the scope of his authority. The purpose of this absolute privilege is to "protect society's interest in the unfettered discussion of public business and in full public knowledge of the facts and conduct of such business." Montgomery v. City of Philadelphia, 140 A.2d 100, 102 (Pa. 1958).

Whether a particular public official is a "high public official" for purposes of absolute immunity depends on "the nature of his duties, the importance of his office, and particularly whether or not he has policy-making functions." Montgomery, 140 A.2d at 105 (citations omitted). Even assuming the above-mentioned defendants are all high public officials for purposes of this absolute immunity,<sup>5</sup> given the allegations of the complaint, the motion to dismiss cannot be granted on the basis of absolute immunity.

Whether Mayor Ross' statement, "Welcome to Mengelville, folks, the ghetto of Upper Gwynedd," was made in the course of his duties as mayor is a question of fact for summary

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<sup>5</sup>The caselaw reflects that mayors are generally considered high public officials, see Angelilli v. Borough of Conshohocken, 1996 U.S. Dist. Lexis 16994 (E.D. Pa. 1996); Lindner, 677 A.2d at 495, but defendants cite to no case in which a councilman, an election official, or a judge of elections has ever been considered a high public official.

judgment or trial. In Angelilli, for example, the defendant mayor moved to dismiss pursuant to 12(b)(6), asserting absolute immunity for high public officials. 1996 U.S. Dist. LEXIS at \*1. The court refused to dismiss the claims, finding that “nothing in the complaint indicates that he made the allegedly defamatory comments ‘in the course and scope’ of his authority and jurisdiction.” Id. at \*19. The court held:

The facts are not clear at this stage of the litigation. Discovery will presumably reveal the context of [Mayor] Storti’s statements and whether they can be characterized as falling within the scope of this authority and his jurisdiction. Because Storti may have made the allegedly defamatory statements outside the scope of his authority and jurisdiction, defendant’s motion with respect to Count III will be denied at this time.

Id. at \*22. Similarly, discovery will reveal whether or not Mayor Ross’ statement, as well as the “Dignity for All” letter allegedly published by all defendants, constitute such acts within the scope of the authority of the above-mentioned defendants. As pled in the amended complaint, however, Mayor Ross’ statement was not made within the course of his duties or within the scope of his authority as mayor, and the publication of the “Dignity for All” letter was not within the job description of any defendant.

#### 4. Immunity under the PA Political Subdivision Tort Claims Act

The Pennsylvania Political Subdivision Tort Claims Act (“PSTCA”) states, inter alia, “Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by an act of the local agency or an employee thereof or any other person.” 42 Pa. C.S.A. § 8541. As such, the Borough argues that

it is immune from liability for the actions of its employees that violate state law, namely plaintiffs' claims of defamation.

The PSTCA provides eight exceptions to this grant of immunity for acts of negligence in the areas of (1) vehicle liability; (2) care, custody, or control of personal property; (3) real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals. 42 Pa. C.S.A. § 8542. The Borough is correct in pointing out that plaintiffs' defamation claims do not fall into any of these exceptions. As such, they are dismissed with prejudice.

#### 5. Good Faith Immunity

Under Section 1983, officials have good faith immunity in their individual capacities if they did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Similarly, under the PSTCA, 42 Pa. C.S.A. § 8546, officials are immune from suit for any conduct in their official capacity that did not constitute intentional, willful misconduct under 42 Pa. C.S.A. § 8550.

Defendants argue, in the alternative, that if they are not entitled to absolute immunity, they are entitled to good faith immunity for violations under Section 1983 and state law.

Plaintiffs have alleged that all defendants acted pursuant to a municipal policy, custom, or practice, and with full knowledge and evil motive in carrying out all of the alleged acts. As such, whether defendants are entitled to good faith immunity is a question of fact to be decided at trial.

#### D. Exhaustion of State Remedies

All defendants argue that plaintiffs' Section 1983 claims are not ripe as all state and administrative remedies have not been exhausted. Defendants cite Parratt v. Taylor, 451 U.S. 527 (1981), rev'd on other grounds, Daniels v. Williams, 414 U.S. 327 (1986), for the proposition that where plaintiffs are able to pursue an adequate state remedy following the state's denial of his due process rights, the "deprivation" is thereby cured for Section 1983 purposes, and that, consequently, there is no valid federal civil rights claim.

Defendants mis-analyze the Court's holding in Parratt. There, a prisoner ordered a \$23.50 hobby kit, which was lost by prison guards. The prisoner filed a Section 1983 action contending that he was deprived of property without due process of law. The Court held that the allegation of negligence was sufficient to constitute a "deprivation."<sup>6</sup> However, the Court concluded that the plaintiff did not allege a violation of the due process clause because he was only seeking a post-deprivation remedy for the lost hobby kit, and the state provided such a remedy through its tort law. The Court emphasized that the case did not involve an issue of inadequate pre-deprivation due process, since there was nothing the state could have done to prevent the hobby kit from being lost. Parratt stands for the proposition that when a random and unauthorized act of a governmental official causes a deprivation of property there is no deprivation of due process under Section 1983 when the state provides an adequate post-deprivation remedy of which the plaintiff has not availed himself.

Since plaintiffs have pled that all defendants' actions were taken pursuant to an unconstitutional municipal policy, custom, or practice, and were not merely random acts, Monell

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<sup>6</sup>This proposition was overruled in Daniels, 414 U.S. 330-31.

controls, and plaintiffs are not required to exhaust state and/or administrative remedies.

#### E. Substantive Due Process

Defendants argue that plaintiffs have failed to articulate a valid claim for violations of their substantive due process rights, because plaintiffs neither allege that any zoning ordinance was enforced against them nor allege that they were cited for failure to comply with a zoning ordinance.

In the context of land use regulation, the third circuit has held that a property owner states a substantive due process claim where it is alleged that the decision limiting the intended land use was arbitrarily or irrationally reached. DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell, 53 F.3d 592, 593 (3d Cir. 1995). In DeBlasio, plaintiff alleged that in late 1988, his lessee was approached by defendant Hoff, an official on the town zoning board, to purchase or rent defendant's land for the purpose of running his business, instead of plaintiff's. Defendant stated that doing so would alleviate the problems that he was having on plaintiff's property, a clear reference to the fact that plaintiff's pre-existing nonconforming use exception to the residential zoning ordinance had been subject to recent neighbor complaints. In February 1989, a neighbor filed a "citizen's complaint" regarding the lessee, and a zoning official inspected the property and concluded that the lessee's operation constituted an expansion of the pre-existing nonconforming use and the operation was thus in violation of the residential zoning ordinance. Plaintiff and lessee appealed to the zoning board, and their appeal was rejected, with defendant zoning board official participating in the decision. Plaintiff's complaint against the zoning board and Hoff alleged, inter alia, violation of substantive due process under Section

1983. The court denied defendants' motion for summary judgment, finding that a genuine issue of material fact existed as to whether or not Hoff, for personal reasons, improperly interfered with the process by which the town rendered zoning decisions, thereby constituting a denial of substantive due process. Id. at 601-02.

Here, defendants argue that the zoning ordinances enacted by the Borough did not infringe on plaintiffs' property rights because they were never enforced. Plaintiffs argue that defendants' conduct, including phony "inspections" of Lamb Foundation homes and intimidation tactics at the polls, all directly interfere with the plaintiffs' use and occupancy of their properties, the conduct by plaintiffs of a lawful charitable enterprise, and the exercise by Lamb Foundation residents of what the law intends to be the free and unfettered right to vote.

In Mesalic v. Slayton, 689 F. Supp. 416 (3d Cir. 1988), the third circuit held that imminent threat of enforcement of a zoning ordinance that is arbitrary or irrational may constitute a denial of substantive due process. Following Mesalic, then, plaintiffs' allegations that the Borough threatened to enforce the zoning ordinances against the Lamb Foundation, Am. Compl. ¶¶ 24, 27, suffice to state a claim for deprivation of property for purposes of substantive due process.

Further, in Palma v. Lansdale, 1991 WL 91557, at \*7 (E.D. Pa. 1991), the court found that a "fundamental interest" of the type "implicitly protected by the Constitution," and thus sufficient to state a substantive due process claim, includes "the general liberty to contract, to operate a business, and to engage in the livelihood of one's choice, free from state interference." The court in Palma also went on to discuss the Supreme Court's broad definition of "liberty" protected by the Due Process Clause, including: "not merely freedom from bodily restraint, but

also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free [persons].” Id. (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). See also Bello v. Walker, 840 F.2d 1124 (3d. Cir. 1988). Viewing the amended complaint in the light most favorable to plaintiffs, the allegations of threats and harassment suffice to state a claim of deprivation of liberty interests without due process of law.

#### F. Equal Protection

Defendants argue that, because plaintiffs are basing their claim only on their association with the mentally and physically disabled, they have not presented a valid claim for denial of equal protection. The court finds that plaintiffs have stated a claim for selective enforcement in violation of the Equal Protection Clause and may recover if they can establish that

- (1) the person, compared with others similarly situated, was selectively treated, and
- (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intention to injure the persons.

Homan v. City of Reading, 15 F. Supp.2d 696, 701 (E.D. Pa. 1998). Plaintiffs’ allegations that they were subjected to threats of zoning enforcement actions, harassment, and other abuses, because of their association with the mentally and physically disabled in the Borough, suffice to allege an equal protection violation.

## G. First Amendment

Defendants argue that plaintiffs fail to state a Section 1983 claim under the First Amendment freedom of association because plaintiffs have not sufficiently shown that their conduct was protected by the First Amendment and that such conduct prompted retaliatory action by defendants. Defendants cite Brady v. Town of Colchester, 863 F.2d 205 (2d Cir. 1988), for this proposition. Brady stands for the proposition that there is no First Amendment protection accorded to associations for financial benefit only, such as those between a lessor and lessee. There, plaintiffs had purchased a two-story colonial building for the purpose of developing it as a commercial property. For political reasons, the zoning board refused to let plaintiffs lease the property to the Borough. The court found that, while the Town of Colchester's actions constituted a denial of substantive due process and equal protection, plaintiffs' First Amendment rights were not violated.

The Supreme Court has recognized a freedom to associate with others "to pursue goals independently protected by the First Amendment—such as political advocacy, litigation ... or religious worship." L. Tribe, *American Constitutional Law* 702 (1978). Appellants do not allege in their complaint that they rented their property to pursue political or other goals independently protected by the first amendment. Rather, as Wesley Brady has acknowledged, they rented their building to the Borough for purely commercial reasons.

863 F.2d at 217.

As pled, the Lamb Foundation's purpose is to "provide[] housing and care of the elderly and special needs persons, including the mentally and physically disabled." In Boy Scouts of America v. Dale, 530 U.S. 640, 648 (2000), the Supreme Court recognized that the activities of

the Boy Scouts of America, whose stated mission was “to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential,” constituted protected activity under the First Amendment. See also Roberts v. United States Jaycees, 468 U.S. 609 (1984) (O’Connor, J., concurring) (“Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.”).

Viewing the amended complaint in the light most favorable to plaintiffs, the Lamb Foundation’s association with the disabled, intended to foster and promote the well being and training of the disabled, suffices to establish a protected activity under the First Amendment.

#### H. Conspiracy under Section 1985(3)

Defendants argue that plaintiffs have not pled their conspiracy allegations with sufficient specificity, and that their allegations are “devoid of any underlying specific factual basis with regard to each Defendant. The conspiracy allegation amounts to little more than a series of diffuse and expansive allegations of a common plan.” (North Wales Borough, at 18.)

To state a cause of action under Section 1985(3), a plaintiff must allege:

(1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons to [sic] the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States.

Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997) (citing United Bd. of Carpenters & Joiners of America, Local 610 v. Scott, 463 U.S. 825 (1983)). To plead conspiracy under Section 1985(3), a complaint must allege specific facts suggesting there was a mutual understanding among the conspirators to take actions directed toward an unconstitutional end. See Duvall v. Sharp, 905 F.2d 1188, 1189 (8th Cir. 1990); Safeguard Mutual Insurance Co. v. Miller, 477 F. Supp. 299, 304 (E.D. Pa. 1979).

Plaintiffs' amended complaint alleges that defendants "in their individual capacities, maliciously, with evil intent and motivated by discriminatory animus against the mentally and physically disabled, conspired together to take actions for the purpose of depriving, directly or indirectly, the plaintiffs of their rights as secured by the First and Fourteenth Amendments of the United States Constitution." (Am. Compl. ¶ 94.) Further, the "defendants conducted acts . . . in furtherance of that conspiracy," (Am. Compl. ¶ 95), and "[a]s a result of defendants' unlawful conspiracy, the plaintiffs were deprived of their rights as secured by the First and Fourteenth Amendments in violation of 42 U.S.C. §§ 1983 and 1985(3)." (Am. Compl. ¶ 96.) From these averments, as well as the specific allegations of a conspiracy to drive plaintiffs and Lamb Foundation members from North Wales Borough, the court finds that plaintiffs have satisfied the first, third, and fourth requirements of conspiracy pleading. The only remaining issues are (a) whether plaintiffs, who are not themselves members of a protected class, can allege a conspiracy under Section 1985(3) based on discriminatory animus against the Lamb Foundation members;<sup>7</sup> and (b) if so, whether Lamb Foundation members constitute a protected class under Section

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<sup>7</sup>Although the parties do not characterize it as such, this is essentially a question of standing under Section 1985(3). See Triad Assoc., Inc. v. Chicago Housing Auth., 1992 WL 349655 (N.D. Ill. 1992).

1985(3).

1. The Lamb Foundation May Sue on Behalf of Members of a Protected Class.

It is well established that corporations are “persons” within the meaning of the Fourteenth Amendment’s Equal Protection Clause. See Triad Associates, Inc. v. Chicago Housing Authority, 1992 WL 349655 (N.D. Ill. 1992) (citing Grosjean v. American Press Co., 297 U.S. 233, 244 (1936)). Corporations have previously been treated as “persons” who are proper party plaintiffs under Section 1985(3). Llano Del Rio Co. v. Anderson-Post Hardwood Lumber Co., 79 F. Supp. 382, 392-93 (W.D. La. 1948), aff’d, 187 F.2d 235 (5th Cir. 1951).

Further, individual property owners also have standing under Section 1985(3), when they are injured because of alleged discriminatory conduct directed at a protected class. Roccobono v. Whitpain Twp., 497 F. Supp. 1364 (E.D. Pa. 1980). In Roccobono, plaintiff had been ready and willing to build an indoor roller skating rink on the property that he owned in the township. He applied to the zoning board for a permit. The Township Planning Commission recommended to the Township’s Board of Supervisors that plaintiff’s application be denied, solely because its members believed that the roller rink would attract black people into the Blue Bell section of the Township. The court found that, because it was pled that defendants conspired to prevent plaintiff from building a roller rink on property that he owned, and the conspiracy was purportedly motivated by a racially discriminatory animus, the complaint set forth sufficient factual allegations of a conspiracy under Section 1985(3) to survive a motion to dismiss. Id. at 1371.

Similarly, here, plaintiffs have averred loss of time, money, and resources to each of them

as a result of defendants' alleged conspiracy to drive out of North Wales members and beneficiaries of the Lamb Foundation. As such, both the Lamb Foundation, a non-profit corporation, and Donna Mengel, an individual owner of properties leased to Lamb Foundation members, have stated a cause of action under Section 1985(3).

2. Lamb Foundation Members are a Protected Class under Section 1985(3).

In Lake v. Arnold, 112 F.3d 682 (3d Cir. 1997), the third circuit held that held that the mentally retarded, as a class, are entitled to protection afforded by Section 1985(3). Whether the physically disabled are also protected is a question of first impression in this circuit. See Griffin v. Breckenridge, 403 U.S. 88 (1971) (leaving open the possibility that Section 1985(3) might apply to class-based animus not based on race); United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott, 463 U.S. 825 (1983) (same, but finding that commercial and economic animus could not for the basis for a Section 1985(3) claim); Trautz v. Weisman, 819 F. Supp. 282 (S.D.N.Y. 1993) (finding that handicapped persons may be protected under Section 1985(3), but reaching only question of mentally, not physically, handicapped); cf. Wilhelm v. Continental Title Co., 720 F.2d 1173, 1176 (10th Cir. 1983) (finding "nothing . . . to give any encouragement whatever to extend § 1985 to classes other than those involved in the strife in the South in 1871"); D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1486 (7th Cir. 1985) ("The handicapped as a class differ radically from the racially based animus motivating the Ku Klux Klan and white supremacists against which Congress directed Section 1985(3).").

In Lake, the third circuit found, "Discrimination based on handicap, including mental handicap, like that based on gender, often rests on immutable characteristics which have no

relationship to ability. Where this is the case, we are convinced that the discrimination is invidious and that the reach of section 1985(3) is sufficiently elastic that the scope of its protection may be extended.” 112 F.3d at 687. While the issue of physically disabled individuals as a protected class did not arise in Lake, the court’s analysis, borrowing from Novotny v. Great American Federal Savings and Loan Association, 584 F.2d 1235 (3d Cir. 1978), where the court extended the scope of Section 1985(3) to women, is logically equally applicable to physically and mentally disabled individuals:

We borrow from Novotny to frame our holding here: “The fact that a person bears no responsibility for [a handicap], combined with the pervasive discrimination practiced against [the mentally retarded] and the emerging rejection of [this discrimination] as incompatible with our ideals of equality convince[s] us that whatever the outer boundaries of the concept, an animus directed against [the mentally retarded] includes elements of a ‘class-based invidiously discriminatory’ motivation.”

Lake, 112 F.3d at 688 (quoting Novotny, 584 F.2d at 1243).

There is no need for the court to reach this question either, as plaintiffs have alleged that they provide housing and care to both the mentally and physically disabled. (Am. Compl. ¶ 15.) Therefore, since the mentally disabled are a protected class under Section 1985(3), and members of the Lamb Foundation include mentally disabled, the court finds that they constitute a protected class.

#### I. Malicious Prosecution/Abuse of Process

Defendants argue that plaintiffs have not set for a valid malicious prosecution claim because, in order to do so, plaintiffs must show that defendants “instituted proceedings without

probable cause, with malice, and that the proceedings were terminated in favor of the Plaintiff.” Cosmas v. Bloomingdale’s Bros., Inc., 660 A.2d 83, 85 (Pa. Super. 1995). Defendants contend that, since plaintiffs cannot establish that the zoning enforcement proceedings instituted against them were terminated in their favor, plaintiffs cannot prevail on a malicious prosecution claim.

Plaintiffs respond that the caption as to the “malicious prosecution” count was actually a misnomer, and was meant to be construed by this court as an abuse of process claim which, they argue, they have sufficiently alleged.

Under the tort of abuse of process, proof of a favorable outcome of the underlying action is not required, only proof of ““(s)ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of process.”” DiSante v. Russ Financial Co., 380 A.2d 439, 441 (Pa. Super. 1977) (quoting Prosser, Torts § 100, at 669 (2d ed. 1955)). Under the facts as pled, plaintiffs have stated a valid claim of abuse of process, and the court will construe it as such.

#### J. Defamation

Defendants contend that plaintiffs have failed to set forth specific allegations supporting their claim for defamation. Under Pennsylvania law, to state a claim for defamation plaintiffs must allege: (1) a defamatory communication; (2) pertaining to the plaintiffs; (3) published by defendants to a third party; (4) who understands the communication to have defamatory meaning with respect to plaintiffs; and (5) that results in plaintiffs’ injury. See Mansmann v. Tuman, 970 F. Supp. 389, 396 (E.D. Pa. 1997); 42 Pa .C.S.A. § 8343. The complaint on its face must ““specifically identify what allegedly defamatory statements were made by whom and to

whom.” Manns v. Leather Shop, Inc., 960 F. Supp. 925 (D.V.I. 1990) (quoting Ersek v. Township of Springfield, Delaware County, 822 F. Supp. 218, 223 (E.D. Pa.1993)). It is for the court to determine whether statements complained of by the plaintiff are capable of defamatory meaning. See Wilson v. Slatalla, 970 F. Supp. 405 (E.D. Pa. 1997).

As pled in the amended complaint, Mayor Ross’ “ghetto” comments and the “Dignity for All” letter are sufficient to establish a defamation claim. Plaintiffs allege that the letter accused them of verbally and physically abusing Lamb Foundation residents, and was distributed by all individual defendants to the public, in several prominent fora. Similarly, Mayor Ross’ comments were made during the course of a public meeting and were published in newspaper with distribution in Montgomery and Bucks counties. As a result of both of these alleged actions, plaintiffs claim they have suffered damages, including “emotional pain, suffering, inconvenience, mental anguish, damage to reputation and loss of enjoyment of life which Ms. Mengel has suffered.” (Am. Compl. Count Xia.) The court finds these allegations sufficient to state a claim for defamation against defendants.

#### K. Punitive Damages

Defendants contend that, while punitive damages are available against a defendant in his individual capacity, they must be reserved for cases in which the defendant’s conduct amounts to something more than a violation justifying compensatory damages or injunctive relief. Keenan v. Philadelphia, 983 F.2d 459, 470 (3d Cir. 1992); Cochetti v. Desmond, 572 F.2d 102, 106 (3d Cir. 1973). Punitive damages are only recoverable in situations where the defendant’s conduct amounts to reckless or callous disregard of the federally guaranteed rights of others. Punitive

damages are available “where the defendants have acted wilfully and in gross disregard for the rights of the complaining party.” Smith v. School District of Philadelphia, 112 F. Supp.2d 417, 434 (E.D. Pa. 2000). Defendants submit that the actions taken in their individual capacities do not warrant the applicability of punitive damages.

Plaintiffs counter that their amended complaint is replete with allegations of malicious, outrageous, and discriminatory conduct committed by defendants, individually and in concert, designed to drive the Lamb Foundation from the Borough. The court finds that the facts, as alleged, sufficiently state a claim for punitive damages against the individual defendants, in their individual capacities.

L. Doreen K. Ross and Albert Tenney

Defendant Doreen K. Ross, in a separate motion to dismiss, avers that she did not hold any public office at the time of the events alleged in the amended complaint, under which she could be perceived to act “under color of state law,” thus she cannot be held liable under any of the federal claims. The court agrees. Defendant Doreen K. Ross is dismissed from all counts except Count XI, Defamation.

Similarly, defendant Albert Tenney contends in a separate motion that, as a member of the North Wales Borough Water Authority, he was never acting in his official capacity during the alleged commission of any of the acts averred in plaintiffs’ amended complaint. Since there is no indication that he ever acted under color of state law, Albert Tenney is dismissed from all counts except Count XI, Defamation.

#### **IV. CONCLUSION**

For the foregoing reasons, defendants' motions to dismiss plaintiffs' amended complaint are granted in part and denied in part.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAMB FOUNDATION and : CIVIL ACTION  
DONNA MENGEL :  
 :  
 :  
 v. :  
 :  
 :  
 NORTH WALES BOROUGH et al. : NO. 01-950

AND NOW, this \_\_\_\_ day of November 2001, upon consideration of the Motions of Defendants to Dismiss Plaintiffs' Amended Complaint, and the arguments of the parties, for the reasons outlined in the attached memorandum, it is hereby ORDERED as follows:

1. The Motion of Defendants North Wales Borough, Frederick W. Goodhart Jr., William J. Gontram, and Jocelyn Tenney to Dismiss Plaintiffs' Amended Complaint is DENIED;
2. The Motion of Defendant Douglas T. Ross to Dismiss is DENIED;
3. The Motion of Defendants Joan F. Goodhart and Pamela C. Gontram to Dismiss is DENIED;
4. The Motion of Defendants Frederick W. Goodhart Jr. and Joan F Goodhart to Dismiss is DENIED;
5. The Motion of Defendant Doreen K. Ross to Dismiss is GRANTED IN PART, with respect to all counts except Count XI, Defamation, with respect to which the Motion is DENIED;

6. The Motion of Defendant Albert Tenney to Dismiss is GRANTED IN PART, with respect to all counts except Count XI, Defamation, with respect to which the Motion is DENIED.

BY THE COURT:

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JAMES T. GILES      C.J.

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to