



Widener University

School of Law
Environmental & Natural
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CITIZENS GUIDE

**TO STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION
(SLAPP) IN DELAWARE**

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SUMMARY

Delaware law protects a citizen's right to participate in public processes the deal with potential environmental problems by providing protection against suits for personal damages and litigation costs that developers or permit applicants might bring to threaten, harass, or intimidate citizens into silence—so-called Strategic Lawsuits against Public Participation, or SLAPP, suits. A citizen sued speech or action in a public form on a matter of public concern is protected under 10 Del. C. §8136-8138 if the speech is:

- Made in connection with an application or granting of a permit or other permission to act from a governmental body;
- Is related to the citizen's efforts to report on, challenge, or oppose the application or permission; and
- Is not knowingly false or made with reckless disregard of whether it is false.

In addition, the citizen may be entitled to recover his/her attorney's fees and costs as well as punitive damages from the developer/permittee who sues him/her under certain circumstances.

GENERAL DESCRIPTION OF THE LAW

Citizens have a First Amendment constitutional right to participate in the public process of their government. To protect this right of their citizens, the Delaware General Assembly amended Delaware Code in 1992 by adding 10 Del.C. §8136-8138. In passing this statute, the General Assembly declared "the policy of the State to be that the rights of citizens to participate freely in the public process must be safeguarded with great diligence" and that "[t]he laws of the state must provide the most protection for the free exercise of speech, petition and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern." 68 Del. Laws 391 (1992). Finding "the threat of personal damages and litigation costs can be and have been used as a means of harassing, intimidating or punishing individuals, unincorporated associations, nonprofit organizations, and others who have involved themselves in public affairs," *id.*, the General Assembly added the protections found in § 8136 – 8138. Because suits against citizens arising out of their participation in public processes are sometimes called Strategic Lawsuits against Public Participation, or SLAPP, suits, we can call the Delaware statutes anti-SLAPP protections. As one court has stated, "the core policy concern of the anti-SLAPP statute . . . is that citizens not suffer baseless, harassing suits simply because they oppose a developer's plans for property." Nichols v. Lewis, C.A. No. 1758-VCS, 2008 WL 2253192, at *8 (Del. Ch. May 29, 2008).

Delaware's anti-SLAPP protections operate by creating a substantial hurdle for the party (for example, the developer or permit applicant) plaintiff suing the citizen defendant:

In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear

and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

10 Del. C. 8136(b). What this requires is that, if the lawsuit against the citizen is “an action involving public petition and participation,” then the developer/permittee plaintiff is going to have to show “by clear and convincing evidence” that the citizen made the statements at issue knowing they were false or recklessly without knowing whether they were true or false. Absent such a showing, the citizen’s statements are protected, and the citizen cannot be required to pay damages to the plaintiff developer/permittee.

What is “an action involving public petition and participation”? The statute defines it as a suit by a person who applied for or obtained permission to act from any government body against someone (like a citizen) who makes a “statement, claim or allegation in a proceeding, decision, protest, writing, argument, contention or other expression” as part of an effort to challenge or oppose the application or permission. 10 Del. C. § 8136(a). Because the anti-SLAPP protections define covered applications and permissions as including “permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body,” 10 Del. C. § 8136(a)(2), statements made in virtually any process involving a governmental body granting permission to do some act can fall within the protection of the statute.

As §8136(b) makes clear, however, the protection is not absolute. If the citizen makes false statements knowing they are false or with reckless disregard as to whether they are true or false, the plaintiff developer/permittee can still recover damages from the citizen. Thus, citizens wanting the protection of Delaware law must be careful to avoid making such statements.

In addition to providing protection from liability, Delaware’s anti-SLAPP protections provide an additional powerful tool to citizens: the ability to collect attorney’s fees, costs and punitive damages from the developer/permittee plaintiff. 10 Del. C. § 8138 allows the judge to award the citizen defendant attorney’s fees and costs if the citizen can show that the action was “commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law.” The right to such fees is not absolute, nor is it applicable simply because the developer/permittee plaintiff “ultimately fails to prove its claims.” Nichols, 2008 WL 2253192, at *8. Rather, “the fee shifting provision is triggered by a showing that the plaintiff has exacted an unjustified toll on a citizen’s right to oppose a development plan by pressing claims that have no substantial basis in fact or law.” *Id.* Punitive damages are available when the citizen defendant makes “an additional demonstration that the action . . . was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.” § 8138(a)(2). While it would not be easy meet this requirement in all cases, the mere possibility of punitive damages probably serves as an additional deterrent to suits against citizens speaking out on permitting and zoning issues.

PROTECTION UNDER THE NOERR PENNINGTON DOCTRINE OF THE FIRST AMENDMENT

A second source of protection for citizens can be found in the right to petition for redress of grievances recognized in the first amendment of the United States Constitution. The explanation and application of this right is found in what is called the *Noerr Pennington* doctrine, which derives its name from two famous United States Supreme Court cases.

The doctrine has its origins in the 1961 decision *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.* In that case, a group of trucking companies sued a group of railroads, claiming that the railroads had conspired to restrain trade and monopolize the long-distance freight business. The Supreme Court found that it was “clear” that the Sherman Act did not prohibit “two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.”¹ While laying out this exemption, the Court also noted that, however, “[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor ...” and thus the exemption does not apply.²

The basic immunity in *Noerr* was reaffirmed by the Supreme Court in *United Mine Workers v. Pennington*.³ In *Pennington*, several large coal companies attempted to eliminate the competition of smaller coal companies by persuading the Secretary of Labor to set a higher minimum wage. The United States Supreme Court found that “joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself even though intended to eliminate competition.”⁴

While the *Noerr Pennington* doctrine initially arose in the anti-trust field, the doctrine has been expanded to protect the First Amendment petitioning of the government from claims brought under the federal and state law, including environmental actions.⁵ For example, in

¹ *Noerr*, 365 U.S. at 136.

² *Id.*, at 139.

³ 381 U.S. 657 (1965).

⁴ *Id.*

⁵ See e.g., *Santana Products, Inc. v. Bobrick Washroom Equipment, Inc.*, 249 F. Supp.2d 463 (M.D.Pa. 2003), *aff'd in part, vacated in part, remanded on other grounds*, 401 F.3d 123 (3d Cir. 2005) (applying *Noerr Pennington* doctrine to Lanham Act and tortious interference claims); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999) (*Noerr* immunity applies to tortious interference and unfair competition claims); *VIM, Inc. v. Somerset Hotel Ass'n*, 19 F. Supp. 2d 123 (W.D. Pa. 1998), *aff'd*, 187 F.3d 627 (3rd Cir. 1999) (noting that it is clear that *Noerr Pennington* doctrine applies to civil conspiracy, tortious interference, and malicious use of process claims); *Zeller v. Consolini*, 758 A.2d 376 (Conn. 2000) (noting that although the *Noerr Pennington* doctrine of immunity is most often asserted against anti-trust claims, the court

Protect Our Mountain Environment, Inc. v. District Court In and For Jefferson County,⁶ a developer who had obtained rezoning decisions from a board of county commissioners filed a complaint for damages based on the tort of abuse of process and civil conspiracy against an environmental group and two individuals. The environmental group and two individuals challenged the ruling denying their motion to dismiss based on the environmental group's First Amendment right to petition the court for redress of grievance. Upon finding that that the group's suit challenging a rezoning determination was filed pursuant to the rule which provided an exclusive judicial remedy for challenging rezoning determination, there was no showing at the dismissal hearing that the group's legal activities were undertaken primarily to harass the developer who obtained a rezoning decision or to accomplish some other improper objective for purpose of the sham exception to the *Noerr Pennington* immunity doctrine, and it could not be determined on the basis of the pleading alone that the complaint challenging the rezoning was without a reasonable basis, the court determined that summary denial of the motion to dismiss was not warranted, where the motion was based on the group's right to petition the court.

Similarly, in *Charter Tp. Of Union v. United Investments, Inc.*,⁷ the court found that the appellee's activity of speaking publicly and petitioning the town government for enforcement of existing zoning laws against the appellant was protected by the First Amendment and the *Noerr Pennington* doctrine. The Court noted that this would be so even were the appellees to have had an ulterior motive of interfering in the appellant in the appellants business relationships. The Court noted that unless the activity in question is a sham, the knowing infliction of injury from petitioning does not render the campaign illegal because to hold otherwise would be tantamount to outlawing all such campaigns. Thus, the *Noerr Pennington* doctrine is a principle of constitutional law barring litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted. Moreover, the Court added, that the United States Supreme Court had found that the sham exception to the *Noerr Pennington* involves a plaintiff whose activities are not genuinely aimed at procuring government action at all, whereas in the instant case, the appellees had not only sought legitimate government action, but had obtained it in the form of a legitimate suit by the town for enforcement of the zoning law, which has been recently settled by consent judgment.

In comparison, in *Village of Lake Barrington v. Hogan*,⁸ objecting citizen voters and property owners brought a counterclaim against a village alleging that their rights were violated by the village's suit, which sought a declaration that village ordinances adopting a special area were valid and alleging that the citizens' threats to litigate the special service area constituted

acknowledged that the doctrine is equally applicable to many types of claims that seek to assign liability on the basis of a defendant's exercise of its First Amendment rights); *Keller v. VontHoltrum*, 568 N.W. 2d 186 (Minn. Ct. App. 1997) (noting that the *Noerr Pennington* immunity doctrine is not limited to the antitrust context); *Arim v. General Motors Corp.*, 520 N.W.2d 695 (Mich. Ct. App. 1994) (noting that the *Noerr Pennington* doctrine is not limited to federal anti-trust actions, but may be invoked in other actions under state or federal law to protect the First Amendment right to petition the government).

⁶ 677 P.2d 1361 (Colo. 1984).

⁷ 2001 WL 936765 (Mich. Ct. App. 2001).

⁸ 272 Ill. App. 3d 225.

tortious interference with contract and tortious interference with economic advantage. The court found that the village was not entitled to file the sham litigation even if the declaratory judgment count had merit, and the village's tort claim were clearly barred by the citizens' conditional privilege arising out of their own right to seek redress of grievance under the First Amendment.

The United States Supreme Court seems to have broadened the scope of protected activities and narrowed its view of the "sham" exception since issuing the *California Motor Transport Co. v. Trucking Unlimited*.⁹ In *California Motor Transport Co.*, a group of truckers allegedly had conspired together to deter competitors from obtaining new or expanded operating rights from the California Public Utilities Commission and the Interstate Commerce Commission by opposing every such application, regardless of the merits. Rather than defining its parameters, the Court listed several examples of the sham exception, such as "perjury of witnesses," "use of a patent obtained by fraud to exclude a competitor from the market," "conspiracy with a licensing authority to eliminate a competitor," and "bribery of a public purchasing agent".

Later in *City of Columbia v. Omni Outdoor Advertising*,¹⁰ the Supreme Court noted that the sham exception to the *Noerr Pennington* doctrine encompassed situations in which persons used the governmental process - as opposed to the outcome of that process - as an anti-competitive weapon. A classic example, the Court stated, was filing a frivolous objection to the license application of a competitor, with no expectation of achieving denial of the license, but simply in order to impose expenses and delay. In other words, the sham exception involves a defendant whose activities were not genuinely aimed at procuring favorable government action at all. The Court in *Omni* concluded that the sham exception does not apply as the action was aimed at procuring favorable government action. However, it is worth noting that although courts in recent years have demonstrated reluctance to find a sham exception to the *Noerr Pennington* doctrine with respect to actions seeking a zoning change, or attempting to block such a change,¹¹ this should not be seen as immunizing all such actions.

CONCLUSION

Citizens have a right to participate in public processes concerning government approval of actions by developers and permittees. The anti-SLAPP protections in Delaware law help to insulate citizens from lawsuits meant to prevent or diminish that public participation. In general, statements made without knowledge of their falsity or reckless disregard of their truth or falsity should be protected from claims seeking damages from the citizens making them. To determine if particular actions or communications fall within the Statutes' protections, you should contact an attorney and seek legal advice.

⁹ 404 U.S. 508 (1972).

¹⁰ 499 U.S. 365 (1991).

¹¹ See, e.g., *Oberndorf v. City & County of Denver*, 900 F.2d 1434 (10th Cir. 1990); *Westborough Mall, Inc. v. City of Cape Girardeau, Mo.*, 693 F.2d 733, 746 (8th Cir. 1982); *Liberty Lake Invs., Inc v. Magnuson*, 12 F.3d 155 (9th Cir. 1982).