

Widener School of Law Environmental & Natural Resources Law Clinic's
Citizens Guide
to Strategic Lawsuits against Public Participation (SLAPP) in Delaware

SUMMARY

Delaware law protects a citizen's right to participate in public processes that 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's 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.

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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.” __ 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.

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.