

OH, SLAPP! NEW JERSEY LEGISLATION PROVIDES OBJECTORS WITH NEW LITIGATION SHIELD THAT MAY COST DEVELOPERS

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As a developer, your project may often draw sharp public criticism—even if fully conforming with a municipality’s zoning ordinance. These vocal objectors and/or gadflies can often delay Planning or Zoning Board proceedings and the ultimate vote on your development application by raising a multitude of issues, even if irrelevant, such as traffic, noise and environmental, to name a few. Although frustrating and at times costly, if, for example, the objectors hire an attorney to represent them to derail the Board proceedings and delay the project, beware that these objectors have a constitutionally protected right to express their displeasure with your project at a public forum. And, as much as you may desire to perhaps bring a lawsuit to silence the objectors and often times their misquoted half truths about your project, take a deep breath and familiarize yourself with the recently enacted New Jersey legislation entitled “Uniform Public Expression Protection Act” (“UPEPA”).

On September 7, 2023, Governor Phil Murphy signed UPEPA into existence,[1] which will protect a wide variety of people, including those objecting to proposed development from “Strategic Lawsuits Against Public Participation,” known as SLAPPs. SLAPPs are often utilized by those who can afford to litigate as a means to force a person, group of people, or an entity from taking certain action, such as expressing their opinion.[2] As such, laws like UPEPA are referred to as “Anti-SLAPP” laws.[3] Developers should take note that taking legal action as a recourse against objectors to a municipal development application may not be as easy as one might think – and the litigation may come with a large price tag.

When Does UPEPA Apply?

Generally speaking, UPEPA allows a defendant to file an order to show cause (“OTSC”) if sued, for example, for

defamation with respect to a “communication” made concerning a governmental proceeding, including administrative proceedings, or otherwise when exercising one’s freedom of speech “on a matter of public concern.”[4] An OTSC in this context is a method for a litigant, the objector, to force its adverse party, the developer, to demonstrate the merits of its claim. Defendants have sixty (60) days from service of a pleading, such as a complaint, to file the OTSC to dismiss the cause of action.[5]

In the context of the land use approval process, a party sued in response to their objection to a proposed development application before a municipality’s Planning Board or Zoning Board may now utilize UPEPA and file an OTSC to fight against the plaintiff-applicant’s lawsuit.



If successful, the cause of action will be dismissed.[6] Importantly, even before dismissal, the court is permitted to stay all proceedings between the plaintiff and the defendant.[7] Any pending motions and even discovery may be stayed; objectors have an advantage from the start, as courts must presume that the stay shall be granted.[8] Parties to a lawsuit should be aware,

however, of UPEPA's limitations in scope. Specifically, government units, employees or agents acting in an official capacity or "to enforce a law to protect against an imminent threat to public health or safety" are protected from this anti-SLAPP measure.[9] Nor may a litigant utilize UPEPA's protections against someone "primarily engaged" in a business selling or leasing goods or services where the claim stems from a communication made with respect to that person's sale or lease of the goods or services.[10]

Burden of Proof to Dismiss the Claim

The burden of proof to dismiss a cause of action through a UPEPA OTSC falls, in part, on both the moving party and the respondent. To dismiss the cause of action, the moving party must demonstrate that UPEPA applies, as described above,[11] and the responding party must fail to prove that they fall under one of the UPEPA exemptions noted above.[12] Assuming satisfaction of both of these elements, the moving party will prevail if either of the two following circumstances exist: (1) the responding party cannot make a "prima facie" showing of every "essential element of any cause of action in the complaint" or (2) the moving party shows either that (i) "the responding party failed to state a cause of action upon which relief can be granted" or (ii) "no genuine issue as to any material fact [exists] and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action." [13] In the event a court denies any part of the motion, the moving party can appeal within 20 days.[14]

UPEPA's Ramifications

This new defense may come at a heavy cost for anyone falling on the losing side of an OTSC. If an objector prevails in its OTSC, then it will be awarded a sum amounting to courts costs, reasonable attorney's fees, and reasonable litigation expenses with respect to the OTSC itself.[15] On the other hand, a developer on the responding end of the OTSC may only receive the same fees if (i) they win on the OTSC claim and (ii) the OTSC was made by the objector frivolously or with the sole intent to delay the proceeding against them.[16] It is

understandable for a party to desire to avoid any complication when it comes to a development application before a municipal board. However, after the enactment of UPEPA, taking legal action against an objector needs to be backed by appropriate evidence to avoid paying costs and fees should a motion for an OTSC to be granted. Objectors now possess an efficient and entirely new legal means to slap(p) back against application related litigation – sometimes it is best to just grin and bear the objectors' comments and let the application speak for itself with the hope the Board grants an approval.

References:

[1] Governor Murphy Signs Bipartisan Bill Protecting Against Lawsuits Designed to Suppress Free Speech, NJ.gov, (Sept. 7, 2023), <https://www.nj.gov/governor/news/news/562023/20230907d.shtml>; [2] Dan Greenberg, et. al, Anti-Slapp Statutes: 2023 Report Card, Institute for Free Speech (Nov. 2, 2023), <https://www.ifs.org/anti-slapp-report/>; [3]Id.; [4]N.J.S.A. 2A:53A, et. seq.; [5]Id. § 2A:53A-51.; [6]Id.; [7]Id. § 2A:53A-52.; [8]Id. § 2A:53A-52(a)(3).; [9] Id. § 2A:53A-50(c)(1)-(2).; [10]Id. § 2A:53A-50(c)(3).; [11]Id. § 2A:53A-55(a)(1).; [12]Id. § 2A:53A-55(a)(1).; [13]Id. § 2A:53A-55(a)(2).; [14]Id. § 2A:53A-57.; [15]Id. § 2A:53A-58(1).; [16] Id. § 2A:53A-58(2).

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