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RESOLVING LAND-USE DISPUTES BY INTIMIDATION:
SLAPP SUITS IN NEW MEXICO
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The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.1

In April 2001, New Mexico joined seventeen other states2 by enacting legislation to curtail SLAPP suits (Strategic Lawsuits Against Public Participation) that target citizens for exercising their rights to petition their government as guaranteed by the First Amendment. The New Mexico Legislature recognized the importance of protecting citizens’ rights to petition their government and to participate in proceedings before governmental tribunals and enacted procedures to mitigate the financial burdens of defending against lawsuits based on citizen participation before governmental bodies.3 At the same time, the new statute prevents the chilling effect of SLAPP suits on both those sued as well as other citizens who might be deterred from participating in issues of community concern because of fear of costly litigation.

The statute addresses those legislative goals. Key provisions require early determination of motions to dismiss SLAPP suits in order to avoid the expenses of defending such a lawsuit. These provisions call for expedited consideration of motions to dismiss SLAPP suits4 and for expedited appeals of rulings on these motions.5 Another provision, designed to deter meritless lawsuits against citizens who petition the government in the exercise of their First Amendment rights, mandates the award of attorney fees to those who succeed on their motion to dismiss.6 Consequently, filing lawsuits against people whose conduct is a legitimate

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Both authors wish to acknowledge Professor Ted Occhialino of the University of New Mexico School of Law for his invaluable help with regard to New Mexico rules of procedure and his suggestions for improvement of the article.

2. As of 2001, the following states had enacted statutes to control SLAPP suits: California, Minnesota, Delaware, Nebraska, Florida, Nevada, Georgia, New York, Indiana, Oklahoma, Louisiana, Pennsylvania, Maine, Rhode Island, Massachusetts, Tennessee, and Washington. See Baker v. Parsons, 750 N.E.2d 953, 962 n.19 (Mass. 2001) (listing states that have SLAPP statutes); Morse Bros. v. Webster, 772 A.2d 842, 846 (Me. 2001) (discussing Maine statute); see also 27 PA. CONS. STAT. § 7707 (2000).
6. N.M. STAT. ANN. § 38-2-9.1(B) (2001). The statute also authorizes courts to award attorney fees and
petitioning of the government or exercise of free speech will no longer be without cost. Under the new anti-SLAPP law, plaintiffs filing such lawsuits now risk having to pay their targets’ attorney fees.

The statute creates no new legal rights or defenses for those sued based on their constitutionally protected petitioning or free speech activities. Nor does the statute limit any rights to file actions against persons whose conduct strays outside the constitutional protections. Rather, the new law provides procedures that allow defendants who claim that lawsuits are based on protected conduct or speech to obtain early rulings on motions to dismiss and reimbursement for their attorney fees if they prevail.

This article outlines recent SLAPP litigation in New Mexico, summarizes the new anti-SLAPP law, and highlights important legal issues posed by the statutory text for land-use controversies.

I. SLAPP LITIGATION IN THE COURTS

A. What are SLAPP suits?

So-called SLAPP suits, the acronym for Strategic Lawsuits Against Public Participation, were diagnosed and analyzed in a legal/sociological study by the University of Denver, which examined 241 lawsuits nationwide that were brought against people based on their conduct seeking to influence official action by governments. This study produced a series of publications culminating in a handbook that has become a bible for lawyers facing tough land-use disputes involving citizen opposition.7

Consistent with the Denver study’s conclusions, SLAPP litigation was profiled by a recent California court’s opinion:

The typical SLAPP suit involves citizens opposed to a particular real estate development. The group opposed to the project, usually a local neighborhood, protests by distributing flyers, writing letters to local newspapers, and speaking at planning commission or city council meetings. The developer responds by filing a SLAPP suit against the citizen group alleging defamation or various business torts....SLAPP plaintiffs do not intend to win their suits; rather, they are filed solely for delay and distraction...and to punish activists by imposing litigation costs on them for exercising their constitutional right to speak and petition the government for redress of grievances.8

As the California court stressed, SLAPPs differ from ordinary commercial litigation in critical ways:

Because winning is not a SLAPP plaintiff’s primary motivation, defendants’ traditional safeguards against meritless actions (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPPs.

Instead, the SLAPPer considers any damage or sanction award which the SLAPPee might eventually recover as merely a cost of doing business.\(^9\)

The money calculus behind SLAPP suits to silence opposition by citizens to a land-use project is simple: imposing or threatening large costs and attorney fees on opponents in defending against the lawsuit and the possibility of having to pay a substantial money judgment. For developers, hiring lawyers and financing such a lawsuit is a tax-deductible business expense. But for victims of SLAPP suits, typically neighborhood associations or private citizens, the high costs of defending inflict heavy financial burdens\(^10\) that may deter further opposition to the proposed development. The neighborhood associations, already financially strapped by fighting the development in forums such as zoning boards, planning agencies, or courts, now must raise even more money to defend against this litigation. Unless scarce pro bono counsel will represent them, they need funds to hire an attorney and to cover litigation costs for depositions and experts. For citizens sued personally, the risks are even higher since an adverse judgment can be satisfied from their private assets. This risk, plus attorney fees and discovery costs, puts pressure on people to quit their opposition to the developer’s project. Furthermore, a high-profile SLAPP suit may not only “chill” and silence the immediate victim but also becomes a smart long-term investment because it makes every victim an example and a carrier who spreads the virus of fear throughout the community.

Of course, SLAPP suits do not come labeled as such. Rather, SLAPP complaints may pick from a menu of tort, contract, defamation, or even civil rights conspiracy causes of action in targeting neighborhood groups or citizens who stand in the way of a developer’s project. The crucial first step, therefore, is to spot such lawsuits as SLAPPs—by focusing on the challenged activities of the target in relation to their First Amendment protections, rather than treating the case as an ordinary commercial or tort litigation. In short, the complaint’s camouflage allegations must be pierced to determine whether the plaintiff’s grievance stems from activities by the defendant that are designed to influence official action and are therefore protected by the First Amendment.

**B. Recent “Classic” SLAPP Suits in New Mexico**

Two recent lawsuits in New Mexico illustrate the nature of SLAPP suits, their use in intimidating citizen opposition in public forums to land development projects, and the need for legislation to curtail their chilling effect on public participation and the democratic process. One lawsuit was filed in Santa Fe in June 1998 and the other in Albuquerque in June 2000.

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9. *Id.* "By the time a SLAPP victim can win a ‘SLAPP-back’ suit years later, the SLAPP plaintiff will probably already have accomplished its underlying objective." *Id.*

10. For example, according to the individual defendants sued by the developer in the Albuquerque Wal-Mart case, *see* Saylor v. Valles, No. CV-2000-06283 (2d Jud. Dist. N.M. filed June 22, 2000), attorney fees for the four individually named defendants in representing them through the motion to dismiss totaled more than $100,000. Fortunately for those individuals, their homeowner’s insurance policies covered these expenses. The neighborhood associations did not pay attorney fees because the New Mexico Civil Liberties Union represented them.
1. The Santa Fe Los Vecinos Case

The widely publicized Los Vecinos SLAPP suit arose from the successful opposition by the Greater Callecita Neighborhood Association and many Santa Fe citizens to a sixty-eight-acre development project on steep foothill slopes in northern Santa Fe. The proposed Los Vecinos subdivision featured nearly sixty large homes, plus an optional commercial tract. This project was twice disapproved by the Santa Fe City Council—in 1995 (eight to zero) and 1997 (five to two)—largely due to drainage and flooding problems that contravened a special protective ordinance that had rezoned this tract as a Planned Residential Community.

After failing to prevent the City Council’s public hearing and then failing to set aside the City Council’s disapproval on the merits, the developer claimed bias, prejudice, and unfairness due to alleged ex parte communications by neighbors with city councilors and alleged collusion among several councilors to disapprove the project prior to the council’s public hearing. Those same charges of misconduct were then recycled in a separate civil action by the developer against three city councilors and the neighborhood association and two of its officers. That lawsuit claimed a loss of $3 million, plus punitive damages and attorney fees, against the neighbors and the three councilors personally. The complaint included separate counts for tort, malicious abuse of process, civil conspiracy, violation of civil rights, and conspiracy to violate civil rights. It claimed injury to the developer caused by the neighbors’ “delay strategy” and the City Council’s disapproval of his Los Vecinos project.

After the state court action was removed to federal court, due to the developer’s federal civil rights claims that sought to support an award of his attorney fees, the Attorney General of New Mexico filed an amicus brief urging immediate dismissal of this “classic” SLAPP suit. The Attorney General’s Brief proclaimed “his concern about the improper use of the courts to deter New Mexico citizens from exercising their First Amendment right to petition the government for redress of grievances and to deprive governmental bodies of the benefits of public participation in the political process.”


12. Id.

13. Id.


16. Id.

17. Id.

18. Id.


20. Id. at 1.
Never reaching these First Amendment issues, United States District Judge James Parker dismissed the developer's federal civil rights claims because the developer's subdivision application created no constitutionally protected property right, and that decision was upheld on appeal. Soon after Judge Parker's ruling, the developer's state law claims for business torts were abandoned. All bias and prejudice claims against the City Council were recently dismissed, with prejudice, by stipulation on the eve of trial. In the end, therefore, the Los Vecinos case collapsed and the developer's SLAPP litigation failed—but only after having terrorized the neighbors and scared Santa Fe citizens through several years of high-profile and media-hyped SLAPP litigation. Conversely, a "SLAPP-back" countersuit filed by the neighbors against the developer, his counsel, and two former city officials alleging a corrupt conspiracy to facilitate the developer's project was settled by the city, and then dismissed as to the other defendants for lack of enough factual specificity to show a federal civil rights conspiracy. The Tenth Circuit recently upheld that ruling; however, the neighbors' state law claims for malicious abuse of process based on the developer's abortive SLAPP suits remain unresolved.

2. The Albuquerque Wal-Mart Case

Another prominent example of a SLAPP lawsuit in New Mexico is the Albuquerque case involving efforts by three neighborhood associations to block development of a shopping center, which included a Wal-Mart Superstore and a Home Depot. The neighborhood associations voiced their opposition to the proposed development before the City of Albuquerque's Planning Department, Environmental Planning Commission, the Land Use Planning and Zoning Committee of the City Council, and the City Council. After the City Council approved the development plan, the neighborhood associations appealed that decision to the state district court. After the district court denied their appeal, the associations filed an appeal in the New Mexico Court of Appeals.

Before the neighborhood associations filed their appeal of the city's approval of the development project in the district court, the counsel for the developer, Geltmore, Inc., sent a letter to counsel for the neighborhood associations advising counsel to inform their clients that an appeal to the district court "might expose [them] to the possibility of significant financial liability," and that their "clients should consider this matter very seriously before they file, as they will find out afterwards that litigation is serious, stressful, expensive, and mostly futile"

The letter expressly threatened a lawsuit if the neighborhood associations filed an appeal, stating, "Geltmore has instructed us to give fair warning that it intends to pursue damages from those responsible if Geltmore incurs a loss of income or lost financial opportunity as a result of meritless actions on your part. Additionally, you should be aware that the current owners of the property could also seek redress on their own if they suffer damages."27

After the neighborhood associations nevertheless filed their appeal to the district court, the developer of the shopping center, Geltmore, Inc., and ten individuals carried out their threat and on June 22, 2000, filed a lawsuit28 against the three neighborhood associations—the West Bluff Neighborhood Association, Grande Heights Neighborhood Association, and West Area Residents for Aesthetic and Responsible Expansion. The complaint further named as defendants four individual association members who had been active in representing their associations’ opposition before the city agencies and City Council and in the district court appeal. Besides Geltmore, Inc., the plaintiffs included individuals who owned property that would be part of the development and other people who resided near the development and were members of the West Bluff Neighborhood Association. The complaint alleged nine causes of action, including malicious abuse of process, prima facie tort, and conspiracy,29 and sought injunctive relief as well as compensatory and punitive damages including claims for lost profits, higher interest rates, additional expenses, and attorney fees and costs.30

On August 11, 2000, the neighborhood associations moved to dismiss the complaint on the ground that the allegations all related to the associations’ constitutionally protected activities in petitioning the City of Albuquerque to deny approval of the development or reduce its scale and in appealing the city’s decision to the district court.31 The neighborhood associations claimed that the lawsuit was a SLAPP suit because the crux of the allegations, which formed the basis of all nine causes of action, challenged their public participation in legitimate forums in opposing the proposed development.32 In their view, such petitioning activities and resort to the courts were constitutionally immunized from liability under the United States Supreme Court’s Noerr-Pennington doctrine,33 which protects the right of

27. Id. at 4.
30. Id.
32. Id. at 8.
c∧izens "to petition the Government for redress of grievances"34 guaranteed by the First Amendment.

The district court on October 30, 2000, dismissed the complaint with prejudice for failure to state a claim upon which relief could be granted as to any of the counts raised therein.35 Judge William Lang ruled that the "Petition Clause of the First Amendment to the United States Constitution affords absolute protection and immunity to defendants for the actions complained of in the plaintiffs' complaint, either for damages or for injunctive relief."36

Geltmore and the other plaintiffs appealed the district court's dismissal of their action to the New Mexico Court of Appeals.37 The Attorney General of the State of New Mexico submitted a brief as amicus curiae in support of the neighborhood associations and individual defendants because of "concern about the improper use of the courts to deter New Mexico citizens from exercising their First Amendment right to petition the government for redress of grievances and to deprive governmental bodies of the benefits of public participation in the political process."38 The Attorney General expressed concern that the complaint filed by Geltmore and the other plaintiffs constituted a "strategic lawsuit against public participation" or "SLAPP."39 Indeed, the Attorney General viewed the allegations in the complaint as fairly raising "a question about whether Plaintiffs' interest in filing the lawsuit was truly to resolve their claims and vindicate their rights, or, like SLAPP, was to punish Defendants for their attempts to influence the City's decision regarding the shopping center and deter similar attempts in the future."40 Notably, the Attorney General's brief cited New Mexico's recently enacted anti-SLAPP law and stated that the district court had "correctly anticipated and applied the public policy underlying the legislation against the misuse of the legal process to chill the exercise of the constitutional right to petition."41 This appeal is currently pending before the New Mexico Court of Appeals.

34. U.S. CONST. amend. I. The defendant associations asserted that the Noerr-Pennington doctrine provided immunity for their petitioning activities. In addition to the constitutional argument, the neighborhood associations claimed the complaint failed to state claims upon which relief may be granted.


36. Id. at 2. In addition, Judge Lang ruled that two counts in the complaint relied on statutes that provided no private right of action that would entitle the plaintiffs to damages or injunctive relief. Plaintiffs filed a motion asking Judge Lang to reconsider his ruling dismissing plaintiffs' claims against defendants without leave to amend. See Plaintiffs' Motion for Reconsideration, Saylor v. Valles, No. CV-2000-06283 (2d Jud. Dist. N.M. filed Nov. 15, 2000). Judge Lang found that "Plaintiffs' Motion is not well-taken" and denied the motion for reconsideration. See Order Denying Plaintiffs' Motion for Reconsideration, Saylor v. Valles, No. CV-2000-06283 (2d. Jud. Dist. N.M. filed Dec. 8, 2000).


38. See Brief of Amicus Curiae Attorney General of the State of New Mexico at 1, Saylor v. Valles, No. 22,027 (N.M. Ct. App. filed Sept. 14, 2001). This same concern was expressed in the Attorney General's amicus brief filed in the Santa Fe Los Vecinos litigation. See Brief of Amicus Curiae Attorney General of the State of New Mexico at 1, Hyde Park Co. v. Greater Callecita Neighborhood Ass'n, No. 98-Civ.-0821 JP/LCS (D.N.M. July 18, 1998).


40. Id. at 16.

41. Id. at 14.
In the latest chapter of this Wal-Mart story, the four individuals sued by the developer filed a countersuit, a so-called SLAPP-back suit, in the state district court on October 24, 2001. The neighborhood associations named as defendants in the suit by the developer are not parties to this action. The complaint names as defendants all of the plaintiffs who sued the defendants and names Wal-Mart Stores, Inc. as an additional defendant. The suit pleads two causes of action, one for malicious abuse of process, and the other for civil conspiracy, both based on allegations that the "[d]efendants intentionally initiated the SLAPP Lawsuit against Plaintiffs, and abused the judicial process, with an improper purpose to intimidate, frighten, silence, and retaliate against Plaintiffs, and to chill other citizens, and without any reasonable belief whatsoever in the validity of the allegations of fact or law of the SLAPP Lawsuit." In addition, the complaint alleges that defendants Silverman, Geltmore, Saylor, and Wal-Mart conspired with one another and their attorney to bring the SLAPP lawsuit against the plaintiffs. The plaintiffs in the SLAPP-back suit requested compensatory damages, punitive damages, pre- and post-judgment interest, and costs incurred in this litigation. The SLAPP-back action is pending in the district court, while the developer's appeal from the dismissal of his SLAPP suit is pending in the court of appeals.

C. First Amendment Protections for Petitioning Activities

The First Amendment's guarantees of free speech and petitioning immunize a broad range of citizens' conduct to promote or oppose official action by government at all levels. The right to petition the government enshrined in the Constitution goes back centuries and predates the Bill of Rights. First applying those protections in an antitrust case, the U.S. Supreme Court's Noerr-Pennington doctrine immunized a deceptive, "unethical," and "reprehensible" lobbying campaign by the railroads designed to destroy competition by the trucking industry for long-haul freight business, on the basis of the constitutional "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws." Following the Noerr decision, the doctrine's broad First Amendment protections have been applied to vindicate citizens' activities to induce legislative, judicial, or administrative action challenged in a variety of state law contexts. As for land-use controversies, citizens' activities to seek zoning changes or to oppose road access to a subdivision have been immunized as protected petitioning under the First Amendment.

43. Id. at 10.
44. Id. at 10-11.
45. Id. at 11.
46. See PRING & CANAN, supra note 7; Briefs of Amicus Curiae Attorney General, supra notes 19 and 38.
48. See Scott v. Hern, 216 F.3d 897, 914-16 (10th Cir. 2000) (listing cases applying First Amendment petitioning immunity to various state law actions); Cardloons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885 & 896 (10th Cir. 2000) (en banc) (finding that First Amendment petition clause protects right to sue but not pre-litigation threats); see also DeVaney v. Thriftway Mktg. Corp., 124 N.M. 512, 519 P.2d 277, 284 n.1 (1997) (holding that access to courts protected by First Amendment compels narrow scope for malicious abuse of process tort).
Amendment. Notably, a recent Connecticut decision applied the *Noerr-Pennington* doctrine to immunize a neighborhood group and its lawyer who had been sued by a developer for vexatiously opposing his mall project before a city zoning commission and before various courts for more than ten years. In the Court’s view, failure to apply the *Noerr-Pennington* doctrine aggressively may create a “chilling effect” on the first amendment right to petition in zoning and other matters... Indeed, such a chilling effect can be a virtual deep freeze when individual citizens not versed in the legal system and without financial resources do not exercise potentially meritorious legal challenges for fear of costly and protracted, retributive litigation from opponents.  

Strengthening those First Amendment protections is the New Mexico Attorney General’s statutory authority to support SLAPP victims in court. Her recent amicus brief in the court of appeals not only supports the district court’s dismissal of the Wal-Mart SLAPP suit in Albuquerque, but also invokes the “important public policy of this state, codified in the recently enacted anti-SLAPP law.” Significantly, the Attorney General is required by law to appear before local, state, and federal courts “to represent and to be heard on behalf of the state when, in his judgment, the public interest of the state requires such action.”  

**D. Need for Early Dismissal of SLAPP Suits**  
As dramatized by the Attorney General’s briefs and pleas for immediate dismissal in the Santa Fe Los Vecinos and the Albuquerque Wal-Mart litigation, a critical aspect of the First Amendment’s protection of citizens’ petitioning is early identification of SLAPP suits, before SLAPP victims are subjected to discovery and other pretrial maneuvers to wear them down or bleed them dry. Unless stopped by upfront rulings on the face of the complaint, so as to cut through conclusory allegations and to pierce camouflage claims, a sharp SLAPP lawyer’s campaign to terrorize opponents of a developer’s project can muster a host of hardball tactics to punish people before the case is ever tried or judged on the merits. But due to the paramount protection of people’s First Amendment rights, courts have fashioned early dismissal procedures by upfront rulings on a SLAPP target’s constitutional defenses, as a matter of law. Thus, in a prominent zoning case, the Colorado Supreme Court held that the developer must show, in order to overcome a motion to dismiss, that the neighbors’ petitioning activities were not immunized by the First Amendment. Shifting the burden of proof to the developer to
overcome and prevail on the First Amendment issues, the court declared that petitioning activities would not be immunized only if shown to lack any reasonable factual support or legal basis, and if their primary purpose was improper harassment. Some New Mexico courts faced with First Amendment defenses by citizens who were sued for their land-use opposition activities also have granted upfront motions to dismiss on constitutional grounds. Judge Lang’s dismissal in the Wal-Mart case and Judge Hall’s dismissal of a Taos developer’s spurious countersuit arising from a dispute under the New Mexico Subdivision Act provide two recent examples.

Significantly, the New Mexico Supreme Court has facilitated resistance to SLAPP suits by merging the previously separate torts of malicious prosecution and abuse of process into the new hybrid tort of malicious abuse of process. Rebuffing a lawsuit against a “whistleblower” for publicizing his business firm’s malfeasance, the Supreme Court (1) abolished previous requirements for a favorable termination of the underlying lawsuit and for proof of special damages prior to raising a malicious abuse of process claim and (2) allowed counterclaims for malicious abuse of process, albeit under higher proof standards, to be brought against still-pending complaints attacking a defendant’s exercise of protected First Amendment rights. Even without the new anti-SLAPP legislation, therefore, New Mexico courts could dismiss SLAPP suits in egregious circumstances or permit a counterclaim against the SLAPPer.

II. NEW MEXICO’S ANTI-SLAPP LAW OF 2001

As signed into law on April 3, 2001, by Governor Gary Johnson, New Mexico has enacted landmark legislation to curtail SLAPP suits that intimidate citizens in the exercise of their constitutional petitioning rights. Under bipartisan sponsorship by Representatives Patsy Trujillo-Knauer, a Santa Fe Democrat, and Pauline Gubbels, an Albuquerque Republican, the statute was backed by many SLAPP victims and a broad spectrum of supporters, many of whom testified—including representatives of Attorney General Patricia Madrid, the cities of Albuquerque and Santa Fe, civil rights and neighborhood associations, as well as environmental and some business groups. After a broad version of House Bill 241 had passed the House, the Association of Commerce and Industry (ACI) and National Association of Industrial and Office Properties (NAIOP) vowed to kill the bill as one-sided and going too far. But after a statewide media and lobbying campaign coordinated by the New Mexico NoSLAPP Alliance, a midnight compromise bill was brokered by Senator Shannon Robinson, an Albuquerque Democrat who was chairman of the Senate Public Affairs Committee. Further amendments were made by the Senate.

55. Id.
60. See H.B. 241, 45th Leg., 1st Sess. (N.M. 2001).
61. See Senate Public Affairs Committee’s amendments to H.B. 241, 45th Leg., 1st Sess. (N.M. 2001). This version was referred to the Senate Judiciary Committee.
Judiciary Committee before House Bill 241 was passed by the Senate in the waning hours on the last day of the session and then quickly adopted by House voice vote, driven by a coalition of support from all sides. The final text included provisions for early dismissal of SLAPP suits, but left important ambiguities and gaps for future clarification, as explained below.

A. The New Anti-SLAPP Law

Effective June 15, 2001, New Mexico’s anti-SLAPP law contains provisions that specify the process for handling SLAPP suits, coupled with legislative findings that illuminate the public policy and statutory purpose in aid of its judicial implementation. In particular, the statute authorizes a SLAPP defendant to file a special motion to dismiss and to obtain an expedited ruling on this special motion in order to prevent the unnecessary expense of litigation. In addition, the statute requires the trial court to award costs and reasonable attorney fees to the SLAPP defendant who prevails on the special motion, or to the party opposing the motion if the court finds that the special motion is frivolous or solely intended to cause unnecessary delay. Finally, the new law gives either party the right to an expedited appeal from the trial court’s order on the special motion or from the trial court’s failure to rule on the motion on an expedited basis.

ARTICLE 2
Pleadings and Motions

§ 38-2-9.1. Special motion to dismiss unwarranted or specious lawsuits; procedures; sanctions; severability

A. Any action seeking money damages against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting in a quasi-judicial proceeding before a tribunal or decision-making body of any political subdivision of the state is subject to a special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment that shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation.
B. If the rights afforded by this section are raised as an affirmative defense and if a court grants a motion to dismiss, a motion for judgment on the pleadings or a motion for summary judgment filed within ninety days of the filing of the moving party's answer, the court shall award reasonable attorney fees and costs incurred by the moving party in defending the action. If the court finds that a special motion to dismiss or motion for summary judgment is frivolous or solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney fees to the party prevailing on the motion.

C. Any party shall have the right to an expedited appeal from a trial court order on the special motions described in Subsection B of this section or from a trial court's failure to rule on the motion on an expedited basis.

D. As used in this section, a "public meeting in a quasi-judicial proceeding" means and includes any meeting established and held by a state or local governmental entity, including without limitations, meetings or presentations before state, city, town or village councils, planning commissions, review boards or commissions.

E. Nothing in this section limits or prohibits the exercise of a right or remedy of a party granted pursuant to another constitutional, statutory, common law or administrative provision, including civil actions for defamation or malicious abuse of process.

F. If any provision of this section or the application of any provision of this section to a person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this section that can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.


§ 38-2-9.2. Findings and purpose
The legislature declares that it is the public policy of New Mexico to protect the rights of its citizens to participate in quasi-judicial proceedings before local and state governmental tribunals. Baseless civil lawsuits seeking or claiming millions of dollars have been filed against persons for exercising their right to petition and to participate in quasi-judicial proceedings before governmental tribunals. Such lawsuits can be an abuse of the legal process and can impose an undue financial burden on those having to respond to and defend such lawsuits and may chill and punish participation in public affairs and the institutions of democratic government. These lawsuits should be subject to prompt dismissal or judgment to prevent the abuse of the legal process and avoid the burden imposed by such baseless lawsuits.
B. Key Anti-SLAPP Elements

Although the statute was cut back from the original House version,\(^67\) the final text nevertheless retains the essentials needed for effective SLAPP curtailment.

1. Early Upfront Dismissals

To protect SLAPP targets from costly discovery and hardball tactics by deep-pocket SLAPPers, the text mandates priority and expedited treatment by trial courts of a “special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment”\(^68\) that is based on the First Amendment immunity of SLAPP targets. Whatever is claimed in a complaint for damages, whether pleaded as a business tort, as defamation, or as a conspiracy, the statute guarantees an expedited ruling on a target’s First Amendment immunities for any petitioning conduct to influence official action. Because such dispositive constitutional defenses may be adjudicated as a matter of law, from the allegations in the complaint and the special motion, the statutory process is designed to ensure upfront dismissals of SLAPP suits without pretrial discovery or dilatory maneuvers and without going into factual details of the complaint’s camouflage claims of business torts. Indeed, the statute expressly states that the purpose of the expedited consideration of the special motion is “to prevent the unnecessary expense of litigation”\(^69\) that discovery and other pretrial maneuvers would entail.

Although the anti-SLAPP law does not explicitly state that the special motion must be based on First Amendment rights, the text of the statute provides that the special motion to dismiss must be premised on the “affirmative defense”\(^70\) that the movant was exercising the right to engage in “conduct or speech undertaken or made in connection with a public hearing or public meeting in a quasi-judicial proceeding before a tribunal or decision-making body of any political subdivision of the state.”\(^71\) Moreover, the legislative findings recognize that baseless lawsuits claiming damages “against persons for exercising their right to petition and to participate in quasi-judicial proceedings before governmental tribunals...should be subject to prompt dismissal.”\(^72\) Since the activities subject to the special statutory motions are protected by the First Amendment,\(^73\) the anti-SLAPP law essentially establishes an expedited process for raising and vindicating First Amendment rights.

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67. The text of the original bill as introduced is set forth in Appendix A. Significantly, the statutory text rather than legislative history controls statutory interpretations. See Regents of Univ. of N.M. v. N.M. Teachers’ Fed’n, 125 N.M. 401, 411, 962 P.2d 1236, 1246 (1998) (“Unlike some states, we have no state-sponsored system of recording the legislative history of particular enactments. We do not attempt to divine what legislators read and heard and thought at the time they enacted a particular item of legislation. If the intentions of the Legislature cannot be determined from the actual language of a statute, then we resort to rules of statutory construction, not legislative history.”).
69. Id.
70. N.M. STAT. ANN. § 38-2-9.1(B) (2001). Although affirmative defenses are generally raised by answer, an affirmative defense that is premised on constitutional immunity may be resolved by motion to dismiss. N.M. R. CTV. P. 1-012(B).
73. See supra notes 46-50 and accompanying text.
Opponents of the bill succeeded in diluting some procedural protections for SLAPP targets. As introduced and approved by the House Judiciary Committee, House Bill 241 expressly provided for suspension of discovery pending decision on the special motion and on any appeal therefrom. The Senate Public Affairs Committee deleted the explicit discovery suspension provision, but inserted a directive that special motions shall be considered on an expedited basis "to prevent the unnecessary expense of litigation." The Senate version, therefore, replaced the automatic stay of discovery with a more generalized direction and rationale for expedited rulings to alleviate the financial impact on targets of SLAPP litigation.

The original version also placed on a SLAPP plaintiff the express burden of establishing by "clear and convincing evidence" that the challenged acts were not constitutionally protected conduct or speech. The Senate amendments likewise deleted those explicit burden of proof requirements to overcome a SLAPP target's special motion. Although the statute thus leaves courts to determine burden and standard of proof issues, the legislature's paramount purpose of protecting SLAPP victims suggests that courts should construe the statute to require a SLAPP plaintiff to bear the burden of showing that the complaint does not punish, intimidate, or retaliate against people for exercising their First Amendment rights and that the complaint does not abuse the legal process.

Furthermore, the statute contains no timeline defining the "priority or expedited basis" for ruling on the statutory special motions. The only time period appears in the subsection providing that if the court grants the special motion "within ninety days of the filing of the moving party's answer, the court shall award reasonable attorney fees and costs incurred by the moving party in defending the action." This subsection, however, does not compel the trial court to rule on the special motion within ninety days; instead, it merely suggests that the special motion should be filed within ninety days of the answer date. Particularly since the motion to dismiss may be filed in lieu of an answer, the courts are left to determine what is meant by ruling on a "priority or expedited basis" in a particular case. Due to the concomitant statutory right to an expedited appeal from a trial court's failure to rule on a special motion on an expedited basis, a specific timeline set by the judiciary would

74. H.B. 241 § 2(B), 45th Leg., 1st Sess. (N.M. 2001), introduced by Rep. Patsy G. Trujillo and Rep. Pauline Gubbels. (The text of the original bill is set forth in Appendix A.) This provision was also included in the House Judiciary Committee Substitute for H.B. 241 § 2(B).
76. Id. § B.
77. See the original bill, H.B. 241 § 2(B), 45th Leg., 1st Sess. (N.M. 2001) in Appendix A. The House Judiciary Committee Substitute for H.B. 241 retained the express burden of proof on the respondent provision but deleted the "clear and convincing" standard.
SLAPP SUITS

remove such temporal uncertainties and give substance to the right to an early dismissal as well as the right to appeal a failure to rule.\textsuperscript{83}

2. Appellate Review of the Trial Court’s Consideration of the Special Motion to Dismiss

Reinforcing the statutory mandate for early rulings on First Amendment defenses raised by a SLAPP target, the Act also provides for expedited appeals not only from court rulings on the merits of a motion to dismiss but also from a court’s failure to rule on such motions on an expedited basis.\textsuperscript{84} This provision raises several issues that are not specifically addressed by the statutory text. First, does this provision create a right to an interlocutory appeal? Second, what procedures and time limits does the expedited appeal entail? Third, what power do courts have to prescribe the procedures for implementing this right to appeal?

The anti-SLAPP law creates a right to an interlocutory appeal, although the statute does not use the term. The text specifically states that “[a]ny party shall have the right to an expedited appeal from a trial court order on the special motions described in Subsection B.”\textsuperscript{85} The motions listed in Subsection B are pretrial motions,\textsuperscript{86} and an appeal from a pretrial ruling before final judgment is necessarily interlocutory in nature. Moreover, the legislature has the power to create a right to an interlocutory appeal. The Supreme Court of New Mexico has recognized the authority of the legislature to establish appellate jurisdiction\textsuperscript{87} and to create a right of appeal.\textsuperscript{88} Such legislative authority derives from the New Mexico Constitution\textsuperscript{89} and does not conflict with the judicial power to regulate procedure, because the creation of a “right to appeal is a matter of substantive law.”\textsuperscript{90}

\textsuperscript{83} The Supreme Court of New Mexico should adopt a rule specifying thirty days as the deadline for rulings on special motions. For example, Rule 59 of the New Mexico Rules of Civil Procedure requires a ruling on motions for new trial within thirty days or the motion will be considered denied. N.M. R. Civ. P. 1-059(D). Similarly, post-judgment motions must be decided within thirty days or the motions will be deemed denied. N.M. STAT. ANN. § 39-1-1 (1978 & Supp. 2001). In light of those precedents, a Supreme Court rule setting such a time limit of thirty days for rulings on a statutory special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment would effectuate the legislative purpose of subjecting SLAPP suits “to prompt dismissal or judgment to prevent the abuse of the legal process and avoid the burden imposed by such baseless lawsuits.” N.M. STAT. ANN. § 38-2-9.2 (2001).

\textsuperscript{84} N.M. STAT. ANN. § 38-2-9.1(C) (2001).

\textsuperscript{85} Id.

\textsuperscript{86} N.M. STAT. ANN. § 38-2-9.1(B) (2001) lists three pretrial motions subject to expedited rulings—motion to dismiss, motion for judgment on the pleadings, and motion for summary judgment.

\textsuperscript{87} See Lovelace Med. Ctr. v. Mendez, 111 N.M. 336, 339, 805 P.2d 603, 606 (1991) (“The appellate jurisdiction of both this Court and the court of appeals is within the legislative power to prescribe.”).

\textsuperscript{88} See State v. Arnold, 51 N.M. 311, 314, 183 P.2d 845, 846 (1947) (“The creating of a right of appeal is a matter of substantive law and outside the province of the court’s rule making power.”).

\textsuperscript{89} N.M. CONST. art. VI, § 2.

The anti-SLAPP statute, however, does more than create a right to interlocutory appeal; it also provides for an "expedited" appeal. The statute does not define what an expedited appeal means, but the legislative purpose set forth in the statute makes clear that the legislature intended a prompt appellate review. The statute, however, prescribes no particular procedure for accelerating the conventional appellate process. Instead, the legislature leaves it to the appellate courts to fashion how to expedite a statutory appeal. By leaving the manner of processing the appeal to the judiciary, the statute does not trench on the constitutional powers of the judicial branch to regulate the procedural aspects of taking and perfecting an appeal. In short, the expedited appeal provision neither regulates the appellate process nor directs exactly when or how an appeal must be heard by the appellate courts. The statute, therefore, conflicts with no court rule of appellate procedure and raises no separation of powers problem.

As a practical matter, appellate courts can choose among various rules adopted for accelerating special appeals—appeals that depart from the usual appeals from final judgments. For example, the New Mexico Rules of Appellate Procedure specify shorter time periods for filing interlocutory appeals, for appeals of bail decisions in criminal cases, and for appeals from orders suppressing or excluding evidence in a criminal case. Significantly, none of these rules accelerating the appellate process prescribes any limit on the time for the court to rule on the appeal itself. The statutory "right to an expedited appeal" likewise sets no time within which the appellate court must rule. Overall, the statutory direction thus leaves it to the courts to determine just what is an expedited appeal and how to implement this right by specific rules or on a case-by-case basis. Consequently, the legislature respected the judicial power to regulate court procedures and management functions.

In addition to what is meant by "expedited" in the appeal provision of the anti-SLAPP law, the right to appeal "from a trial court's failure to rule on the motion" also presents implementation questions. How does an appellate court handle a failure to rule by a trial court? Does the appellate review mean that the appellate court enters an order directing that the trial court forthwith rule on the First Amendment issue? Does the appellate court take over for the trial court and decide

91. *Arnold*, 51 N.M. at 314, 183 P.2d at 846-47.
92. Although *Maples v. State*, 110 N.M. 34, 36, 791 P.2d 788, 789 (1990), says that "the legislature has no power to fix the time within which an appeal must be heard by the supreme court in appeals from the district courts," citing *Ammerman*, the statute considered in *Maples* conflicted with a court rule. *Id.* Because the anti-SLAPP statute prescribes no fixed time for an expedited appeal and has no provision that conflicts with a court rule regarding the time and manner of taking and perfecting an appeal, the legislature has not attempted to regulate the appellate process and has not intruded directly into the courts' constitutional powers. *See supra* notes 88 and 90.
93. N.M.R.App. P. 12-203. For interlocutory appeals, the application for appeal must be filed within fifteen days of the trial court order, and the respondent has fifteen days to respond to the application.
94. N.M.R.App. P. 12-204. This appeal must be filed within ten days of the decision, and the state has five days to file a response.
95. N.M.R.App. P. 12-201(A)(1). This appeal must be filed within ten days of the decision, but there is no time limit for the response.
96. *See Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 340-41, 805 P.2d 603, 606-08 (1991). The New Mexico Supreme Court said that "rules relating to pleading, practice, and procedure in the courts, particularly where those rules relate to court management or housekeeping functions," are subject to the rule-making power of the Supreme Court. *Id.*
the special motion on its own? Does the appellate court treat the failure to rule by
the district court on a timely basis as a denial of the motion, or conversely, as a
constructive grant of the appeal as well as the underlying special motion? Since the
statute offers no guidance, the appellate court is left to answer these questions in
order to give meaning to the right to appeal from a failure to rule. Here, too, the
legislative declaration of purpose should inform the appellate court’s determination
of how to proceed with such an appeal. This statutory purpose—to make lawsuits
that chill and punish participation in public affairs and the institutions of democratic
government subject to prompt dismissal in order to prevent the abuse of the legal
process and avoid the burden imposed by such baseless lawsuits—should favor
a prompt procedure that avoids all further delays and costs due to a district court’s
failure to rule in a timely manner.

Without a specific provision addressing a district court’s failure to rule, a writ of
mandamus may effectuate the statutory right to an expedited appeal from a trial
court’s failure to rule on a special motion on an expedited basis. According to the
New Mexico Supreme Court, mandamus is a proper remedy for compelling a
district court to act when such action is required by law and no discretion is
involved. The anti-SLAPP law directs that special motions “shall be considered
by the court on a priority or expedited basis.” Although a district judge may retain
discretion as to how to calendar priority or expedited matters, the court has no
discretion to avoid a ruling on the motion itself. At some point, therefore, failure to
rule becomes tantamount to failure to consider the motion on a priority or expedited
basis, and a writ of mandamus lies. Just when that point arrives must be judged by
a higher court in a given case. Thus, unless and until the New Mexico Supreme
Court promulgates a pertinent rule, mandamus or other prerogative writs can prod
trial courts to rule promptly on special statutory motions to dismiss SLAPP
complaints.

3. Shifting of Legal Fees

Providing a financial disincentive for SLAPP filers to intimidate citizens, the
statute mandates the payment of attorney fees and costs incurred by a SLAPP victim

to rule on a post-judgment motion within thirty days of the filing of the motion shall be deemed denied).
98. Sender v. Montoya, 73 N.M. 287, 291, 387 P.2d 860, 863-64 (1963) (finding that mandamus is proper
remedy to require district court to dismiss the proceeding below where the dismissal was mandatory under existing
99. For example, Rule 1-059 of the New Mexico Rules of Civil Procedure treats a district court’s failure
to rule on a motion for new trial within thirty days as an automatic denial of the motion. N.M. R. CIV. P. 1-059(D).
See also N.M. STAT. ANN. § 39-1-1 (1978 & Supp. 2001) (stating that failure to rule on a post-judgment motion
within thirty days means the motion shall be deemed denied). To effectuate the anti-SLAPP law’s legislative
purpose, the New Mexico Supreme Court could adopt a special rule, limited to the special statutory motions,
treating the failure to rule within thirty days as tantamount to grant of the motion, or as an automatic denial
allowing an immediate appeal therefrom. Such a new rule could be placed in N.M. R. CIV. P. 1-007.1, which
concerns motions, as a separate provision, or be added as an entirely new rule.
100. See also Dixon v. Superior Court, 36 Cal. Rptr. 2d 687, 697 (Cal. Ct. App. 1994) (issuing peremptory
writ of mandamus directing entry of order granting special motion to strike and to dismiss SLAPP complaint
without pretrial discovery, as a matter of law; also upholding constitutionality of California anti-SLAPP statute).
who prevails on a motion to dismiss the complaint.¹⁰¹ The prospect of quick dismissals plus payment of the victim’s legal fees will discourage potential SLAPPers and their lawyers from filing SLAPP suits altogether.¹⁰² In addition, such fee awards level the playing field because they enable SLAPP targets to engage lawyers to take their case, without having to pay upfront legal fees for handling meritorious First Amendment defenses.

The statute mandates the award of attorney fees and costs incurred by the SLAPP target who files a special motion to dismiss if (1) the motion raises as an affirmative defense the rights to petition and to participate in proceedings before governmental tribunals and (2) the trial court grants the special motion that was filed within ninety days of the filing of the moving party’s answer.¹⁰³ Although the ninety-day term appears in the subsection regarding the award of attorney fees and costs, the text suggests that the legislature did not intend to make a ruling within ninety days of the answer a condition for the award of attorney fees—particularly since no answer might ever be filed.¹⁰⁴ In light of the statute’s overarching remedial purpose, a ruling in favor of the SLAPP defendant’s motion on First Amendment grounds is the critical factor in awarding attorney fees so long as the motion to dismiss or for summary judgment was timely filed.¹⁰⁵

Although the statute also authorizes an award of attorney fees to a SLAPP plaintiff who defeats a special motion to dismiss, different standards apply to SLAPP victims and to SLAPPers.¹⁰⁶ The SLAPP target need only win the motion to dismiss in order to be awarded attorney fees and costs. For a prevailing SLAPP plaintiff, however, attorney fees and costs are authorized only if the court finds that the special motion to dismiss is “frivolous or intended to cause unnecessary delay.”¹⁰⁷

¹⁰². See Ketchum v. Moses, 17 P.3d 735, 741-43 (Cal. 2001) (setting criteria for “enhancement” of legal fee awards to SLAPP victims prevailing on motion to dismiss).
¹⁰⁴. The special motion to dismiss may be filed in lieu of an answer under Rule 12(B)(6) (failure to state a claim upon which relief can be granted). N.M. R. Civ. P. 1-012(B)(6).
¹⁰⁵. The special motions authorized by the anti-SLAPP statute are timely filed if filed within ninety days of the filing of the answer. N.M. Stat. Ann. § 38-2-9.1(B) (2001). An answer to a SLAPP complaint must be filed within thirty days after service of the complaint. N.M. R. Civ. P. 1-012(A).
¹⁰⁶. N.M. Stat. Ann. § 38-2-9.1(B)(2001). Compare Mitchell v. City of Moore, 218 F.3d 1190, 1203 (10th Cir. 2000) (noting that attorney fees are routinely awarded to prevailing plaintiffs in federal civil rights litigation, but awards to prevailing defendants are “rarely” granted and only if the complaint was vexatious, frivolous, or harassing).
¹⁰⁷. N.M. Stat. Ann. § 38-2-9.1(B)(2001). The original bill, H.B. 241 (set forth in Appendix A), did not establish different standards for movants and respondents. Section D provided that whoever prevailed should be awarded litigation costs, including reasonable attorney fees and expert witness fees incurred in connection with the motion. The original bill, Section E, also authorized additional sanctions against the SLAPP plaintiff if the court granted the motion and the moving party demonstrated that the SLAPP lawsuit was filed to harass, inhibit public participation, interfere with protected constitutional rights, or injure the moving party. The additional sanctions included actual damages to the moving party and disciplinary referrals of the responsible attorneys or law firms. H.B. 241, 45th Leg., 1st Sess. (N.M. 2001). This provision was deleted by the Senate Public Affairs Committee. Senate Public Affairs Committee Substitute for House Judiciary Committee Substitute for H.B. 241, 45th Leg., 1st Sess. (N.M. 2001).
4. Strong Anti-SLAPP Message

Enabling courts to construe the text of the statute and to fill gaps in a remedial way, the specially codified legislative findings and purpose provide important interpretive context. Thus, the legislature’s condemnation of “baseless civil lawsuits seeking or claiming millions of dollars” against “persons for exercising their right to petition” sends a strong signal to courts. Likewise, the statutory findings as to the financial burdens of SLAPP victims, which “may chill and punish participation in public affairs and the institutions of democratic government,” alert both bench and bar to the legislature’s policy to safeguard citizens’ constitutional rights to petition their government. In short, those legislative findings and purpose sound a bullhorn to bench and bar to stop SLAPP suits as an offense against the public policy of New Mexico.

C. Evolving Issues of Statutory Interpretation

Due to the cutback of House Bill 241 by the compromises needed for Senate passage, the statutory text leaves open important issues for judicial interpretation. However, the task for courts is facilitated by the legislature’s findings and purpose to resolve textual ambiguities, by the pre-existing constitutional case law defining citizens’ conduct protected by the First Amendment, and by expansive interpretations of the California anti-SLAPP law’s analogous text backed by strong statutory findings.

1. Scope of Protected Conduct “In Connection With” Administrative Proceedings

At the root of the statute’s murky scope is the compromise between the supporters who had pushed for broad coverage of all First Amendment-protected conduct and the strategy of opponents to cut back the bill to cover only conduct in so-called “quasi-judicial proceedings” as their fallback from killing the House-passed bill outright. As introduced in the House and approved by the House Judiciary Committee, the bill provided explicit “immunity from liability” for any conduct or speech that “has as its primary purpose informing, communicating with, influencing or otherwise participating in the process of government.” The Senate deleted the immunity text and limited the conduct and speech subject to a special statutory motion to dismiss. Thus the Senate Public Affairs Committee narrowed

109. Id.
112. Senate Judiciary Committee amendments to House Judiciary Committee Substitute for H.B. 241.
113. Senate Public Affairs Committee amendments to House Judiciary Committee Substitute for H.B. 241.
the bill’s coverage by specifying that the conduct or speech must be “made in connection with a public hearing or meeting in a quasi-judicial proceeding before a tribunal or decision-making body of any political subdivision of the state.” In short, whereas the original version of House Bill 241 provided immunity for all constitutionally protected conduct or speech affecting the political process—whether through media, at private meetings, or before zoning commissions—the Senate deleted such special immunities. Instead, by way of a broad savings clause, the Senate preserved “the exercise of a right or remedy of a party granted pursuant to another Constitutional, statutory, common law or administrative provision.”

As a result, liabilities depend on legal rights granted elsewhere by law, conspicuously the First Amendment, so long as such conduct or speech occurred in connection with public hearings or public meetings as defined by the Act.

The crux of the bill’s ultimate coverage, therefore, is its limitation to actions for damages that are brought “against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting in a quasi-judicial proceeding” (emphasis added). This text protects petitioning conduct or speech occurring in connection with either of two distinct settings—a “public hearing” or a “public meeting in a quasi-judicial proceeding.” The statute specially defines a “public meeting in a quasi-judicial proceeding” as including “meetings or presentations before official tribunals.” The statute does not, however, define “public hearing” and does not limit this setting to particular official tribunals. In sum, the statute extends to any public hearing, whether in a traditionally quasi-judicial setting or otherwise.

Reference to the two separate settings in the statute, therefore, protects citizen participation in connection with judicial, quasi-judicial, administrative, or legislative forums. This reading is confirmed by the legislative findings and purpose, which not only seek to “protect the rights of citizens to participate in quasi-judicial proceedings,” but also deplore and declare “subject to prompt dismissal” baseless lawsuits brought “against persons for exercising their right to petition” (as well as to participate in quasi-judicial proceedings), because they “may chill and punish participation in public affairs and the institutions of democratic government.”

As to the meaning of “quasi-judicial proceedings,” New Mexico case law says that “administrative hearings which investigate facts, weigh evidence, draw conclusions as a basis for official action, and exercise discretion of a judicial nature, are quasi-judicial in nature.” For example, public administrative hearings in zoning proceedings, although they might be deemed “quasi-legislative” rather than

114. Id. § A.
118. N.M. STAT. ANN. § 38-2-9.1(D) (2001). This definition section was added by the Senate Judiciary Committee in its amendments to House Judiciary Committee Substitute for H.B. 241, 45th Leg., 1st Sess. (N.M. 2001).
119. Under the “last antecedent rule” of statutory construction, qualifying words are to be applied only to the “immediately preceding” text. Briggs v. Eden Council for Hope and Opportunity, 969 P.2d 564, 569 (Cal. 1999) (interpreting anti-SLAPP statute).
SLAPP SUITS

“quasi-judicial,” are nevertheless covered—particularly because of the paradox of otherwise protecting citizens’ participation in some but not other land-use proceedings that rely even more on broad citizen input.

The “in connection with” text of the statute protects citizen activity outside of public hearings or public meetings. As to what conduct is “in connection with” covered proceedings, analogous California case law supports an expansive interpretation. Thus, letters to the editor, communications among opposing citizens, or other conduct that in some way relates to either ongoing, past, or prospective land-use proceedings would be treated as occurring “in connection with” such expressly covered proceedings.\(^2\) Significantly, even if conduct targeted by a SLAPP suit falls outside the statutory coverage, the complaint must still be dismissed if the challenged conduct is protected by the First Amendment.\(^3\)

Under preexisting case law, the First Amendment provides a constitutional defense to such lawsuits—but without the benefit of the specific mandates of the anti-SLAPP statute for expedited process at all levels, and without its mandatory award of legal fees to targets prevailing on their special motions to dismiss.\(^4\)

2. Limits on Defamation Claims

The statutory savings clause for defamation actions\(^5\) must be read in conjunction with case law that sharply limits defamation claims arising from land-use controversies due to broad First Amendment protections. Under established U.S. Supreme Court jurisprudence, a developer suing for defamation may have the burden of proving, by “clear and convincing evidence,” that the target “made the statements with knowledge of falsity or with a reckless disregard of the truth.”\(^6\)

This heavy burden applies to all defamation claims by “public figures,” who must demonstrate “actual malice” beyond the falsity requirements of ordinary defamation law.\(^7\) Significantly, a developer’s status as a “public figure” for this limited purpose has been held to flow from media publicity mirroring public concern over the land-use controversy, the developer’s own participation in public proceedings, or even the developer’s implicit invitation or “consent” to public comment during such proceedings.\(^8\) Indeed, communications or statements by citizens made

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123. See N.M. STAT. ANN. § 38-2-9.1(E) (2001); see also cases and discussion supra notes 46-50.

124. However, courts have inherent powers to award attorney fees “for expenses incurred as a result of frivolous or vexatious litigation.” DeVaney v. Thriftway Mktg. Corp., 124 N.M. 512, 524, 953 P.2d 277, 289 (1997). For example, after dismissing a SLAPP countersuit by a Taos developer, Judge James Hall of the Santa Fe County District Court ordered payment of attorney fees of several SLAPP targets. Holzka, supra note 57.


126. See Schwartz v. Am. Coll. of Emergency Physicians, 215 F.3d 1140, 1144 (10th Cir. 2000) and DeVaney, 124 N.M. at 526-27, 953 P.2d at 291-92 for pertinent criteria and doctrines of New Mexico defamation law subject to the First Amendment.

127. Id.

directly in land-use proceedings, as opposed to conduct merely "in connection" therewith, may enjoy absolute immunity from suit regardless of malice.129

3. Preservation of Malicious Abuse of Process Actions

By contrast, the express savings clause for other claims130 may benefit SLAPP targets by validating their pursuit of further relief. As articulated by the New Mexico Supreme Court’s DeVaney decision, which merged the pre-existing separate torts of malicious prosecution and abuse of process into one hybrid cause of action, a SLAPP target need no longer await dismissal or final favorable termination of the SLAPP suit before filing a countersuit against the SLAPPer.131 Also, the SLAPP victim may sue for further redress, in addition to recovery of the statutory attorney fees, for any emotional distress or other injury caused by the SLAPP action.132 Indeed, as authorized by DeVaney, a SLAPP target may even file a malicious abuse of process case against the SLAPPer as a counterclaim, on the face of the pleadings, and recover damages upon “clear and convincing proof” that the SLAPP action was brought without probable cause and for a plainly improper purpose—such as the intimidation of citizens for exercising their First Amendment petitioning rights.133

4. Federal Court Litigation

Although the New Mexico statute does not address its application beyond state court litigation, the analogous California anti-SLAPP statute has been held applicable also to cases in the federal courts involving diversity jurisdiction.134 According to the Ninth Circuit, the state’s statutory process was equally apt for federal court litigation because it would provoke no “direct collision” with the Federal Rules of Civil Procedure.135 In the same way, the New Mexico anti-SLAPP law should also control the process in federal court litigation, under diversity or statutory civil rights jurisdiction or otherwise, particularly since its process effectuates the United States Constitution’s protections enshrined in the First Amendment.

CONCLUSION

Beyond preserving the constitutional protections for citizens exercising their rights to petition their government, New Mexico’s anti-SLAPP law of 2001

129. Dixon, 36 Cal. Rptr. 2d at 696 (discussing statute that expressly invites public comment).
131. For discussion of such “SLAPP-back” litigation, see Pring & Canan, supra note 7, at 168-87. Notably, a SLAPP target’s insurance coverage for legal or other costs cannot reduce the SLAPPer’s liability, because the “collateral source” doctrine prevents a wrongdoer from offsetting such insurance benefits against those who have paid their own premiums. See Yardman v. San Juan Downs, Inc., 120 N.M. 751, 762, 906 P.2d 742, 753 (Ct. App. 1995); Jojola v. Baldridge Lumber Co., 96 N.M. 761, 765, 635 P.2d 316, 320 (Ct. App. 1981).
133. However, public entities that have been sued may not retaliate with malicious abuse of process actions against citizens. City of Long Beach v. Bozek, 645 P.2d 137, 141 (Cal. 1982) (holding that, to prevent chilling effect of lawsuits against citizens by public bodies, First Amendment right to petition bars municipality from maintaining malicious prosecution action against individual who unsuccessfully sued the city), vacated by 459 U.S. 1095 (1983), remanded to 661 P.2d 1072 (Cal. 1983) (judgment upheld).
134. United States v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999).
135. Id. at 972-73.
transforms the legal terrain for resolving land-use disputes throughout the state. Most importantly, the statute mandates that the bench and bar spot and stop SLAPP suits camouflaged as ordinary business litigation. By awarding legal fees to prevailing SLAPP victims, thus attracting lawyers to take their cases without asking for money upfront, the anti-SLAPP law raises the risk and removes the financial incentive for filing SLAPP actions in the first place. The legislature’s message to judges and lawyers, therefore, is that the era of intimidation by SLAPP suits in New Mexico is over.
Appendix A

(ORIGINAL VERSION OF) HOUSE BILL 241

45th LEGISLATURE – STATE OF NEW MEXICO – FIRST SESSION, 2001

AN ACT

RELATING TO CIVIL ACTIONS; ESTABLISHING IMMUNITY FROM LIABILITY FOR CONDUCT IN FURTHERANCE OF A PERSON’S RIGHTS TO PETITION THE GOVERNMENT AND FREE SPEECH IN CONNECTION WITH A PUBLIC ISSUE; ESTABLISHING PROCEDURES; PROVIDING FOR DAMAGES; ENACTING SECTION OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. FINDINGS AND PURPOSE. – The legislature finds that civil lawsuits often claiming millions of dollars have been filed against persons for exercising their right to free speech and to petition the government and to seek relief from, influence action by, inform or otherwise participate in the processes of government; these lawsuits are an abuse of the legal process because they chill and punish participation in public affairs and the institutions of democratic government. The legislature declares that it is in the public interest to encourage continued public participation in matters of public significance and to restore balance between the right of access to courts and the rights of citizens to petition, speak out, associate and otherwise participate in the political process without fear of litigation.

Section 2. SPECIAL MOTION TO DISMISS UNWARRANTED OR SPECIOUS LAWSUITS—PROCEDURES—DAMAGES—SEVERABILITY—

A. In an action claiming economic damages arising from conduct or speech that has as its primary purpose informing, communicating with, influencing or otherwise participating in the process of government, a defendant in that action is immune from liability for that conduct, except upon clear and convincing evidence that there was no objectively reasonable basis for the conduct or activity and the conduct or activity was undertaken in bad faith.

B. An action described in Subsection A of this section is subject to a special motion to dismiss that shall be considered by the trial court on an expedited basis. The responding party to the special motion to dismiss shall have the burden of going forward with the evidence and of persuasion on the motion. Discovery shall be suspended pending decision on the motion and any appeal from a decision on the motion. The court shall grant the special motion to dismiss and dismiss the claim unless the responding party produces clear and convincing evidence that the alleged acts of the moving party are not immunized from liability pursuant to Subsection A of this section.

C. A governmental entity to which the party that is moving to dismiss has directed its actions, or the attorney general, may intervene to defend or otherwise support the moving party.
D. The court shall award litigation costs to the prevailing party on the special motion to dismiss, including reasonable attorney fees and expert witness' fees, incurred in connection with the motion.

E. If the court grants the special motion to dismiss and the moving party demonstrates that the respondent to the motion to dismiss brought the action described in Subsection A of this section for the purpose of harassment, to inhibit the moving party's public participation, to interfere with the moving party's exercise of protected constitutional rights or otherwise injure the moving party and shall impose such additional sanction, including disciplinary referrals, upon the party responding to the motion to dismiss and the party's attorneys or law firm as the court deems sufficient to deter repetition of the conduct and comparable conduct by others similarly situated.

F. The moving party shall have the right to an expedited interlocutory appeal from a trial court order denying the special motion to dismiss or from a trial court's failure to rule on the motion on an expedited basis.

G. Nothing in this section limits a right or remedy of a party granted pursuant to another constitutional, statutory, common law or administrative provision.

H. If any provision of this section or the application of any provision of this section to a person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this section that can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.