

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 439 (Skinner)
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Fiscal: No
Urgency: No
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SUBJECT

Special motions to strike: priority housing development projects

DIGEST

This bill creates a special motion to strike a challenge to the approval or permitting of an affordable housing project modeled after California's anti-SLAPP statute.

EXECUTIVE SUMMARY

A typical "strategic lawsuit against public participation" (SLAPP) is a meritless civil lawsuit filed to chill the defendant's exercise of their political rights and deplete their resources. The anti-SLAPP statute enables such defendants to expeditiously unmask SLAPP suits with a special motion to strike that stays discovery proceedings and may result in an award of attorney's fees and costs if the plaintiff is unable to show a probability of prevailing on the claim. Although commonly associated with the protection of constitutional rights, the anti-SLAPP statute applies to a broad range of contexts.

This bill creates a nearly identical motion to strike in another context. California Environmental Quality Act (CEQA) challenges to the approval or permitting of "priority housing developments" will be subject to these motions. The developments included are those in which 100 percent of the units will be reserved for lower income households, as provided. Just as with the anti-SLAPP motions, the court is required to deny the motions if the plaintiff is able establish that there is a probability that the plaintiff will prevail on their claim.

This bill is co-sponsored by the California Housing Consortium and the Public Interest Law Project. There is a wide coalition of groups in support, including a YIMBY coalition and various community development groups. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes anti-SLAPP procedures. Provides that a cause of action against a person arising from any act of that person “in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue” is subject to a special motion to strike, unless the court determines, based on the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based, that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. (Code Civ. Proc. § 425.16(b).)
- 2) Defines an “act in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue” to include:
 - a) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
 - b) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
 - c) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or
 - d) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. (Code Civ. Proc. § 425.16(e).)
- 3) Entitles a prevailing defendant, with certain exceptions, to attorney’s fees and costs; likewise for a prevailing plaintiff, provided the court finds the motion was frivolous or solely intended to cause unnecessary delay pursuant to Section 128.5 of the Code of Civil Procedure. (Code Civ. Proc. § 425.16(c).)
- 4) Stays discovery proceedings upon filing of notice of a SLAPP motion. (Code Civ. Proc. § 425.16 (g).)
- 5) Generally exempts certain actions from the anti-SLAPP statute:
 - a) Actions brought solely in the public interest or on behalf of the general public, provided that (1) the plaintiff does not seek any relief greater than or different from the relief sought for the class; (2) the action enforces an important right affecting the public, and confers a significant benefit on the public or a large class of persons; and (3) private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to their stake in the matter. (Code Civ. Proc. § 425.17(b).)

- b) Actions against a person for statements or conduct, provided the person is primarily engaged in the business of selling or leasing goods or services, the statement or conduct consists of representations of fact related to the business, and the intended audience is a potential buyer or customer, as specified. (*Id.* at (c).)
- 6) Requires lead agencies with the principal responsibility for carrying out or approving a proposed discretionary project to prepare a negative declaration, mitigated declaration, or environmental impact report (EIR) for this action, unless the project is exempt from CEQA (CEQA includes various statutory exemptions, as well as categorical exemptions in the CEQA Guidelines). (Pub. Res. Code § 21100 et seq.)
- 7) Sets requirements relating to the preparation, review, comment, approval and certification of environmental documents, as well as procedures relating to an action or proceeding to attack, review, set aside, void, or annul various actions of a public agency on the grounds of noncompliance with CEQA. (Pub. Res. Code § 21165 et seq.)
- 8) Authorizes judicial review of CEQA actions taken by public agencies, following the agency's decision to carry out or approve the project, and specifies certain time periods in which an action must be instituted depending on the type of claim alleged. (Pub. Res. Code § 21167.)
- 9) Provides that upon motion, a court may award attorney fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if:
 - a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons;
 - b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate; and
 - c) such fees should not, in the interest of justice, be paid out of the recovery, if any. (Code Civ. Proc. Sec. 1021.5.)

This bill:

- 1) Provides that in all civil actions, including actions brought pursuant to Section 21167 of the Public Resources Code, brought by any plaintiff to challenge the approval or permitting of a "priority housing development" project, a defendant may bring a special motion to strike the whole or any part of a pleading.
- 2) Requires the court to deny the motion to strike if it determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the

claim. In making this determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

- 3) Provides that if the court determines that the plaintiff has established a probability the plaintiff will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.
- 4) Provides that in such actions, a prevailing defendant is entitled to recover attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.
- 5) Exempts enforcement actions brought by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.
- 6) Requires the special motion to be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.
- 7) Stays all discovery proceedings in the action upon the filing of a notice of this motion. The stay remains in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this provision.
- 8) Provides for interlocutory appeal of an order granting or denying this special motion to strike.
- 9) Defines "priority housing development" as a development in which 100 percent of the units, exclusive of any manager's unit or units, will be reserved for lower income households, as defined.

COMMENTS

1. CEQA generally

Enacted in 1970, CEQA requires state and local agencies to follow a set protocol to disclose and evaluate the significant environmental impacts of proposed projects and to

adopt feasible measures to mitigate those impacts. CEQA itself applies to projects undertaken or requiring approval by public agencies, and, if more than one agency is involved, CEQA requires one of the agencies to be designated as the “lead agency.” The environmental review process required by CEQA consists of: (1) determining if the activity is a project; (2) determining if the project is exempt from CEQA; and (3) performing an initial study to identify the environmental impacts and, depending on the findings, prepare either a Negative Declaration (for projects with no significant impacts), a Mitigated Negative Declaration (for projects with significant impacts but that are revised in some form to avoid or mitigate those impacts), or an EIR (for projects with significant impacts).

An EIR must accurately describe the proposed project, identify and analyze each significant environmental impact expected to result from the proposed project, identify mitigation measures to reduce those impacts to the extent feasible, and evaluate a range of reasonable alternatives to the proposed project. Before approving any project that has received environmental review, an agency must make certain findings pertaining to the project’s environmental impact and any associated mitigation measures. If mitigation measures are required or incorporated into a project, the public agency must adopt a reporting or monitoring program to ensure compliance with those measures. To enforce the requirements of CEQA, a civil action may be brought under several code sections to attack, review, set aside, void, or annul the acts or decisions of a public agency for noncompliance with the act.

Unlike other environmental laws specific to air resources, water resources, or the control of toxic substances, there is no statewide bureaucracy charged with enforcement of CEQA. Rather, it is enforced through citizen participation and litigation if necessary. Arguably, this makes the implementation of CEQA more efficient and expeditious than if a state agency were created to administer the law. Thus, CEQA litigation could more appropriately be characterized as mere enforcement.

“CEQA operates, not by dictating proenvironmental outcomes, but rather by mandating that ‘decision makers and the public’ study the likely environmental effects of contemplated government actions and thus make fully informed decisions regarding those actions. ... In other words, CEQA does not care what decision is made as long as it is an informed one.” (*Citizens Coalition Los Angeles v. City of Los Angeles* (2018) 26 Cal. App. 5th 561, 577.)

2. Anti-SLAPP motions

California’s anti-SLAPP statute provides that a cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike. (Civ. Proc. Code § 425.16.) The Legislature asserted that the law was justified because “it is in the public interest to

encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.”

The seminal article entitled *Strategic Lawsuits Against Public Participation* defined SLAPP suits as “civil lawsuits ... that are aimed at preventing citizens from exercising their political rights or punishing those who have done so.”¹ While SLAPP suits “masquerade as ordinary lawsuits” such as defamation and interference with a prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic consequences for the defendant, and not to vindicate a legally cognizable right.²

In 1992, Code of Civil Procedure section 425.16 was added by SB 1264 (Lockyer, Ch. 726, Stats. 1992) to provide a “special motion to strike” for use by defendants in SLAPP suits to obtain an early judicial ruling and termination of a meritless claim arising from a person’s exercise of their constitutional rights of petition and free speech in connection with a public issue. In passing the anti-SLAPP law, the Legislature found “that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” (Code Civ. Proc. § 425.16(a).)

The special motion to strike must be brought within 60 days of service of complaint; it can result in an award of attorney’s fees and costs, stays discovery proceedings, and must be heard within 30 days if the court’s docket permits. (Code Civ. Proc. § 425.16(c), (f), (g).) The motion involves two steps. First, the moving party must show that the claim at issue arises from a protected activity, which includes any “statement or writing made in connection with an issue under consideration or review by a ... judicial body.” (*Id.* at (e).) If so, under the second step the burden shifts to the opposing party to demonstrate a reasonable probability of prevailing on the merits. (*See id.* at (b).) If the opposing party meets this burden, the special motion to strike is denied.

3. Anti-SLAPP in the CEQA context

This bill creates a special motion to strike that is nearly identical to the anti-SLAPP statute with regard to challenges to certain housing developments. According to the author:

The California Environmental Quality Act (CEQA) is intended to ensure that environmental impacts are considered and mitigated before local decision makers approve a proposed construction project. Sadly, opponents of affordable housing development have misused CEQA to

¹ Canan, Penelope & Pring, George, (1988) 35 Social Problems 506.

² Canan, Penelope & Pring, George, *SLAPPS: Getting Sued for Speaking Out* (Temple University Press, 1996).

stop projects they don't like even when the requirements of CEQA have been met, filing lawsuits that can almost indefinitely slow or stop the approved development. Such illegitimate lawsuits against affordable housing projects that have been approved and have undergone the full CEQA required review can result in the developer losing the financing needed to complete the affordable housing project.

Our state is in an increasingly severe housing crisis. Misusing the system to obstruct affordable housing projects that have already fulfilled the requirements of CEQA and received approval from their respective local government only exacerbates our housing crisis. SB 439 will empower courts to intervene in nuisance lawsuits by allowing judges to throw out a CEQA lawsuit filed against an affordable housing project when that lawsuit lacks merit and does not have a chance of success in court. If a court does throw out an illegitimate case, SB 439 allows the affordable housing developer to recover costs and attorney's fees. This will ensure that affordable housing dollars are going towards new homes not fighting spurious lawsuits.

This bill allows for this motion to strike to be filed in a case that challenges the approval or permitting of a "priority housing development" project, explicitly including actions brought pursuant to CEQA. The procedures and guidelines mirror those in Section 425.16. As such, the court is required to deny the motion if it determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

The bill only applies to developments in which 100 percent of the units, excluding manager's units, are reserved for lower income households. "Lower income households" means persons and families whose income does not exceed the qualifying limits for lower income families as established and amended from time to time pursuant to Section 8 of the United States Housing Act of 1937. This includes very low income households and extremely low income households. (Health & Saf. Code § 50079.5.) Despite this limitation, the success of such a motion in this context would likely spur expansion into other projects.

The California Housing Consortium and the Public Interest Law Project, co-sponsors of the bill, write:

Despite the many tools policymakers have provided to ensure affordable and supportive housing projects can move forward, too often developers continue to face non-meritorious litigation attacking their projects even after securing local approval. This type of litigation is pursued by NIMBYs who, having tried unsuccessfully to stop the development during the approval process, turn to the courts, knowing that the prospect of ongoing

litigation may deter funding for the project and cause untenable delays and expenses.

One example involves a project Eden Housing proposed in downtown Livermore, which would provide 130 units affordable to households earning 20% to 60% of Alameda County's area median income. The project overcame community opposition during the local approval process and won unanimous support from the city council, but Save Livermore Downtown (SLD) then filed a suit claiming the city's approval violated CEQA and the state's Planning and Zoning Law. Over the next 18 months, the court consistently rejected SLD's claims, asserting that the claims are "almost utterly without merit" and that the court's decision to reject them was "not a close call." The project would already be complete today but for the litigation. Instead, Eden has yet to break ground and is waiting to see if SLD is going to file an appeal and further delay the project.

The challenge to the Livermore project is hardly unique and represents an increasingly common NIMBY tactic. For example, a similar saga ensued when a local merchant challenged a 49-unit supportive housing project in the Boyle Heights neighborhood of Los Angeles. There, the developer endured a five-year local approval process only to then be forced to defend its project against a meritless suit brought by a neighboring merchant. The Lorena Plaza project finally broke ground in 2022 after years of delay and at greatly increased cost.

SB 439 would establish a special motion to strike, similar to the motion that is permitted under state Anti-SLAPP law, to quickly end litigation filed against approved affordable housing projects that has no likelihood of success on the merits.

SUPPORT

California Housing Consortium (co-sponsor)
Public Interest Law Project (co-sponsor)
Affirmed Housing
AMCAL
AMG & Associates, LLC
California Housing Partnership
CRP Affordable Housing and Community Development
East Bay YIMBY
Eden Housing
Grow the Richmond
How to ADU
John Burton Advocates for Youth

LINC Housing
Merritt Community Capital Corporation
Midpen Housing Corporation
Mountain View YIMBY
Napa-Solano for Everyone
Northern Neighbors
Peninsula for Everyone
People for Housing Orange County
Progress Noe Valley
Resources for Community Development
San Francisco Bay Area Planning and Urban Research Association
San Francisco YIMBY
San Luis Obispo YIMBY
Santa Cruz YIMBY
Santa Rosa YIMBY
Satellite Affordable Housing Associates
South Bay YIMBY
Southside Forward
The John Stewart Company
The Pacific Companies
Urban Environmentalists
Ventura County YIMBY
YIMBY Action
YIMBY Law

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 393 (Glazer, 2023) requires a plaintiff or petitioner in an action brought pursuant to CEQA relating to a housing development project, as defined, to disclose the identity of a person or entity that contributes in excess of \$5,000 toward to cost of the action, as provided. The bill would provide that a failure to comply with these requirements may be grounds for dismissal of the action by the court. The bill also prohibits an action or proceeding from being brought in the court to attack, review, set aside, void, or annul an act of a public agency for housing projects, included in a master environmental impact report or other plan or project already approved following the completion of an environmental review, on grounds of noncompliance with CEQA, as specified, and that further environmental reviews are not subject to this provision. SB 393 is set to be heard by this Committee on the same day as this bill.

SB 794 (Niello, 2023) requires anyone challenging a project under CEQA to file an affidavit with the court identifying anyone who has contributed \$100 or more - in financial or in-kind support - to support the effort. The bill also requires CEQA challenges to certain commercial, housing, or public works projects where a minimum of \$25 million has been invested to be resolved by the court in 365 days or fewer. SB 794 failed passage in the Senate Environmental Quality Committee, but was granted reconsideration.

Prior Legislation: SB 1264 (Lockyer, Ch. 726, Stats. 1992) *See* Comment 2.
