Of Sexy Phone Calls and Well-Aimed Golf Balls: Anti-SLAPP Statutes in Recent Land-Use Damages Litigation

Paul D. Wilson*

LATE IN THE TWENTIETH CENTURY, many state legislatures detected a dangerous trend: real estate developers, upset about opposition to their projects, were cowing project opponents into submission by filing frivolous lawsuits against them. These legislatures responded by enacting what are commonly called "Anti-SLAPP" statutes, whose goal is to let the project opponent out of the courthouse almost as quickly as the developer dragged him in, and to let him out at the developer's expense, at that.

"SLAPP" is an acronym for Strategic Lawsuit Against Public Participation. Developers file SLAPP suits against project opponents who participate in public permitting processes by, for example, circulating petitions, testifying at public hearings, and filing appeals of zoning decisions. Whether a SLAPP suit has merit is irrelevant because the developer's goal is not to collect damages, but to cool the ardor of the project opponents.

In response to such tactics, the legislatures of twenty states have enacted Anti-SLAPP statutes.[1] The Massachusetts statute, at issue in two of the most interesting Anti-SLAPP land-use cases of 2002, is a good example. Like most Anti-SLAPP statutes, the Massachusetts law provides that a defendant sued for "exercise of its right to petition under the constitution of the United States or the commonwealth"[2] may immediately bring a "special motion to dismiss" that lawsuit.[3] The filing of this special motion stays all discovery, and, if the defendant succeeds in getting a case dismissed, the plaintiff must pay the defendant's reasonable attorney fees incurred in the lawsuit.[4] The statute defines pe-

*Paul D. Wilson is a member of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. in Boston, Massachusetts. He received his A.B. from Princeton University in 1975 and his J.D. from New York University in 1981. The author gratefully acknowledges the assistance of his colleague Helen Gerostathos with the research for this article.

1. Those states are: Delaware, Florida, Georgia, Hawaii, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, and Washington. The statutory citations can be found at http://www.casp.net/menstate.html.
2. MASS. GEN. LAWS. ch. 231, § 59H (West 2003).
3. *Id.*
4. *Id.*

titioning activities to include, among other things, "any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration . . . ."[5]

Like the Massachusetts statute, many Anti-SLAPP statutes do not actually mention real estate developers or project opponents. In most states, the statutory language is so broad that defendants in lawsuits who are far removed from the land-use area can seek its protection.[6] Indeed, litigation involving the California Anti-SLAPP statute has strayed so far from the original developer/opponent paradigm that in 2002 the California legislature passed a bill that would have made the Anti-SLAPP special motion to dismiss unavailable to certain categories of defendants, particularly those engaged in the sale or lease of goods and services.[7] However, Governor Gray Davis vetoed the bill.[8]

This article will consider only the paradigm case: lawsuits brought by real estate developers or owners against others who participate in public processes, resulting in a special motion to dismiss on Anti-SLAPP grounds. In 2002, four variations on that paradigm illustrate the development of Anti-SLAPP laws. The two Massachusetts cases among them also add a little factual spice, involving, as they do, telephone sex and the use of golf balls as weapons.

I. The Classic Case Arises in Washington

An opinion of the Supreme Court of Washington, *Right-Price Recreation, LLC v. Connells Prairie Committee Council*,[9] illustrates exactly what most state legislatures had in mind when they enacted Anti-SLAPP laws. The plaintiff real estate developer sought government approval for proposed subdivisions, and opposition groups sprang up.

5. *Id.*

6. In 2002 alone, for example, appellate courts have considered Anti-SLAPP motions in a lawsuit for fraud against the independent trustee of an investment company, *Navellier v. Sletten*, 52 P.3d 703 (Cal. 2002); a lawsuit alleging that a former girlfriend had abused process when obtaining a domestic violence protection order, *Fabre v. Walton*, 781 N.E.2d 780 (Mass. 2002); and a lawsuit between school teachers and organizers of a protest at the school, *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733 (Cal. 2002). Even junk bond king and convicted felon Michael Milken, hardly the stereotypical easily intimidated protestor of limited means, has used an Anti-SLAPP statute to obtain dismissal of a lawsuit against him. Gail Diane Cox, *Pushing the SLAPP Envelope*, 156 N.J.L.J. 276 (1999).

7. S.B. 789, 2001–02 Sess. (Cal. 2002).

8. Jeff Chorney, *Davis Smacks Down Bill to Revise Anti-SLAPP Motions*, THE RECORDER 1, Oct. 2, 2002.

9. 46 P.3d 789 (Wash. 2002).

The developer reacted by suing the groups themselves, their officers, and even the spouses of their officers, for slander and commercial disparagement, for interference with the developers' contracts with the local sewer authority, for interference with the hearing process, and for civil conspiracy. Apparently believing that the lawsuits by themselves would not be sufficiently chilling, the developer then served discovery requests seeking copies of the groups' membership lists and mailing lists, correspondence the groups had sent to other nonprofits, and minutes of all of their meetings. Faced with the expensive task of responding to the intrusive discovery, and perhaps concerned that the developers were looking for additional parties to sue, the project opponents responded with a special motion to dismiss, under the Washington Anti-SLAPP statute.

The Washington Supreme Court had no trouble finding that the opponents had been sued for statements they had made to a county council, and that those statements were protected activity under the Anti-SLAPP statute, formerly Wash. Rev. Code § 4.24.510.[10] The Washington statute, the court found, immunizes public hearing participants from liability for such statements.[11] This immunity is not absolute because the special motion to dismiss must be denied if the developer demonstrates abuse of the Anti-SLAPP privilege. But in this case, "[e]ven if there had been statements at the [county council] meetings which were claimed to be defamatory, the citizens' groups were entitled to immunity under former RCW 4.24.510 as Right-Price totally failed to establish clear and convincing evidence that the groups' statements were made with actual malice."[12]

In opening the door ever so slightly for real estate developers to defeat an Anti-SLAPP special motion to dismiss, the Washington Supreme Court was relying on the fact that the Anti-SLAPP statute, as then construed, only protected statements made to a public official "in good faith."[13] The Washington legislature amended its Anti-SLAPP statute in 2002 to remove the words "in good faith" from section 4.24.510, although apparently not in response to *Right-Price*, because that opinion mentions that the statute had already been amended.

10. *Id.* at 795–96.
11. Wash. Rev. Code § 4.24.510 then stated: "A person who in good faith communicates a complaint or information to any agency of federal, state or local government . . . is immune from civil liability for claims based upon the communication to the agency . . . regarding any matter reasonably of concern to that agency. . . ." *Id.* at 796.
12. *Id.* at 796.
13. *Id.*

Thus, the state legislature may have closed the door altogether to real estate developers attempting to get past Anti-SLAPP special motions to dismiss. Perhaps not because, even in its revised version, section 4.24.510 is titled "Good faith communication to government agency or self-regulation Organization – Immunity,"[14] and, more to the point, the legislative findings that support this immunity, found in section 4.24.500, still say that the purpose of the Washington Anti-SLAPP statute "is to protect individuals who make *good-faith* reports to appropriate governmental bodies"[15] (emphasis added).

II. The Massachusetts Supreme Judicial Court Defines "Petitioning Activity" Broadly

The citizens groups in *Right-Price* were engaging in the classic "petitioning activity": asking a government body not to grant a land-use development permit because they thought the development was a bad idea as a matter of policy or principle. But what if the real estate controversy is not about the permitting of a new proposed development, but about the use of an old one? In addition, what if the recipient of the "petition" is not a traditional governmental agency granting a permit, but rather a quasi-governmental agency engaging in a private transaction? Finally, what if the citizen is petitioning, not as a matter of principle, but because she is in it for the money? All those facts were present in *Office One, Inc. v. Lopez*[16]—and so was telephone sex. Despite these departures from the classic SLAPP paradigm, the Massachusetts Supreme Judicial Court found that the petitioning activities at issue were protected, and affirmed the dismissal of the plaintiffs' claims and a six-figure legal fee award to the defendants.

Office One concerned a preexisting condominium in Cambridge, Massachusetts, consisting of 166 luxury residential units and eight office or commercial units. During the real estate meltdown of the early 1990s, the Federal Deposit Insurance Corporation (FDIC), apparently as receiver of a failed bank, found itself owning several of the office and commercial units. One of the residents of the condominium, Mr. Silver, who apparently wanted his commute to be a short elevator ride, sought to purchase four of the office/commercial units from the FDIC, so he could move his business into the building in which he lived. That business, it turned out, was the sale of telephone sex.[17] Since telephone

14. WASH. REV. CODE § 4.24.410 (2002).
15. *Id.* § 4.24.500.
16. 769 N.E.2d 749 (Mass. 2002).
17. *Id.* at 753.

sex is not a 9-to-5 operation, Silver's fifteen to twenty-five workers per shift needed round-the-clock access to the condominium's garage and also wanted to use the condominium swimming pool and health club.

Many of the residents of this condominium were apparently unwilling to swim in a pool also used by people who had sex, however virtual, for a living, and opposition to Silver's proposed purchase of the units was widespread and vehement. After the FDIC accepted Silver's offer, but before it closed on the sale, numerous trustees and unit owners expressed concern at an open meeting of the condominium association. Petitions soon circulated among unit owners regarding contacting public officials to block the FDIC's sale of the unit to Silver. Certain residents of the condominium, including some of the trustees, appealed to the FDIC not to sell the units to Silver. These opponents also contacted their senator and congressman (this being Massachusetts, both were named Kennedy) and other public officials asking them to put pressure on the FDIC not to go through with the sale. One particularly imaginative resident actually "opened an account" with Silver's business, "obtained an authorization code that allowed him to access services offered,"[18] and then posted a leaflet on the condominium's bulletin board "that listed, in explicit detail, telephone services of a sexual nature allegedly provided by [Silver's business] Pilgrim."[19] Counsel for the condominium association apparently convinced Congressman Kennedy's office to persuade the FDIC to delay the closing for two weeks, but in response to a demand letter from Silver, the FDIC closed on schedule anyway.[20]

The trustees then convinced a compliant Cambridge building inspector to order them to comply with the limitations in the condominium special permit concerning the number of parking spaces that could be devoted to commercial use. When the building inspector found a violation of the special permit's limit of fifteen spaces, the trustees allocated those fifteen commercial parking spaces to the businesses in the condominium on the basis of their seniority, leaving Silver with the ability to use only five of his newly purchased thirty-six spaces for his commercial operation. Silver's corporations appealed that determination to the Zoning Board of Appeals, which upheld it, and to the courts, which ultimately overturned it.[21]

18. *Id.* at 754 n.6.
19. *Id.* at 757 n.14.
20. *Id.* at 754.
21. 769 N.E.2d at 754.

As far as the record shows, it is possible today to call a certain number in Cambridge, Massachusetts and engage in constitutionally protected speech of a sexual nature. Nonetheless, at some point during these proceedings, Silver's corporations sued the trustees, the more vocal resident opponents, and the lawyer for the condominium association. The defendants filed a special motion to dismiss under the Anti-SLAPP statute and the trial court dismissed most counts under that statute.[22]

While the state supreme court conceded that the "typical mischief that the legislation intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects,"[23] it held that the Anti-SLAPP statute provided for "broad protection for other petitioning activities as well."[24] Most of the petitioning activities, which formed the basis for this lawsuit—the contacts with the Kennedys, the enforcement request to the building inspector, the petitions, and the leaflets on the bulletin board—were classic political activism. Therefore, the court found it irrelevant that these petitions did not concern a "development project"[25] or that the petitioners were, as plaintiffs called them, a group of "politically connected individuals in an upscale condominium complex."[26]

One of the trustees, however, had a more self-interested motive for her petitioning: she was a real estate broker and had submitted a bid to the FDIC for the same units on behalf of one of her clients.[27] This trustee was also protected by the Anti-SLAPP statute, the court held, because she was petitioning the government, "notwithstanding the fact that she was doing so for purely economic self-interest."[28]

Nor did it matter to the court that the FDIC was not exactly the county council in *Right-Price* granting a development permit, but rather was a quasi-governmental agency engaged in a commercial transaction. Even when acting as the receiver of a bank, the FDIC acts "in the name of, or on behalf of, the United States" to promote stability of the banking system, and so therefore it was indeed "the government" that the *Office One* defendants were petitioning.[29]

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22. *Id.* at 755–56. As to the others, the court granted summary judgment to the defendants on the theory that Silver's corporations could not state a claim as a matter of law.
23. *Id.* at 757 (quoting Duracraft Corp. v. Holmes Prods. Corp., 691 N.E.2d 935, 940 (Mass. 1998)).
24. *Id.*
25. *Id.*
26. 769 N.E.2d at 756.
27. *Id.* at 758.
28. *Id.*
29. *Id.* at 757 n.15.

So *Office One* expands the protection of the Anti-SLAPP statute well beyond the paradigm, to protect citizens petitioning a quasi-governmental agency engaging in a commercial transaction, having nothing to do with the development of land, and for their own self-interest at that.

III. Georgia and Massachusetts Courts Parse Out Protected Petitioning Activity from Unprotected Sporting Events

Suppose the developer sues the project opponents because of their petitioning, but also accuses the citizens of related wrongdoing. In Georgia and Massachusetts last year, appellate courts carefully examined the defendants' alleged misconduct and dismissed only the claims based directly on petitioning activity.

The Georgia case, *Denton v. Browns Mill Development Co.*,[30] looked very much like a *Right-Price* paradigmatic SLAPP suit from Washington, with one twist. The Georgia Supreme Court found that this twist led to a different result.

Plaintiff Browns Mill was attempting to obtain permits to create a subdivision. Defendant Denton was an open space activist. In order to convince governmental bodies to refuse permits for new subdivisions, Denton prepared a report about allegedly illegal clearing and grading practices by certain developers, including Browns Mill. Denton sent that report to various government agencies and the news media. In typical SLAPP suit fashion, Browns Mill sued Denton for libel and slander, interference with business opportunities, and trespass because Denton could not have taken certain pictures that appeared in his report without trespassing on Browns Mill's land. The Georgia Supreme Court upheld the dismissal of the libel, slander, and interference with business opportunities claims because they were based on protected petitioning activity. The trespass claim, though, was a different story.

The Georgia Supreme Court started from the premise that the purpose of the Anti-SLAPP statute was to "encourage participation by the citizens of Georgia in matters of public significance through the exercise of constitutional right of freedom of speech and the right to petition the government for redress of grievances."[31] The Court noted that Georgia's Anti-SLAPP statute included a laundry list of protected acts, such as written or oral statements in a governmental proceeding, all of which were acts of communication.[32] A trespass, though, is not an act of com-

30. 561 S.E.2d 431 (Ga. 2002).
31. *Id.* at 434.
32. *Id.*

munication.[33] The citizen activist argued that making such fine distinctions would give developers carte blanche to engage in old-time SLAPP tactics by falsely suing their opponents for trespass, thus forcing them to defend those lawsuits. But this possibility did not faze the *Denton* court, which pointed out that citizens sued falsely had other remedies, pointing to the Georgia statutes allowing attorney fees for frivolous lawsuits and creating the tort of abusive litigation.[34]

Denton was a 4–3 decision. In dissent, Chief Justice Fletcher pointed out that the Anti-SLAPP statute said that the protected acts "include" various acts of communication, and the use of the word "include" suggested that other acts were also protected.[35] Another part of the statute, the dissenters pointed out, said that any act was protected that could "reasonably be construed as an act furthering the exercise of [his] constitutional rights to free speech or the right to petition the government."[36] The dissenters would put into that category project opponents' trespasses onto a developer's land to obtain evidence. Nonetheless, the law of Georgia is now that a citizen is entitled to a quick dismissal of any lawsuit brought against him because he has filed a report with a governmental agency, but he had better have gathered the evidence in that report from the public sidewalk.

In another less-than-unanimous decision, a panel of the Massachusetts Appeals Court also looked very carefully at the defendants' conduct to sort the protected petitioning from the unprotected use of athletic gear. *Ayasli v. Armstrong*[37] is a reminder to us all to very carefully inquire into the personalities and sports preferences of our new neighbors before we purchase a home.

Plaintiffs bought a summer cottage in a "[three]-lot compound off a private road leading to a beautiful area overlooking Megansett Harbor"[38] on Cape Cod. One family had owned all three houses "going back five generations."[39] Defendant Armstrong, a member of that family—and plaintiffs' new next-door neighbor—had unsuccessfully bid for the cottage they purchased, unsuccessfully appealing to his aunt's sense of family solidarity in begging her not to sell the family's "anchor to windward" to "outsiders," even while he offered her only about half of the market value of the cottage.[40] After easily outbidding the Arm-

33. *Id.*
34. *Id.* at 435.
35. 561 S.E.2d at 436 (Fletcher, C.J., dissenting).
36. *Id.*
37. 780 N.E.2d 926 (Mass. App. Ct. 2002).
38. *Id.* at 929.
39. *Id.* at 930.
40. *Id.* at 929.

strongs for the cottage, plaintiffs sought to renovate the cottage into a year-round residence. Those renovations required various permits from local government bodies. Plaintiffs obtained some of these permits over the opposition of the Armstrongs, but they did not even apply for others until the Armstrongs complained to town officials. These officials directed plaintiffs to file the requisite applications, providing other opportunities for the Armstrongs to express their feelings at municipal hearings.

The Armstrongs also expressed those feelings directly to plaintiffs in a variety of "neighborly" ways. *A la Denton*, Ms. Armstrong trespassed to take pictures, claiming to plaintiffs that she considered their property to be her "backyard." On another occasion, she said, "now that the house was down [during renovations], she wanted it to stay down."[41] When, after obtaining yet another permit, plaintiffs' lawyer asked Ms. Armstrong if there was a way to resolve their differences, she told him: "This is not the end. We will do everything we can to stop this project."[42] Ms. Armstrong told plaintiffs' contractor that she hoped that the plaintiffs' property would become "conservation land."[43]

The Armstrongs also expressed their views in other ways. They erected a gate to block a common driveway, putting up a sign directing plaintiffs and their workmen to use an old right of way, which was impassable.[44] The Armstrongs' dogs frightened plaintiffs' children because they "appeared to be chasing them" as the children walked along the common drive.[45] The children were unaware that the dogs were actually controlled by an electronic fence—but not completely, since the dogs appeared on plaintiffs' property "[o]n at least one occasion."[46] Finally, the Armstrongs continued an old family tradition of driving golf balls from their property into the sea, undeterred by the fact that plaintiffs' children now swam in that ocean and played on the beach.[47]

Near the end of the permitting process, plaintiffs sued the Armstrongs, but not for the usual torts. They sought damages under the Massachusetts civil rights statute, which does not require state action, but does require that the defendants interfered "by threats, intimidation, or coercion" with the exercise of rights secured by the constitution or laws of the United States or of Massachusetts.[48] Their protected right,

41. *Id.* at 931.
42. 780 N.E.2d at 931.
43. *Id.* at 930.
44. *Id.* at 930–31.
45. *Id.* at 929.
46. *Id.* at 930.
47. 780 N.E.2d at 930.
48. MASS. GEN. LAWS ANN. ch. 12, §§ 11H, I (West 2003).

plaintiffs' said, was the state constitutional right to use and enjoy their property.[49] The defendants responded by counterclaiming for abuse of process and by filing an Anti-SLAPP motion to dismiss, which, after hearing, "was denied without comment."[50] At trial, the jury awarded plaintiffs $211,000 in damages, to which the trial judge added attorney fees and costs of $160,000—the total far exceeding what the Armstrongs had offered their aunt for the property itself.

On appeal, the Armstrongs argued that the trial court should have allowed their Anti-SLAPP special motion to dismiss.[51] Like the Georgia court in *Denton*, the Massachusetts Appeals Court decided that plaintiffs' lawsuit was aimed at some protected petitioning activity, but also had an "independent basis."[52] The defendants were intentionally interfering with plaintiffs' right to use and enjoy their property,[53] the court said, citing Ms. Armstrong's statements that she wanted the house to "stay down" and that she would do everything that she could to stop work on the house.[54] Under *Bell v. Mazza*[55] and *Pheasant Ridge Ass'n Ltd. Partnership v. Burlington*,[56] such statements could provide the "threats, intimidation, or coercion" necessary for liability under the state's civil rights act.

However, such statements were all acts of communication arguably protected by the Anti-SLAPP law. Perhaps concerned about that possibility, the appeals court looked for bases for the lawsuit beyond mere petitions to the government and statements about those petitions. The *Ayasli* court found them in the Armstrongs' "erection of the sign directing those trying to reach the Ayaslis' property to an impassable way, the threatening dogs at the boundaries of the Ayaslis' property, and the golf balls falling on the Ayaslis' beach where the children swam."[57] Therefore, the appeals court ruled that the trial court had properly denied the Anti-SLAPP motion to dismiss.

In this case, unlike *Denton*, that meant that the entire controversy properly went to trial. In *Denton*, the real estate developer brought separate counts against the environmental activist, some of them aimed

49. MASS. CONST. pt. 1, arts. 1, 10, 12.
50. *Ayasli*, 780 N.E.2d at 932.
51. *Id.* at 933.
52. *Id.*
53. *Id.*
54. *Id.*
55. 474 N.E.2d 1111, 1115 (Mass. 1985).
56. 506 N.E.2d 1152, 1159 (Mass. 1987). The author and his more senior colleague Michael Gardener were the victorious lawyers for the real estate developer in *Pheasant Ridge*.
57. *Ayasli*, 780 N.E.2d at 934.

at protected activity, while one, the trespass claim was not. The court could dismiss most of the claims under the Anti-SLAPP statute and let one survive. Here, however, the petitioning and the unprotected activity together formed the basis for the unitary civil rights count, and so the court found that there was no error in letting the entire case go to trial, without discussing the fact that the jury's verdict in favor of Plaintiffs might well have been based in part on the Armstrong's protected petitioning activity.

In *Ayasli*, as in *Denton*, the appellate judges could not agree on the proper resolution of the case. The dissenting judge on the three-judge panel believed "the Ayaslis' civil rights claim against the defendants had no substantial basis other than the Armstrongs' lawful petitioning activities,"[58] petitioning activities that were "factually supported, arguably based in the law, and generally successful," at that.[59] The dissenter referred to Ms. Armstrong's threats as "[h]uffing and puffing . . . during [a] neighborhood dispute[]. . . ."[60] The dissenter described the Armstrongs' custom of hitting golf balls across plaintiffs' property into the ocean as "a questionable practice that had become traditional with their family . . . ,"[61] but noted that the "record does not suggest, however, that this practice was ever carried on when the beach was in use."[62] However, the dissenter's larger concern was his belief that the majority had elevated a "neighborhood imbroglio" into a state civil rights violation "merely because one of the participants prove[d] intemperate or inconsiderate."[63] Thus, the state appeals court judge was echoing what federal judges say regularly in dismissing federal civil rights claims under 42 U.S.C. § 1983 in land use disputes.[64]

Even so, the dissenting judge did not criticize the trial judge for refusing to grant the Anti-SLAPP motion to dismiss at the outset because the trial judge's view at the time was based solely on the pleadings and affidavits; therefore, it was only at trial that it became obvious, the dissenter suggested, that the lawsuit had no substantial basis beyond the petitioning activities.[65] Thus, even the dissenter believed that plain-

58. *Id.* at 940 n.1 (Rapoza, J., dissenting).
59. *Id.* at 941.
60. *Id.* at 942.
61. *Id.* at 943.
62. 780 N.E.2d at 943.
63. *Id.*
64. *See, e.g.*, Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822 (1st Cir. 1982) and its progeny; *see also* Paul D. Wilson, *When Sending Flowers Is Not Enough: Developments in Landowner Civil Rights Lawsuits Against Municipal Officials*, 34 URB. LAW. 981, 989 (2002).
65. *Ayasli*, 780 N.E.2d at 940 n.1 (Rapoza, J., dissenting).

tiffs had alleged enough to survive an Anti-SLAPP motion to dismiss; however, his course of action would have been to grant a motion for directed verdict on the substantive claim of the civil rights violations at trial.[66]

IV. Conclusion

In twenty states, Anti-SLAPP statutes now protect project opponents who protest proposed land use developments, as in *Right-Price*, and even those who petition the government about its disposition of existing real estate in a commercial transaction, as in *Office One*. But, as *Denton* and *Ayasli* demonstrate, the protestors had better limit their activities to classic political activism. For Anti-SLAPP protection, it turns out, there is an ocean of difference between driving public officials crazy with a flood of protests about a neighbor's permit application, and driving those neighbors crazy by driving golf balls over their property into the sea.

66. *Id.* at 943.