

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CITY OF SANTA ROSA,

Plaintiff and Appellant,

v.

VILLAGES AT WILD OAK
ASSOCIATION et al.,

Defendants and Respondents.

A134107

(Sonoma County
Super. Ct. No. SCV248544)

This case arises out of a dispute about whether bicyclists have an easement to ride on private property owned by defendants. The City of Santa Rosa (City) brought this action against defendants Villages at Wild Oak Association (Villages) and the Roman Catholic Bishop of Santa Rosa (Church), asserting bicyclists and equestrians had such an easement and seeking declaratory relief, abatement of violations of the City codes, and prescriptive public easement. Villages cross-complained against the City, asserting causes of action for declaratory relief, abatement of a nuisance, trespass, quiet title, restitution for surcharge of easement, and inverse condemnation. The City responded by filing a special motion to strike the first amended cross-complaint under Code of Civil Procedure¹ section 425.16, the anti-SLAPP (strategic lawsuit against public participation) statute. The trial court denied both the anti-SLAPP motion and Villages' request for sanctions.

¹ All statutory references are to the Code of Civil Procedure.

In its appeal, the City challenges the trial court’s order denying its anti-SLAPP motion. In its cross-appeal, Villages challenges the order denying its request for sanctions. We shall affirm the order in its entirety, but shall order the City to pay sanctions on appeal.

I. BACKGROUND

A. The Complaint

The complaint, as later amended in a first amended complaint, alleged that defendants owned three parcels (collectively “the property”) within the boundaries of the City, and that a 20-foot-wide public access easement existed on all three parcels along a former railroad road bed and right-of-way. The Wild Oak subdivision (the subdivision) shares a boundary with Annadel State Park, and the easement extends to a portion of the development that abuts the state park. The subdivision was developed as a gated community with private roads. According to the first amended complaint, when the Santa Rosa City Council changed the zoning of the property in 1977 to allow the subdivision to be developed, it incorporated into its ordinance a policy statement providing in part: “Public access to Annadel State Park shall be provided by easements through the Wild Oak property for pedestrian, equestrian and bicycle access. This access may be along the route shown on the development plan which parallels the old railroad bed.”² In approving the tentative map for the subdivision, the City’s Planning Commission adopted a resolution (Resolution 3915) setting as one of the conditions: “Public access to Annadel State Park shall be provided for pedestrians, equestrians, and bicycles via an improved easement paralleling the old railroad bed or in a location approved by the Department of Community Development.” An easement deed that was recorded in November 1980, however, granted an easement “for the purposes of Public Pedestrian and Emergency Vehicle Access.” It did not mention bicycle or equestrian access. The final map that was recorded a month later depicts and offers to the public a

² In reciting the allegations of the operative pleadings, we express no opinion on the merits of the City’s action against defendants. Our concern in this appeal is solely the propriety of the trial court’s ruling on the City’s anti-SLAPP motion.

“public pedestrian and emergency vehicle access easement.” At about the same location of the easement, the final map depicted “Timber Springs Drive (private road).” The first amended complaint alleged that a City Engineer and City Director of Community Development “inadvertently certified the Final Map,” but that they did not have power to amend the conditions of approval of the tentative map or to waive the public’s right of access without a public hearing or approval of the City Council or Planning Commission.

According to the first amended complaint, bicycles, equestrians, and pedestrians used the easement without dispute between 1980 and 2008. Sometime in or about 2008, however, “no trespassing” signs were posted in or about the easement, without permit or city approval. Some of the signs said: “Pedestrians and Official Vehicles Only. NO BICYCLES.” The City repeatedly notified Villages that the easement included pedestrians, equestrians, and bicyclists and that unpermitted signs must be removed. Villages denied that the public had any access rights, or, in the alternative, took the position that the scope of the easement was limited to pedestrians and official vehicles. Villages refused to remove its signs. The complaint also alleged that the Church had constructed approximately ten handicapped parking spaces, an access ramp, and signage in the public access easement, creating conflicts between the users of the easement and of the parking lot.

B. The First Amended Cross-complaint

Villages cross-complained. In its July 2011, first amended cross-complaint (the cross-complaint), Villages alleged the easements of record were for the passage of pedestrians and emergency vehicles only. According to Villages, Resolution 3915 did not set a definitive location for the “aspirational and eventual goal of public bicycle and/or equestrian access to Annadel.” Villages alleged that the “deletion of any mention of public access for bicyclists and equestrians” between the City’s approval of the tentative map and its approval of the final map “was deliberate and intentional” on the City’s part.

In its first cause of action, Villages sought a declaration that the City was bound by the restriction of the easement to pedestrians and emergency vehicles only; that the

City had no right to expand the easement to include bicycle or equestrian access by the general public; that the City be enjoined from trying to so expand the easement; that the “ongoing efforts by [the City] to interpret and include bicycle and pedestrian access” in the easement constituted a public and private nuisance; that the establishment of an undifferentiated easement for bicycle and equestrian traffic as well as pedestrian and emergency vehicle traffic had been performed in a defective manner, so as to constitute a nuisance; and that the public had not obtained any prescriptive right of use of the easement for bicycling or equestrian purposes.

In its second cause of action, for abatement of a public and private nuisance, Villages alleged the City had “encouraged, aided, and abetted” the entry of large numbers of bicyclists into the Church’s handicapped parking lot and onto Villages’ property, and that the overburdening of the easement beyond its express terms had become an ongoing nuisance by “interfer[ing] with the free passage of innumerable pedestrians, elderly persons with walkers, wheelchairs, parents and guardians with baby carriages, forcing them aside on the narrow pathways, and impeding and blocking both vehicular and pedestrian traffic” Moreover, the manner in which public access had been enlarged—without regulating or segregating the bicycles from the pedestrian traffic—constituted a public and private nuisance.

In its third cause of action, for trespass, Villages alleged that beginning approximately two years previously, the City had “demanded that the subject easement be enlarged in scope and width to accommodate unlimited and unrestricted bicycle traffic,” and “de facto encouraged the general public from outside the subdivision and neighborhood to traverse the subdivision by bicycle without the consent of Cross-Complainant, and to use the full width of that section of Timber Springs Drive to the side of which the public pedestrian easement runs, for racing and gymnastics, all to the detriment and discomfort of homeowners and others who depend on the street for ambulation in the neighborhood.” Moreover, the City had “purposefully and deliberately failed and shunned its governmental obligations to maintain these easements for their dedicated purpose, and to discourage and suppress the invasions of disorderly bicyclists

who crowd pedestrians off the paths and blockade Timber Springs Drive for their personal recreation.”

In its fourth cause of action, to quiet title, Villages sought a declaration that the City’s claim of a bicycle and pedestrian easement was meritless and void.

In its fifth cause of action, for restitution, Villages alleged the City’s action “in purporting to enlarge the subject public easement to include access for bicyclists and equestrians within its scope” constituted an unlawful surcharge for which restitution was owed.

In its sixth cause of action, for inverse condemnation, Villages alleged that from and after the time the City had “turned hostile to the complaints of Wild Oak residents” in 2008, the City was developing a revision of its master bicycle and pedestrian plan. Villages objected to inclusion of the “existing pedestrian easement” in the plan, and “pleaded to the Commission to drop the project (called Route 231) until final judgment could come down in this action.” The City Council “rejected the pleas of the Wild Oak homeowners and included the challenged route in the final plan.” Villages alleged the “coordinated efforts” to “pursue a relentless course” toward imposing an easement for bicyclists was clouding the title of the homeowners and diminishing the value of their property.

C. The Anti-SLAPP Motion

The City brought a special motion to strike the cross-complaint under section 425.16. Villages opposed the motion and requested attorney fees as sanctions. (§ 128.5.) The trial court denied both the City’s anti-SLAPP motion and Villages’ request for sanctions.

II. DISCUSSION

A. Protected Activity

Section 425.16 provides in pertinent part: “(a) The Legislature finds and declares 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. The Legislature finds and declares that 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. To this end, this section shall be construed broadly. [¶] (b)(1) 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, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” An act in furtherance of the constitutional right of free speech in connection with a public issue includes: “(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) 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, (3) 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 (4) 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.” (§ 425.16, subd. (e).)

Under this statute, “ ‘the court makes a two-step determination: “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation.] ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause fits one of the categories spelled out in section 425.16, subdivision (e)’ [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citation.]” [Citations.] “Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” [Citation.] [¶] A ruling on a special motion to strike under section 425.16 is reviewed de novo. [Citation.] This includes whether the anti-SLAPP statute applies to the challenged claim. [Citation.] Furthermore, we apply our

independent judgment to determine whether [plaintiff's] causes of action arose from acts by [defendant] in furtherance of [defendant's] right of petition or free speech in connection with a public issue.' ” (*Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, 609–610.)

In order to show that a challenged cause of action is one “ ‘arising from’ protected activity,” “the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff’s cause of action itself was *based on* an act in furtherance of the defendant’s right of petition or free speech.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76, 78 (*Cotati*).)³ The fact that a cause of action may have been triggered by protected activity does not mean it *arose* from that activity. (*Id.* at p. 78.) We look to the gravamen of the plaintiff’s cause of action to determine whether the anti-SLAPP statute applies. “[W]hen the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.” (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188; see also *Cotati*, 29 Cal.4th at p. 79.)

Our colleagues in Division Two of the First Appellate District discussed this rule in detail in *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees’ Retirement Assn.* (2004) 125 Cal.App.4th 343 (*San Ramon Valley*). There, the board of a county retirement system voted at a meeting to adopt an increase in county employees’ retirement contributions, and a fire protection district sought mandamus relief as to the amount of the increase. (*Id.* at pp. 347–348.) The board filed an anti-SLAPP motion, which the trial court denied. (*Id.* at p. 349.) In affirming the trial court’s order, the appellate court noted that there was support for the argument that the protection of the

³ To decide whether an action arises from protected activity, we consider not just the pleadings, but also the supporting and opposing affidavits stating the facts on which liability is based. (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1232 (*Tuchscher*).)

anti-SLAPP statute extended to statements made by public officials at a public meeting, and perhaps also to their votes. (*Id.* at p. 353, citing, inter alia, *Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 183–184, fn. 3.) However, the court went on, “there is nothing about the Board’s collective action in requiring the District to make additional contributions to the [retirement association] in the amount specified by the Board’s actuary that implicates the rights of free speech or petition. As our Supreme Court has put it, ‘the mere fact that an action was filed after protected activity took place does not mean it *arose from* that activity.’ ” (*San Ramon Valley*, 125 Cal.App.4th at p. 353, citing *Cotati, supra*, 29 Cal.4th at pp. 76–77.) The court went on: “[T]he fact that a complaint alleges that a public entity’s action was taken as a result of a majority vote of its constituent members does not mean that the litigation challenging that action *arose from* protected activity, where the measure itself is not an exercise of free speech or petition. Acts of governance mandated by law, without more, are not exercises of free speech or petition.” (*San Ramon Valley*, 125 Cal.App.4th at p. 354.) The court expressed the crucial distinction as follows: “[T]he board was not sued based on the content of speech it has promulgated or supported, nor on its exercise of a right to petition. The action challenged consists of charging the District more for certain pension contributions than the District believes is appropriate. This is not governmental action which is speech-related. By contrast, if the action taken by the Board had been to authorize participation in a campaign to amend state pension laws, or to become actively involved in a voter initiative seeking such changes, then the Board’s own exercise of free speech might be implicated. But this is not the case, and this distinguishing feature is dispositive of the Board’s argument.” (*Id.* at p. 357.)

The court went on: “To decide otherwise would significantly burden the petition rights of those seeking mandamus review for most types of governmental action. Many of the public entity decisions reviewable by mandamus or administrative mandamus are arrived at after discussion and a vote at a public meeting. [Citations.] If mandamus petitions challenging decisions reached in this manner were routinely subject to a special motion to strike . . . the petitioners in every such case could be forced to make a prima

facie showing of merit at the pleading stage. [That result] would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power, which is at the heart of those remedial statutes. It would also ironically impose an undue burden upon the very right of petition for those seeking mandamus review in a manner squarely contrary to the underlying legislative intent behind section 425.16.” (*San Ramon Valley, supra*, 125 Cal.App.4th at pp. 357–358, fn. omitted.)

In an analogous case, the court in *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207 (*Graffiti*) considered whether an action for mandamus and declaratory relief was subject to the anti-SLAPP statute. The plaintiff there had a municipal contract to maintain a city’s bus stops. After four years, the city terminated the contract as permitted and, without inviting competitive bids, entered into a new contract with another company. (*Id.* at p. 1211.) The plaintiff brought its action to invalidate the new contract and compel the city to award the contract through competitive bidding. The city filed an anti-SLAPP motion, which the trial court granted. (*Ibid.*)

The appellate court reversed. It noted first that although prelitigation communications between the city and others were helpful in establishing the events leading up to the termination of the contract, the plaintiffs’ claims were not *based* on those communications, but rather on state and municipal laws requiring the city to award certain contracts through competitive bidding. (*Graffiti, supra*, 181 Cal.App.4th at p. 1215.) The court stated, “[Plaintiff] does not contend that any statement or writing by the City is actionable. And the City’s conduct—entering into a contract with NES absent bidding—was not undertaken in furtherance of the City’s right of petition or free speech.” (*Id.* at p. 1218.) After discussing the pertinent case law, including *Cotati* and *San Ramon Valley*, the court concluded the action did not implicate the city’s petition and free speech rights, reasoning that the claims were not based on communications between the city and others, but on competitive bidding laws, and that liability was not based on the communications themselves. The court stated: “That City officials may have deliberated in deciding whether to invite bids in selecting [plaintiff’s] successor does not mean the City exercised its right of petition or free speech. [Citation.] *The substance of the City’s*

decision was not protected activity.” (*Id.* at p. 1224, italics added.) The court quoted with approval *San Ramon Valley*’s statement that any other result would burden the rights of those seeking mandamus review of governmental actions, and concluded, “[t]he same may be said of a declaratory relief action that challenges the validity of governmental conduct. And the chilling effect of requiring the plaintiff in an action for a writ of mandate or declaratory relief to make a prima facie showing of merit at the pleading stage is of particular concern because a defendant who prevails on an anti-SLAPP motion is entitled to an award of attorney fees.” (*Id.* at pp. 1225, citing *San Ramon Valley*, *supra*, 125 Cal.App.4th at pp. 357–358.)

The court in *USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 62–65 (*USA Waste*), applied this reasoning in a case procedurally similar to the one before us now. United Rock Products Corporation operated a sand and gravel pit in the City of Irwindale, subject to certain conditions, among them the requirement that the fill be compacted to a rate of 90 percent bulk density or a lesser percent if approved by the city engineer.⁴ (*Id.* at pp. 56–57.) A subsequent lessor of the pit, USA Waste, agreed to the same conditions. (*Id.* at p. 58.) The city later adopted guidelines providing for a higher compaction rate of 93 percent, and told USA Waste that the higher compaction rate applied to the pit. (*Ibid.*) The city issued a notice of violation (NOV) alleging the pit was in violation of both the original and the later, more stringent, fill standards. A previous assignee of the pit brought a declaratory relief action against United Rock and USA Waste, and USA Waste cross-complained against the prior assignee and the city, alleging causes of action against the city for declaratory relief, breach of contract (the standstill and tolling agreement), and equitable estoppel. (*Id.* at p. 59.) The city filed an anti-SLAPP motion, which the trial court denied. (*Id.* at p. 60.)

⁴ The city had originally approved United Rock’s “Reclamation Plan” for reclaiming the land. Disputes arose between the parties after United Rock began to backfill the pit in accordance with the reclamation plan, and the parties entered into a “Standstill and Tolling Agreement,” which stayed the litigation and resolved some of the disputes. This agreement provided for the 90 percent compaction rate. (*USA Waste*, *supra*, 184 Cal.App.4th at p. 57.)

The Court of Appeal affirmed this order, holding that a cross-complaint based on land use guidelines issued by a city was not subject to the anti-SLAPP statute. (*USA Waste, supra*, 184 Cal.App.4th at p. 56.) First, the court concluded USA Waste’s cross-complaint was not based on protected activity. The city had argued that by issuing the NOV, it engaged in protected speech in connection with an official proceeding for purposes of section 425.16. (*Id.* at p. 62.) The appellate court rejected this argument, stating that even if the issuance of the NOV was protected speech, the causes of action in the cross-complaint “[were] not based on the City’s issuance of the NOV. The causes of action concern whether the Reclamation Plan and the Standstill and Tolling Agreement govern the manner in which USA Waste is required to compact the fill in Pit No. 1, whether the City is bound to the Reclamation Plan and the Standstill and Tolling Agreement, and whether City may add to or alter the requirements in the Reclamation Plan and the Standstill and Tolling Agreement through enactment of the Guidelines. That is, the ‘principal thrust or gravamen’ of USA Waste’s causes of action concerns the applicable compaction standards for Pit No. 1 and not the filing of the NOV.” (*Id.* at p. 63.) These sorts of claims, the court continued, were not within the reach of the anti-SLAPP statute. (*Id.* at p. 64.) The court concluded: “*Actions to enforce, interpret or invalidate governmental laws generally are not subject to being stricken under the anti-SLAPP statute.* If they were, efforts to challenge governmental action would be burdened significantly.” (*Id.* at p. 65, italics added.)

The City makes no attempt whatsoever to grapple with this holding of *USA Waste*. The City first argues that the reasoning of *San Ramon Valley* and *Graffiti* do not show an intention to extend their reasoning from mandamus actions to the types of claims in the cross-complaint here. But *Graffiti* by its terms applies to claims for declaratory relief challenging the validity of governmental conduct—a claim Villages made here. (*Graffiti, supra*, 181 Cal.App.4th at p. 1224.) More importantly, *USA Waste* expressly held the reasoning of *San Ramon Valley* and *Graffiti* applicable to a cross-complaint alleging causes of action based on a public entity’s interpretation of its land use laws, including claims for breach of contract and equitable estoppel. The City, however, simply ignores

the primary holding of *USA Waste* and instead distinguishes that case based on its *alternate* holding that, even if the claims at issue were based on speech within the meaning of section 425.16, they were not sufficiently connected to a public issue or a matter of public interest to be protected by the anti-SLAPP statute. (See *USA Waste, supra*, 184 Cal.App.4th at pp. 65–66.) Thus, the City distinguishes *USA Waste* on the ground that it involved a “private contract dispute,” and therefore does not apply here, where the claim is for “tort damages” for the use of a public easement which “was [the] subject of public hearings.”

Here, the gravamen of Villages’ claims against the City is its contention that the City has wrongly interpreted and attempted to enforce the easement. At the heart of each of its causes of action is the theory that the easement through the subdivision does not include access for bicyclists, as the City asserts. The fundamental issues in this case are the proper interpretation of the scope of that easement and, by extension, the City’s right to include the easement in its bicycle and pedestrian plan. In these circumstances, we reach the ineluctable conclusion that the cross-complaint does not arise from protected activity; rather, this is an “[a]ction[] to enforce, interpret or invalidate governmental laws,” that is “not subject to being stricken under the anti-SLAPP statute.” (*USA Waste, supra*, 184 Cal.App.4th at p. 65.)

The City argues that the cross-complaint alleges protected speech. To show protected activity, the City draws our attention to the cross-complaint’s allegations that the City “encouraged, aided, and abetted” bicyclists to enter Villages’ property; that the City “demanded” that the easement be enlarged in scope and width to accommodate greater bicycle traffic; that the City “failed and shunned” its governmental obligations to maintain the easements for their dedicated purpose; that the City “turned hostile” to the complaints of Wild Oak residents and after a city council meeting “rejected the pleas of the Wild Oak homeowners and included the challenged route in the final [master bicycle and pedestrian] plan”; and that the City “pursue[d] a relentless course” toward “the imposition of a[] burdensome public easement for unlimited intrusion by bicyclists.” Some of these allegations may arguably be read to allege speech—in particular, that the

City encouraged bicyclists to use the easement and that it included the easement in the bicycle and pedestrian plan. However, any alleged speech is at best incidental to the gravamen of the cross-complaint, which is that the City was incorrect in its position that bicyclists in fact had an easement over the property.⁵

We are not persuaded otherwise by the City’s citation to *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, and *Tuchscher*. In *Vargas*, our Supreme Court concluded that the defendants had satisfied their burden of showing that an action contending a city and its officials had engaged in unlawful campaign activities by using public funds to prepare and distribute pamphlets, newsletters, and internet materials arose from protected activity. (*Vargas*, 46 Cal.4th at pp. 16–19.) In *Tuchscher*, the court concluded a developer’s allegations that a port district and one of its commissioners had interfered with an exclusive negotiating agreement between the developer and other entities during closed door meetings, telephone calls, and e-mails concerning the proposed project fell within the ambit of the anti-SLAPP statute (*Tuchscher, supra*, 106 Cal.App.4th at pp. 1226, 1228–1230, 1232–1235.) In each of those cases, the communicative conduct itself—distributing campaign-related materials or communicating with various entities—was the gravamen of the action. Here, the core issue is the correct interpretation of the easement.

Therefore, we conclude the cross-complaint does not arise from protected activity, and does not fall within the scope of section 425.16.

B. Trial Court’s Denial of Sanctions

In its cross-appeal, Villages contends the trial court abused its discretion in denying its request for sanctions.

“The anti-SLAPP statute requires the trial court to award reasonable attorneys’ fees to a prevailing plaintiff pursuant to section 128.5 when the court determines that a

⁵ Indeed, in its reply brief in support of its anti-SLAPP motion below, the City stated, “The Association’s admitted ‘principal thrust or gravamen’ is to attack an alleged ‘legislative decision/interpretation’ . . . by City . . . ‘to treat this public easement *as if* it provided access to the general public for bicycling or equestrian purposes.’ ”

defendant’s anti-SLAPP motion was ‘frivolous or . . . solely intended to cause unnecessary delay.’ (§ 425.16, subd. (c)(1) [‘shall’ award].) Frivolous in this context means that any reasonable attorney would agree the motion was totally devoid of merit. [Citation.] An order awarding attorneys’ fees pursuant to section 128.5 as incorporated in section 425.16, subdivision (c), is reviewed under the abuse of discretion test. [Citation.] A ruling amounts to an abuse of discretion when it exceeds the bounds of reason, and the burden is on the party complaining to establish that discretion was abused. [Citation.]” (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450 (*Gerbosi*); see also *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 469.)

Applying this rule, the court in *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 198–200, concluded a trial court had abused its discretion in denying a request for sanctions. There, the defendant attorney who brought the anti-SLAPP motion did not meet her threshold burden of showing the challenged causes of action arose from protected activity where the conduct underlying the causes of action was her drafting of an agreement to allow a trust to be terminated prematurely, an action that was not connected with any issue under review by an official body, and that was part of a private transaction unconnected to any public issue or issue of public interest. (*Id.* at pp. 199–200.) This action “clearly did not constitute an act in furtherance of the right to petition or free speech in connection with a public issue,” and “any reasonable attorney would agree that an anti-SLAPP motion did not lie under these circumstances and that the instant motion was totally devoid of merit.” (*Id.* at p. 200.)

Villages argues the trial court abused its discretion denying its request for sanctions. First, Villages points out that in its moving papers below, the City failed to cite or distinguish *Graffiti* or *USA Waste*. (See *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 31–32 [appeal frivolous where party, *inter alia*, failed to cite or distinguish contrary

authority from same appellate district].)⁶ Villages also argues that the anti-SLAPP motion was frivolous, both on the first prong question of whether the cross-complaint alleged protected activity, and on the second prong question of whether Villages met its burden to show a probability of prevailing on the merits. As to the second prong of the anti-SLAPP test, Villages further argues the frivolity of the City’s motion is shown by the fact that the City’s moving papers did not make any showing that Villages did not have a probability of prevailing.

As we have explained, we agree with the lower court that the cross-complaint is not subject to an anti-SLAPP motion based on the rule developed in *San Ramon Valley, Graffiti*, and *USA Waste*. We also agree that the City should have cited *USA Waste* in its moving papers below, rather than simply arguing at the hearing on the motion that the rule of *USA Waste* did not apply to tort causes of action. However, to show that the trial court abused its discretion in denying sanctions, Villages would have to show that “any reasonable attorney would agree the motion was totally devoid of merit,” and that any other conclusion “exceeds the bounds of reason.” (*Gerbosi, supra*, 193 Cal.App.4th at p. 450.) Although the City’s legal arguments were woefully inadequate and failed to identify and discuss the most relevant authority, we cannot conclude that the trial court exceeded the bounds of reason.

In a somewhat confusing argument, Villages also contends that the City should have been sanctioned for trying to bring its own case-in-chief to trial while this appeal was pending. This argument is based on a motion the City filed pending the trial court’s ruling on the anti-SLAPP motion, titled a “Motion for Relief from Stay of Discovery, or, in the Alternative, Severance of the First Amended Cross-Complaint.” This motion,

⁶ Villages also complains that in its opening brief on appeal, the City quotes and highlights more words from the cross-complaint than it did in its moving papers below without asking leave for us to take new evidence on appeal, that on appeal, the City “grossly misconstrues” the governing line of cases, and that the City’s opening brief ignores evidence that favors Villages. The content of the City’s appellate briefing was of course not before the trial court below, and we fail to see how it is relevant to the propriety of the trial court’s ruling on the request for sanctions.

Villages appears to argue, was brought for the improper purpose of unnecessary delay. Villages does not show that it requested sanctions in connection with that motion, that it sought to renew its earlier request for sanctions after the City made that motion, that the trial court ruled on the motion, or that Villages appealed any adverse ruling. In the circumstances, we will not consider this issue on appeal.

C. Sanctions on Appeal

Villages moved for sanctions on appeal, on the ground the appeal was frivolous and/or taken solely for purposes of delay. After oral argument on the merits of the appeal, we notified the City we were considering ordering sanctions on appeal.

Section 907 provides: “When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just.” California Rules of Court, rule 8.276(e)(1) provides that an appellate court “may impose sanctions . . . on a party or an attorney for: [¶] (A) Taking a frivolous appeal or appealing solely to cause delay.”

Our Supreme Court has ruled that “an appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) However, the high court cautioned, “any definition [of frivolous appeal] must be read to avoid a serious chilling effect on the assertion of litigants’ rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions.” (*Ibid.*) The power to punish attorneys for prosecuting frivolous appeals “should be used most sparingly to deter only the most egregious conduct.” (*Id.* at p. 651.)

“In determining whether an appeal indisputably has no merit, California cases have applied both subjective and objective standards. The subjective standard looks to the motives of the appealing party and his or her attorney, while the objective standard

looks at the merits of the appeal from a reasonable person’s perspective. [Citation.] Whether the party or attorney acted in an honest belief there were grounds for appeal makes no difference if any reasonable person would agree the grounds for appeal were totally and completely without merit. [Citation.] [¶] The objective and subjective standards ‘are often used together, with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay.’ [Citation.] An unsuccessful appeal, however, ‘ “should not be penalized as frivolous if it presents a unique issue which is not indisputably without merit, or involves facts which are not amenable to easy analysis in terms of existing law, or makes a reasoned argument for the extension, modification, or reversal of existing law.” ’ ” (*Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534, 556–557 (*Kleveland*); see also *Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1422.)

On the unique facts of this case, we find sanctions warranted here. We have already explained that the City failed to address *USA Waste* and *Graffiti* in its moving papers below. In effect, we have given the City the benefit of the doubt that it failed to identify or understand the significance of these dispositive cases in preparing its moving papers. Such a presumption is impossible on appeal, however. In its statement of decision below, the trial court pointed out, “The *USA Waste of California* case, in fact, in its introductory paragraph holds that ‘the anti-SLAPP statute can[not] be extended to apply to [a cross-complaint challenging] land use guidelines issued by a city.’ (*USA Waste, supra*, 184 Cal.App.4th at p. 56.) The order went on: “The First Amended Cross-Complaint challenges ‘the application, interpretation, and/or validity’ of the Plaintiff City of Santa Rosa’s ordinances and enactments governing the scope of this public easement. ‘Actions to enforce, interpret, or invalidate governmental laws generally are not subject to being stricken under the anti-SLAPP statute. If they were, efforts to challenge governmental action would be burdened significantly.’ *USA Waste, supra*, 184 Cal.App.4th 53, 65 (citing *Graffiti, supra*, 181 Cal.App.4th 1207, 1224–1225). The *USA Waste* case, in fact, in its introductory paragraph, holds that ‘the anti-SLAPP statute

can[not] be extended to apply to [a cross-complaint challenging] land use guidelines issued by a city.’ 184 Cal.App.4th, at 56.)” There can be no doubt that the City was aware of the primary holding of *USA Waste* and its relevance to this case.

As we have explained, rather than acknowledging this explicit holding of *USA Waste* and either distinguishing it or arguing that it was wrongly decided, on appeal the City simply ignored it and relied on the fiction that the case was decided solely on the basis of its *alternate* holding that the private dispute at issue in *USA Waste* did not involve a matter of public interest. (*USA Waste, supra*, 184 Cal.App.4th at pp. 65–66.) Even after the primary holding of *USA Waste* was once again pointed out in Villages’ respondent’s brief and at oral argument, the City stuck to its guns and refused to acknowledge the rule established by the case—although the City itself had argued in its briefing below that the admitted gravamen of the action was “to attack an alleged ‘legislative decision/interpretation’ . . . by City . . . ‘to treat this public easement *as if* it provided access to the general public for bicycling or equestrian purposes.’ ” In light of the clear applicability of the primary holding of *USA Waste* to this case, we can only conclude the City’s refusal to acknowledge or discuss it was willful.

This conclusion is reinforced by the City’s inexplicable insistence that the reasoning of *San Ramon Valley* and *Graffiti* applies only to mandamus actions, even though *Graffiti* explicitly applied its rule to a cause of action for declaratory relief (*Graffiti, supra*, 181 Cal.App.4th at p. 1224) and *USA Waste* expressly applied the reasoning of *San Ramon Valley* and *Graffiti* to a cross-complaint that included claims for breach of contract and equitable estoppel (*USA Waste, supra*, 184 Cal.App.4th at pp. 59, 62–65).

Based on the record as a whole, including the City’s repeated pattern of ignoring or misrepresenting relevant authority, we are persuaded that any reasonable attorney would agree the grounds the City relied on to advance its appeal completely lacked merit and would not have pursued the appeal. (*Kleveland, supra*, 215 Cal.App.4th at p. 558; see *Pierotti v. Torian, supra*, 81 Cal.App.4th at pp. 31–32 [sanctioned party did not cite or attempt to distinguish appellate case addressing issue on appeal]; see also *Alicia T. v.*

County of Los Angeles (1990) 222 Cal.App.3d 869, 885 [sanctions payable to court awarded in part because party failed to mention controlling case in opening brief, and after omission was pointed out in respondent's brief failed to address effect of case].)

Villages has told us its counsel spent 127.7 hours preparing the opposition to the appeal, and estimated it anticipated spending an additional five hours in connection with oral argument, at an hourly rate of \$300 per hour. The City did not dispute these numbers. Consequently, we shall order the City to pay Villages sanctions in the amount of the attorney fees they incurred, or \$39,810. (See *Millenium Corporate Solutions v. Peckinpaugh* (2005) 126 Cal.App.4th 352, 362.)

III. DISPOSITION

The judgment is affirmed. As sanctions for a frivolous appeal, the City shall pay Villages the amount of \$39,810. Villages shall recover its costs on appeal.

Rivera, J.

We concur:

Reardon, Acting P.J.

Humes, J.