An Introduction to SLAPPs Suits
(Statement of problem)

AN INTRODUCTION TO SLAPP SUITS[1/]

February 20, 1998

We take for granted the right of every person to participate in decisions that affect themselves and their communities. However, as the American Bar Association recently reported, "increasingly, Americans who speak out in opposition to private development plans before local zoning boards, testify at school board meetings or circulate petitions to their elected officials are finding themselves in court, defending themselves against lawsuits by developers, landowners and even government officials claiming to have been defamed or otherwise injured by public comment."[2/] Counting the number of these so-called "SLAPP"[3/] suits is difficult, primarily because most suits are filed in local courts and dismissed before trial. By all accounts, however, the number of these suits has been increasing during the last twenty years. Examples of SLAPP suits from around the country reveal the extent of the practice:

- In Rhode Island, a woman filed comments on proposed groundwater rules, raising concerns about possible groundwater contamination from a local landfill. The landfill operators sued her for defamation and tortious interference with prospective business contracts, seeking both compensatory and punitive damages.

- In Pennsylvania, a couple wrote letters to their United States Senator, state health officials and CBS news complaining about conditions in a local nursing home. The state investigated and eventually revoked the nursing home license. The nursing home then sued the couple, Sen. Heinz and a state health department official.

- In Minnesota, a retired United States Fish and Wildlife Service employee mobilized his neighbors against a proposed condominium development on a small lake. After the rezoning request was rejected, the developer sued him, alleging he had made false statements that damaged the developer's business reputation.

- In Texas, a woman confined to her home by illness spoke out publicly against a nearby landfill. In response, the landfill owners filed a $5 million dollar defamation suit against the woman and her husband.

- In California, a group of small cotton farmers bought newspaper advertising opposing a proposed ballot measure supported by Boswell Corporation, the nation's largest cotton agribusiness. The corporation subsequently sued the farmers for libel, requesting $2.5 million in damages.

- In California, a $63 million dollar lawsuit was filed by a developer who claimed the Beverly Hills League of Women Voters had unlawfully stymied his 10-acre project.

• In California, a consumer advocate who reported to a state health agency that there were cancer-causing substances in a Shell product used in home plumbing was in turn sued by Shell Oil co.

• In Washington, The Nature Conservancy was sued for $2,790,000 by seaweed-farm developers after the Conservancy had inventoried potential natural areas in San Juan County, identified lands that should be preserved (including the plaintiffs') and turned the study over to the county as a recommendation.

Research by Pring and Canan reveals that the majority of SLAPP suits arise out of local real estate development proposals. They are often filed by developers who doubt their ability to succeed in the public, political forum where the dispute arose.[4/] Surprisingly, SLAPP suits filed against citizens, taxpayers and voters by governmental officials and employees follow closely in number behind land use SLAPPs.[5/] These include suits filed by police officers and school teachers against their critics, and suits by public officials against opponents of various proposed public works projects, such as incinerators, water development projects and landfills.

Environmental activists have been the targets of many SLAPP suits,[6/] as have citizens opposing proposed facilities -- perhaps a factory, drug treatment center or office park -- in their communities.[7/] Finally, Pring and Canan identify a category of lawsuits they call "Rights SLAPPs," where suits are filed against individuals who assert rights, usually to a governmental agency, as consumers, workers, property owners and others.[8/] For example, a Vancouver, Washington, couple discovered their housing developer had failed to pay state excise taxes or record their purchase contract. The couple assisted the state in recovering over $350,000 from the developer, who filed a defamation SLAPP against them for $100,000.

WHAT IS A SLAPP SUIT ?

The essence of a SLAPP suit is the transformation of a debate over public policy -- including such local issues as zoning, wetlands preservation, school curriculum or consumer protection -- into a private legal dispute. A SLAPP suit moves a political, policy dispute into the courtroom, where the party speaking out on the issue must defend her actions. As one commentator observed: "SLAPP plaintiffs use tort law to punish activists for exercising the constitutional right to speak and petition the government for redress of grievances."[9/]

Although intimidation or SLAPP suits may arise in many different contexts, they have a number of things in common:

1. The conduct of the targets that are sued in the lawsuit is generally protected as First Amendment speech intended to advance a view on a public issue pending before an executive, legislative or judicial branch of the government or the voters. In the majority of cases, a SLAPP suit is filed in retaliation for public participation in a political dispute. The plaintiff is attempting to intimidate a political opponent and, if possible, prevent further participation by the person or organization in the decision-making process.

2. Targets are individuals or associations that are advancing social or political interests of some significance and not solely acting for personal profit or commercial advantage.

3. The filers are individuals or groups of individuals who believe their current or future commercial interests may be negatively affected by the defendants' actions. Although developers and other commercial entities are the most common SLAPP plaintiffs, others also resort to SLAPP suits. For example, in Oklahoma, a group supporting tort reform was the subject of a class action libel suit filed by trial lawyers.[10/] In California, county officials filed a $42 million SLAPP against a local citizen because of his opposition to a proposed incinerator project.

4. The action is based on one or more of the following common law or statutory torts:

(a) Defamation (libel, slander)

(b) Business torts (interference with contract, business relationships, economic advantage or a restraint of trade)

(c) Misuse of judicial process (abuse of process, malicious prosecution)

(d) Civil rights violations (due process, takings or equal protection), and

(e) Conspiracy to commit with others one or more of the above tortious acts.

5. Damages claimed are often in the multi-million dollar range, with injunctive or declaratory relief (such as an order prohibiting the defendant from making certain statements) being only a secondary consideration in most instances. In the cases studied by the Denver Political Litigation Project, when damages were requested, the average demand was for $9.1 million.[11/]

6. Finally, almost all SLAPP suits are eventually dismissed or decided in favor of the defendants. Based on research by the Denver Project, Pring and Canan concluded that "SLAPPs, as lawsuits go, are losers: the vast majority are ultimately dismissed by the courts, and in the remainder the targets (or their insurance companies) give up and enter into a

settlement to get the case dismissed. Only a very small number of SLAPPs proceed to trial and result in a judgment for filers that is upheld on appeal. . . . Targets win dismissals at the very first trial court appearance in approximately two-thirds of the cases."[12/]

Which is not to say these lawsuits are unsuccessful. This is a key to understanding SLAPP suits and to crafting remedies: a SLAPP suit is successful when it diverts the energy of an individual or group from the political or policy issue in controversy, and requires them to hire counsel and spend money in defense. Constitutionally-protected speech and participation in democratic processes are chilled. The results can be profound, leaving the defendant both emotionally and financially exhausted.[13/]

ISN'T POLITICAL SPEECH PROTECTED BY THE CONSTITUTION ?

Two separate constitutional doctrines, both founded on the First Amendment to the United States Constitution, protect political speech.

The first constitutional doctrine concerns the protection accorded allegedly defamatory speech in a defamation lawsuit. Referred to as the *New York Times v. Sullivan* doctrine,[14/] it has developed in the general context of defamation cases, without regard to whether the speech occurs in a political context. Under this doctrine, the protection given speech in any particular case depends upon (1) the status of the plaintiff as a public or private figure (2) whether the subject matter of the speech is of public or private concern, and (3) the state of mind of the defendant with regard to the falsity of the speech. Speech about a public figure concerning a matter of public concern is protected under the first amendment unless made with "actual malice" that is, with knowledge that it was false or with reckless disregard for its truth or falsity.

The second constitutional doctrine concerns the right to petition, protected by the Petition Clause of the first amendment. Under the so-called *Noerr-Pennington* doctrine[15/], petitioning activities of all kinds are shielded from liability as long as they are genuinely aimed at procuring favorable government action. This approach protects all except "sham" petitioning, in which the petitioner is not actually seeking governmental action, but instead is using the governmental process solely to injure an opponent. (For this reason, although the right to sue is a key activity protected by the petition clause, SLAPP suits are not protected by the First Amendment.[16/]) The *Noerr-Pennington* doctrine was strengthened and the "sham" exception narrowed in *City of Columbia v. Omni Outdoor Advertising Inc.*, 499 US 365 (1991).

As interpreted by the Supreme Court in *Omni*, the Petition Clause provides broad protection to all manner of speech and political activities, provided only that the petitioner is genuinely seeking some governmental action. However, as applied by most courts, neither doctrine provides the relief that SLAPP defendants really need: prompt dismissal of unfounded lawsuits that infringe upon constitutionally-protected speech.

The most common method for a defendant to promptly dispose of a lawsuit is through a motion to dismiss, in which the defendant argues that, based on what the plaintiff has alleged in the complaint, the plaintiff cannot prevail. The burden of proof is on the party seeking dismissal and the facts alleged in the complaint are assumed to be true. For those reasons, and because the right to sue is itself a constitutionally-protected right, a judge generally will not dismiss a lawsuit at this stage if the plaintiff has merely alleged facts upon which, if proved, the plaintiff could prevail. Most often, the judge will allow the plaintiff to proceed with discovery, including depositions during which the plaintiff's attorney may question a defendant's knowledge, beliefs and motives.

Although the Petition Clause protects virtually all political speech and activities, the analysis requires a factual decision about whether or not the activity was "sham" petitioning. The analysis under the *New York Times* doctrine is even more fact-intensive, requiring decisions about the truth or falsity of the allegedly defamatory statements, the defendant's knowledge of falsity and disregard for the truth, and whether the plaintiff is a private or public figure.[17/] As a result, once a SLAPP plaintiff has merely alleged actual malice or sham petitioning, most courts will deny a motion to dismiss and allow the lawsuit to proceed.[18/]

The problem with the current legal framework, then, is that it simply takes too long get SLAPP suits dismissed. As noted above, virtually all SLAPP suits are ultimately dismissed or decided in favor of the defendant. However, according to Professor Pring, the average SLAPP suit takes 40 months -- over three years -- to resolve. During this time, the suit inflicts both emotional and financial costs on the defendant, and often the defendant withdraws completely from political activity. By the time a SLAPP suit is dismissed, the plaintiff has successfully retaliated against the defendant and discouraged future political activities.

AREN'T REMARKS OF A PUBLIC OFFICIAL PROTECTED ?

Under the common law, remarks made by a legislator as part of the legislative process are "absolutely privileged." That is, the speaker has absolute immunity from a lawsuit based on those comments, "even though the defamatory matter is uttered maliciously, as well as falsely."[19/] In Oregon, the privilege extends to members of various boards and commissions, at least for statements made during a commission meeting when the commission is acting in its legislative capacity.[20/] An executive officer, such as a mayor, has an absolute immunity from suit for comments made in the course of performing his official duties.[21/] An absolute privilege also applies when statements are made to carry out a statutory requirement.[22/] Communications protected by an absolute privilege cannot be grounds for a defamation action, and a SLAPP suit based on such communications should be promptly dismissed.

The absolute immunity for non-executive public officials has limits: it does not extend to comments made outside official meetings of the public body, and may be limited to those meetings where the public body is acting in a legislative capacity. For example, the Supreme Court had held that absolute immunity does not extend to comments made by a city council member to a newspaper reporter, even though the comments concerned pending council legislative business and were made from his office.[23/]

In absence of an absolute privilege, public officials are entitled only to a qualified or conditional immunity.[24/] Under this standard, a communication could not be the basis for a libel action unless the speaker was acting with "actual malice."[25/] As discussed above, the "actual malice" standard requires a fact-intensive evaluation into the truth or falsity of the statement. A public official asserting a defense of conditional immunity in a SLAPP suit therefore has the same problems gaining a prompt dismissal as do other SLAPP suit defendants.

AREN'T SOME STATEMENTS BY PRIVATE CITIZENS ALSO PRIVILEGED ?

In Oregon, absolute immunity attaches to statements made in the course of, or incident to judicial proceedings. This immunity includes statements made during quasi-judicial proceedings before administrative bodies and extends to proceedings before administrative bodies having the power to grant and revoke licenses.[26/] Based on this principle, statements made to any public body making a quasi-judicial land use decision

should be absolutely privileged, however no Oregon appellate court has yet so held.[27/] The Oregon legislature has also provided immunity for communications to certain governmental bodies, although the privileges appear to be less than absolute.[28/]

ARE THERE WAYS TO AVOID OR DETER A SLAPP SUIT BEFORE IT IS FILED ?

Pring and Canan provide a number of suggestions for avoiding a SLAPP suit beforehand, and for deterring a SLAPP suit if one is threatened.[29/] A number of organizations, including The First Amendment Project,[30/] a non-profit law firm that actively opposes SLAPP suits, and the California Anti-SLAPP Project,[31/] an organization dedicated to protecting the right to speak freely about public issues, offer resources for SLAPP targets. The American Civil Liberties Union (ACLU) has provided advice and representation to targets of SLAPP suits. And the SLAPP Resource Center at the University of Denver School of Law,[32/] run by Professors Pring and Canan, collects information about and tracks SLAPP suits across the country.

The organizations mentioned above suggest a number of steps that a potential target can follow to avoid a SLAPP suit. Among others things, they advise targets to: (1) recognize the issues and participants that may spark a SLAPP suit; (2) recognize the difference between fact and opinion (you may not be sued for statements of opinion, but merely qualifying a statement as your "opinion" will not transform a factual assertion into an opinion); (3) check your insurance coverage for protection from personal injury lawsuits based on defamation, interference with contract. etc.; (4) consider seeking legal advice before you speak out on a public issue.

At the first sign that a SLAPP suit may be filed, Pring and Canan suggest that potential targets seek legal counsel. They also suggest that, with the help of counsel, the potential target immediately inform the opponent (and his attorney) that the SLAPP suit he is contemplating is an attack on constitutionally protected conduct and will not succeed, and that it will cause the filer a loss of reputation and money, including attorney fees and court costs. An opponent who suggests or threatens a SLAPP suit should also know he faces the very real risk of multi-million dollar damages from a SLAPPback suit (see below). Pring suggests informing the filer's attorneys that by filing a groundless lawsuit designed to stiffle or chill citizens' exercise of their constitutional rights, they are exposed not only to bad publicity and professional grievances, but risk judicial sanctions and personal liability for attorneys fees, and may be named as defendants in a SLAPPback suit.[33/] A potential SLAPP target should also consider informing the government agencies and officials involved

and the filer's peer groups (trade associations, chamber of commerce, etc.), and should encourage extensive media coverage of a threatened suit. These efforts may head off a threatened SLAPP suit before it is filed.

Once a suit has been filed, a defendant should immediately consult with an attorney. The groups listed above can help a defendant find an attorney and provide resources for managing the SLAPP suit in court.[34/]

CAN I SUE SOMEONE WHO FILES A SLAPP SUIT AGAINST ME ?

So-called "SLAPPback" suits, where the target of a SLAPP suit files a countersuit against the original filers, have become an accepted - and highly successful - means to vindicate constitutional rights and recover for injuries and losses caused by the original suit.[35/] Verdicts and settlements in favor of the original SLAPP targets, with very large monetary damages, are now common. Several of the cases mentioned in this Introduction spawned successful SLAPPbacks: the California consumer advocate won a $5.2 million verdict against Shell Oil Co.; the family cotton farmers won an $11.1 million verdict against the Boswell agribusiness giant. In SLAPPbacks, judges and juries have been quick to recognize SLAPP suits as a violation of citizens' fundamental constitutional rights, and have responded with verdicts against SLAPP filers and their attorneys that reflect their indignation.

SLAPPback suits are most often based on claims of malicious prosecution and abuse of process, but may include claims of defamation. emotional harm and violation of constitutional rights. These claims can be difficult - and expensive - to prove, although a SLAPPback victory can provide a strong deterrent to potential SLAPP filers. On the other hand, many SLAPP targets are emotionally and financially exhausted by the time the SLAPP suit is dismissed, and have very little desire to extend the litigation for several more years.

ARE THERE LEGISLATIVE SOLUTIONS TO SLAPP SUITS ?

Because existing legal remedies have been seen as inadequate, state legislatures have begun to address the problem of SLAPP suits. By 1996, at least nine states - California, Deleware, Massachusetts, Minnesota, Nebraska, Nevada, New York, Pennsylvania and Rhode Island - had adopted legislation addressing SLAPP suits.[36/] Pring and Canan have evaluated the strengths and weaknesses of the state laws, and have drafted a model anti-

SLAPP statute. Pring and Canan identified three tests that a law must pass in order to effectively protect public participation in government:

> 1. Communications: It must cover all public advocacy and communications to government, whether direct or indirect and whether in the form of testimony, letters, reports of crime, peaceful demonstrations, or petitions.
> 2. Forums: It must cover all government bodies and agents, whether federal, state, or local, and whether legislative, executive, judicial, or the electorate.
> 3. Prevention and Cure: It must set out an effective early review for filed SLAPPs, shifting the burden of proof to the filer and, in so doing, serving a clear warning against the future filing of such suits.[37/]

The model legislation meets the tests, in particular by providing a procedure for early review of SLAPP suits and by suspending discovery pending a decision on a motion to dismiss and any appeal from the motion. (Section 5). At its core, the law would codify the constitutional protections of the Petition Clause by providing absolute immunity for all actions directed toward influencing governmental action. (Section 3). At the hearing on the motion to dismiss, the suit must be dismissed unless the filer produces clear and convincing evidence that acts of the defendants are not immune from liability under Section 3.[38/]

The model legislation also provides for an award of costs and attorney fees against the filer, and sanctions against the filer or his attorney as necessary to deter similar conduct in the future. (Section 5(g)). The legislation also provides specific authorization for SLAPPback suits. (Section 5(h)). These provisions will provide a financial disincentive to potential SLAPP filers and make it easier for defendants to find legal counsel. The legislation authorizes, but does not require, the involved governmental body or the Attorney General to intervene and defend or support the SLAPP target. (Section 5(f)). Although not included in the model legislation, in an innovative effort to support citizen participation, Suffolk County, New York, has created a fund from which community members can draw if they are forced to defend against a SLAPP suit which results from involvement in community permit proceedings.

Although arguments can be made against anti-SLAPP legislation, such statutes represent a legislative decision that, even though citizen communications may at times be self-interested or incorrect, citizen participation is essential to our democratic process and must be protected from the threat of SLAPP suits. (Section 2).

ENDNOTES

[1/] Researched and prepared by Charles Landman, Paralegal, Oregon Department of Justice, for the Citizen Involvement Advisory Committee of the Land Conservation and Development Commission.

[2/] The Price of Speaking Out, ABA Journal, September, 1996 (Cover Story).

[3/] The term - an acronym for "strategic lawsuits against public participation" - was coined by University of Denver Professors Penelope Canan and George Pring. Canan and Pring have researched and tracked SLAPP suits for many years. Their results are reported in various journal articles and in their book titled SLAPPs: Getting Sued for Speaking Out (Philadelphia: Temple University Press, 1996). This Introduction, like most work in the field, draws upon their work.

[4/] *See* Pring & Canan, *supra* note 2 at Chapter 3 "Real Estate SLAPPs".

[5/] *See* Pring & Canan, *supra* note 2, Chapter 4 "The Ultimate SLAPP."

[6/] *See* Pring & Canan, *supra* note 2, Chapter 5 "Eco-SLAPPs".

[7/] *See* Pring & Canan, *supra* note 2, Chapter 6 "Not in My Backyard SLAPPs."

[8/] *See* Pring & Canan, *supra* note 2, Chapter 7 "Rights SLAPPS".

[9/] Waldman, SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation, 39 UCLA Law Review 979, 981-82 (1992).

[10/] West Legal News, July 17, 1996.

[11/] Pring and Canan, *supra* note 2 at 217.

[12/] Pring and Canan, *supra* note 2 at 218.

[13/] Victor Monia was the head of the West Valley Taxpayers and Environmentalists Association, a California group which was SLAPPed with a suit seeking $40 million. He described from personal experience what can happen to a group, and to an individual, that gets SLAPPed:

> People melted away . . . We had had a very active organization with 550 homeowners, and we had won 16 or 18 elections in a row. The year after the suit, we won only one and lost three or four. Membership in the first year dropped to 100, and by the second year of the suit, it was really only the board of directors and hard-core folks, about 25 of us, who were left. People wondered about our judgment. Were they going to get dragged in? People who had been very active just sort of disappeared. They wouldn't even sign a petition.

> . . . I became so preoccupied by the suit that it changed my whole focus and direction in life . . . I got appraisals on the house and thought of moving to Oregon. I'm like most Americans: My assets are in my home. This case was an overhanging cloud. Even though you may prevail, you'll spend a ton of money fighting it. You can win and still lose. I didn't function well at work because I was trying to figure out how I was going to protect my family. The president [of my firm] called me in one day and said my performance wasn't satisfactory and asked for my resignation. If I didn't resign, I'd get fired the next day. I resigned.

Robert H. Boyle, *Activists at Risk of Being SLAPPed*, Sports Illustrated, Mar 25, 1991 at 6, 7-8, as quoted in Huling. Tired of Being Slapped Around: States Take Action Against Lawsuits Designed to Intimidate and Harass, 25 Rutgers Law Journal 401, 406 nt. 16 (1994),

[14/] The doctrine stems from the decision in *New York Times v. Sullivan*, 376 US 254 (1964), in which an Alabama jury found that the newspaper had defamed the Montgomery police commissioner. The Alabama court had allowed the newspaper only the common law defense to defamation, which required the newspaper to prove the truth of the publication. The Supreme Court reversed. Finding that the First Amendment was implicated, it announced a new constitutional standard: public officials acting in their official capacity could be defamed only be a statement made with "actual malice." The court has expanded the doctrine to include other individuals, based on whether they are public or private figures. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 US 767 (1986).

[15/] The name refers to *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 US 127 (1961) *United Mine Workers v. Pennington*, 381 US 657 (1965). In *Noerr* and *Pennington*, the Court held that the constitutional right to petition immunized publicity and lobbying campaigns from antitrust liability, regardless of the offensive purpose or intent of the campaigns, unless the actions are a mere "sham" and not intended to influence government action. In *Nat'l Ass'n for Advancement of Colored People v. Claiborne hardware Co.*, 458 US 886 (1982), the Court applied the *Noerr-Pennington* principles outside the antitrust arena, holding that the petition clause protected indirect petitioning of government through boycotts of private businesses.

[16/] *See* Pring and Canan, *supra* note 2 at 21.

[17/] *See, e.g. Koch v. Laborico*, 66 Or App 78 (1983), a defamation action where the court held that the record contained issues of actual malice and loss of privilege that should have been submitted to the jury.

[18/] An exception is found in *Protect Our Mountain Env't, Inc. v. District Court*, 677 P2d 1361 (Colo. 1984), where the Colorado Supreme Court established a rule that all dismissal motions on based on the Petition Clause should be expedited and regarded as a motion for summary judgment, with the burden of proof placed on the filer of the complaint rather than on the defendant. The Ninth Circuit has ruled that, in a suit based on conduct arguably protected by the First Amendment, more specific allegations are required in the complaint. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F2d 1076, 1082-83 (9th Cir 1976), *cert den* 430 US 940 (1977).

[19/] *Moore v. West Lawn Mem'l Park*, 266 Or 244 (1973); *Grubb v. Johnson*, 205 Or 624 (1955).

[20/] *Noble v. Ternyik,* 273 Or 39 (1975) (speech of port commissioner before commission absolutely privileged).

[21/] *Shearer v. Lambert*, 274 Or 449 (1976); *Schroeder v. Poage*, 75 Or app 671 (1985).

[22/] *Christensen v. Marvin*, 273 Or 97, 100 (1975) (alleged defamatory statements were absolutely privileged because defendant board members were required by statute to publish the reasons they failed to rehire plaintiff.)

[23/] *Adamson v. Bonesteele*, 295 Or 815 (1983).

[24/] *Id.* at 829.

[25/] *Grubb v. Johnson*, 205 Or 624, 632 (1955)

[26/] *Moore v. West Lawn Mem'l Park*, 266 Or 244 (1973) (communications to funeral directors licensing body absolutely privileged); *Ramstead v. Morgan*, 219 Or 383 (1959) (unsolicited letter sent to State Bar Association absolutely privileged, even though no proceeding was in progress and the letter did not result in any formal proceeding.) *Compare Demers v. Meuret*, 266 Or 252 (1973) (statements made to city Airport Commission not absolutely privileged because commission was not acting in quasi-judicial capacity.)

[27/] The Oregon Supreme Court has developed a three-part test to determine whether a proceeding is legislative or quasi-judicial. *Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591 (1979).

[28/] *See, e.g.* ORS 430.753 (immunity for "good faith" reports of abuse of mentally ill or developmentally disabled); ORS 419B.025 (immunity for good faith reports of child abuse); ORS 441.655 (immunity for good faith reports of nursing home violations).

[29/] Pring and Canan, *supra* note 2 at 145-49.

[30/] First Amendment Project, 1736 Franklin Street, Eighth Floor, Oakland, California 94612; telephone (510) 208-7744.

[31/] California Anti-SLAPP Project, 1611 Telegraph Avenue, Twelfth Floor, Oakland, California 94612; telephone (510) 835-0850.

[32/] SLAPP Resource Center, University of Denver School of Law, 1900 Olive Street, Denver, Colorado 80220; telephone (303) 871-6266.

[33/] Pring and Canan, *supra* note 2 at 148-49.

[34/] Pring and Canan include a thorough discussion of litigation strategies in their book. *Supra* note 2 at 157-169.

[35/] *See* Pring and Canan, *supra* note 2 at Chapter 9.

[36/] For a discussion of the state laws, see Pring and Canan, *supra* note 2 at 188-200. It is worth noting that, in almost every case, the legislature was motivated to act after a particularly egregious SLAPP suit. Although arguments can be made against anti-SLAPP legislation

[37/] Pring and Canan, *supra* note 2 at 189.

[38/] In an advisory ruling on a similar New Hampshire law, the state Supreme Court advised that a provision requiring dismissal unless the plaintiff shows a "probability" of prevailing at trial violates New Hampshire's guarantee of a right to trial by jury. Opinion of the Justices (Slapp Suit Procedure) 641 A2d 1012 (N.H. 1994).

Oregon
John A. Kitzhaber, M.D., Governor

Department of Land Conservation and Development
635 Capitol St. NE, Suite 200
Salem, Oregon 97301-2540
Phone (503) 373-0050
Director's Fax (503) 378-5518
Main Fax (503) 378-6033
Rural/Coastal Fax (503) 378-5518
TGM/Urban Fax (503) 378-2687
Web Address: http://www.lcd.state.or.us

Testimony in Support of House Bill 2805, To Limit "Strategic Lawsuits Against Public Participation" (SLAPP's)

Testimony of Mitch Rohse, Policy Development Specialist,
Oregon Department of Land Conservation and Development (DLCD),
To the House Committee on Judiciary -- Civil Law,
The Honorable Lane Shetterly, Chair
March 24, 1999

The Department of Land Conservation and Development strongly supports House Bill 2805, to limit "strategic lawsuits against public participation" (SLAPP's). Our interest in this issue grew out of a request to us from the state's Citizen Involvement Advisory Committee last summer. The committee had received a letter from a local planner expressing concern that several citizens in his county had withdrawn from local land use proceedings because they had been threatened with a SLAPP. His letter caused the committee to study the issue of SLAPP's and to invite testimony from interested parties. The resulting inquiry convinced the Citizen Involvement Advisory Committee that SLAPP's are a serious problem in Oregon.

In the packet that accompanies my comments today, you will find some of the testimony the committee received. We believe you will find the citizens' testimony to be quite persuasive. We certainly did. That is why DLCD responded to the committee's request to seek legislation. We believe that land use planning -- and indeed governmental processes of all kinds in Oregon – can be effective only if Oregonians are free to participate in them without fear of intimidation and groundless litigation.

In arriving at our position, DLCD considered three main questions:

1. Are SLAPP's an issue that involves state policy?
2. Are SLAPP's such a serious problem that legislation is needed?
3. Is there any precedent for legislation to limit SLAPP's?

Our answer to all three of those questions is Yes, for reasons described below.

1. Are SLAPP's an issue that involves state policy?

The answer to this question is surely "yes." For more than a quarter of a century, Oregon has had extensive laws, rules, and goals to promote citizen involvement in land use planning. Notices must be mailed to interested parties. Public hearings must be held. Cities and counties must adopt citizen involvement programs. The state gives grants and technical

More . . . ☞

assistance to local governments to help them conduct workshops, community visioning, and design charettes. And first among our statewide planning goals is a goal that calls for the opportunity for citizens to participate "in all phases of the planning process." Clearly, state policy encourages extensive citizen involvement in planning. To the extent that SLAPP's interfere with such involvement, they are an issue that involves state policy.

2. Are SLAPP's such a serious problem that legislation is needed?

The record of testimony we have seen from the past year convinces us that SLAPP's ***are*** becoming a serious problem. It is, of course, difficult to document the extent of these suits. SLAPP's are not conveniently labeled as such in court records, and many SLAPP's never even make it to court. Just the threat of one is often enough to achieve its aim of keeping a citizen from speaking out.

But although we cannot determine the exact number of SLAPP's that occur in Oregon, the evidence does seem sufficient to support these four conclusions:

1. SLAPP's have been and are being used in Oregon.
2. SLAPP's have been filed against citizens whose only "crime" was to participate in a public forum, as they had been encouraged to do by their government.
3. SLAPP's have imposed some large costs – in money, time, and stress – on their victims.
4. SLAPP's or a threat of them have kept some citizens from participating in public forums.

We believe that such problems demonstrate a need for legislation to protect the rights of citizens to speak out in public forums.

3. Is there any precedent for legislation to limit SLAPP's?

When the state Citizen Involvement Advisory Committee asked DLCD to request legislation to limit SLAPP's, we wanted to know whether there was any precedent for such a law or whether we would be entering uncharted waters. We soon learned that many states have recognized a need to protect their citizens from SLAPP's. At least nine states have adopted laws to limit SLAPP's, and many more are considering such laws.

But we don't need to go beyond Oregon's borders to find a precedent for anti-SLAPP legislation or to find some laws that protect citizens who speak out. In fact, the testimony of everyone who speaks before this committee today is protected by such a law, and that law has been on the books for more than a decade. The law I refer to is ORS 171.530. It describes the act of testifying before a legislative committee as "privileged." It states that a citizen giving such testimony "shall not be subject to an action for civil damages as a result thereof unless the witness knowingly makes a false and immaterial statement for the purpose of defaming another."

In other words, Oregon law already contains the foundation for anti-SLAPP legislation. It already provides a form of immunity for citizens who speak out in a hearing before a legislative committee. We simply ask that such immunity be extended to citizens who would speak before their local planning commission, city council, or board of county commissioners. House Bill 2805 would provide such immunity, and we therefore support its passage.

Governor Kitzhaber shares our concerns about the abuse of SLAPP's. We have discussed this issue with the Governor's staff and provided them with testimony and other material on this subject. Robin McArthur-Phillips, the Governor's Land Use and Transportation Advisor, asked me to convey to the House Judiciary Committee today that Governor Kitzhaber believes SLAPP's are a significant issue and that he supports legislation to limit the filing of such suits.

Thank you for your attention. If you have questions about our testimony, please contact Mitch Rohse, of the Department of Land Conservation and Development; 503 373-0050, Extension 226; e-mail *mitch.rohse@state.or.us*.

Mitch Rohse

cc: State Citizen Involvement Advisory Committee (CIAC)

Attachments