

SLAPPs: Travesties Of Justice

by Jerry J. Ritter

The last thing Terry Smith (an alias name) expected was a lawsuit. After all, he and some of his neighbors were exercising their First Amendment rights. They had raised legitimate concerns about a proposed development in Banks, their home town in western Washington County (population: 580).

The proposed subdivision of approximately 300 homes could triple Banks population. Smith and other citizens testified at public hearings that the additional population would overwhelm the school district, already the fourth most crowded in the state. The Banks School Board echoed those fears, warning that the impact of the subdivision on the schools and on the community would be terrible and irreversible.

The Banks City Council denied the developer's application. In addition to the testimony of citizens in public hearings, the Council members heard objections from high-ranking city officials and from the Planning Commission, which voted unanimously against the application. The Council cited both procedural and substantive objections to the proposal, including proponents missing the required filing date and filing an incomplete application, the overloading of schools, and inadequate sidewalks, streets, and parks.

When the developer reapplied in late 1994, he raised the stakes dramatically by filing suit against the mayor, members of the city council, and a number of the citizens who had testified against the subdivision at public hearings. The suit alleged discrimination against minorities and families with children because low income housing would have been included in the development. The real purpose of the suit was to silence opposition to the project. Smith and the others

had become victims of a Strategic Lawsuit Against Public Participation, or a SLAPP.

SLAPPs have been described as bogus attempts to muzzle the public (Corvallis Gazette-Times, 5/28/98) and as silencing tactics filed under the guise of defamation of character (Salem Statesman-Journal, 4/27/99). Most commonly used by developers against those opposing their projects, SLAPPs are not intended to be won, but to intimidate the public and public officials into silence. They are devastatingly effective.

Although the suit against Smith and the other defendants was ultimately dismissed, they had run up nearly \$18,000 in legal costs that they weren't allowed to recover. The threat of additional suits silenced the opposition the developer won the war. According to Smith, It put a muzzle on us. Nobody wanted to say anything because they were afraid they'd get sued, too.

LCDC Becomes Involved

Smith's case was not unique. Members of Oregon Communities For A Voice In Annexations (OCVA) have been hit by SLAPPs, too. OCVA is a citizens group created in 1996 to defend the rights of local citizens to vote on annexations. Our basic strategy has been to persuade local citizens to pass city charter amendments requiring voter approval of annexations.

OCVA developed this strategy in part because of a 1995 law submitted to the Legislature by the Oregon Building Industry Association (OBIA) prohibiting cities from considering the impact of new subdivisions on schools when processing permit requests. With Voter Annexation, citizens can take school impact into consideration when deciding whether to approve or deny an annexation.

Voter annexation is extremely unpop-

ular with building and real estate interests. Unable to defeat these initiatives at the ballot box, they have tried to outlaw them in the courts (e.g., *Heritage Enterprises vs Corvallis*, Oregon Supreme Court, 1985) and in the legislature, but have been unsuccessful so far.

Since all legitimate means to thwart our strategy had been to no avail, it came as no surprise to us when our members became targets of SLAPPs. One member who had led St. Paul's voter annexation effort, and had been a key witness at the legislature defending voter annexation was sued by a developer over an editorial letter she had written to the *The Newberg Graphic*. In Salem, another member was threatened with a suit if he did not remove his statement in support of a systems development charge initiative from the November 1997 voter pamphlet.

The Citizen Involvement Advisory Committee (CIAC) of the Land Conservation and Development Commission (LCDC) had already received complaints about SLAPPs. The Committee began soliciting additional information in early 1998. OCVA approached the CIAC and was granted a hearing that May. OCVA testified about SLAPPs aimed at its members and about the findings of Vanderbilt University's Freedom Forum. The Freedom Forum estimates that only one SLAPP in ten ever is reported in the Press.

People Came Out Of The Woodwork

OCVA also agreed to assist CIAC by soliciting reports of SLAPPs in its statewide newsletter. As our chairman Jeff Lamb put it, people started coming out of the woodwork with SLAPP stories. They contacted OCVA from places like Yachats, Tillamook County, Columbia County, and the lower Willamette Valley. The stories all sounded alike: ordinary citizens or elected officials would express opposition to some project, policy or person in a public forum, and a person or company whose business or professional interests were affected would file or threaten to file a suit for defamation, based on the flimsiest grounds. Faced with such retaliation, the critics either

would back down and withdraw from the controversy or would fight back in court, usually winning hands down but spending thousands of dollars in the effort. They would never get their court costs paid. Whether the victims of these threats backed down or fought back, they and all the other people who knew about the cases got the message: Oregonians are likely to pay dearly if they exercise their right to criticize the actions of well-financed persons or organizations.

After examining the testimony OCVA collected, CIAC member Larry DeBates concluded, SLAPPs are becoming far too common throughout the state. This is exactly what the proponents of these development proposals wanted - to silence public participation. The CIAC convinced LCDC that SLAPPs posed a significant threat to Goal 1 of Oregon Land Use Law: citizen involvement. LCDC then agreed to pursue a legislative remedy in the 1999 session.

The Travesty In The Legislature

By themselves, SLAPPs are a travesty of justice, because they use baseless legal action to suppress legitimate discussion of public issues. But the treatment of anti-SLAPP legislation in the Senate was much more harmful. While the influence of an individual SLAPP is limited, the action in the Senate affected the future of democratic processes throughout the state. In both cases, the intricate conventions of public institutions were used to stifle public debate that affected powerful economic interests.

OCVA sought a well-defined remedy in an anti-SLAPP bill. The ideal anti-SLAPP law would have four elements: (i) protection from civil action for a wide range of activities in which citizens engage as they participate in government; (ii) authority for summary dismissal of any suit which violates that protection; (iii) a mandatory provision for the victim of a SLAPP to recover legal costs; and (iv) authority for the courts to assess punitive damages. Summary dismissal and recovery of costs were remedies against a SLAPP's very purpose to tie up a defendant's resources. Punitive damages make the

protection even stronger by boosting the financial risk for anyone considering a SLAPP.

With the approval of Gov. Kitzhaber, LCDC drafted anti-SLAPP legislation. It contained the first three elements, but did not allow for punitive damages. The scope of its protection was particularly broad:

A person is not civilly liable for their speech, influencing action, or otherwise participating in the process of government, regardless of intent or purpose. This immunity acts as a furtherance of the constitutional right to petition government.

After the Legislative Counsel was done with the LCDC bill (now called SB-330), two of the three elements were affected. The scope of protection was reduced to any statement made ...

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in ... any administrative, quasi-judicial, or legislative proceeding. Probably the most important element because it stops the bleeding right away, summary dismissal was dropped altogether. So SB-330 started with three of the elements of an ideal bill, and ended up with about one and a half.

Early in the session, Jeff Lamb of OCVA arranged a strategy meeting with LCDC's Citizen Involvement Advisory Committee (CIAC), the League of Women Voters and nearly a dozen other organizations. The participants knew that the Senate bill would be controlled by Senator Neil Bryant (R, Bend), Chair of the Senate Judiciary Committee, who was seen by many as a staunch ally of development interests. They also knew that Representative Kurt Schrader (D, Canby) had drafted

an anti-SLAPP bill in the House (HB-2805). This bill was stronger than the Senate bill because it contained all of the elements listed above, making their chances for support much better in the House. If strong approval could be won in the House, Senate approval would be easier. Therefore, the meeting's participants agreed to abandon the LCDC bill in the Senate and concentrate their initial lobbying in the House. The proponents were further encouraged by the knowledge that Governor Kitzhaber would support anti-SLAPP legislation.

Public hearings on HB-2805 were held before Representative Lane Shetterly's (R-Dallas) House Judiciary Committee in March and April, 1999. Approximately two dozen victims of SLAPPS and SLAPP threats showed up to testify from around the state. The only testimony against the bill came from a representative of the Oregon Building Industry Association who stated the protection granted by HB-2805 was too broad, giving people license to lie. In response, the bill was amended to remove protection for statements that were knowingly and intentionally false. The amended bill was moved out of the Judiciary Committee with an 8:1 do pass recommendation and sailed through the full House with a non-partisan 49:9 approval margin in late April. HB-2805 then headed to the Senate and to Senator Bryant's Senate Judiciary Committee. That's when the trouble began.

Bryant's first tactic was to block the House bill by refusing to hold a hearing. OCVA and its allies successfully countered with an appeal to the media. Under pressure from editorial boards around the state, Bryant finally scheduled a hearing in mid-May last year.

Those who showed up for the hearing were dismayed to learn that standard procedure precludes the record of their House testimony to be transferred to the Senate. They were shocked further when Bryant announced there would be only 15 minutes allowed to recreate that

testimony. Instead of squelching the supporters, this maneuver outraged people. Many had waited as long as five years to tell their story. There was such an uproar that Bryant chose to turn the gavel over to the Vice Chair, Peter Courtney (D-Salem) and leave the hearing. Courtney extended the hearing for three hours and held a second hearing to allow all witnesses to testify, including the lobbyists who opposed the bill. Opposition to the bill came mainly from the construction, real estate, and aggregate mining lobbies. They were joined by Oregonians In Action, a property rights group.

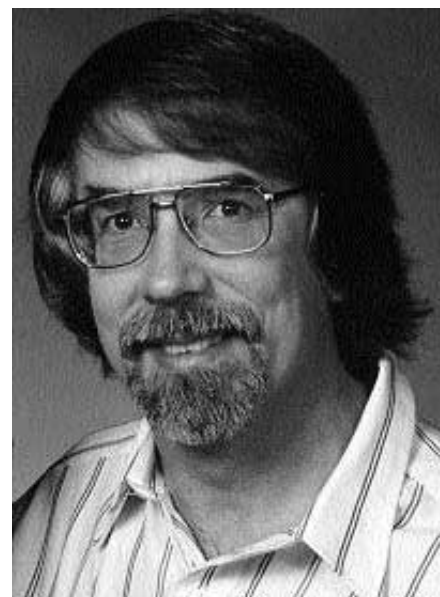
After the hearings were over, the Committee gutted HB 2805 by reducing the protections in three ways. First, punitive damages were eliminated outright. Second, cost recovery was made optional. Those two were obvious enough. The third was more subtle. The scope of protection was changed in a way that effectively wiped out the most important element, expedited dismissal. You'll recall that the House had narrowed the scope of protection by excluding any statements that were knowingly or intentionally false. The Senate Committee expanded that exclusion by exempting from protection any statement that a person should have known was false. Besides being much more nebulous, this standard blocked expedited dismissals by making the court responsible for an elaborate process of discovery before a case could be dismissed. Instead of being relieved of the burden of a prolonged and costly defense against an empty complaint, defendants would be back in the soup.

Undaunted, OCVA resumed its media campaign. Despite many more editorials favoring a strong bill, the Republican majority on the Committee forwarded the gutted version to the full Senate. Unbelievably, the bill met a surprising fate when it reached the Floor it was tabled. Afterwards, one senator expressed the opinion that the Republican caucus had been badly embarrassed by the treatment of the bill in Bryant's committee, and did not want to be associated with strategic legislation against public participation. If he was correct, then we have a right to be optimistic about our chances in the next session. OCVA won hands down in the

House. Additionally, Representatives Shetterly and Schrader have agreed to sponsor anti-SLAPP legislation again. Neil Bryant no longer will be around to lead the opposition in the Senate. We also have the strongest possible support from the media. In the words of the Oregonian (4/1/99), Citizens who bother to walk through the doors of City Hall with something legitimate to say shouldn't be kicked through the doors of a courtroom for saying it.

In the meantime, SLAPPS continue to be a formidable weapon against citizen involvement. OCVA has documented several more cases since the defeat of HB 2805. If you are concerned enough about SLAPP suits to get involved, there are several things you can do. Join OCVA or one of the other organizations engaged in the fight. Raise the issue with current candidates for the Legislature. Call or write your representatives during the next session. You could even take a few hours and visit Salem to talk to your representatives and attend a hearing. OCVA needs all the help we can get.

If readers want to join our organization or pass on their knowledge of SLAPPS or threats of SLAPPS, please contact OCVA at P.O. Box 248, Philomath, OR 97370.



Jerry J. Ritter is a co-founder and current member of the board of directors of Oregon Communities For A Voice In Annexations.

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