

**Public Testimony  
to the 1997-1999 Legislature  
Testimony by Individuals and Organizations**

**Prepared in May 1999**



# Oregon

John A. Kitzhaber, M.D., Governor

76 of 179

## Department of Land Conservation and Development

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May 21, 1999

The Honorable Neil Bryant, Chair  
Senate Judiciary Committee  
Room 354, State Capitol  
Salem, Oregon 97310



### State Citizen Involvement Advisory Committee

Dear Chair Bryant and Members of the Committee:

The state's Citizen Involvement Advisory Committee (CIAC) strongly supports the passage of **House Bill 2805** (A-Engrossed) to limit SLAPP's (Strategic Lawsuits Against Public Participation).

The move to develop legislation to control SLAPP's originated in our committee, about a year ago. We heard testimony from several citizens that SLAPP's (or the threat of such litigation) had been used to intimidate people who spoke in public forums against certain land use proposals. These citizens asked us to investigate the matter and consider seeking legislation. We did investigate and concluded that legislation was indeed needed. Over the course of several months, we received extensive written and oral testimony that convinced us that SLAPP's have become a significant and growing problem in Oregon.

We asked the Department of Land Conservation and Development (DLCD) to draft a proposal for anti-SLAPP legislation, and DLCD did. The resulting bill, Senate Bill 330, was assigned to your committee early in the legislative session. Later, Representative Kurt Schrader introduced similar legislation in the House. His bill, House Bill 2805, was identical to SB 330, except for the addition of a provision for the awarding of punitive damages to SLAPP victims.

CIAC gave its support to HB 2805, as did DLCD. When concerns that the bill was too broad arose in the House Judiciary Committee on Civil Law, Representative Schrader proposed amendments. Those amendments were agreed to by the committee, which sent the bill to the House floor with a "Do-Pass" recommendation (on an 8-1 vote). The House subsequently passed HB 2805 (A-Engrossed) with a very strong vote of 49-9.

*More on next page . . .* 

*Neil Bryant, Chair, Senate Judiciary Committee*

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*May 21, 1999*

The history of this bill demonstrates four points that we believe should be of vital interest to your committee:

- There is very strong and widespread support for legislation to control SLAPP's.
- Throughout extensive public hearing and review over the course of several months, not one citizen or organization has testified in opposition to HB 2805.
- Many of the state's newspapers have written editorials in support of the bill. We know of none that have written in opposition to it.
- The bill has been amended to address early concerns that it was too broad.

But we have learned that new concerns may be raised at this late stage of the bill's review. You may hear proposals to amend the bill, especially to expand the exceptions to the immunity described in Section 1(1). Doing so would greatly weaken the bill and thus leave Oregon's citizens just as vulnerable to SLAPP's as they are now. **We therefore urge you not to make changes to the bill and to send House Bill 2805 (A-Engrossed) to the Senate with a strong recommendation of "Do Pass."**

Sincerely,



Robert Moldenhauer,  
Chair

cc: Representative Kurt Schrader  
Richard P. Benner, Director of DLCD  
Robin McArthur-Phillips, Governor's Land Use and Transportation Advisor  
William Blosser, Chair, Land Conservation and Development Commission



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## 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 DLCDC 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](mailto:mitch.rohse@state.or.us).

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cc: State Citizen Involvement Advisory Committee (CIAC)

## **Attachments**

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March 16, 1999

**TO: The Honorable Lane Shetterly, Chair  
House Committee on Judiciary - Civil Law**

**FROM: Richard P. Benner, Director** 

**RE: House Bill 2805, on "SLAPP's"**



The Department of Land Conservation and Development strongly supports House Bill 2805, which has been introduced by Representative Kurt Schrader to deal with the growing problem of "SLAPP's" in Oregon. SLAPP's are "Strategic Lawsuits Against Public Participation." They are used to silence or intimidate citizens who would otherwise participate in public forums such as planning commission meetings. Such suits often are thrown out by the courts, but only after a citizen has been forced to spend a great deal of money, time, and energy to defend his or her right to speak out. As you will see from the attached material, SLAPP's occur in Oregon, and they have a chilling effect on citizen participation in planning and in other public decision-making processes.

Is there a significant public policy issue in these seemingly private SLAPP disputes? We believe there is. Effective public policy-making and decision-making can occur only if citizens participate freely. That is why Oregon and all of its cities and counties have strong policies to encourage open meetings, notice to affected parties, public hearings, and citizen participation in land use planning. SLAPP's block such participation by enabling the filer of a SLAPP to force citizens out of the public forum and into the courts. That works against state and local policy for citizen involvement, and it works against our Constitution's First Amendment, which promises citizens the right to "petition the Government for redress of grievances."

The U.S. Supreme Court recently expressed its concern about the chilling effect of SLAPP's. In the 1991 case of *Columbia v. Omni Outdoor Advertising*, the court said the First Amendment's petition clause protects a citizen's "concerted effort to influence public officials regardless of intent or purpose." This case and others are cited in the 1996 book *SLAPP's: Getting Sued for Speaking Out*, by George Pring and Penelope Canan. The authors believe that the problem of SLAPP's is widespread and growing. They note that many states have taken action to limit SLAPP's: "Nine states--California, Delaware, Massachusetts, Minnesota, Nebraska, Nevada, New York, Rhode Island, and Washington--have adopted modern, 'active' anti-SLAPP statutes in the 1990s, and a number of others--including Florida, Georgia, New Jersey, Pennsylvania, Tennessee, Texas, and the territory of Guam--are considering them." (Pring and Canan, p. 189)

(More . . . )

*SLAPP's, page 2*

Early in this session, DLCD and the state's Citizen Involvement Advisory Committee (CIAC) sought legislation to limit SLAPP's. We proposed Senate Bill 330, which has been assigned to the Senate's Judiciary Committee. House Bill 2805 is quite similar to SB 330, but is stronger in that it provides for punitive damages against the filer of a SLAPP. We believe that putting such a provision in the law is appropriate, and we therefore support the passage of House Bill 2805.

If you would like more information from DLCD on this matter, please call Mitch Rohse at 373-0050, extension 226. Thank you for your attention. □

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*The legislature hereby declares it to be the policy of the state that the rights of citizens to participate freely in the public process must be safeguarded with great diligence. The laws . . . must provide the utmost protection for the free exercise of speech, petition and association rights, particularly . . . in a public forum with respect to issues of public concern. The . . . threat of . . . litigation . . . can be and has been used as a means of harassing, intimidating or punishing individuals, unincorporated associations, not-for-profit corporations and others who have involved themselves in public affairs.*

New York State Legislature, in adopting its  
1992 anti-SLAPP Citizen Participation Act,  
quoted in Pring and Canan, page 188

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cc: Sen. Neil Bryant  
Rep. Kurt Schrader  
Citizen Involvement Advisory Committee  
Robin McArthur-Phillips  
Mitch Rohse  
Jeff Lamb  
Evan Manvel

*Attachments*



LEAGUE OF WOMEN VOTERS  
OF OREGON

TO: House Judiciary - Civil Law Committee  
Representative Lane Shetterly, Chair

March 24, 1999

**RE: Testimony on HB 2805  
Civil Immunity for Free Speech**

The League of Women Voters of Oregon is a non-partisan organization of over 1350 members statewide. The League's mission statement includes support for "the individual liberties established by the Constitution". The right of an individual to free and unencumbered speech is one of the most important of the rights guaranteed to citizens under the U.S. Constitution.

You will hear today of specific examples of lawsuits, some threatened and some real, brought against citizens participating in one way or another in a government decision-making process. These lawsuits are of deep concern to the League. While lawsuits which are brought against citizens attempting to effect government are generally dismissed by the Courts, the defendant is left with legal costs, sometimes enormous legal costs.

The League which is well-known for its advocacy of citizen participation is deeply concerned about the impact of such lawsuits on citizen participation. One of the most egregious results of these lawsuits is the intimidating effect on citizen participation. No one, just to express an opinion, wants to be sued. No one likes the publicity; no one would choose to spend time, energy and money defending their reputation. Just one lawsuit or threat of a lawsuit of this nature leads to the potential silencing of not just one citizen - but of many citizens. Not only is a community the poorer for the loss of this participation, our country is the poorer for allowing this potential for intimidation.

The League strongly supports HB 2805 in its efforts to keep our government really open to legitimate opportunities for citizen participation - without fear of intimidation.

Paula Krane  
President

Liz Frenkel  
Natural Resources Action Coordinator



Testimony  
In Support of HB 2805  
Before the House Civil Law Judiciary Committee  
March 24, 1999

from  
Evan Manvel  
Planning Advocate, 1000 Friends of Oregon

Chair Shetterly, Members of the Committee, my name is Evan Manvel. This testimony is submitted on behalf of 1000 Friends of Oregon, a nonprofit organization with more than 5,500 members statewide. 1000 Friends is affiliated with nine local land use groups from Curry County to Hood River.

President George Bush once said: "No obstacle is more chilling than the fear of personal liability ... The ripple effect of just one [law]suit on the willingness of people to serve as volunteers is great." That is why we're here today.

We support HB 2805 because it would protect citizens from lawsuits brought to discourage public participation in local government decisions (so-called "Strategic Lawsuits Against Public Participation", or SLAPPs). Specifically, the bill would provide civil immunity for statements made by people in the course of participating in administrative, quasi-judicial, or legislative proceedings conducted by a public body. HB 2805 would allow citizens to recover reasonable expenses incurred in their self-defense against such lawsuits, and would allow courts to levy punitive damages against the filers of such suits.

#### **Effective Land Use Planning Depends on Citizen Involvement**

SLAPPs threaten the effectiveness of Statewide Planning Goal 1, *Citizen Involvement*. Our statewide planning program's success *depends* on local citizens participating in a public dialogue about the planning process and permitting decisions. Back in 1973, the Land Conservation and Development Commission selected and designed our statewide planning goals based on conversations with citizens around the state. Today, the conversation continues on a more local level. House Bill 2805 protects citizens engaged in this critical ongoing dialogue.

#### **The Problem is Intimidation**

A senator recently asked me, "Doesn't free speech protect everyone?" The answer is YES -- to an extent. Almost all the lawsuits you hear about today were dismissed by the courts, as courts recognize the right to petition government as a core Constitutional right. The sad fact is, these lawsuits are not filed to be won, but to intimidate. Defending yourself against an 18.8 million-dollar lawsuit, as Terry Fleming was forced to do in Banks, is difficult and painful, and drains both your pocketbook and your willingness to participate in the civic process.

As President Bush noted, the SLAPP -- or threat of SLAPP -- successfully silences not only the defendant, but many others of the community. When our citizens are afraid to participate in

public processes, we lose the democratic ideal that makes America great. If those who own more resources control and dictate the community planning process, we are governed by money, not people. House Bill 2805 protects innocent citizens from bearing high legal defense costs, and allows courts to punish those parties whose strategy is to sue citizens into silence.

### **These Lawsuits are Prevalent in Oregon**

Many people I talk to doubt these lawsuits exist here in Oregon. Yet the Citizen Involvement Advisory Committee of Department of Land Conservation and Development has documented a dozen cases of such lawsuits over the last five years (see attachment A). Developers in Banks, Newberg, St. Paul, Yachats, and Tillamook County have filed suits against citizens and public boards who opposed their proposals. Some planners believe it has become standard practice in their counties for developers to threaten lawsuits against those who oppose development proposals.

### **Oregon Has Fallen Behind Other States in Protecting Citizens from SLAPPs**

SLAPPs have been recognized nationally as a threat to democracy and effective governance, yet Oregon lags behind in addressing this problem. At least thirteen states currently have laws protecting citizens from SLAPPs: California, Delaware, Georgia, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, and Washington (for a copy of Minnesota's statute, see attachment B). Several other states are currently considering such legislation.

### **Dealing with Falsehoods**

Opponents argue House Bill 2805 offers people the broad ability to lie and deceive while giving testimony, without consequence.

The solution to that problem is both simple and challenging -- to rebut false assertions in the public forum. An appropriate response to a public misstatement is a public correction, not a million-dollar -- or 18.8 million dollar -- lawsuit. I have faith in democracy. Most Oregonians participating in the public process are honorable and will speak what they believe to be the truth. And we *must* have some faith in the ability of our elected officials to ferret out the truth.

Furthermore, it is not true that if we protect citizens from civil liability, people testifying have no reason to tell the truth. Reputation and credibility are some of the most valuable assets both citizen activists *and* developers have -- and both can be destroyed by careless disregard for the truth. This is one reason we have *not* seen any demonstration that intentional and malicious provision of false testimony by citizens is a widespread problem, or that it would become one if we passed this bill.

If we assume there are approximately 10,000 land use decisions made each year, each decision inspires about two pieces of testimony, and each piece of testimony has three pages. We would be fooling ourselves to believe current laws ensure the 60,000 pages of testimony are anywhere close to free of misrepresentation, distortion, or numerical error. The truth is, democracy can be a messy, imprecise form of government.

Professor George Pring, a national expert on SLAPPs at the University of Denver, argues: "While some citizen communications to government inevitably will be incorrect, unsound, self-

interested, or not in good faith, it is essential in our democracy that the constitutional rights of citizens to participate fully in the process of government be uniformly, consistently and comprehensively protected and encouraged."

Some would say we face a trade-off. The Salem *Statesman Journal* described it in an editorial (5/14/98):

"Oregon should limit lawsuits that undermine free speech ... The latest threats to [free speech and the freedom to petition] come not from the government, but from people intent on protecting their interests by sacrificing our freedoms ... Oregonians must keep their right to speak their minds."

We are, admittedly, accepting an imperfect solution. But I, for one, would rather err on the side of protecting citizens and open public debate, and put my faith in the truth to come out.

Another option -- to have a law discriminating between protected and unprotected testimony -- fails to keep these situations from becoming legal battles. Public debate belongs in the council chamber and on the street corner, not in the court room.

### **Suggested Improvements to HB 2805**

We support House Bill 2805 as written. However, as I have said, we must keep these cases out of the courts. We've studied ten other state laws that address SLAPPs, and have amendments to propose for House Bill 2805 (attachment C).

The first change proposes to expand the protection in House Bill 2805 to traditional public forums used in the process of petitioning government. It is our intent to protect such forums as letters to the editor, when those letters are aimed at influencing governmental decisions. Other states, including California and Massachusetts, have such protections.

The second set of changes proposes a process for quick dismissal of these lawsuits. Instead of bearing the thousands of dollars of legal costs, and years of agony with million-dollar lawsuits hanging over their heads, citizens could get these suits quickly dismissed. This would also free up our courts to do more important work. National experts on SLAPPs, from Vanderbilt University's Freedom Forum and the University of Denver, say this feature is a critical part of successful SLAPP legislation. Seven of the ten statutes we studied have this provision (California, Delaware, Massachusetts, Minnesota, Nebraska, Nevada, and Rhode Island).

The third set of changes proposes to clarify the terms in the legislation, most importantly the definition of "public participation." This definition of public participation is similar to the definition used in other states, including Nebraska and Rhode Island.

### **A Note on Punitive Damages**

Finally, a note on punitive damages. Six of the ten state statutes we reviewed allow punitive damages. While courts are known to be reluctant to award such damages, we feel the court should have the option -- if not the obligation -- to award them. Punitive damages are meant to discourage actions counter to the public interest. Without such damages, 1000 Friends is uncertain if this legislation will adequately discourage those who choose to use lawsuits to

strategically intimidate the public. Award of attorneys fees may simply be seen as a cost of doing business, and a worthwhile investment for developers if citizens are intimidated into silence.

In conclusion, if indeed we wish to be a government of the people, by the people, and for the people, we need to protect those people who stand up to the civic challenge and get involved. I urge you, therefore, to support House Bill 2085, and support the efforts of all Oregonians who involve themselves in this treasured process of democracy.

Thank you for your attention; I would be glad to answer any questions.

attachments (3)