SURVIVAL GUIDE FOR S.L.A.P.P.s -- STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

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REFERENCE: Proceedings of the 1991 Georgia Water Resources Conference, held March 19 and 20, 1991 at The University of Georgia. Kathryn J. Hatcher, Editor, Institute of Natural Resources, The University of Georgia, Athens, Georgia.

THE S.L.A.P.P. PHENOMENON: THE MOUNTING THREAT TO CONSTITUTIONAL FREEDOMS

The increasing risk of becoming the target of a political intimidation lawsuit, or SLAPP (Strategic Lawsuit Against Public Participation), represents a major challenge facing individuals actively involved in environmental issues. In unprecedented numbers, individuals are being intimidated and silenced with SLAPP action lawsuits because of their participation in a wide range of traditional political activities which SLAPP critics contend are integral to the American political process as protected by the United States Constitution (Pring, 1990).

Dr. George W. Pring, a national SLAPP expert, considers the alarming proliferation of political intimidation lawsuits in America over the past two decades to be the "newest litigation explosion" (Ibid.). Along with colleague Dr. Penelope Canan, Pring first became aware of the negative ramifications of the SLAPP phenomenon in the 1970's while "studying and defending environmental and community advocates" (Ibid.). Pring and Canan have since managed to document that SLAPPs constitute a common and accelerating phenomenon which "can be found in every state, every government level, every type of political action, every public issue of consequence" (Ibid.).

Issues included the following categories: urban and suburban development/zoning (25%); complaints against public officials and employees (20%); environmental/ animal rights (18%); civil/human rights (11%); neighborhood problems (7%); and consumer protection (6%), (Ibid.). Water management issues have been involved in several of these SLAPP categories. Urban and suburban development/zoning has increasingly become a hybrid category which more and more frequently entails addressing the impact on water supply, waste disposal, or/and water system infrastructure in any situation where a more intensive use of land or potentially pollutive use is being considered.

Among those specific activities which Pring and Canan have documented as stimulating SLAPP threats are the following activities which most high school citizenship classes teach us are acts of an alert, involved citizenry: writing letters; calling government officials; criticizing government actions and policies; speaking out at a public meeting; reporting violations of law; giving testimony; campaigning on issues; demonstrating, picketing, and boycotting; filing public issue lawsuits (Pring, Jan. 1, 1990).

What They Didn't Tell You on "L.A. Law"

On the November 8 airing of the 1990 season's "L.A. Law," viewers were presented with an entertaining, but dangerously misleading SLAPP scenario. Developers seeking to eradicate homeowner opposition to a proposed shopping mall contracted the services of a large and powerful law firm to threaten SLAPP action against the homeowners. Attorneys at the firm had confidence in their intimidation power, especially when they learned that the homeowners were to represented by a single, sole practitioner attorney. The program concluded with the homeowners launching a countersuit -- known as a "SLAPPback" -- against the developers, much to the chagrin of attorneys at the large firm who did not expect "the little guys" to retaliate.

Even though they all lived happily ever after on "L.A. Law," the real-life SLAPP scenario is a far different story. In the vast majority of instances with which Pring and Canan have become familiar, the mere threat of a SLAPP action suit by the would-be filer has succeeded in the SLAPP victim's fearful and hasty capitulation to the filer's demands.

S.L.A.P.P. INTIMIDATION: PHANTOM OF THE AMERICAN LEGAL SYSTEM

SLAPP intimidation is difficult to locate, track, and evaluate for good reason. The SLAPP lawsuit only begins to leave footprints when it is actually filed and becomes part of the public records. The actual filing, however, represents Act III of a scenario in which the first two acts take place offstage, and Act III is seldom performed at all (Georgia SLAPP Coalition, 1990).

Typically in Act I, the attorney for the client initiating the SLAPP settles for a verbal warning -- either to the

intended victim or to the victim's attorney. Depending on the SLAPP attorney's intimidation quotient, the verbal threat can range from gentle hint to aggressive onslaught. Chillingly, this verbal warning is often all that is needed to achieve compliance (Ibid.).

If necessary, Act II provides the formal written warning in which the intended victim is given thirty days to cease, desist, withdraw from legal action, sign documents limiting the victim's future actions and freedom of speech, and whatever else the would-be filer has in mind. Failure to comply with these demands represents grounds for the official filing of the SLAPP lawsuit (Ibid.).

Additional SLAPP tactics currently being utilized to achieve maximum intimidation power include subpoenaing the victim for lengthy depositions -- frequently before the victim has had time to obtain adequate legal counsel; making threatening statements to the media regarding the victim and his future fate if he persists in disturbing the would-be filer; and/or filing various motions, for instance, interlocutory injunctions against the victim's continued freedom of speech (Ibid.).

In 85% or more of the cases studied, Act III never takes place at all. SLAPP threat victims, regardless of their rights under the United States Constitution, simply elect in most instances to capitulate to the would-be filer's demands rather than face the extreme financial pressure and emotional duress of multi-million dollar lawsuits (Pring, 1990; Georgia SLAPP Coalition, 1990).

Pring writes of his early experience with SLAPP intimidation: "We saw committed, hard-charging activists become frightened into silence, supporters drop out, resources diverted, fund-raising wither, public-issue campaigns flounder, and community groups die." (Pring, 1990).

THE S.L.A.P.P. BY ANY OTHER NAME, INTIMIDATES THE SAME

SLAPP lawsuits by their very nature are intimidative in intent, but since the desire to intimidate is not legal grounds for filing a lawsuit, SLAPPs must "masquerade" legally and enter the system "camouflaged as one of six ordinary torts." In the cases studied by Pring and Canan, the percentage distribution spread over these six ordinary torts was as follows: defamation/libel (53%); business torts (32%); judicial torts (20%); conspiracy (18%); constitutional/civil rights violations (14%), and nuisance/other (Ibid.).

Whereas few SLAPPs actually reach the courts, the danger is that those which do will be perceived as ordinary lawsuits, rather than as a sleight-of-hand use of the legal system in which both the forum and the issue in dispute become changed and the motivation behind the SLAPP concealed.

Pring terms SLAPPs "classic 'dispute transformation' devices, a use of the court system to empower one side of a political issue, giving it the unilateral ability to transform both the forum and the issue in dispute" (Ibid.). By initiating the SLAPP, one set of interests manages to successfully transform "a public, political-arena debate into a private, judicial-arena adjudication" (Ibid.).

Two water-related SLAPP events offer excellent examples of the transformational power of SLAPP threats and lawsuits.

Example #1: SLAPPed for $2,000,000

Retired third grade teacher Ann Williams became concerned about a proposed waste recycling plant which would be releasing low-level pollution upriver from the public water intake for her small town of Buras, Louisiana. She started to talk to neighbors. She handed out leaflets, and wrote to the newspaper editor voicing her worries about the level of pollution involved in the effluent and its proximity to the city's water intake, and she lobbied her local government representatives. She was SLAPPed with a $2,000,000 lawsuit.

School teacher Williams is being sued for libel, slander, and defamation by the owner of the proposed waste recycling plant because supposedly her questions damaged his reputation and that of his company. At the same time, her own District Councilman, Bryan Dickinson, calls the lawsuit "ridiculous" and comments that "the questions she was bringing up at council meetings and in her flyers aren't all that unusual" ("20/20" Telescript, 1990).

Example #2: SLAPPed for $5,000,000

Snellville (Gwinnett County, Georgia) homeowners filed an appeal of a re-zoning decision made by the Snellville City Council in December 1989 which would allow development of a major regional mall virtually "on their doorsteps." The appeal cited numerous concerns about violation of their rights of due process and of proper zoning procedure, and it questioned the impact on their home value and social infrastructure.

In addition, since the property contained an area of wetlands and a tributary of the Yellow River, there were legitimate concerns about the way in which a mall of that size would impact and alter these sensitive areas. Residents had also been subject to watering restrictions and to a recent sewer moratorium. They had legitimate questions about the mall's density of development, water requirements and impact on their water system infrastructure.

Within hours after the appeal was filed by the homeowners, the five named plaintiffs, along with several homeowners who had passed out flyers or spoken out at the re-zoning hearing, received letters threatening them with multi-million dollar lawsuits for "abusive litigation" or "libel." The story of the Snellville Mall Opposition SLAPPdown was described in a series of articles appearing

from December 1989 to February 1990, in the Gwinnett Daily News and the Atlanta Constitution.

One by one, the named plaintiffs in the Snellville Mall Opposition re-zoning appeal dropped out of the suit. Fellow members of the homeowners' association watched as the thousands of dollars which they had collected to pay for the suit went down the drain.

Pring had recently appeared on the "MacNeil Lehrer Hour" for a discussion of SLAPP lawsuits. He was contacted by homeowners and media professionals and stated that the Snellville Mall SLAPPdown was a classic example of the use of SLAPP threats to intimidate and silence.

In both cases, that of Ann Williams and the Snellville Mall Opposition, the SLAPP action successfully transformed a matter of legitimate public concern. Water-related issues affecting the public's health, welfare, and quality of life failed to be addressed as the debate was transferred to another arena. Ironically, even a solution in the SLAPP arena offers no solution for the original dilemma.

To further complicate the Snellville Mall Opposition SLAPPdown story, Atlanta Constitution staff writer, Ken Foskett, released an exhaustively researched front page exposé within days after the last named plaintiff withdrew from the appeal (Foskett, March 5, 1991). In his article, "A Tangled Web of Relationships in Vote for Mall," Foskett detailed the many familial and business connections between mall developers and city of Snellville councilpersons who had voted for the mall. Although the public was outraged to learn of these relationships, the opportunity to address these and other issues had been lost because of SLAPP intimidation.

RESEARCH ON S.L.A.P.P.s

The highly successful chilling effect of SLAPPs on traditional forms of American advocacy lies at the heart of a mounting concern among judges, attorneys, legislators, and members of civic, consumer, homeowner, and environmental groups who are attempting to address the abusive ramifications of the SLAPP phenomenon.

Together, Pring and Canan head the Political Litigation Project, the first nationwide study of the SLAPP phenomenon. In this project, sponsored by the National Science Foundation, researchers are actively seeking information regarding SLAPP threats and actions throughout the country. The project provides free information upon request to SLAPP victims or their attorneys. Pring serves as an expert witness testifying in conjunction with SLAPP action suits.

The Georgia SLAPP Coalition

The Georgia SLAPP Coalition was formed in 1990 by George E. Butler II, an adjunct professor of law at Emory University and practicing attorney specializing in zoning and real estate law; by Mike Chancey, a former community advocate who ousted a 29-year incumbent for a city council position in the wake of the Snellville Mall Opposition SLAPPdown; and by the author of this paper, Grayson Roquemour.

All founding members of the Georgia SLAPP Coalition have experienced SLAPP activity first hand. George Butler has lost clients to SLAPP threats. Mike Chancey has been threatened with a SLAPP suit, and Grayson Roquemour currently has an active SLAPP suit filed against her.

Georgia Legislation

Motivating the establishment of this Coalition was the dramatic increase of SLAPP activity following the passage of the "abusive litigation" legislation by the Georgia Assembly in 1989. Although some abusive litigation suits are justified, and all SLAPPs are not filed as abusive litigation suits; this particular category of tort appears to be irresistibly attractive to those who would seek to intimidate through the use of SLAPP threats and suits.

Specific instances in Fulton, Gwinnett, Dekalb, Bibb and Walton Counties which used SLAPP intimidation have generated considerable support and encouragement for the Georgia SLAPP Coalition and efforts being made to address SLAPP intimidation.

Former state Senator Roy Barnes, who introduced the "abusive litigation" bill, has gone on the record concerning the Snellville Mall Opposition SLAPPdown in saying that the original intent of the bill was not served in this instance. State Attorney General Michael Bowers commented to the same effect (Snellville Mall SLAPPdown Series, 1989-90).

WHO GETS S.L.A.P.P.ED?

SLAPP intimidation is not an equal opportunity situation. Many activists may have spent a lifetime participating in various political processes mentioned previously in this paper as stimulating SLAPP threats and action -- and never been threatened with a SLAPP lawsuit. The fact that one has never been threatened with a SLAPP lawsuit means very little except that the precipitating array of red flag warning conditions may not have been present.

While these red flag conditions may vary in specifics, they tend to cluster around four major factors: money; impact; legal sophistication; and inequality of power, influence, or financial resources.

Money. The developers of the Snellville Mall stood to earn millions if the land was rezoned to allow a major regional mall of the type they had planned and marketed. The appeal suit on the part of the homeowners

represented the possibility of answering questions, making compromises in development plans, and taking time -- all of which the developers perceived as threats to their anticipated profits. So the size of the stake is one factor influencing the likelihood of becoming a SLAPP victim.

Impact. The last thing a sincere activist would want to learn is that he is making no impact, but that often is the case. The teacher in Example #1 was not SLAPPed until her questions and her flyers and her actions began to cause others to ask questions about the potential effects of the waste from the incinerator. Appeals of re-zoning decisions often include a motion for an injunction against the beginning of construction until the zoning can be reviewed by the court. Consequently, the developer has his development plans impacted and impeded by those appealing the rezoning decision.

Legal Sophistication. The developers of the Snellville Mall obviously undertook little risk and secured high returns by initiating SLAPP threats against named plaintiffs and other homeowners in the Snellville Mall Opposition.

The law firm which handled this SLAPPdown effort characterizes itself as representing developers and financial/lending institutions. Both the clients and the attorneys representing these clients could be accurately described as "legally sophisticated" -- especially when compared with homeowners who may be experiencing this type of legal action for the first time.

Inequality of Opponents In Terms of Power, Influence and/or Financial Resources. Intimidation is not an effective tactic when both parties are equally armed. Since 85% of SLAPP threats never need to be filed, it stands to reason that the wearing down tactic of "litigating one party to death" does not enjoy much chance of success if both parties are evenly matched in resources. Area Atlanta homeowners who had filed an appeal of a rezoning decision near their homes were verbally warned by the opposing attorney that a SLAPP could be forthcoming. However, when a former United States Congressman and influential attorney proved to be one of the homeowners, the power of his celebrity and position served to ward off further threats of SLAPP action. Intimidative in purpose, SLAPPs only serve their purpose when there is an inequality among the opposing parties (Georgia SLAPP Coalition, 1990).

SURVIVING THE S.L.A.P.P.

Given a multiplicity of state codes and varying levels of sophistication among attorneys and the courts, the way in which SLAPPs are dealt with legally varies from state to state, court to court.

Ongoing research such as that being done by the Political Litigation Project and the Georgia SLAPP Coalition continues to uncover variations on old themes; however, all of the data considered for this paper strongly suggests the efficacy of knowledge, preparation, and a willingness to act decisively as being critical to the optimum counteroffensive response in the face of SLAPP threats and legal action.

Surprise is a Disadvantage. As this paper makes clear, SLAPP activity is increasing and can happen within a number of contexts. The Georgia SLAPP Coalition conducted an informal survey of SLAPP activity throughout the state. Results of this survey indicated an astonishing level of ignorance regarding the SLAPP phenomenon. To understand SLAPPs and how they work, and to be prepared for the likelihood of a SLAPP threat, is critical to taking the proper action if the need arises.

Knowledge is an Advantage. If a SLAPP is actually filed, two outcomes are the most characteristic. Often the defendants will have their attorney get the case before a judge in a preliminary hearing of some sort. In many cases, with a cursory review of the facts, judges familiar with the intimidative intent in filing a SLAPP will act to dismiss the SLAPP lawsuit which then frees the defendants from this additional burden and expense.

Where the defendant elects to countersue, or "SLAPPback," in an effort to secure legal costs and punitive damages, the decision of the SLAPP/SLAPPback usually goes to the defendant, or SLAPP victim. Unfortunately, this latter course of action, due to the expense and pressure involved, is seldom the course of action taken by those threatened with SLAPP lawsuits.

At this point in time, the attorney for a would-be filer of a SLAPP lawsuit can quite truthfully advise his client that either the threat will work to secure capitulation or that the suit (if actually filed) may be dismissed by the judge. Either way, the intimidation aspect operates to the maximum while keeping risk to a minimum -- for the would-be filer and his attorney.

S.L.A.P.P. INTIMIDATION: THE SECRECY AGENDA

If SLAPPs are a threat to the Constitution and political processes which insure a working democracy, why isn't anything being done to address the problem?

As previously discussed, SLAPP threats are currently so successful that it is seldom necessary to file the actual SLAPP lawsuit. In addition, SLAPPs are not filed as political intimidation lawsuits or SLAPPs, but as ordinary torts. The case must be analyzed to determine if a particular suit qualifies as a SLAPP. To simply build documentation has presented considerable problems, and these are being addressed by the Political Litigation Project, the Georgia SLAPP Coalition, and others trained to recognize the "dispute transformation device" nature of the SLAPP lawsuit.

Perhaps the most insidious quality blocking viable action being taken against SLAPP intimidation, however,

is the secrecy agenda of SLAPPs -- the concomitant use of injunctions and secrecy contracts which serves to prevent future actions and speech of those threatened with SLAPP lawsuits.

The results of such activities are frightening and have a surreal air of "This can't happen in America," and yet it is. By effectively utilizing a secrecy agenda, those employing SLAPP intimidation not only secure the future silence and passivity of the SLAPP victims, but they also erase their own footprints, prevent the free exchange of information, and make it difficult for others to learn from the experience of those who have gone before.

For example, in a recent newspaper article featuring the growing effectiveness of neighborhood associations in fighting for quality growth and better, zoning, the only person interviewed for the Snellville Mall Opposition segment of the article was one of the SLAPP victims who had been forced to sign a secrecy contract -- to avoid a SLAPP lawsuit. As a result, a potentially good article became far less enlightening than it should have been, and readers were not informed about the chilling effectiveness of the SLAPP secrecy agenda.

POSTSCRIPT

Currently, founding members of the Georgia SLAPP Coalition are working with a prominent member of the Georgia General Assembly to structure a legislative response to SLAPP intimidation. Opposition to such legislation is anticipated, for as has been made clear, SLAPP intimidation tactics are working all too well for a certain segment of the population.

For Help or Further Information: The Political Litigation Project has a number of articles available upon request, including many of those in the bibliography of this paper.

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For information about the Georgia SLAPP Coalition or to report SLAPP activity in Georgia, contact: (1) George E. Butler, II, 201 Peachtree Circle, NE, Atlanta, Georgia 30309, telephone: (404) 873-2544; (2) Mike Chancey, 2118 Meadowcrest Terrace, Snellville, Georgia 30278, telephone: (404) 979-7829; (3) Grayson Roquemour, P.O. Box 1717, Loganville, Georgia 30249-1717, telephone: (404) 533-7274.

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