Horton's Michigan Notebook
Political & Social Commentary

Volume I, Number 11—April 1, 2018

Attempts to Silence Public Participation

I came across a story in the daily newspaper that caught my interest. It was an Associated Press article about a 28-year-old man from Sibley Iowa—population 2,600 people—who won a free-speech lawsuit against the government of his hometown. He had filed it after city officials threatened to sue him "if he didn't stop criticizing the town's odor problem."

What brought this on, according to the article, is a company that makes a high-protein animal food supplement from pig blood had located in the community in 2013. Apparently, their processing operation created a smell that this resident, Josh Harms, found offensive. Whether others in town shared that opinion was not mentioned.

What got him in the crosshairs of local officials was that he started publishing a website in 2015 under the domain name of "Should You Move to Sibley, Iowa?" In it, he brought up the problem of the smell from the processing plant and what he felt was an ineffective response by the city government. Among his comments was that his hometown smelled "like rancid dog food."

Whether this comment (or others like it) was the 'straw that broke the camel's back" or else the Sibley powers-to-be felt the community was being unfairly maligned by the general tenor of Harms' criticism and the website was hurting future development is not mentioned in the article. Nor is there any mention of what the company, they of the alleged foul odor, felt about his accusation, although presumably they were not happy and may have conveyed their displeasure to the public officials.

But none of that is really pertinent. It's what happened next that made this event newsworthy. According to the story, the young man received a letter from the city attorney stating that "Harms was hurting the community with his website and threatened a lawsuit if he didn't stop."

Harms apparently is not easily intimidated, or maybe the alleged odor is so offensive to him that he didn't care, but instead of shutting up and no longer posting comments on his website, he was able to enlist the assistance of the American Civil Liberties Union (ACLU) of Iowa.

The attorneys for the ACLU, seeing this as an attempt by government to deny a citizen his right of free speech under the First Amendment, filed a suit on behalf of Harms in the U.S. District Court, asking that the court prevent the City of Sibley from filing their lawsuit. A federal judge, the Honorable Leonard Strand, did just that.

In a permanent injunction approved by the judge and agreed to by the city and Harms, Sibley officials were prohibited from making any further threats. Judge Strand also awarded Harms $6,500 in damages and $20,000 in legal fees. In addition, the terms of the agreement allow Harms to be interviewed by the news media, meaning he's able to say whatever he wants to a much larger

megaphone, and he can continue publishing his website without any restrictions. The city is also required to issue a written apology and hold First Amendment training for the staff. As to having to apologize and take a refresher course in civics, talk about hard labor.

Harms, in a comment to the Associated Press reporter, said he understood someone "personally disagreeing with something that's been written," but equated the threat of the lawsuit with censorship.

Rita Bettis, the legal director for the ACLU of Iowa, added that "The right of the people to freely and opening criticize their government is the very foundation of democracy," pointing out that "In America, the government cannot threaten legal action against someone for speaking out against it."

What Sibley officials did, it seems to me, is try a version of SLAPP, better known as "Strategic Lawsuit Against Public Participation". This legal maneuver—often initiated by a big corporation—is not designed to win in court, but rather to silence or otherwise discourage critics through the intimidation of an expensive lawsuit.

The corporations, of course, possess "deep pockets" and can write the expense off as a cost-of-doing-business. For the person, or the organization being sued, the latter often being a public advocacy group, the expense of mounting a legal defense can be financially burdensome, even crippling.

Part of the strategy has also been to utilize the tactic of "if at first you don't succeed, try again," meaning that losing a case in court does not stop the plaintiff from filing another lawsuit, appealing the outcome, or coming at it from a different angle.

Many states have anti-SLAPP laws in place to address this tactic (it is not a new one) as well as statues that deal with frivolous lawsuits. These measures allow for an early dismissal of the case by a judge and can require the plaintiff to reimburse the defendant for legal expenses. However, determining if a lawsuit falls under either category is not always a clear-cut. Those engaging in this practice don't generally admit to this motive. Also, there's still a desire to allow everyone their 'day in court' if they feel they have a valid claim or have been wronged.

Robert Reich—the former Secretary of Labor under President Bill Clinton, and nowadays a college professor, author, and public advocate extraordinaire—wrote in a column of how SLAPP was recently used by a couple of large corporations against environmental groups opposed to their respective projects—only with a new twist. Both of the lawsuits, Reich pointed out, are based on a U.S. conspiracy and racketeering law, known as RICO, intended to ensnare mobsters.

The environmental groups and other named defendants were accused in both lawsuits of "illegally conspiring to extort the company's customers and to defraud their own donors." One of the lawsuits (Reich pointed out) "even alleges they support eco-terrorism and engage in drug trafficking."

The similarity of allegations is no coincidence since the lawsuits were filed the same attorney. One of the attractions of using RICO, Reich pointed out, is that it allows triple damages. Given that one of the companies pegged their financial damages at $300 million, a judgment in favor of the plaintiff would come to $900 million, effectively bankrupting the defendants.

Reich applauded the fact that one of the suits was thrown out by the federal judge early on, but noted, "Winning isn't necessarily the goal of SLAPP suits. Just by filing the suits, it drains environmental groups of time, energy and resources they need, so they can't continue to fight to protect the environment."

Reich foresees similar lawsuits used against other public advocacy groups deemed to be thorns-in-the-side by companies.

"Connect the dots, and consider the chilling effect SLAPP suits are having on any group seeking to protect public health, worker's rights and even our democracy," he said.

While groups would be the first target of this effort, outspoken individuals would very likely be included in the crosshairs. If left unchecked or unopposed, any of us could

become victims of this attempt to silence, intimidate, or censor via the lawsuit—or threat of one. Any of us could be dragged into court for expressing a critical opinion, opposing a policy or practice, bringing forth a personal grievance, or taking part in a protest rally. Or, at least, for doing it too publicly, or too well.

It's a strategy that, if fully pursued and not countered by public outcry, may prove effective. It may very well silence a good deal of public participation and censor the right of free speech.

Such intent and outcome, in my mind "stinks!"