

COMMONWEALTH OF PENNSYLVANIA  
HOUSE OF REPRESENTATIVES

TOURISM AND RECREATIONAL DEVELOPMENT  
COMMITTEE HEARING

STATE CAPITOL  
HARRISBURG, PA

RYAN OFFICE BUILDING  
ROOM 205

MONDAY, MARCH 18, 2013  
11:30 A.M.

PRESENTATION ON HB 544  
RECREATIONAL USE OF  
LAND AND WATER ACT

BEFORE:

HONORABLE JERRY STERN, MAJORITY CHAIRMAN  
HONORABLE KAREN BOBACK  
HONORABLE GORDON DENLINGER  
HONORABLE HAROLD A. ENGLISH  
HONORABLE MIKE FLECK  
HONORABLE MARCIA M. HAHN  
HONORABLE DOYLE HEFFLEY  
HONORABLE RYAN E. MACKENZIE  
HONORABLE DAN MOUL  
HONORABLE MARGO L. DAVIDSON  
HONORABLE FRANK FARINA  
HONORABLE JARET GIBBONS  
HONORABLE MARK LONGIETTI

\* \* \* \* \*

*Pennsylvania House of Representatives  
Commonwealth of Pennsylvania*

COMMITTEE STAFF PRESENT:

ALLEN TAYLOR

MAJORITY EXECUTIVE DIRECTOR

NANCY COLE

MAJORITY LEGISLATIVE ADMINISTRATIVE ASSISTANT

ERIC BAYNE

DEMOCRATIC EXECUTIVE DIRECTOR

I N D E X

TESTIFIERS

\* \* \*

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SUBMITTED WRITTEN TESTIMONY

\* \* \*

(See submitted written testimony and handouts online.)

## P R O C E E D I N G S

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2  
3 MAJORITY CHAIRMAN STERN: The hour of 11:30 being  
4 here, I'd like to bring this meeting of the House Tourism  
5 and Recreational Development Committee to order.

6 Will the secretary take the roll at this time.

7  
8 (Roll was taken.)

9  
10 MAJORITY CHAIRMAN STERN: Thank you.

11 I'd like to remind the Members and also the  
12 testifiers today that today's public hearing is being  
13 recorded.

14 This bill today, the topic of today's hearing is  
15 HB 544 sponsored by Representative Moul. This is a bill  
16 that had been around last session. Representative Moul had  
17 an informational hearing before this Committee last  
18 session. We took testimony from basically the same group  
19 that's going to be testifying here today.

20 We have eight new Members to the House Tourism  
21 Committee, so I wanted to make sure that our Members were  
22 familiar with this bill and the changes that he proposes to  
23 make to the Recreational Use of Land and Water Act.

24 This is a law that provides landowners with  
25 liability protection if they open their property for public

1 recreational use at no charge. Pennsylvania enacted this  
2 law in 1966, and currently 49 States have a similar one.  
3 The law has been very successful at encouraging more people  
4 to open private land for public access.

5           Today we're going to hear from a panel of  
6 individuals representing outdoor recreation as well as,  
7 also, the legal community. So at this time I would like to  
8 ask the panel -- that would be the outdoor recreational  
9 panel -- to step forward, and we have several members that  
10 are here with us I see in attendance today. We have  
11 Ron Grutza with the Pennsylvania Association of Boroughs;  
12 Andy Loza, the Pennsylvania Land Trust Association; we have  
13 Devin DeMario here this morning with the Fish and Boat  
14 Commission -- if you would come up present -- Fred Brown,  
15 who is representing the Pennsylvania Off-Highway Vehicle  
16 Association; and I also see in attendance here this morning  
17 John Bell, who represents the Pennsylvania Farm Bureau. If  
18 you could join your colleagues up front. We have one  
19 microphone for all of you to share, so we'll have to pass  
20 it back and forth.

21           Whatever you would like to do to begin. I don't  
22 have any preference here as far as who begins the  
23 testimony, so you can kind of look at each other and wink,  
24 nod, and do whatever to see who would like to be the first  
25 to testify. But if you could please give your names to the

1 Committee, and whoever would like to be the first to  
2 testify, please begin.

3 So if we would start -- possibly let us start  
4 over here with Devin and have her begin, and then we'll  
5 pass it down as far as introducing yourself.

6 MS. DeMARIO: Good morning. My name is  
7 Devin DeMario, and I am the Legislative Liaison for the  
8 Pennsylvania Fish and Boat Commission.

9 On behalf---

10 MAJORITY CHAIRMAN STERN: Are you going to begin  
11 the testimony or---

12 MS. DeMARIO: Oh, would you like me to begin---

13 MAJORITY CHAIRMAN STERN: Okay.

14 MS. DeMARIO: ---or do you guys just want to go  
15 down the line?

16 MAJORITY CHAIRMAN STERN: Okay; that's fine.

17 MS. DeMARIO: It's totally up to you, Chairman.

18 MAJORITY CHAIRMAN STERN: Nope; that's fine.

19 MS. DeMARIO: Okay. I guess I'll start then, if  
20 you don't mind.

21 MAJORITY CHAIRMAN STERN: Okay. Very good.

22 MS. DeMARIO: Good morning, Chairman Stern --  
23 Chairman Kirkland isn't present -- and Members of the  
24 Committee. My name is Devin DeMario, and I am the  
25 Legislative Liaison for the Pennsylvania Fish and Boat

1 Commission. On behalf of our Board of Commissioners and  
2 Pennsylvania's anglers, boaters, and aquatic resources,  
3 thank you for the opportunity to express our support for  
4 HB 544.

5 In its most recent triennial audit of our agency,  
6 the Legislative Budget and Finance Committee repeated a  
7 finding from a similar audit done in 2008. In each case,  
8 the LBFC acknowledged the shortcomings of the Recreational  
9 Use of Land and Water Act and recommended that the General  
10 Assembly consider amending RULWA consistent with HB 544.

11 The LBFC did an excellent job of summarizing the  
12 issues behind the need for fishing- and boating-related  
13 improvements to RULWA. The following text is taken  
14 directly from the LBFC's 2010 report, entitled "A  
15 Performance Audit of the Pennsylvania Fish and Boat  
16 Commission." If you're interested, the full report may be  
17 found at the Legislative Budget and Finance Committee  
18 Website or you can contact me and I'd be happy to provide  
19 it to you.

20 The LBFC made the following observations in its  
21 analysis of our agency's efforts to improve public access  
22 to the Commonwealth's waters:

23 "Pennsylvania has a long history of private  
24 landowners allowing the public access to stream-side lands  
25 for fishing. In fact, 83 percent of stocked trout waters

1 are on private lands, as are 70 percent of wild trout  
2 waters, and 59 percent of Class A" wild "trout waters.  
3 Many prime fishing destinations in the Commonwealth,  
4 however, have become difficult or impossible to access due  
5 to landowners posting no trespassing signs on their  
6 properties.

7 "Boaters and anglers are, therefore, increasingly  
8 experiencing difficulties in gaining access to areas where  
9 they can launch boats and/or fish. The establishment of  
10 private fishing clubs and private leases has restricted  
11 public fishing at locations that have previously been open  
12 to the public. According to the PFBC, 47 percent of  
13 anglers responding to the 2008 Pennsylvania Trout Fishing  
14 Survey indicated that private land posting is" indeed "a  
15 problem....

16 "The Recreational Use of Land and Water Act...was  
17 enacted in 1966 to encourage land owners to make land and  
18 water areas available for public recreational purposes and  
19 limits a property owner's liability toward persons entering  
20 their property, providing the landowner opens his property  
21 free of charge to the public for recreational use, and  
22 makes no requirement that the landowner keep his property  
23 safe for recreational purposes or warn the public of any  
24 dangerous property conditions. While the definition of  
25 'land' under the RULWA specifically includes 'buildings,



1 structures and machinery or equipment when attached to the  
2 realty,' Pennsylvania courts have held that RULWA coverage  
3 does not extend to certain situations concerning property  
4 that has been improved.

5 "As noted in our 2008 report, the PFBC believes  
6 the protection afforded by the RULWA is a major factor  
7 leading many public and private landowners to permit free  
8 public hunting, fishing, boating, and other recreational  
9 uses of lands and waters. However, the PFBC still  
10 considers it unclear as to whether the legal protections of  
11 the..." act "apply to fishing and boating related  
12 improvements to realty such as access ramps and paths..."  
13 including ADA paths, "fishing and boating piers, boat  
14 launch ramps, docks, stream improvement projects, dams and  
15 impoundments, and parking lots, for example. The lack of  
16 legal clarity as to what fishing and boating related  
17 improvements to land are covered under the RULWA has  
18 reportedly discouraged some landowners, clubs, and  
19 organizations from..." moving "forward with proposed  
20 projects."

21 "A landowner can still be liable where he either  
22 charges a fee for the use of the land or acts willfully or  
23 maliciously in failing to guard or warn against a dangerous  
24 condition."

25 Building on this analysis, the LBFC offered the

1 following recommendation:

2           “The General Assembly should consider amending  
3 the RULWA...by clarifying and broadening the scope of legal  
4 protection afforded by the act to cover certain fishing and  
5 boating related improvements to land, which could include  
6 improvements such as boating access and launch ramps,  
7 fishing piers, boat docks, ramps, access to and parking for  
8 these areas, and hiking trails.”

9           HB 544 directly addresses the issues identified  
10 by your colleagues on the LBFC. The Pennsylvania Fish and  
11 Boat Commission agreed with the LBFC’s recommendations, and  
12 we support HB 544 as a means to provide landowners further  
13 incentives to maintain those lands currently open to  
14 recreational fishing and boating and hopefully encourage  
15 additional landowners to allow public access to more miles  
16 of Pennsylvania’s rich aquatic resources and waterways.

17           We appreciate Representative Moul’s leadership in  
18 introducing the bill and thank the other cosponsors of this  
19 important piece of legislation.

20           Thank you for the opportunity to offer the  
21 perspectives of our agency, the Commonwealth’s 800,000-plus  
22 licensed anglers, over 330,000 registered boaters, and not  
23 to mention Pennsylvania’s \$3.4 billion fishing and boating  
24 industry.

25           Thank you, Chairman.

1 MAJORITY CHAIRMAN STERN: Thank you, Devin.

2 Before we have you testify, Andy, I would like to  
3 recognize Representative Gibbons who is in attendance,  
4 Representative Davidson who is in attendance, and  
5 Representative Fleck who is in attendance as well.

6 So at this time what we're going to do is we're  
7 going to wait until all of you give testimony, and then if  
8 there are any questions, then we'll open it up for  
9 questions to the first panel first.

10 So go ahead, Andy. Go ahead and introduce  
11 yourself and who you represent.

12 MR. LOZA: Thank you, Chairman Stern and Members  
13 of the Committee.

14 First off, I do have written testimony which I'll  
15 share with you. I'm going to take a risk and rather than  
16 read my, what I think is actually stunning prose, I'll try  
17 to take a more conversational style here.

18 MAJORITY CHAIRMAN STERN: We appreciate that,  
19 Andy. We have the testimony of every one of you, so any  
20 one of you that want to just take it and just share your  
21 comments and thoughts and get off script a little bit would  
22 be fine with the Committee, because we can read those  
23 verbatim, your testimony. So to speed up the process to  
24 allow Members to possibly ask questions, I appreciate what  
25 you're doing. Thank you.

1 MR. LOZA: Very good.

2 The Recreational Use of Land and Water Act is not  
3 delivering on its purpose, and a quick example that I will  
4 give you is, it is a common misconception that the act as  
5 enacted by the General Assembly all those years ago was  
6 never intended to cover structures or equipment tied to the  
7 recreational land. And if you look on page 2 of the act,  
8 and it's a very short act, it says in fact that structures  
9 and equipment are covered.

10 The courts, which in a mindboggling way to me --  
11 mindboggling, because I'm a layperson -- seem to have come  
12 to the opposite conclusion, that the General Assembly did  
13 not intend the act to cover structures and equipment in  
14 spite of it being in black and white on the top of page 2  
15 of the act. It's but one example of how the act's  
16 protections of private landowners have eroded over time and  
17 why we need this bill enacted to reinvigorate the act and  
18 protect private landowners and charitable organizations who  
19 are trying to do the right thing.

20 And I have to emphasize, it's not doing right by  
21 private landowners who are trying to do the right thing.  
22 It does not do right by charitable organizations, by local  
23 government, and it doesn't do right by the public, the  
24 public who is denied opportunities to hike, bike, hunt,  
25 bird watch, et cetera, otherwise enjoy the outdoors,

1 because of the protections that are not given to generous  
2 landowners and nonprofits and local governments.

3           The 75 member organizations of the Pennsylvania  
4 Land Trust Association work with private landowners every  
5 day to conserve important places, places that are important  
6 for a variety of reasons -- preserving productive farmland,  
7 preserving hunting areas, protecting wildlife, scenic  
8 areas, preventing flooding, all manner of things.

9           In 2011 Land Trust completed 124 conservation  
10 easements with private landowners. Those easements, which  
11 kept the land in private ownership, effectively, again,  
12 provided all these major public benefits, whether that's  
13 stormwater management, flood protection, scenic views,  
14 wildlife habitats, whatever. Many of those landowners  
15 donated those conservation easements. They did it out of  
16 the generosity of their hearts.

17           What many of those landowners did not do was  
18 provide any public access with those conservation  
19 easements. They did not either sell or donate these  
20 conservation easements to provide trails or any other sort  
21 of public access. And why is that? The answer is really  
22 simple: They're afraid of liability, deeply afraid of  
23 liability. They want to hear from the land trusts, from  
24 the trail group, that if they do this, you know, they're  
25 not going to get in trouble; you know, they're not going to

1 get sued, and we really can't deliver that to them.

2 I do a lot of training in seminars and  
3 conferences and I work with a lot of trail groups, and over  
4 and over again they say to me, you know, Andy, can't you  
5 just give us a fact sheet? Give us some brochure we can  
6 hand to a landowner that says, hey, the Recreational Use of  
7 Land and Water Act has you covered; you don't have to worry  
8 about this stuff. You know, donate these trail easements  
9 to us; give these rights of public access. And my sad  
10 response is no, you know, we can't do that.

11 We can tell them that they have some protection,  
12 and, you know, sometimes it's pretty good, but you just  
13 can't be sure. And that's not a comforting brochure;  
14 that's not a comforting thing to be able to say to a  
15 landowner. So it really shuts off opportunities to have  
16 generous private landowners work with us to open lands for  
17 the public.

18 It's also bad for the public because it really  
19 puts a crimp on charitable organizations doing the right  
20 thing. Many land trusts, many of my member organizations,  
21 won't accept donations of land where they could establish a  
22 private park, a private preserve, that the public would  
23 come in to, and they won't accept land because they're  
24 afraid of liability. If they own the land, then they're  
25 more likely to get sued, and so they keep away from it.

1 They stick more to easements and stick to other  
2 conservation activities, again, for that fear.

3           Going beyond that, even when they do open land to  
4 the public, I can tell you that their legal counsels often  
5 tell them, you know what? Be real careful; don't improve  
6 this with, you know, a lot of benches or picnic tables or  
7 parking lots, because the more you do that kind of stuff,  
8 the more you're going to run risking liability and not  
9 getting the protections of RULWA. So the bottom line right  
10 now is, you know, potentially no good deed goes unpunished,  
11 and the General Assembly has a real opportunity to amend  
12 RULWA to bring more recreational opportunities to the  
13 public.

14           I recognize that there's a balancing of  
15 interests, and we don't want landowners to just be willful  
16 and malicious in, you know, causing problems and presenting  
17 hazards to the public. But, you know, we're not talking  
18 about people where they're -- we're not talking about  
19 private landowners who are going, hmm, can I make a million  
20 dollars, you know, by not protecting the public or such  
21 things? We're talking about people who are, you know,  
22 making generous decisions and making difficult decisions on  
23 whether to open their land to the public. And, you know,  
24 they want to do the right thing. Right now they're being  
25 prevented from doing the right thing for fear of liability.

1 Thank you very much, ladies and gentlemen.

2 MAJORITY CHAIRMAN STERN: Thanks, Andy.

3 Ron.

4 MR. GRUTZA: Thank you, Chairman Stern and  
5 Members of the Committee and staff as well. I appreciate  
6 your time, inviting us back again this session to share our  
7 thoughts on HB 544 and Pennsylvania's Recreational Use of  
8 Land and Water Act.

9 My name is Ron Grutza. I am Regulatory Affairs  
10 Coordinator at the Pennsylvania State Association of  
11 Boroughs. PSAB is a nonprofit, nonpartisan local  
12 government association. We represent over 900 boroughs  
13 throughout the State and many in your communities and over  
14 10,000 elected and appointed borough officials as well.

15 We've been around for over 100 years now, and we  
16 certainly do appreciate the opportunity to present here our  
17 perspectives on Representative Moul's HB 544. We'd like to  
18 thank Representative Moul for his leadership on this cause  
19 and look forward to working with him and the Committee as  
20 this process unfolds. We would also like to thank the  
21 22 cosponsors which signed on to the bill.

22 As you heard before, I won't go into all of the  
23 intents of the statute. They have been very succinctly  
24 went over by Devin and Andy. But I will tell you why  
25 Pennsylvania local governments support the RULWA, and I've



1 listed in my testimony for three specific reasons.

2 First, by enacting this statute and by enhancing  
3 it and clarifying it, as Representative Moul has done in  
4 HB 544, Pennsylvania expands the areas of recreational use  
5 open to sportsmen and recreationalists and thus reducing  
6 the costs for government to provide that need.

7 Second, the act specifically covers leases for  
8 lands to the State or local governments and thus not  
9 excluding them by virtue of the fee exemption.

10 And third, the act has been used by local  
11 governments throughout the years as a defense from immunity  
12 claims on recreational lands.

13 PSAB believes that the current language in the  
14 act needs updating now to further achieve the original  
15 intents of the act. We believe that broadening and  
16 clarifying the definition of "land" and allowing certain  
17 types of de minimis in-kind contributions will further  
18 expand the lands available to recreational users, and this  
19 is why, of course, we are supporting Representative Moul's  
20 HB 544.

21 PSAB encourages the Members of this Committee to  
22 carefully consider the merits of the bill and the number  
23 and variety of groups which are supporting the legislation,  
24 and we ask for your favorable consideration if and when the  
25 bill is considered in Committee.

1           Thank you, Mr. Chairman and Members of the  
2 Committee, and we'll be happy to answer any questions after  
3 we're all finished.

4           MAJORITY CHAIRMAN STERN: Thanks, Ron.

5           I'd also like to recognize the presence of  
6 Representative Denlinger who is here with us now.

7           Fred, go ahead and begin at your convenience.

8           MR. BROWN: Thank you, Mr. Chairman.

9           Members of the Committee, staff, my colleagues,  
10 thank you all for the opportunity to again present some  
11 comments with respect to HB 544 and the Recreational Use of  
12 Land and Water Act.

13           My name is Fred Brown, and I am here today on  
14 behalf of the Pennsylvania Off-Highway Vehicle Association  
15 and the more than 250,000 registered ATVs and the owners of  
16 those vehicles and trail bikes to solicit your support and  
17 affirmative vote for HB 544.

18           As my colleagues have indicated the various  
19 provisions of the bill, I would just like to recap a couple  
20 of them. And in the interests of time and for questions  
21 and answers, I will not belabor the entire six pages of my  
22 testimony.

23           But I would like to start by reading a passage  
24 that a colleague of yours, Representative Kate Harper,  
25 wrote back in the mid-nineties when I think Governor Ridge

1 convened one of his first recreational conferences, and it  
2 reads as follows:

3           The purpose of Act 586 of 1966 is "...to  
4 encourage owners of land to make land and water areas  
5 available to the public for recreational purposes by  
6 limiting their liability towards persons entering thereon  
7 for such purposes." Except where the owner charges people  
8 who use the land for such use, or where the owner is guilty  
9 of a willful or malicious failure to guard or warn against  
10 a dangerous condition, use, structure, or activity, "an  
11 owner of land owes no duty of care to keep the premises to  
12 persons entering for such purposes." The practical effect  
13 of RULWA is to provide landowners with immunity to suits  
14 for damages for injuries caused by mere negligence or  
15 carelessness while preserving the right of injured parties  
16 to sue the landowner if the landowner acted deliberately or  
17 maliciously regarding a dangerous condition of which they  
18 were aware of or should have been made aware of.

19           Many of you who served on this Committee in the  
20 last session will recall the comments of those that oppose  
21 this legislation, and I'd just like to address those, if I  
22 might.

23           Last session, the opponents of the legislation  
24 offered several inaccurate and errantly creative arguments  
25 against the bill; therefore, it is important to illustrate

1 what the bill does not do.

2           The opponents asserted that the "wherever  
3 located" language, which is on page 2, line 1, would  
4 exonerate landowners from liability where, quote, unquote,  
5 "permitted fireworks," for example, fall upon someone  
6 else's property miles away. I would argue that the  
7 definition of "willful or malicious" as contained in the  
8 legislation would address those situations. The definition  
9 reads, " 'Willful or malicious' means, in reference to an  
10 owner of real property, an actual or deliberate intention  
11 by the owner to cause harm or which, if not intentional,  
12 shows an utter indifference to or conscious disregard for  
13 the safety of others." I think the phrase "willful or  
14 malicious" has been the standard in the act since 1966.

15           The opponents also asserted that the amendments  
16 will increase litigation because they allow contributions  
17 of an in-kind or de minimis nature. That means, of course,  
18 they would have to be, that those definitions, those  
19 phrases, would have to be litigated.

20           I am advised by counsel to the Republican Caucus  
21 that in fact the "in-kind" definition has been litigated  
22 already. That value has been determined by the court to be  
23 \$561.77, and in-kind is something of a good or service that  
24 is contributed to the cause.

25           The opponents assert that the definition of

1 "structures" is "enhanced to include the construction of  
2 defective bridges and the like." Actually, the definition  
3 of "land," as you know, already includes structures, and to  
4 me, a bridge would be a structure. And I don't believe  
5 that any rational person would construct a defective  
6 bridge, therefore exposing themselves to any potential  
7 litigation.

8           The opponents also assert that the law would  
9 provide effective immunity to conditions that are improved  
10 by "a manmade effort." Why should the immunity be given to  
11 someone who creates a structure or other object which  
12 causes harm? They further opine that the section would  
13 effectively destroy any incentive to create a safe  
14 environment for recreational activity. It will serve as a  
15 trap for the unwary.

16           The current definition embodies those structures  
17 that are manmade created. The only ones within the current  
18 definition that I think are maybe slightly created by man  
19 are manmade water impoundments, but certainly land and  
20 water is something that God has created that man may alter.

21           The opponents assert that "recreational purpose"  
22 should not be expanded to include motorized vehicles such  
23 as snowmobiles, all-terrain vehicles, and motorcycles.  
24 These items have already been the subject of litigation,  
25 and I think that's all that needs to be said regarding that

1 particular position.

2           The opponents assert that the language providing  
3 for the reimbursement of attorney's fees is, quote, "...not  
4 constitutional because it infringes upon Pennsylvania  
5 Supreme Court's rule-making" authority "by awarding  
6 attorney's fees and costs..." and that "The legislation  
7 makes awards of these fees...without providing...  
8 corresponding award to those who are successful in  
9 overcoming the strict immunity."

10           My colleague, Mr. Grutza, and I did a word search  
11 of the Legislative Data system here in the Capitol, and we  
12 found over, well, the accurate number is 400 references to  
13 attorney's fees. And further looking at those particular  
14 instances, there are 25 titles of Purdon's that carry some  
15 element of the distribution of attorney's fees, whether  
16 it's a "may" or "shall" provision, whether it goes to the  
17 prevailing party, whether it goes to the defendant, or  
18 whether those fees are set by the court or by law to go to  
19 the plaintiff. So the fact that it does not infringe upon  
20 the Constitution or the Supreme Court's right to establish  
21 rules in this area, we have crossed that threshold.

22           Most recently, the attorney fee provision, the  
23 reimbursement of attorney's fees to a defendant, was passed  
24 in this last session, HB 40, which ended up as the Castle  
25 Doctrine, and the vast majority of the Members of this

1 Committee, as in fact the entire General Assembly, voted  
2 for the Castle Doctrine with few exceptions on this  
3 Committee, and I believe that we're well beyond the  
4 concerns that we are abridging the Supreme Court's rights  
5 to do so.

6 HB 544 reaffirms and reinforces the immunity  
7 promised when RULWA was adopted in 1966. HB 544 poses no  
8 barriers in bringing legitimate claims on behalf of  
9 innocent and injured people. We believe bringing baseless  
10 litigation against landowners solely because they are  
11 convenient targets is an outrageous violation of a  
12 landowner's fundamental rights.

13 Thank you, Mr. Chairman, for the opportunity.

14 MAJORITY CHAIRMAN STERN: Thank you, Fred.

15 John, you're the last testifier. Not to put any  
16 pressure on you, but---

17 MR. BELL: And we are getting closer to lunch. I  
18 hope you don't mind if I stole one of the Committee's  
19 microphones here.

20 MAJORITY CHAIRMAN STERN: That's fine. Help  
21 yourself.

22 MR. BELL: Okay.

23 MAJORITY CHAIRMAN STERN: Just hopefully condense  
24 your remarks, and we have your written testimony, so. We  
25 appreciate you being here today.

1 MR. BELL: I appreciate being here, Mr. Chairman.

2 I am John Bell. I am Governmental Affairs  
3 Counsel for the Pennsylvania Farm Bureau. The Farm Bureau  
4 is a statewide general farm organization representing  
5 nearly 55,400 farm and rural families.

6 The issues that are dealt in this legislation are  
7 very important to private landowners. When the Legislature  
8 passed this law in 1966, I truly believe that the  
9 Legislature had farmers in mind when they enacted  
10 originally this law.

11 Private landowners certainly make up the bulk of  
12 opportunity that is provided for many Pennsylvanians to use  
13 the good graces of the Commonwealth. Farmers are very  
14 obliging, for the most part, in providing that opportunity,  
15 and certainly they are encouraged to do so, but there is a  
16 certain apprehension that many of our farmers do have with  
17 lack of clarity in law and landowner liability. Certainly  
18 the Legislature has done a very good job through the Crimes  
19 Code in directing conduct and deterring conduct that takes  
20 advantage of a farmer's generosity.

21 In the civil liability area, certainly the  
22 Recreational Use of Land and Water Act has done a fair job  
23 in doing that, but certainly there are improvements that  
24 could be made to lessen the apprehension.

25 I'd like to give the Committee a bit of a history



1 lesson that I think I gave this Committee last May. Back  
2 in 2005, I believe it was, a landowner was held liable,  
3 notwithstanding the Recreational Use of Land and Water Act,  
4 for actions of a hunter whose bullet strayed from the  
5 property and unfortunately hit a person a good distance  
6 away. I believe at that time landowners, farmers, believed  
7 that this act protected them, but in the course of  
8 litigation it was shown that the landowner was liable,  
9 partly liable, notwithstanding the Recreational Use of Land  
10 and Water Act.

11 This act is a policy decision, and we recognize  
12 it, but it also comes with, I think, some reasonable  
13 expectations that many landowners who generously open their  
14 land do want to expect. When the landowner was held liable  
15 in that situation, it really caused an uproar among our  
16 farmers, and farmers threatened en masse to essentially  
17 close their land to public hunting and probably would have  
18 taken the additional step in closing their land for other  
19 recreational activities. Thankfully the Legislature saw  
20 the reason in extending that act and corrected that.

21 We see the extensions here and clarifications to  
22 be very reasonable. The extensions to fishing piers and  
23 parking lots are what I think our folks would reasonably  
24 expect. They're not recreational activities per se, but  
25 certainly they support the recreational activities that our

1 farmers can and do allow. And farmers, you know, will  
2 create areas for parking lots or create areas for fishing,  
3 and again, the act we see as a clarification.

4 We also see the act as a clarification of the  
5 willful and malicious provisions that currently exist, and  
6 normally when you hear those terms and when farmers hear  
7 those terms, they think of something pretty drastic, that  
8 either the landowner is intentionally trying to not  
9 disclose or just willfully almost disregarding the safety  
10 of those who may come on to the property. We think the  
11 clarification is a good one, and it's almost necessary in  
12 response to some court decisions that have, in our opinion,  
13 wandered off the reservation and extended the exception to  
14 the protection to more negligence types of failure to warn,  
15 similar to landowner liability.

16 And lastly, and no one has mentioned this  
17 provision, the attorney's fees -- oh, actually, Fred has.  
18 I've got to give him credit. The attorney's fees  
19 provisions we also see as a reasonable extension. When I  
20 talk to landowners on the subject of landowner liability,  
21 they don't ask the question, well, am I ultimately legally  
22 going to be found not liable? They ask the question, am I  
23 going to get sued? And if I do, well, am I going to have  
24 to pay for the costs of defending that landowner action  
25 against an injured party? And certainly in situations

1 where somebody gets seriously injured, chances are that the  
2 landowner is going to be potentially vulnerable, and at  
3 least when the letter-law provisions of this protection are  
4 evoked and the landowner uses that defense, that landowner  
5 will at least be assured that they won't have to,  
6 notwithstanding being innocent of liability, have to incur  
7 out-of-pocket costs.

8           And again, these are policy decisions. Certainly  
9 we can spin scenarios where justice might well prevail on  
10 the landowner's side or justice might well prevail on the  
11 injured party's side, but again, this act is attempting to  
12 encourage recreational use of lands that private owners  
13 allow, and we think when there is a doubt, the benefit of  
14 the doubt should go to the landowner.

15           Thank you.

16           MAJORITY CHAIRMAN STERN: Thank you, John.

17           I would like to also recognize Representative  
18 Heffley who has joined us as well.

19           Do any Members at this time have any questions  
20 for this first panel?

21           Representative Longietti.

22           REPRESENTATIVE LONGIETTI: Thank you,  
23 Mr. Chairman, and thank you to all of you for your  
24 testimony.

25           I want to pick up, I guess, where we left off as

1 far as the attorney's fees provision. As I read the bill,  
2 and tell me if I'm wrong, if an injured party brings a  
3 claim and they're unsuccessful, then they would be  
4 responsible for the attorney's fees for the defense.  
5 However, on the other end, if the injured party prevails  
6 and the defense is defending and not settling, there is no  
7 provision that the injured party gets attorney's fees. Is  
8 that your all understanding of the way the bill is written?

9 MR. BROWN: Representative, to answer your  
10 question, yes. The way the bill is written, that would be  
11 the case. But as John pointed out, the statute is built  
12 for the property owner to encourage them, and the  
13 protections are afforded to the property owner.

14 Should there be, I would argue, should there be a  
15 successful plaintiff claim, that landowner's insurance  
16 company is more than certain to help cover the costs of  
17 whatever attorney's fees that plaintiff would be awarded.

18 REPRESENTATIVE LONGIETTI: I know a little bit  
19 about insurance companies. They don't like to pay claims,  
20 and I'm not aware of any insurance company that is going to  
21 pay something that is not part of an order of court. In  
22 fact, they're going to say, well, they have an obligation  
23 to their policyholders not to just generously give money.  
24 So my interpretation is different than that, that if there  
25 is no language in the law that says that they have to pay

1 attorney's fees, the insurance company is not going to be  
2 paying attorney's fees. They're not going to be ordered by  
3 the court. Am I wrong in that?

4 MR. BROWN: I'm not a lawyer, so I can't answer  
5 that directly. I don't know if John, in this situation  
6 that he referenced in Lehigh County, where or who or how  
7 those funds or payments were made, because clearly the  
8 injured party in that situation, I would imagine there was  
9 an attempt to make them whole, or at least in part.

10 REPRESENTATIVE LONGIETTI: Well, one of the other  
11 concerns I have with the bill, and there was some talk  
12 about mere negligence and carelessness, and I understand  
13 that, but as I understand, you know, what about  
14 recklessness?

15 So we have three levels of liability. We have  
16 mere negligence or carelessness. Then we have something  
17 that's a little bit beyond that, reckless conduct, gross  
18 negligence in the law -- gross negligence, carelessness,  
19 and reckless disregard for the safety or lives of others.  
20 Then we go above that and we have willful and wanton  
21 conduct: deliberate; I wanted to injury somebody. Or, you  
22 know, maybe you can't prove exactly that I wanted to, but I  
23 had such a conscious disregard that it appears that I  
24 wanted to hurt somebody.

25 Why are we -- you know, when we craft a bill that

1 seems to be quite broad, now we're not just talking about  
2 rural settings, we're talking about urban settings, too.  
3 Now we're not talking just about unimproved land, we're  
4 talking about amenities on, you know, very heavily invested  
5 land. Why would we want to absolve reckless conduct? If  
6 somebody gets injured, maybe killed, why would we want to  
7 not hold somebody responsible for reckless conduct?

8 Does anybody want to take a stab at that?

9 MR. BELL: Well, I think at this point we are  
10 kind of splitting hairs. And again, the protection under  
11 the act, the exception to the protection under the act,  
12 relates to a malicious failure to warn, okay? And if I  
13 don't see much difference between a disregard of condition  
14 and a reckless-type conduct -- I mean, the response of the  
15 landowner here is discovery of the condition and failure to  
16 respond to that condition. If the landowner does  
17 something, there's a question of whether the protection  
18 would apply at all.

19 I mean, if the landowner is actively doing  
20 something to harm the person coming onto the property, we  
21 might not even be talking about the act at all. But at  
22 least this act focuses on failure to warn of a dangerous  
23 condition, and I think whether we're talking recklessness  
24 or we're talking maliciousness, the lines I don't think are  
25 that fine, that the lines of difference aren't that fine.

1           MR. LOZA: Technically, John, you know, splitting  
2 hairs, willful recklessness: I think the legislation  
3 speaks for itself, you know? Willful: Was there an actual  
4 or a deliberate intention by the owner showing a conscious  
5 disregard for the safety of others? You know, that sounds  
6 a lot like reckless to me. I mean, we can split hairs  
7 forever, but I think we're there.

8           But I want to address something else,  
9 Representative, that you alluded to, and that is that this  
10 amendment is somehow expanding from rural lands to urban.  
11 If you look at the legislation as it was originally  
12 written, it was clearly meant to apply to recreational  
13 lands, including those that have structures, that have  
14 equipment. It did not distinguish between rural and urban.  
15 We are simply clarifying and telling the courts that the  
16 General Assembly means what it originally said, so I don't  
17 think there's any fundamental broadening of the  
18 protections.

19           REPRESENTATIVE LONGIETTI: I'm just going to make  
20 a couple of comments and then I'll be done, and I  
21 appreciate your answers. I have real concerns here in, you  
22 know, splitting hairs when it comes down to somebody being  
23 injured or killed and when it affects one of our  
24 constituents personally or perhaps us. It makes a huge  
25 difference.

1           You know, we are broadening, potentially  
2 broadening this act very significantly, in my view. I'll  
3 give you an example. So a few months ago, back last year,  
4 I'm in Florida and there's an outdoor shopping mall -- lots  
5 of amenities, lots of structures. Unfortunately, it's not  
6 as popular as it used to be, and so it's not as well  
7 traveled. It has gone into some disrepair.

8           Now, fortunately for us, they cordoned off some  
9 areas, blocked them off so that people would not travel on  
10 those any longer. There's an expectation when I go to a  
11 place like that that I'm going to be safe, that I'm not  
12 going to get seriously injured. If a law like this passes,  
13 there's no incentive. There's no incentive to spend the  
14 money to make sure that I don't travel on those areas that  
15 are in disrepair now. And that's the thing with liability  
16 law. It modifies conduct, because people get concerned  
17 about, well, I could be held responsible, and now we're  
18 talking about reckless conduct. Gross negligence: we've  
19 exempted that out in this bill. There would be no  
20 liability for gross negligence.

21           Let me give you another example that concerns me,  
22 and this is under the act as currently written, not the  
23 bill. There was a case in my county, in Mercer County,  
24 where a piece of land in a rural setting was open to the  
25 public for use, and somebody took it upon themselves -- and



1 there were people that walked and hiked on it and there  
2 were people that used their motorcycles on it -- somebody  
3 took it upon themselves to string a cable about neck high  
4 across two trees, and a young person was riding their motor  
5 bike, came across it, and was killed. A lawsuit resulted  
6 from that. This act was used as a defense, and it was a  
7 very significant defense. They couldn't prove that the  
8 landowner put up the cable, no responsibility for reckless  
9 conduct on the landowner's part. My concern is, now you  
10 have a provision in here that says you're responsible for  
11 attorney's fees if you lose. So the lawyer has to counsel  
12 the client. You know, they've got a really good defense  
13 here. And by the way, if you lose, you're going to pay me  
14 considerable money in the form of attorney's fees. What do  
15 you think happens in a case like that? I don't think that  
16 case gets brought, and I think that's an injustice.

17 So I have a number of concerns about changing  
18 the attorney's fees provisions in this bill, making it a  
19 one-way street -- the defense recovers, the plaintiff  
20 doesn't -- and just the concept of awarding attorney's fees  
21 and what that will do. And then broadening it to urban  
22 areas, to improved areas, to places with amenities where I  
23 have an expectation I'm going to be safe, I have real  
24 concerns about those provisions.

25 Thank you.

1 MR. LOZA: May I respond, Chairman?

2 Thank you, Representative, and I appreciate your  
3 concerns. I think they're legitimate, and I think there's  
4 the matter of balancing public policy interests. I think  
5 that there will, no matter how we configure the law, we're  
6 always going to be able to find situations where we can  
7 say, oh, you know, we'd really like to make that work  
8 better for that person. But I guess the question I would  
9 have for the Representative is, do we want to shut off  
10 landowner generosity and make all manner of lands open to  
11 the public for fear of that really odd and out-there  
12 possibility, which, you know, I think everything hinges on  
13 whether the landowner did it -- doesn't it? -- and that  
14 would certainly be a willful and malicious activity.

15 The other thing I would like to point out in  
16 considering the broad public policy issues is, I think that  
17 when you're dealing with a corporation, somebody who exists  
18 to generate profits to deliver money to the shareholders, I  
19 think it's important to have laws that help the corporation  
20 balance that drive for profit with making sure that they  
21 protect the public in making the right decisions. So in  
22 that context, it makes sense to me. But what we're dealing  
23 with here is landowners who are not operating under any  
24 sort of profit motive. They're operating under, do we want  
25 to do something nice for people, you know? We don't have

1 to do this; do we want to do something nice, and that's the  
2 public policy, that's the heart of what we're dealing with  
3 here. You know, how much protection do we want to give  
4 them to encourage them to do good things for the public?

5           There's a line somewhere. Obviously, you know, I  
6 think it's one place, you may think it's another, but it  
7 basically comes down to a public policy decision, in my  
8 mind.

9           MR. BELL: At the risk of stating the obvious,  
10 the act only protects those landowners who allow for public  
11 recreation without charging. So it's very important that  
12 the Committee know that and understand that.

13           REPRESENTATIVE LONGIETTI: And just as a final  
14 comment, if I could. The outdoor mall in Florida that me  
15 and my wife walked around, we didn't spend a dime, by the  
16 way. They didn't charge us any money to come on their  
17 property and use it; it was just open to the public at no  
18 charge.

19           MAJORITY CHAIRMAN STERN: Thank you to the first  
20 panel for your testimony, and I appreciate you being here  
21 before the Tourism Committee this morning. Thank you.

22           At this time we'd like to call for testimony from  
23 Mark Phenicie, who's Legislative Counsel for the  
24 Pennsylvania Association for Justice.

25           Sorry we ran a little bit over your time here,

1 Mark, but we'll allow you to do whatever you want. We have  
2 your written testimony. However you want to present your  
3 remarks is fine with the Committee.

4 MR. PHENICIE: I promise that I will not be as  
5 wordy and verbose as the last panel.

6 Thank you, Chairman Stern, Members of the  
7 Committee, and staff. Our name is going to be the  
8 Pennsylvania Trial Lawyers Association pretty soon, but  
9 we're still the Pennsylvania Association for Justice.

10 My name is Mark Phenicie, and I'm currently  
11 serving as Legislative Counsel. The members of our  
12 association represent victims injured or killed, and their  
13 families, mainly as a result of gross negligence,  
14 recklessness, or intentional conduct.

15 We welcome the opportunity to speak to the  
16 Committee today to elaborate why the Committee must take a  
17 careful look at HB 544 in its current version and make sure  
18 that major changes are made before it is voted out of this  
19 Committee and considered by the full Pennsylvania House of  
20 Representatives.

21 First, I would have to ask, is this an answer in  
22 search of a problem? HB 544 is not necessary and  
23 represents a departure from even the most strict immunity  
24 statutes without any purported justification. We are not  
25 aware of any verdicts or large settlements against the

1 landowner of an unimproved or improved land under the  
2 current system except the one case referenced by the last  
3 panel, in the Allentown area several years back, which was  
4 ultimately dismissed without a verdict. Certainly with the  
5 passage of joint and several liability by the Assembly last  
6 year, there wouldn't even have been a case, much less a  
7 verdict, which was ultimately dismissed.

8           Second, there are two problems with the bill  
9 which this Committee should not endorse. I will elaborate  
10 on four of them.

11           Number one, the overall scope of the land is  
12 broadened to apply to all portions of land, even if they  
13 are improved. That's certainly not the original purpose of  
14 the act. If you go back and check the legislative history  
15 of the bill, it was meant to apply to open unimproved land,  
16 which does not include the Fish and Boat Commission nor  
17 does it include structures in Philadelphia which might  
18 house a swimming pool for a charge, but it was intended for  
19 land mostly in a natural state, which is difficult to  
20 supervise or inspect. It was passed largely to protect  
21 landowners who allow hunters and fishermen to use their  
22 unimproved lands, not as a blanket immunity for all  
23 structures. It does not apply to public recreational areas  
24 that are highly developed, and it shouldn't be. That's not  
25 the purpose of the law when it was passed originally.

1           Again, an instance might be that a borough or a  
2 township might build a swimming pool, charge people to swim  
3 in the pool, and by this change -- that's not what the bill  
4 was intended to be -- they probably charge you a buck or  
5 two to swim. This bill was not intended -- the original  
6 Land and Water Act was not intended to do that.

7           It also protects instances of abhorrent behavior  
8 such as gross negligence or reckless conduct. In these  
9 cases, a landowner may not have acted intentionally or  
10 criminally but certainly with a wanton and reckless  
11 indifference to the rights of others and still be immune.  
12 This bill does not adequately protect those injured as a  
13 result of recklessness or what is known as gross  
14 negligence. In these types of instances, a person could  
15 actually be liable for punitive damages, but under HB 544,  
16 these actions would be immune. Therefore, in a case where  
17 a child is injured or killed as a result of gross  
18 negligence or recklessness, the wrongful landowner is  
19 immune. Is that fair?

20           Number three, the bill unnecessarily expands the  
21 scope of activities covered to inherently dangerous ones  
22 such as snowmobiling and all-terrain vehicles. Adding  
23 these provides immunity and greatly increases the  
24 likelihood that a person injured through reckless conduct  
25 will not be compensated and the wrongdoer protected.

1           Number four, HB 544 awards attorney's fees and  
2 costs to an owner, lessee, manager, or holder of an  
3 easement of real property who is found not liable without  
4 providing the same corresponding award to a successful  
5 injured party. Representative Longietti explained that far  
6 better than I could today.

7           And while a representative of the last panel said  
8 that there are so many provisions in the law that award  
9 attorney's fees, none of these have ever been challenged.  
10 And I'm sure if they were challenged, the Pennsylvania  
11 Supreme Court under Article X, Section 5, has given the  
12 Supreme Court, the entire history -- that's in the  
13 Constitution; it's not from me -- the unique power and only  
14 power to regulate the practice of law. I'm sure if one of  
15 those cases was brought forward, it would be stricken  
16 immediately. At the very least, the same type of award  
17 should be available to a victim who overcomes the strict  
18 immunity hurdle.

19           There are also major drafting errors implicit  
20 here. How and where did you come up to define a structure  
21 that is "large" or "small"? What does that mean? I don't  
22 know what that means.

23           Thank you for giving us a chance to voice our  
24 100 percent opposition to this bill and some of our  
25 specific concerns. I'll be more than happy to answer any

1 questions that Committee Members may have.

2 MAJORITY CHAIRMAN STERN: Thank you, Mark.

3 Representative Heffley.

4 REPRESENTATIVE HEFFLEY: Thank you for your  
5 testimony and your time. Thank you, Chairman.

6 A question with the attorney's fees: Is it a  
7 general practice of attorneys to, as far as when a claim is  
8 paid out, that they would get a percentage of that claim?

9 MR. PHENICIE: Well, under the contingent fee  
10 system, yes. If there's no recovery, there's no award.  
11 But if there would be a recovery by the injured party, yes,  
12 there would be a portion of that paid to the attorney.

13 REPRESENTATIVE HEFFLEY: Okay. So then the  
14 argument that the claimant would be liable for the property  
15 owner's legal expenses if they lose the case, then the  
16 claimant, if the claimant loses the case, they wouldn't  
17 have any of their own legal fees, correct? Because their  
18 attorney would be doing the work on---

19 MR. PHENICIE: Correct; that would be the only  
20 attorney.

21 REPRESENTATIVE HEFFLEY: Okay. So---

22 MR. PHENICIE: To cover his own expenses.

23 I guess our principle concern, Representative  
24 Heffley, is it's not fair. It's one way: loser pays.  
25 It's like geez. And again, Representative Longietti said



1 it better than I did. This entire bill, by the lack of  
2 standard of care, the attorney's fees and every other  
3 aspect of it is for people to never, whether or not they  
4 have a good case, ever to bring a lawsuit. That's the  
5 purpose of this bill. No other area of the law that I know  
6 of protects the type of conduct that's here. It couldn't.

7 REPRESENTATIVE HEFFLEY: Well, you know, with the  
8 conduct, and you're talking about reckless conduct---

9 MR. PHENICIE: Reckless and gross negligence,  
10 yeah. They're pretty high standards to meet.

11 REPRESENTATIVE HEFFLEY: Yes.

12 MR. PHENICIE: Now, the standard case in a  
13 medical malpractice or a products liability or an auto  
14 insurance case is 51 percent.

15 REPRESENTATIVE HEFFLEY: But I think if you're  
16 looking at medical malpractice, I mean, that's in a  
17 structured setting. If you're looking at a landowner that  
18 owns, say, 50 to 100 acres of land or maybe 5 acres of land  
19 and say they're chopping wood one afternoon, and they have  
20 a nice-sized pile of wood that they have not gotten a  
21 chance to put away and there's somebody fishing on their  
22 property and they go up in the house for lunch, if a small  
23 child or anybody climbs on that pile of wood and the pile  
24 of wood tumbles over and they're hurt, would the landowner  
25 then be responsible?

1 MR. PHENICIE: Probably not.

2 REPRESENTATIVE HEFFLEY: But could you say that  
3 was reckless? Could that case be made?

4 MR. PHENICIE: No, that wouldn't---

5 REPRESENTATIVE HEFFLEY: What protection does a  
6 landowner have besides closing a property?

7 MR. PHENICIE: No, that property would not, that  
8 conduct would not be considered reckless. No.

9 REPRESENTATIVE HEFFLEY: And that would be in  
10 what standard?

11 MR. PHENICIE: Well, that would be a standard  
12 that, again, as Representative Longiotti explained better  
13 than me, it's more than mere negligence and it's not quite  
14 willful and wanton. But no, that would be immunity there.  
15 I wouldn't see a problem with that.

16 REPRESENTATIVE HEFFLEY: You wouldn't, but still  
17 the landowner does. So do you have any idea how many acres  
18 of private property right now are posted and restricted for  
19 use because of those landowners and the fear of liability?

20 MR. PHENICIE: I don't know. The panel before  
21 that would know that better than I would.

22 REPRESENTATIVE HEFFLEY: I mean, I see it  
23 happening more and more in the district, and really it has  
24 restricted any kind of access. And I think what this  
25 legislation is really trying to apply is some common sense

1 to the law to say that people that are going on property  
2 have a responsibility to, you know, be responsible. And I  
3 also think in dealing with -- I mean, if it's intentional,  
4 if it is an intentional action to cause harm, you're going  
5 to be liable for that. But I think this takes a good step  
6 forward in opening up a lot more private lands for public  
7 use, and, you know, I would definitely encourage support of  
8 this legislation.

9 MR. PHENICIE: Well, private use is one thing,  
10 but again, this bill goes way beyond the original  
11 intentions of the bill and includes, again, my example of a  
12 borough who builds a swimming pool and charges people for  
13 that. We don't think that ought to be there, and certainly  
14 the way the bill is written, you couldn't tell.

15 REPRESENTATIVE HEFFLEY: Okay.

16 MR. PHENICIE: At a minimum, this bill needs  
17 clarified more. I'll again ask you how anyone can define a  
18 structure that is large or small. What does that mean?  
19 But certainly the public aspect of the bill is not clear  
20 enough that it does not and should not apply from this from  
21 the original legislative history of this act.

22 REPRESENTATIVE HEFFLEY: Thank you.

23 MAJORITY CHAIRMAN STERN: Thank you.

24 Representative English.

25 REPRESENTATIVE ENGLISH: Thank you, Mr. Chair.

1           It seems to me that the component that's added in  
2 this is speed. Maybe it's speed in error, and specifically  
3 it seems to be maybe motorcycles or snowmobilers. And it  
4 seems as though, why shouldn't those activities, whether,  
5 you know, as my grandmother would say, that's crazy or  
6 reckless or ultra-hazard, why should they get protection if  
7 they're going to come on to anyone's land and go, arguably,  
8 full throttle or trying to catch air, going through blind  
9 turns and, you know, not being familiar with the course and  
10 not seeing it? And I think there's a difference between  
11 someone that's just, whether it's hunting or fishing, going  
12 at a slower pace, or bird watching, or, you know,  
13 collecting insects. They're just out there enjoying the  
14 land, which I think we want to encourage, but now we're  
15 adding this speed or this danger element.

16           MR. PHENICIE: I couldn't agree with you more.

17           REPRESENTATIVE ENGLISH: Why do they get the  
18 protection and---

19           MR. PHENICIE: I couldn't agree with you more,  
20 Representative English. That's one of the points that we  
21 make.

22           Again, the original purpose of this act is what  
23 you said: it's to encourage landowners to open up their  
24 lands for hunting and fishing and unimproved land, not to  
25 have all-terrain vehicles and snowmobiles wreck their land.

1 I agree with you completely.

2 REPRESENTATIVE ENGLISH: But my question will be  
3 then, why can't we let landowners allow it but those groups  
4 don't get the benefit, if they crash and burn, they don't  
5 get the benefit of that protection?

6 MR. PHENICIE: Well, I think that would be fine.

7 REPRESENTATIVE ENGLISH: And I just think there's  
8 always a gray area between property owners, you know, if  
9 you're on a recreational area not for fee versus for fee.  
10 And, you know, the boundary is hard in the woods, and then  
11 when I add this speed component and whatever else is  
12 occurring -- the elements; you know, whether it's foggy or  
13 snowy or rainy -- it's just hard to see. I mean, you know,  
14 hunters can't even tell you what township they dropped  
15 their deer in sometimes: I'm not sure, because I'm just  
16 out here in the wild. And that just seems problematic, but  
17 yet we want to expand this. We want people to encourage it  
18 and we don't want the landowners to have to pay, and I want  
19 people to come onto my land and not be attacked and not be  
20 sued and not have to pay, so.

21 MR. PHENICIE: Well, again, I think this -- I  
22 don't really understand. Again, it's an answer in search  
23 of a question. These are not common instances that happen.  
24 And I guess I would ask the Snowmobile Association and the  
25 Township Supervisors and the Pennsylvania Agriculture

1 Association why they don't give better counsel. This is  
2 not a common occurrence where there is a lawsuit there.  
3 But at a minimum we think there should be a certain level  
4 of behavior by the landowner that this bill goes far beyond  
5 what we think is reasonable.

6 REPRESENTATIVE ENGLISH: Thank you.

7 MAJORITY CHAIRMAN STERN: I also would like to  
8 acknowledge Representative Boback's presence here at the  
9 Committee hearing.

10 And I think at this time we have the prime  
11 sponsor of the legislation. Representative Moul has a  
12 question, and I'll just turn it over to him at this time.

13 REPRESENTATIVE MOUL: Thank you, Mr. Chairman.

14 And thank you, Mark. I appreciate the other  
15 aspect on the other viewpoints on this bill.

16 I just want to go over a couple little things  
17 here. You had mentioned the definition between a large or  
18 small improvement, whether it's a building, and I'm  
19 reading: "The term applies to those areas and physical  
20 objects whether they are in an unimproved condition or a  
21 condition improved by manmade effort, whether they are  
22 large or small in size and whether they are located in a  
23 rural or an urban setting." Is that the paragraph that  
24 you're referring to when you said who is to determine what  
25 that is?

1 MR. PHENICIE: Yes.

2 REPRESENTATIVE MOUL: You know, I grew up in  
3 Dutch land, Pennsylvania, and one of the old phrases that  
4 my grandpa used to use, except he'd actually use the real  
5 words, this is kind of like picking fly dung out of pepper,  
6 you know? I mean, I think if you read it, it says it  
7 doesn't really matter whether they're large or small. It's  
8 not asking for a definition of what is "large" or "small."  
9 And it doesn't really matter whether it's in the city or  
10 sitting in the country; it all applies. I mean, we could  
11 take that out and say everything. But I think whoever  
12 crafted the bill pretty much says it doesn't really matter  
13 what size they are.

14 MR. PHENICIE: Well, again, we have more of a  
15 problem with the fact, going past that question, we have  
16 more of a fact with the problem of city structures. Again,  
17 the purpose of this bill and the legislative history to  
18 this bill when it was passed was talking about farm owners  
19 who let their land out for people who like to hunt or to  
20 fish, not the world. That's not the purpose of the act  
21 originally.

22 REPRESENTATIVE MOUL: So you're referring to  
23 motorcycling and all-terrain vehicles, snowmobiling, when  
24 you're talking about that?

25 MR. PHENICIE: Well, yeah, that part as well as

1 in urban areas where there's a charge, you know, by, again,  
2 a city swimming pool.

3 REPRESENTATIVE MOUL: Well, a city swimming pool,  
4 especially if you paid to get in it, I would certainly  
5 think that the owner of the swimming pool -- in this case,  
6 it would be the borough -- would be liable to make sure  
7 that it is in a safe condition. But if a child is running  
8 and trips on the concrete around the pool, does that mean  
9 the borough is liable? I mean---

10 MR. PHENICIE: Probably not. That happened to me  
11 once. I didn't sue.

12 REPRESENTATIVE MOUL: So what you're saying, if  
13 I'm not mistaken, does this bill take anybody's right to  
14 sue away?

15 MR. PHENICIE: Yeah, basically it does,  
16 Representative.

17 REPRESENTATIVE MOUL: Why would that be?

18 MR. PHENICIE: Well, the standard that you  
19 have here is almost impossible to reach for a plaintiff.  
20 Again I'll refer to Representative Longietti's  
21 statements.

22 This bill in three or four different ways makes  
23 filing a lawsuit and being successful, if you're an injured  
24 plaintiff, virtually impossible. If that's the purpose of  
25 the bill, it's right there. Whether they were injured



1 legitimately or not, the standard of behavior that would  
2 hold a defendant liable, the attorney's fees, the types of  
3 activities including snowmobiles and ATVs, this bill,  
4 honestly, and of course we do this for other issues, is one  
5 of the most restrictive bills that I've ever seen as far as  
6 creating any sort of balance for injured plaintiffs and  
7 defendants.

8 REPRESENTATIVE MOUL: Does it always have to be  
9 someone else's fault when someone gets hurt?

10 MR. PHENICIE: No; no, absolutely not.

11 REPRESENTATIVE MOUL: So then why wouldn't we  
12 want to protect those people that offer their land free of  
13 charge? And Representative Longietti gave an example of  
14 the cable across the trail or whatever and a man came  
15 riding his motorcycle and it killed him, and that's tragic,  
16 and we all agree, but it could possibly have cost that  
17 landowner a small fortune to defend that case, even though  
18 he had no idea the cable was there. Someone else could  
19 possibly have done it, but yet we're going to drag him  
20 through court just to shake the tree and see what might  
21 fall out?

22 MR. PHENICIE: Well, this bill is way beyond  
23 that, Representative, shaking the tree and seeing what  
24 falls out. This is essentially a total immunity bill, and  
25 if that was the intention of the author or the staff or the

1 Legislative Reference Bureau, they have it here.

2 REPRESENTATIVE MOUL: Okay. Thank you.

3 And just in closing, I still think that this bill  
4 is definitely a step forward for encouraging people to open  
5 their land for use for recreational purposes, which will  
6 spur economic development as well. We can always use that  
7 in Pennsylvania.

8 And I do appreciate both sides, listening to both  
9 side of the argument, but I do believe it is a long overdue  
10 necessity in Pennsylvania to encourage people to open up  
11 their land for these purposes.

12 Thank you, Mr. Chairman. Thank you.

13 MAJORITY CHAIRMAN STERN: Thank you,  
14 Representative Moul, for your question and presentation of  
15 the bill, and thank you, Mr. Phenicie, for your testimony  
16 this morning.

17 I'd also like to make as part of the record this  
18 morning, there are 19 groups that are in your packets this  
19 morning that support changes in HB 544 to the Recreational  
20 Use of Land and Water Act. Another group that has sent a  
21 letter here this morning is the County Commissioners  
22 Association of Pennsylvania. They support HB 544 as well.  
23 I wanted to read that into the record this morning.

24 So if there are any other questions? Any other  
25 good for the good of the Committee? If not, this meeting

1 stands adjourned. Thank you.

2 MR. PHENICIE: Thank you.

3

4 (The hearing concluded at 12:43 p.m.)

1           I hereby certify that the foregoing proceedings  
2 are a true and accurate transcription produced from audio  
3 on the said proceedings and that this is a correct  
4 transcript of the same.

5  
6  
7           Debra B. Miller

8           Committee Hearing Coordinator/

9           Legislative Reporter

10          Notary Public

11  
12          Tamara S. Neidlinger

13          Audio Transcriber