ZONING AND PLANNING LAW REPORT

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THE 2002 ZiPLeRs: THE EIGHTH ANNUAL *ZONING AND PLANNING LAW REPORT* LAND USE DECISION AWARDS

by Dwight H. Merriam, FAICP, CRE

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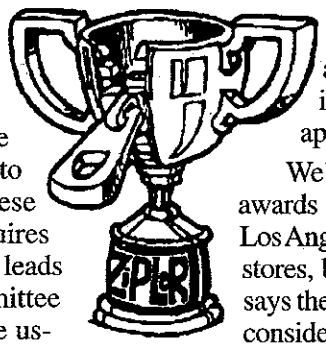
Introduction

Eight years. This is the eighth year for these awards and the readers tell us that this is their highlight of the year in land use law. Some might find that a compliment. I'm just worried that you all have no other life.



I get lobbied throughout the year by those who want to be featured. I think they are the same people who try to get engagement and wedding announcements in The New York Times for their children, or for themselves the second time around. But I have to be true to the high level of integrity we bring to these awards, the coveted ZiPLeRs. Integrity requires that I rely only on the most reliable sources as leads for nominees and that our selection committee carefully considers each and every nominee using the criteria so carefully developed in nearly a decade of picking the best of the best.[1]

In case this is your first exposure to the ZiPLeRs, let me explain that what we do is gather up all the unusual, bizarre, sometimes important, and hopefully always amusing land use cases from the year and give awards to the best among them. And in so doing we recognize those exemplars who guide us appropriately in our land use professions.

We've done an analysis of how you use the annual awards issue. Actually, we did as much of a study as Los Angeles did before adopting the restrictions on adult stores, but more about that later. Of course, everyone says they read this issue cover to cover with thoughtful consideration. But when we probed a little deeper we

found that readers were approaching the annual ZiPLer awards issue about like all those sophisticated people who say they read The New Yorker. You know what they really do—they skim for the cartoons and maybe the movie reviews. Admit it, some of you are among them and you read this issue the same way. Just about everyone skips over the really intellectual stuff like vested rights, substantive due process, ripeness and even the usual nativity scene cases and they go straight to...yes,...the adult entertainment cases.

To save you the time and eye strain of jumping ahead, we'll start with those. It isn't much of a challenge, however, because these are low-lying fruit as far as land use cases go. I haven't counted them, but given that I actually read a large number of land use cases and summaries over the year, I can say that adult use cases outnumber any other category of land use. So, to the sound of the background music at the Bada-Bing walkway, I proudly announce the 2002 ZiPLeRs,...bada-ba-boom, bada-ba-boom, bada-ba-boom...

The "Reasonably Rational Relationship Reasoning" Award

This one goes to the City of Los Angeles for nothing-up-this-sleeve-but-an-elbow reasoning when it comes to adult business regulation. I thought I had this one—the *Alameda Bookstore* case—pegged. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). No way, I thought, could the U.S. Supreme Court uphold the Ninth Circuit ruling that L.A.'s law banning multiple adult uses in a single establishment was constitutional.

Fearing that I might be delusional about my prognostication, which I later announced to hundreds of local government lawyers in New York months before the decision, I talked with Randal Morrison, a certified guru of First Amendment land use issues. See his website at www.signlaw.com. He said the law was unconstitutional. I guess Randal and I should have told the Court.

Here's what happened. L.A. adopted the usual separation requirement for such nasty things following a comprehensive study in 1977, i.e., you can't have an adult business within 1,000 feet of another adult use. That sort of distancing requirement is constitutional.

But a retailing phenomenon developed in the last two decades—one-stop shopping. The Super Wal*Mart with 180,000 square feet of everything from cheap underwear to double-stuffed Oreos™ and the 135,000 square foot Home Depot are of this genre. Why should a lusty fellow have to get into his car to go from a video peep show, to rent a video, to buy a book, and to pick up some handy equipment? That's at least five trip ends, as the traffic engineers would certify, when one could cut out all that tooling around and get down to business in one establishment.

The 1977 study looked at the "secondary effects" of adult businesses—all the bad things that go on around such places, such as prostitution, sexual assaults, drug dealing, land use lawyers eulogizing practical difficulty and necessary hardship to get variances their clients don't deserve. They didn't find any evidence of the last effect, but they did find everything else and more, as all these studies invariably do. What they didn't study was whether there were secondary effects from multiple adult uses in a single establishment. Yet, that was exactly one of the things the city council wanted to prohibit when it adopted the ordinance.

When the zoning enforcers interpreted the ordinance as to the distancing requirement, they found that multiple uses were permitted. So the council amended the law to expressly prohibit multiple uses, relying on a study that didn't study the effects of multiple uses. Two business owners sued.

The district court found the study provided no support for the law, was not content-neutral and was unreasonable. The court granted summary judgment for the businesses.

The Ninth Circuit, bless its misguided soul for giving us pundits so much to write about, might have done right this time—it upheld the trial court, finding that the because the study didn't look at the secondary effects of combined operations, the government had failed to show it had a substantial governmental interest in prohibiting multiple uses in a single establishment. Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719, 724 (9th Cir. 2000).

The U.S. Supreme Court's decision is a mess. For the whole story, look back at Professor Jules B. Gerard's article, *Banning Two Adult Uses in Same Building Upheld by Fragmented Supreme Court*, in this publication in September. The 5 to 4 decision had a plurality of four. Justice Kennedy's concurring opinion becomes the holding of the Court. He worried that the plurality might be subtly expanding City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), which enables municipalities to rely on studies done elsewhere as evidence of potential local secondary effects. He also worried that not enough attention had been paid to the analysis of whether secondary effects could be suppressed without suppressing speech. But, in the end, Kennedy seems to agree with the plurality that there was enough evidence to support the ordinance.

Professor Gerard and I part company on the question of what evidence should be necessary. He says, at p. 62, it is "nearly impossible" to predict "the exact consequences of proposed legislation." I say, there was absolutely nothing in the 1977 studies to show that multiple uses in the same retail floor area cause any more or different secondary effects than a single use in the same store. Why not require a simple study in L.A. or elsewhere showing that secondary effects are more serious for multiple uses in a single store? Intuitively, and drawing from years of retail experience, I cannot fathom how a 3,000 square foot peep show location that removes a viewing booth and adds video rental, or which removes a viewing booth and adds adult books for sale, is going to have such an increase in patronage that any measurable effect will be seen in the secondary effects. I had photographs taken of the bookstore and it is just another storefront location of less than 3,000 square feet in a typical small open center, which except for the neon "Adult Books" sign on the front, looks like a pharmacy, Christian Science

Reading Room, or cellular phone outlet. Frankly, I would rather have those people who want what Alameda Books has to sell to get it all in one place than in several places spread 1,000 feet apart across my town. It is not hard to foresee and argue that L.A.'s attempt to regulate these uses out of existence will only lead to a proliferation of sites. To limit their growth, why not study what square footage is needed to meet customer demands for all types of adult businesses and then allocate that much floor area with some extra to allow for competition? We do the same thing, only more crudely, in allocating land area for uses.

It is never over until it is over. The case is remanded to trial. The spin doctors have come at the case from all sides.

"It is a narrow decision," said Deputy Los Angeles City Atty. Michael L. Klekner, who defended the zoning ordinance. "The good news is that we won in the Supreme Court. The bad news is that we have to go to trial now." John Weston, the lawyer who represented the bookstores, said he is confident of winning in a trial. "We believe we should prevail. The evidence will not support the city's theory that this combination [of adult businesses] in any way causes greater secondary effects." David G. Savage, *Zoning Curbs on Adult Video Parlors Upheld*, Los Angeles Times, May 14 2002.

"The Supreme Court is ruling more and more narrowly," said Michael Spotts, a Stuart attorney who represents an adult business in Fort Pierce. "The court is giving more rights to the government to restrict these businesses." "Those so-called secondary effects are a crock," Spotts said. "The studies that these rulings are based on are biased. There are probably more crimes at big-box stores than adult businesses." Mark Pollio, *Attorneys Weigh Adult Store Ruling*, The Stuart News/Port St. Lucie News (Stuart, FL) May 19, 2002.

We had a great time researching what the industry said because, in the interest of intellectual pursuit, we had to explore their websites. Our computer, i.e., MIS, people had to maneuver into each individually as we could not otherwise get through the firm's filter. Here's a small sampling of what the industry thinks.

"What does all this mean? It means that the children of the right are screaming bloody murder. For people who believe in their self-righteousness so much, it is interesting to see how quickly they run away from the truth when they are confronted with it. I have seen them stand up before city councils and flat out assert that the councils should ignore the actual statistics of what is going on in their communities because 'other studies' (which they never actually identify) show that adult businesses cause these horrendous and evil secondary effects. The right is so scared about the truth that a number of their amicus briefs in the Alameda Books case have asked the Supreme Court to simply declare, as a matter of law, that adult businesses cause secondary effects and that municipalities are therefore justified in passing any regulation that they can come up with to impact your industry. They are running away from the truth as fast as their little feet will carry them, and they are asking the courts to turn a blind eye to reality; they simply want that legal fiction—the lie." Brad Shafer, *Trench Warfare in the Battle of Secondary Effects*, at http://www.exoticdancer.com/news/trench.php.

"The good part of the opinion is that it appears to expand the basis for factual litigation at the trial court level [more] than many courts have held in the past," observed Free Speech Coalition board chairman Jeffrey Douglas. "Certainly many courts ruled that if you hadn't put the data in front of your city council, then you couldn't introduce it at the district court level. I think this allows you to do that. So that's a good sign." Alameda attorney John Weston went even further, noting specifically that the high court failed to rubber-stamp the "rational basis" argument advanced by the City, which was that as long as the City Council had a "rational basis" for believing that its legislation would thwart the alleged secondary effects of the adult businesses, that basis was not open for challenge by the adult businesses. "I think the biggest thing is going to be that the cities and their *amici* lost hugely," he opined. "What everybody, ourselves included, were concerned about was that a rational-basis standard was going to be upheld, and that in essence, there would be no meaningful review of adult legislation of any kind once the meaningless rational-basis standard had been satisfied. Unequivocally, that did not happen. That was rejected by the plurality, by Justice Kennedy, and by all the dissenters." *Alameda Books: Attorneys Hopeful After Supreme Court's Mixed Opinion*, Adult Video News, July 12, 2002, at http://avn.digitalod.com/query/index.cgi?eid=10683&for=news.

The churches have their own view. "The good news is that these confusing, concurring and conflicting opinions by the court reveal that not all of the nine justices have completely lost their minds when it comes to the pornography issue," said Richard Land, president of the Southern Baptist Ethics & Religious Liberty Commission. Tom Strode, *High Court Sides With Pornography Opponents*, Baptist Press, May 18, 2002 at http://www.rpdigest.com/06555.htm.

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The "Never on Sunday" Award

The Sixth Circuit upheld a Tennessee law prohibiting adult-oriented book and video stores from opening on Sunday and holidays, even though live entertainment places could be open, and for that they deserve this award. Richland Bookmart, Inc. v. Nichols, 278 F.3d 570 (6th Cir. 2002), cert. denied, 123 S. Ct. 109 (U.S. 2002). The court reasoned that adult use owners are not a suspect class and that any "under-inclusiveness" in the law was not content-based. The court saw this piecemeal regulation as a "plausible step-by-step approach" to reform of a perceived problem. The exemption of live cabarets is permissible because it is not an invidious distinction, such as a "head tax from which Christians are exempt." That is quite a comprehensible and guiding standard.

The "Equal Rights for Kids" Award

This award goes to the Tenth Circuit for seeing the wisdom, supported by the protections of the U.S. Constitution, to let our children into strip joints. No more surfing the raunchy reaches of the web or swiping dad's magazine from the bottom drawer in the workshop. Henceforth the adolescents of Federal Heights, Colorado, thanks to the Tenth Circuit, are now free ride their bikes to attend First Amendment-protected performances at a local establishment, "Bare Essence." Essence, Inc. v. City of Federal Heights, 285 F.3d 1272 (10th Cir. 2002), cert. denied, 123 S. Ct. 411 (U.S. 2002).

The City of Federal Heights prohibited those under 21 from being on the premises of adult entertainment establishments. Helping our teenagers to get good part-time jobs, the district court allowed the content-neutral age restriction for patrons, but found that as to dancers it was unconstitutional, as it was unrelated to furthering any substantial governmental objective. The reasoning is something to behold. The court thought that the First Amendment burden on the underage dancers, who could only dance before patrons age 21 and over, was incidental. The Tenth Circuit struck the entire age restriction because the city had not offered any probative evidence in support.

The "Public Trust Trump the Chump" Award

Everyone in the land use law business loves takings cases, because they are the ideal medium within which to play out the constant tension between property rights advocates and the police power hawks.

Our award winner this year of the "Public Trust Trump the Chump" Award for defeating a takings claim is none other than that perennial favorite of courts, a court that has brought us more great land use decisions than any other in the country because of where it is and because so many of its decisions are at the cutting edge or just plain wrong—the Ninth Circuit Court of Appeals.

The court's award winning decision is Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978 (9th Cir. 2002). Esplanade bought a tidelands parcel in 1992 for $40,000, completely submerged during half of the tidal cycle. It sought local approvals to build nine homes on pilings at a time when residential development over water was apparently permitted, and Esplanade had a vested right to proceed under those regulations after the City amended them to prohibit Esplanade's proposed use. I've seen that sappy movie, *Sleepless in Seattle*, and my wife, Susan, and then infant-son, Alexander, once spent a night on the "bed-and-bunk" former Army tugboat, the M/V CHALLENGER in Seattle, so don't tell me there isn't housing on and over the water, public trust or not ...

Oh, you clever readers, you are a step or two ahead of me. Of course, the City denied the permits. How else would we get to the takings issue? The City identified three problems, chief among them that the parking was not on dry land. By the City's interpretation, parking for non-water dependent uses like housing could not be on pile-supported structures. The Washington Court of Appeals agreed.

What happened next is a little difficult to tell from the decision, but it appears that Esplanade's lawyer, Larry Smith, did not amend the application, but applied for a variance from the "no-parking-on-pilings" problem. Larry Smith is a friend and fine land use lawyer, and when he says the City led him to believe he could follow this process rather than address each and every detailed concern, that's enough for me. At the same time, the City says it never gave him any such impression, and the City deemed the application abandoned and void for failure to supply the requested information. Owww . . .! This is the classic "he-said-she-said" we have all been caught up in one time or another. In the "go-along-get-along" world of local land use, whether you are the government or a property owner, it's sometimes not good to be too formal in your deal making, though sometimes as here it can come back and bite you.

So Esplanade sued Seattle for a taking and violation of its substantive due process rights in federal court. I sent an e-mail to Larry Smith, asking how he could do this in federal court in 2000 when Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) required pursuit of compensation in state court first. I received an "auto reply" that his generous law firm gave him a sabbatical through the end of the year and he's on some safari until January. We'll catch up on this case in next year's report.

Ultimately, the federal district court granted the City's motion for summary judgment on both claims. The two grounds for rejecting the taking claim were that Esplanade had failed to establish that the City was the "proximate cause" of Esplanade's damages and that the "background principles" (ta-da!) of Washington state law would have precluded development under the precedent created by Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

You may recall that *Lucas* was the case where David Lucas was prevented from developing his two waterfront lots and was completely wiped out economically, leading the U.S. Supreme Court to invent the "categorical taking," which is the equivalent of a physical invasion taking, but in the context of severe regulation. The idea of categorical tak-

ings is still around for display purposes, but has no more life in it than Roy Rogers' horse, Trigger, which was stuffed and put on display after the trusty steed died. Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001) and Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) took care of that.

Under *Lucas,* a property owner is compensated for a categorical taking without having to jump through the three hoops of Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)—diminution in value, investment-backed expectations, and the character of the government's action. In *Esplanade*, the Ninth Circuit assumed a categorical taking and looked to the two exceptions in *Lucas,* under which it is possible that a property could be rendered valueless by regulation, but compensation would not be due. One is the nuisance exception—no property owner has the right to create a nuisance—and the other is the background principles of law exception—if there is some old state law that would otherwise prohibit development, then the property owner has no right to compensation. Enter the public trust doctrine.

The public trust doctrine dates back to the Justinian Code—we're talking Roman times here. In the United States, we look to what was in place at the state level at the time the state entered the Union. The simplistic version is that the public trust holds land below the high tide line to mean low water for the public's use, including navigation, fishing, fowling, and basically hanging out on the beach (my modern gloss on the concept), but that it can be used privately if that use does not interfere with the public's use.

We have a client who wants to build a private boat dock on the ocean at his home. The neighbors said it would preclude their public trust access. We put out an anchor and float to mark the end of the proposed dock and plunked one of our ace land use analysts in the water in his kayak. We then videoed his passing and repassing to demonstrate the dock would have no impact on public navigation. (Yes, we billed and were paid for that work.) We proved that the private use would not unreasonably interfere with the public use.

So the public trust becomes the ultimate trump card in *Esplanade*. Not surprising, you say, and a logical result? There are a couple of problems here, however.

First, do these background principles have any role in *Penn Central*-type takings? That's not this case, but it is a serious question. See Machipongo Land and Coal Co., Inc. v. Com., 799 A.2d 751, 774 (Pa. 2002), cert. denied, 2002 WL 31012174 (U.S. 2002).

Second—and here's the real problem—the Ninth Circuit said that the public trust precluded approval of the project because, as a background principle of state law, it makes any such use of the property illegal *ab initio* (sorry, love that Latin—I mean "from the outset"). What about the original 1992 applications before the law changed and the existence of Esplanade's acknowledged vested rights to proceed under the old regulations? No good, said the court, because the houses-and-cars-on-pilings were always an illegal use under the public trust.

The court went too far, don't you think, in going the extra gratuitous step? Can't it now be argued that the state's (need I say the sovereign's?) public trust makes any such development illegal *ab initio* such that all prior locally-approved similar projects are illegal, even though they have local approvals? I would not want to be giving opinions on the validity of prior approvals in the coastal zone in Washington State, at least not without negotiating a reduction in the deductible on my errors and omissions policy. Some title insurance companies and mortgage holders must be sweating bullets out there.

Professor David Callies of the University of Hawaii, who is an expert in public trust law, tells me the *Esplanade* decision is especially troubling because it seems to completely reject the possibility of the private use of public trust lands, which has always been permitted where it does not unreasonably interfere with the public's use.

Speaking of opinions, did you know that in Vermont when a lawyer gives a title (the operative word is "title") opinion, they are opining as to the compliance with zoning? This amazing but horrible situation arose out of a decision by the Vermont Supreme Court in Bianchi v. Lorenz, 166 Vt. 555, 701 A.2d 1037 (1997), in which the court held that a zoning violation breaches the covenant against encumbrances in a warranty deed, if the violation can be determined from town records and substantially impairs the purchaser's use and enjoyment of the property. The legislature has enacted some corrective measures. So, belatedly, we [posthumorously] award the Vermont Supreme Court a 1997 ZiPLer as the recipient of the "Lawyers Are Deep Pockets and Guarantors of Everything" Award. Just about every conveyance in Vermont now involves an extra step of permitting due diligence, ferreting through Town Hall in quest of zoning compliance and those building permits and certificates of occupancy, so much the norm (not) for self-reliant Vermonters.

The "Cuisine Control" Award

Local governments regulate land use under a grant of the police power from the state, either through enabling legislation or home rule provisions and a charter. The police power is the power to promote and protect the public's health, safety, and general welfare. In Arcata, California, protecting the public includes keeping them from having access to too many "formula" restaurants, which are defined in the local ordinance as ones which share the same design, menu, trademark, and other characteristics with 12 or more other establishments.

The City of Arcata is a winner for banning any new formula restaurants in the city, which has nine already, including McDonald's, Subway, and Denny's, unless the restaurant replaces an existing one. The measure was initiated by the Committee on Democracy and Corporations, created to implement a referendum which sought to "ensure democratic control over corporations conducting business within the city, in whatever ways are necessary

to ensure the health and well-being of our community and its environment." For more examples of such ordinances, see www.newrules.org/retail.

Did it ever occur to these fine folks, gourmands perhaps, that a health food restaurant chain won't be able to come to town to take on the usual miscreants of fast food who have now been given a protected position by banning all newcomers? There's also this minor constitutional thing called substantive due process, which seems to require that land use regulations be reasonably related to furthering a permissible governmental objective. Oh my goodness, what am I saying? I forgot. This is a California case. The usual rules don't apply.

The "You Were Arrested Handcuffed And Jailed Overnight For What?" Award

If I hadn't read it myself in the ABA Journal (April 2002), I might not have believed it, but here it is. Tony and Angelica Flores, our award winners, were first cited in April 2001 by Peoria, Arizona for their failure to remove Christmas decorations within 19 days after Christmas. They went to court twice to explain how Tony's back injury kept them from removing the lights, but nothing much happened. They claimed they received a notice of dismissal.

They moved to Glendale, Arizona, figuring their criminal past was behind them. However, the police showed up, arrested them, slapped on the handcuffs and put them in the slammer overnight. The charges were later dropped.

According to Peoria officials, the law is intended to "maintain the integrity" of neighborhoods. I don't get it. My family was from Vermont. We have a weekend house there, and from the memories of my youth (ok, limits of my memory) I can attest to the tradition, continuing to this day, of the many Vermont homes with year-round Christmas decorations. It's nice to be reminded of Christmas in July by your neighbors, on Route 100 and in the Northeast Kingdom. So we give the hapless Mr. and Mrs. Flores a second "You Light Up My Life" Award for providing us some holiday cheer year-round.

The "Shrub Snub" Award

Thanks once more to our west coast bureau chief, Gideon Kanner, we have been able to select Palo Alto, California, for this new award. Let your hedge in Palo Alto between the sidewalk and the street grow above two feet and you will find yourself arrested on criminal misdemeanor charges, be fingerprinted and have your mug shot taken, just like Kay Leibrand, who also faces a fine of up to $1,000 and six months in jail. "A High Hedge Brings Brush With the Law" by Karen Alexander, Los Angeles Times, April 21, 2002 at B10.

The "We Don't Want Any Really Permanent Residents" Award

This one goes to the Arcadia, Florida City Council which voted down a widow's request to have her husband buried in their backyard. The neighbors got together a petition of 150 people, including the decedent's son and daughter, opposing the idea. Maybe the children should get the "Ted Williams" Award. As the son said: "He told me he was going to keep them talking. I know he's saying that's enough." "Council: No Backyard Burial" news-press.com www.news-press.com/news/today/020904buried.html, "Arcadia City Council Nixes Backyard Interment," Bonita Daily News (Sept. 5, 2002) at www.bonitanews.com/02/09/bonita/d818736a.htm.

The "Not In My Back Yard" Award

Speaking of burying people, the entrepreneurial owners of the famous 2.9-acre cemetery, Westwood Memorial Park, decided to go the anti-sprawl route and intensify the use of their property by proposing to build almost 2,100 above-ground crypts along the cemetery's south side. The burial of Marilyn Monroe there in 1962 brought Westwood Memorial Park notoriety. Among the many celebrities resting there are Burt Lancaster, Dean Martin, George C. Scott, Walter Mathau, Roy Orbison (unmarked grave), Carroll O'Connor, Natale Wood, Truman Capote, Frank Zappa, Mel Torme, and Carl Wilson of the Beach Boys. Hugh Hefner, who many doubt will ever die, purchased the plot next to Marilyn Monroe. The Los Angeles Council takes this award for designating the cemetery a monument. Now, any changes to the cemetery must be approved by the city's Cultural Heritage Commission. And you can pretty much guess how that will go. "Westwood Fears Dead Could Lie Too Close," Los Angeles Times (Apr. 15, 2002) at 31;"Resting Place of Hollywood Greats Declared a Cultural Monument," Agence France Presse (Oct. 16, 2002) [note—for you we are even out there looking in the international press]; "Day & Night; Day & Night," The Express (Oct. 18, 2002) at 42.

The "Beach Bum" Award

This award goes to everyone in Malibu, California caught up in a heady game of beach blanket bingo over who controls and gets to use the beach. It got so big that Gary Trudeau ran it for days in Doonesbury™. "Owners of Malibu Mansions Cry, This Sand Is My Sand," The New York Times, (August 25, 2002) at 1. David Geffen, a heavyweight in the entertainment industry, partner of Steven Spielberg in Dreamworks SKG, and supporter of liberal causes, has suddenly become a property rights conservative when it comes to "his" beachfront. The property owners have "hired help" to keep people from walking on "their" beaches and even from swimming there. Mr. Geffen brought a takings claim to block access to a walkway along the beach. This is likely to be a perennial favorite for the ZiPLeRs, at least for a few years. Stand by.

The "It Takes a Village" Award

It is important to keep our children close to home and to be part of the neighborhood even when both parents are out working. What better way to make that possible than allow state-licensed day care of six or fewer children in private homes?

But what happens when a covenant in the deeds for a residential subdivision prohibits "commercial, industrial or business uses" but also provides that the properties should be put to "residential use"? Should the courts invalidate the no-business-use covenant as it applies to day care because taking care of a few children at home is fundamentally residential in character?

Pause for a moment and consider what you would do. Covenants shouldn't be struck down casually, but can you see down the slippery slope in this case?

The award goes to the Michigan Supreme Court for turning to the most authoritative source of the law for what is right and just—Black's Law Dictionary—and upholding the covenant because the day care fits within the definition of business as an "activity or enterprise for gain, benefit, advantage or livelihood." Let's give the court a subscription to Westlaw® so they can search words and phrases instead of going to Black's alone.

Of course the day care workers get paid, but isn't day care essentially residential in character, as the Michigan Court of Appeals found in setting aside the covenant? No, it is not, held the Michigan Supreme Court.

A dissenter had the best shot in arguing that the court should declare that it is against public policy to prohibit caring for children in a home, but the majority, though it conceded that several states (including California and New Jersey) had outlawed such non-commercial use covenants by statute, said it wasn't their place to set policy.

Thanks to Professor Patrick A. Randolph, Jr. of the University of Missouri at Kansas City School of Law, the moderator of DIRT List, a wonderful real estate list server, for giving us this case and making two observations in his comments. First, the slippery slope problem, obvious to most, is that those of us who work at home (as I am as I write this) are among potential covenant violators. Some courts have invalidated such covenants. See, e.g. Gabriel v. Cazier, 130 Idaho 171, 938 P.2d 1209 (1997) (homeowner's children can give swimming lessons in their home pool during the summer even though covenant prohibits "business or trade"). The Michigan Supreme Court's position is pernicious because it has no logical end. Second, the Restatement of Servitudes (this is the groovy stuff you also get on DIRT List) favors the use of public policy analysis in modifying or barring the application of servitudes.

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The "They Are So Mad They See Yellow" Award

This one goes to all the neighbors of Melinda and Joe Bula of El Dorado Hills, California. "A Yellow House? Well, We Can't Have That," The New York Times (July 24, 2002) at A10. It's yet another covenant case. We forget sometimes, because of our focus on public land use regulation, that much regulation goes on privately in the declarations of covenants and restrictions controlling untold numbers of developments. Even yours truly ran into this buzzsaw of aesthetic correctness a couple of years ago in building a new home in a covenanted subdivision. The covenants said that the colors were to be colonial or earth tones. Our architect (whose house is this anyway?) and the interior designer (yet another expert) picked some "special" colors for the exterior of our Shaker-style but somewhat contemporary home (it still met the "colonial or traditional" appearance covenant). How the interior designer got outside, I still can't figure. Anyway, they picked red and green, colors you don't usually see together, but which they documented right out of a Shaker house book. Some of the neighbors squawked, but were held at bay. One day I came home to see the painters slapping purple paint on the small areas connecting the three sections of the house. I grabbed the "designer": "What are you doing? They painted our house purple! It looks like an eggplant!" "No, Dwight," she said, "It's aubergine." "What is that?" I asked. "French for 'eggplant,' " she said. End of discussion. The house is red, eggplant, green, red, eggplant, green...from left to right...and nobody sued anybody.

So I sympathize with the Bulas, whose neighbors went postal when the Bulas painted their house yellow which the experts—there they are again—say is the most visible of eight million colors. The neighborhood architectural review committee has demanded that they repaint the house in earth tones. For now the Bulas will fight, and I say, good for them. As Joe Bula said: "The only thing stupider than fighting it is not fighting it." "The Big Yellow Splat," Chicago Tribune (July 30, 2002) at 12. I have a bucket of aubergine paint left over which I will send with the award that they can use for accents.

Another year gone by and it leaves me with a smile. Aren't we lucky to be in this business? Please send me your cards and letters (dmerriam@rc.com) with nominees for next year's 2003 ZiPLer Awards. The more the merrier!

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1. Actually, it is a committee of one; just me. West Group is a very nice company, but they can't foot the bill for a real committee. I barter for this work and get three-year-old pocket parts in return. However, my auditors, internal and external, have certified the results. And if you can't trust in audited results, what can you trust, right? Also, my partners remind me to tell you that these eccentric opinions are my own and that you should know they have nothing to do with our clients past, present or future.

NOTED IN BRIEF

The "effective prohibition" provision of the Telecommunications Act was violated when a town zoning board denied variances and a special use permit for construction of a wireless lattice tower that would close an undisputed two-mile coverage gap. National Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14 (1st Cir. 2002). In denying the applications, the board initially took the position that it was not authorized under the town zoning by-laws to allow the proposed tower anywhere in the district, which was zoned for commercial business, and which was partially overlapped by a watershed protection overlay district. The board therefore never ruled on the applicant's evidence regarding the undesirability of other potential sites, because

they were all subject to the same zoning restrictions. Subsequently, in court, the board attempted to introduce the argument that the applicant had failed to demonstrate that there were no better sites. In finding that the board had violated the TCA, the First Circuit reached the following important holdings: (1) local zoning decisions and ordinances that prevent the closing of significant gaps in the availability of wireless services violate the TCA; (2) the effective prohibition clause can be violated even if substantial evidence exists to support the denial of an individual permit under the terms of the town's ordinances; (3) the burden is on the proponent of the tower to show that "further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." The court also held that a "board may not provide the applicant with one reason for a denial and then, in court, seek to uphold its decision on different grounds... In short, a board's decision may not present a moving target[.]" Regarding the board's initial position (i.e., that it was not authorized to allow a tower anywhere in the district), the First Circuit held that "[s]etting out criteria under the zoning law that no one could ever meet is an example of an effective prohibition." 297 F.3d at 23. Regarding the Board's subsequent argument, the First Circuit stated, "[W]e will not uphold a board's decision on grounds that were not stated to the applicant." 297 F.3d at 24. The First Circuit therefore affirmed a grant of injunctive relief for the applicant.

The denial of a special exception and variance for construction of a wireless communications tower was upheld by the Eleventh Circuit in American Tower LP v. City of Huntsville, 295 F.3d 1203 (11th Cir. 2002). The court found that the decision of the local zoning board was supported by substantial evidence. The court noted that several residents had testified about the "negative aesthetic and value impact" of the proposed tower, and a realtor had testified that she had already lost potential buyers in the area. In addition, the BZA had heard "testimony on safety questions tied to the proposed tower's unusual proximity to two schools and several soccer fields used by children."

An ordinance requiring dancers at an adult cabaret to wear bikini tops to avoid relocation of the business did not violate the First Amendment. Baby Dolls Topless Saloons, Inc. v. City of Dallas, Tex., 295 F.3d 471 (5th Cir. 2002). The cabaret owner argued that the city had never studied the specific question of whether the bikini top requirement would reduce deleterious secondary effects. The Fifth Circuit rejected this argument, emphasizing that the standard under *Renton* is "reasonable belief." The Fifth Circuit held that "it was reasonable for the City to conclude that establishments featuring performers in attire more revealing than bikini tops pose the same types of problems associated with other [sexually oriented businesses]." 295 F.3d at 482.

The court also rejected a First Amendment challenge to an ordinance provision forbidding contact between dancers and patrons. Quoting from its decision in Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1253 (5th Cir. 1995), the court said: "[I]ntentional contact between a nude dancer and a...patron is conduct beyond the expressive scope of the dancing itself. The conduct at that point has overwhelmed any expressive strains it may contain. That the physical contact occurs while in the course of protected activity does not bring it within the scope of the First Amendment...Similarly, patrons have no First Amendment right to touch a nude dancer." 295 F.3d at 484.

Registration requirements under the licensing provisions of a city's adult business ordinance violated the First Amendment. Pleasureland Museum, Inc. v. Beutter, 288 F.3d 988 (7th Cir. 2002). The Seventh Circuit struck down provisions requiring applicants to provide a residential address and telephone number, a recent photograph, social security number, tax identification number, driver's license information, and fingerprints. Quoting from Schultz v. City of Cumberland, 228 F.3d 831, 852 (7th Cir. 2000), the Seventh Circuit found that such information was "redundant and unnecessary for [the city's] stated purposes...[and] serve[s] no purpose other than harassment." 288 F.3d at 1000.

The Seventh Circuit also reviewed the city's signage and painting restrictions relating to the outward appearance of adult businesses. The court upheld restrictions on font and color because it found those requirements to be "appropriate in order to prevent a decline in the values of surrounding properties." 288 F.3d at 1002. However, the Seventh Circuit invalidated a provision that limited signage to "only the legal name of the enterprise." The court found that this provision burdened substantially more speech than necessary to further the city's goals. "[The city] fails to articulate a single reason why it is necessary to limit a sexually-oriented business' signage solely to display its name. Under [the ordinance provision], a sexually-oriented business will not be allowed to notify the public about what type of store it operates or what its hours of operations are. Such a drastic restriction on signage cannot be sustained without some sort of evidentiary support." Id.