ZONING AND PLANNING LAW REPORT

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THE 2005 ZIPLERS: THE ELEVENTH ANNUAL *ZONING AND PLANNING LAW REPORT* LAND USE DECISION AWARDS

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Introduction

Welcome back all you recidivists, those of you who have enjoyed reading the annual ZiPLeR Awards these past 10 years. I have heard from many of you that it is the highlight of your mundane lives as land-use law aficionados. For those of you just joining us, these awards are now in their eleventh year and were created to look back over the last 12 months and identify the more unusual and sometimes important land-use decisions. You won't find most of the U.S. Supreme Court decisions in here because they aren't that interesting and many are simply not important. Very few of them are ever fun. What you will read about is the stranger stuff off the beaten path. In many instances, the stories will resonate with what you have experienced close to home, demonstrating once again that with land use we share much in common all across the country.

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You should not feel that you're missing anything by not getting all of the big-name cases. The *San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (U.S. 2005) decision by the U.S. Supreme Court this year is one example of something you're not going to learn about in this puff piece because it is completely unworthy of a coveted ZIPLeR Award. Why? Because although it addresses an important issue — whether a property owner ought to be able to preserve a federal takings claim even though forced to litigate it first in state court under the ripeness doctrine — the opinion is just plain boring and arcane. Skim this one paragraph from the decision and then thank me for sparing you:

> Article IV, § 1, of the United States Constitution demands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." In 1790, Congress responded to the Constitution's invitation by enacting the first version of the full faith and credit statute. See Act of May 26, 1790, ch. 11, 1 Stat. 122. The modern version of the statute, 28 U.S.C. § 1738, provides that "judicial proceedings … shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ." This statute has long been understood to encompass the doctrines of res judicata, or "claim preclusion," and collateral estoppel, or "issue preclusion." See Allen v. McCurry, 449 U.S. 90, 94-96, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980). (125 S. Ct. at 2500.)

We who earn a living in this area of the law have to read this and actually pretend to understand it. It is not always palatable and certainly not entertaining, so it has no place in the ZiPLeRs.

Oh, you say, how about that blockbuster *Kelo v. New London* case – it must win a ZiPLeR. Yes, it does, because it has the necessary "fun quotient," which is a statistical measure made of all entries. A rough approximation of the "fun quotient" is to take the second derivative of counterintuitive result raised to the third power and find the square root of the combined additional income of all land use lawyers from the resultant confusion caused by the case over a span of months three times the number of footnotes in the decision…well, it is more complicated than that, but you get the idea. Selection of the ZiPLeRs is completely objective.

As to *Kelo*, by the way, contrary to what many think it does not rhyme with JELL-O®, so please stop pronouncing it that way. One of the really big names in land use law (sounds like "pie lick") said it that way in a speech quite recently. No, it actually is like "kilo," as in: "I'll have a kilo of your finest mind-altering drugs so I can figure out what the term 'public purpose' really means."

You returning customers know that it has become our custom to start off these awards with the First Amendment-adult-entertainment-topless-bottomless-whatever cases in a self-serving attempt to play to the predominant prurient interests out there. Unfortunately, we had two reported instances of cardiac arrhythmia last year as a result, so the general counsel of Thomson West has directed me to ease into the ZiPLeR Awards this year with some really ordinary stuff to avoid any potential liability.

The **Who-Has-The-Police-Power? Award** goes to the City Council of Mentor, Ohio, the first ever winner of this new award recognizing the willingness of government to give up its police power responsibilities in deference to the whims of private covenants and negative easements. *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St. 3d 372, 2005-Ohio-2163, 826 N.E.2d 832 (2005)

The Mentor City Council refused to issue a building permit based on restrictions contained in private covenants. Those covenants were part of the subdivision documentation, and the municipality considered those covenants in making its decision. The consequence was, according to the Supreme Court of Ohio, that the denied applicant had at least the color of a claim for a constitutional regulatory taking on the ground that the city's decision to deny the subdivision was an application of public policy. The fact that they relied on the private covenant to make a public decision made it public policy. I'm thinking of Billy Bob Thornton playing Karl Childers in *Sling Blade* (1996): "Uh huh. Yep. Some calls it a private covenant, I calls it public policy. Uh huh." Whether the property owner will win or lose at trial is another question.

Like most good land-use cases, there appears to be a story behind the story. The court hinted that the property owner might have been maneuvering to get the city to buy his property. He paid $1000 for the parcel next to a stream subject to flooding and had refused the city's offer of $1000. You can bet that someone is going to weigh the cost of legal fees against the costs of sweetening the deal, one way or the other.

With that toe-in-the-water, ho-hum, kind of start, let's take it up a couple of notches and award the U.S. Supreme Court the newly-minted **Twenty-Commandments-Confusion-Not–for-the-Life–of-Jesus-Can-I-Figure-this-One-Out Award** for its back-to-back decisions in *McCreary County, Ky v. American Civil Liberties Union of Ky*, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (U.S. 2005), and *Van Orden v. Perry*, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (U.S. 2005).

Both cases involve the display of the Ten Commandments in public places, and with the flip of a single justice from one case to the other, the U.S. Supreme Court found the first instance violated the constitutional protection against the establishment of religion by government and the other did not.

The difference in result can be found in a combination of timing and context. It appears that if you installed a plaque of the Decalogue a long time ago alongside lots of icons of various religions, values, beliefs, mores and history, and the plaque was put out without any religious incantation (or better yet, no record of what was said), then under *Van Orden*, the Texas case, there is no Establishment Clause problem. If, however, you installed the Ten Commandments quite recently in a public place with little or nothing else around it and had a ceremony with clergy invoking religious mandate, you might want to use Velcro® instead of Krazy Glue® to put it up, because it's coming down when the ACLU gets done with you.

The ACLU filed suit in October against the board of county commissioners of the County of Haskell, Oklahoma, in the U.S. District Court for the Eastern District of Oklahoma as reported by the Associated Press on October 10, 2005. "ACLU Sues Over Courthouse's 10 Commandments Display." According to the complaint (I have a copy if you want to see it), there was a groundbreaking ceremony on November 7, 2004, on the courthouse lawn to unveil and dedicate the monument. Several hundred people attended and 17 churches were represented. One of the county commissioners said in connection with the placement of the permanent monument of the Ten Commandments on the courthouse lawn: "That's what we're trying to live by, that right here [referring to the monument]. The good Lord died for me. I can stand for him… I'm a Christian and I believe in this. I think it's a benefit for this community." Another commissioner is alleged to have said: "We're also Christians, and believe in God, and the Ten Commandments are our path to heaven… we're just trying to do something to get young people in our town to realize… there are other ways than being a thief or a dope head… To me, if you go by the Ten Commandments, you got it made." The complaint alleges several other similar statements. I would suggest that if you're interested in getting a picture of the Decalogue on the courthouse lawn in Haskell County, Oklahoma, you get down there right quick.

While the Oklahoma ACLU was drafting its complaint, the U.S. Court of Appeals for the Eighth Circuit, after studying *McCreary* and *Van Orden*, handed down its decision on August 19, 2005, in *ACLU Nebraska Foundation v. City of Plattsmouth, Neb.*, 419 F.3d 772 (8th Cir. 2005), holding no establishment clause violation in the placement in 1965 of a 5-foot tall and 3-foot wide granite monument of the Ten Commandments. Not only was the monument placed there some 40 years ago, but the court noted:

> In addition to the monument, the park contains, among other items, recreational equipment, picnic tables and shelters, and a baseball diamond. Certain individual items located in the park, such as grills, benches, and picnic shelters, bear plaques identifying their donors. In addition, a large plaque inscribed with the names of all donors to Memorial Park is located near the park's entrance. Because no contemporaneous city records exist, there is little evidence in the record regarding the process by which the monument was accepted and installed.

Do you see the emerging pattern? If the monument has been there a long time, is in the context of other plaques and displays, and was installed with no recorded religious fanfare, it will probably survive an Establishment Clause challenge.

The **You-Ought-To-Get-a-Time-Out-in-Your-Room Award** goes to the Los Angeles City Council for their failure to sit up and pay attention during a public hearing. They will also get a check minus on their next report card under "Pays Attention in Class." *Lacy Street Hospitality Service, Inc. v. City of Los Angeles*, 22 Cal. Rptr. 3d 805 (Cal. App. 2d Dist. 2004), ordered not to be officially published, (June 15, 2005). (Yes, I can see that

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the decision was filed on December 30, 2004, but it didn't make its way to the East Coast until 2005 and it therefore qualifies).

Lacy Street Hospitality Service (LSHS) operated an adult cabaret known as The Blue Zebra, "which showcased nude female dancers." Now, you're paying attention. LSHS petitioned to remove some of the conditions imposed on the prior tenant, such as the hours of operation, so they could stay open longer. The Zoning Administrator granted the modifications, but the City Council reversed. LSHS appealed and the trial court in turn reversed the City Council on the ground that due process was not provided because of the Council's failure to pay attention during the hearing.

The court viewed a videotape of the hearing and said in its decision: "A picture is worth a thousand words, and here the picture was a videotape." The tape revealed that when LSHS was summoned to present its case, eight council members were not in their seats. Only two of them were paying attention. "Four others might have been paying attention, although they engaged themselves with other activities, including talking with aides, eating, and reviewing paperwork."

The court also noted that one minute into the presentation a council member began talking on a cell phone and two other council members started a conversation between themselves. A minute later, two other council members started their own private conversation.

Then, the council member who was originally on a cell phone ended that call and started another while four council members talked among themselves or with others. One council member walked from one side of the chamber to the other to talk to different colleagues.

I can see you smiling at this report. It has happened to all of us and we have all wanted to pick up a big, wooden ruler and go up and rap some knuckles…but of course we couldn't. Now, the California court is about to do just that.

The court cited from a California case "he who decides must hear" and held that the Council's distraction made it impossible for them to fully hear the case. We might imagine the Council paid more attention the second time around.

A special thanks to my friend and former colleague, Matthew J. Cholewa, Assistant Vice President and Branch Counsel, LandAmerica Lawyers Title in Cromwell, Connecticut, for bringing this next award winner to my attention. This first time ever **But-I-Have-Special-Needs Award** goes to the employees of the New York Department of Environmental Conservation for getting away with entering a property in Babylon, New York, to make a site inspection without permission, even though the property was marked with "No Trespassing" signs, and signs saying "Rabid Pit Bulls Will Attack," "Hidden Bear Traps," "Lethal Danger — Trip Guns," and "Poison Lagoons." Okay, so I made up the latter signs…it just said "No Trespassing." Sometimes with land use cases you need to pump them up a little. *Palmieri v. Lynch*, 392 F.3d 73 (2d Cir. 2004), cert. denied, 126 S. Ct. 424, 163 L. Ed. 2d 323 (U.S. 2005). (Yes, another one that came in too late last year to be eligible for a 2004 award).

The Court of Appeals for the Second Circuit upheld, in a 2-1 decision, the lower court's dismissal of the plaintiff's section 1983 and 1985 civil rights claims (asserting Fourth Amendment violations) as well as a common-law trespass claim, brought because employees of the New York State Department of Environmental Conservation traversed the front and back of his waterfront residence in order to perform a site inspection of the plaintiff's dock and adjacent tidal wetlands. The site inspection was prompted by the homeowner's application to increase the size of his dock from 92 feet to 142 feet and add a third boat lift. The employees entered the property despite the prominent "No Trespassing" signs. The employees were there less than three minutes.

The case turned on the majority's opinion that the warrantless inspection did not violate the Constitution because of the presence of governmental "special needs." The dissenting judge reasoned that the employees had no right to enter the property to inspect the dock and that there was no special need in part because the DEC could have simply denied the application until a satisfactory inspection could be performed.

As the court said with some understatement: "We think it wise for courts to be cautious in applying the special-needs doctrine, given that it allows for a degree of governmental intrusion into concededly private areas. But we cannot escape the conclusion that in cases such as the one at bar, the doctrine may be especially applicable, given its utility in providing a framework to balance important non-arbitrary governmental objectives against de minimus intrusion in situations in which there are some degree of an expectation of privacy." At 12.

The American Planning Association, the Urban Land Institute, and The Congress for the New Urbanism share the **Let's-Put-the-Planning-Back-in-Planning Award** for their collective rush to be the first on the ground on the Gulf Coast following Katrina. You would think they were working for CNN. I'm connected in one way or the other with all three organizations and hold them in high regard, but in their zealous efforts to do good, their charettes became charades. No one seems to be willing to go up against the big issue head on — should the low-lying areas along the Gulf Coast be rebuilt at all? In public workshops on *Kelo* and the use of eminent domain after Katrina, particularly in New Orleans, I and others

have provocatively suggested that maybe the wealthy homes in the upland areas should be taken by eminent domain to create moderate and higher density affordable housing for the poor families displaced from the low lands.

Displaced residents are fighting floodproofing and relocation. "Residents Fight Shift in Zoning For Gulf Coast," *The New York Times*, Dec. 12, 2005, at 1 (2005 WLNR 19924198). The Louisiana Recovery Authority apparently agrees that large numbers of people may need to be relocated. "With Coastline in Ruins, Cajuns Face Prospect of Uprooted Towns," *The New York Times*, Dec. 27, 2005, at 1 (2005 WLNR 20966239).

The plain fact is that rebuilding the levees is inordinately expensive solution that does not guarantee perpetual protection. It is stunning to go back and read John McPhee's piece, "The Control of Nature: Atchafalaya" in *The New Yorker*, Feb. 23, 1987. There, and later in the book by the same name, which you can order on line from his website for $12 (http://www.johnmcphee.com/controlofnature.htm), McPhee makes a completely convincing case that nature is not to be stopped. The Mississippi River, for example, is going to go wherever Mother Nature directs, not where the U.S. Army Corps of Engineers chooses. We cannot in the long run control nature.

Perhaps the organizations ought to be looking 10 years or 50 years or 100 years hence and think about not just the current generation displaced by this horrible disaster, but the generations to come. No one, so far as I've seen, has put hard numbers to some of the solutions and no one has calculated whether the long-term good would be greater if we gave the displaced families substantial sums rather than put that money into new levees. We need to rethink where the development should go within the dynamic natural systems of the lower Mississippi River and the low-lying Gulf Coast areas. Read Dr. Orrin H. Pilkey's work. (http://www.nicholas.duke.edu/people/faculty/pilkey2.html#pubs) His basic theme is get out of the way, for example: "There's just a bunch of well-off people who have been very imprudent, even stupid, and they've built their buildings right next to a beach … They're asking us to pay for restoring the beach when all we have to do is tell them to move their buildings and the beach will be restored."

This year's **Total Capitulation Award**, or perhaps it is the **Total Co-option Award**, goes to New York developer Brad Zackson, who gamely asked Miami Shores, Florida residents to basically design his project for him. Susan Stabley, "Residents given cameras, asked to help developer," *South Florida Business Journal* (Jun. 13, 2005).

Zackson, a former manager in the Trump Organization, wants to develop 14 acres with a mix of residential and commercial buildings, spending about $300 million in the process. He started his project by holding a community meeting at the Miami Shores Country Club during which he handed out disposable cameras and requested that participants take pictures of whatever they thought would be good construction and design and, likewise, what they thought was not good. The images were to be used in the next community meeting to help plan the project.

The **Scarlet Letter Award** goes to the state of Iowa for its overly broad law restricting residential locations for sex offenders. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), cert. denied,126 S. Ct. 757 (U.S. 2005). This is a significant issue across the country. Politicians, even in honest attempts to protect the public good, sometimes go too far without considering the unintended consequences. The award is made with the hope that others will consider how such laws in their state might be shaped. Our thanks to Professor Patrick A. Randolph Jr. of the University of Missouri Kansas City School of Law for bringing this case to our attention through his Daily Development listserv posting.

In 2002, the Iowa General Assembly passed and the governor signed into law a bill prohibiting persons convicted of certain sex offenses involving minors from living within 2000 feet of a school or registered childcare facility. The challenge was brought by individuals who might move to Iowa on their own behalf and for others similarly situated. The Federal District Court found that the majority of available housing locations in many cities would be foreclosed by the separation requirements. In smaller towns, it was found that a single school or childcare facility could cause all of the incorporated area to be off-limits. The court held for the plaintiffs.

The Court of Appeals for the Eighth Circuit reversed, unanimously holding that the residential restriction was not unconstitutional on its face. The court found that there was no fundamental right affected by the statute. It also turned aside due process and equal protection claims, as well as challenges based on self-incrimination and retroactivity.

Under Iowa law, any "sex offender" includes only people found guilty of sex crimes involving minors. And, thus, it appears that an 18-year-old who had sexual contact with a 17-year-old and was adjudicated under the statute will need to register under the Iowa Sex Offender Registry provisions of chapter 692A and will be restricted from living in large areas of the state.

Where-There-Is-Fire-There's-Smoke Award goes to the Fosters of Milford, Connecticut, who were sued by a neighbor, Laura Russo, for a temporary and permanent injunction to stop them from using their outdoor fireplace on their patio some 150 to 240 feet from Ms. Russo's residence. *D'Ademo v. Viera*, Conn Super. Ct., Doc No. CV04-4000801S (Mar. 7, 2005).

This is the first outdoor fireplace case we have seen, which is somewhat surprising given their popularity and the Stone Age-like yearnings which cause people to give way to their primal side and gather around a blazing fire in the open space of their suburban backyards to consume large quantities of malt beverage. No violation of the law, no nuisance, no proof that the use of the land was unreasonable, and no evidence that the fire was the cause of Ms. Russo's asthma attack. The court noted that one of the plaintiffs cooks on a barbecue in their own backyard as well.

The **Zealous-Advocacy-Has-Its-Consequences Award** goes to the law firm of Foley & Lardner and two of its San Diego office lawyers. U.S. District Judge Manuel Real sanctioned them for bringing an action on behalf of their developer client against opponents of a luxury condominium development on Big Bear Lake near the tiny town of Fawnskin, California. "Developer's lawyers fined for frivolous Big Bear lawsuit," Associated Press, Aug. 16, 2005. The penalty? An extraordinary $267,000 for filing a frivolous racketeering lawsuit. New York University Law School ethics professor, Stephen Gillers, said: "For a court to award that kind of money, the court has to find an utter lack of basis" for the lawyers' position.

The developer, Irving Okovita, planned on building 132 luxury condominiums, a 175-slip marina, and tennis courts on the lake. Opponents argued that the project would threaten the bald eagle. The opponents filed suit against the project and U.S. District Judge Robert Timlin issued an order stopping the development. The judge found that the project had "the potential to both harass and harm the bald eagle," protected under the federal Endangered Species Act.

Okovita then sued the opponents under the Racketeer Influenced and Corruption Organizations Act, popularly known as RICO, naming U.S. Forest Service workers. It was reported that this may have been the first time that RICO was used against such federal employees, who were accused in the suit of abusing their government offices and authority to create a complex conspiracy aimed at scuttling the Big Bear Lake proposal.

S. Wayne Rosenbaum of Foley & Lardner is quoted in a press release dated November 8, 2004, before he got whacked with the sanctions: "The defendants in this case, employees of the U.S. Forest Service, knowingly and willfully abused the color of their authority of the cloak of that office for their own personal benefit."

Foley & Lardner issued a statement after the sanctions were ordered: "We are disappointed by the ruling. With all due deference to the court, we disagree with the decision and anticipate filing an appeal."

The **Some-Naughty-Things-Are-Just-Not-Criminal Award** is necessarily shared by the Supreme Court of the State of Oregon for its decision in *City of Nyssa v. Dufloth*, 339 Or. 330, 121 P.3d 639 (2005), and the Texas Appellate Court for the Fifth District for its decision in *State v. Howard*, 172 S.W.3d 190 (Tex. App. Dallas 2005), reh'g overruled, (Sept. 30, 2005). Once again, just as we've seen in almost every of one of the previous editions of the ZiPLeR Awards, we note how courts struggle to make sense out of the reasonable regulation of sexually oriented businesses. Their efforts at maintaining judicial decorum are entertainment enough (and least for those of us pushing 60 and older …).

In the Texas case, the city code had a classic "no touch" restriction. The criminal defendant in that case, a dancer in an adult entertainment establishment, was charged with "recklessly" rubbing her breasts against the customer's head. Can you imagine being the police officer who had the write up this charge? Maybe it is not a violation of the law if such rubbing is done without recklessness. It reminds me of one of my collateral duties aboard ship during Vietnam, years before I went to law school, when I as the legal officer was called on to write up charges and specifications. A sailor got drunk on the beach and caused quite a bit of trouble coming back to the ship, ending with his urinating on deck. I couldn't find anything in the Uniform Code of Military Justice addressing this type of misbehavior, so I charged him under the General Article 134 for the heinous crime of "wrongfully urinating on the Number Five king post aft," as if someone could rightfully urinate there… Eventually he got a special court martial, was convicted of all charges and specifications, but the court decided to give him no punishment anyway.

"Recklessly" turned out not to come into play in the Texas case because the code made the touching a strict liability offense, regardless of the degree of culpability. You touch for any reason, you're guilty of the crime.

The dancer claimed that her performances were constitutionally protected expressive conduct and, consequently, any criminal law should require specific intent.

The Court of Appeals agreed, finding the "no touch" provision unconstitutional and void because it was overbroad, beyond what was necessary to protect the community from the "secondary effects" of adult entertainment. "Criminalizing the touching of a customer without requiring any culpable mental state criminalizes accidental or inadvertent touching and thus is a greater restriction on free expression than is essential to further the City's interests.

I imagine if there is any more touching, it will be followed by: "Oh, my goodness, excuse me, I'm sorry, I didn't mean to do that…"

The City of Nyssa, Oregon, had a similar story. The problems really arise with the criminalization, as contrasted with mere regulation, of what is at least marginally protected expression. A police officer responded to a complaint at Miss Sally's Gentlemen's Club and "upon entering, saw a nude dancer kneeling against the barrier surrounding the stage, shaking her hair in a patron's face. The dancer was less than a foot away from the patron." The city code requires that nude dancers stay at least four feet away from the nearest patron.

The defendants, owners of the club, where convicted in Municipal Court of violating the code provision. The circuit court after a trial de novo convicted the defendants of the violations and fined them each $185. On appeal to the Court of Appeals, that court held, contrary to just about everywhere else in the country, that nude dancing was not protected speech under the state constitution.

The Oregon Supreme Court rejected that position and held that the present law with its separation requirement did not fall within any historical exception to the state constitutional protection of expression. Consequently, the court determined that the law was directed at restraining a variety of expression and was unconstitutional on its face.

These adult entertainment cases don't stop with the operators or performers or host communities – the California Commission on Judicial Performance removed a Los Angeles County Superior Court judge from office for, among other things, "his willingness to be filmed as a judge in a strip club in hopes of being able to market himself off the bench into a more lucrative career." "Adjudication in Strip Club Gets Judge Stripped of Position," *The Recorder*, reported on law.com, Nov. 18, 2005. Apparently, the judge was going to adjudicate a reality television show dispute over a "Miss Wet on the Net" contest in a strip club. Go figure.

Finally, some places just won't tolerate much nudity, and Boise, Idaho, is among them. They have an anti-nudity ordinance with exceptions for art of "serious artistic merit" including dance, theater, and artistic drawing. Such art cannot be for the purpose of "entertainment which is intended to provide sexual stimulation or gratification." Boise police say strippers don't qualify as "artistic." "Dancers accused of violating cities anti-nudity law," *The Idaho Statesman*, Apr. 6, 2005.

Art is in the eye of the beholder and Erotic City is an establishment which believes itself to be truly a patron of the arts. Unfortunately, the Boise police don't agree that "serious artistic merit" includes "Art Night" at which patrons sketch nude dancers and then display their art work on the walls. So closes the loophole in Boise's law.

The **I-Killed-My-Parents-and-Now-I-Am-an-Orphan-So-Please-Be-Merciful Award** goes to Wilmington Hospitality LLC for building a hotel larger than allowed by zoning and then requesting a variance to keep it. *Wilmington Hospitality, LLC v. New Castle County*, 2005 WL 1654024 (Del. Super. Ct. 2005).

This is an old, old song. You may recall the New York City skyscraper case in which a dozen or so floors had to be lopped off after the building was up because the developer had misinterpreted or disregarded the zoning regulations. One of the prior ZiPLeR awards was for a development in Florida a few years ago where many residential condominiums had to be demolished when they were built contrary to the zoning requirements.

This year, we give the award for a case where an owner sought to build an 118,805 square-foot hotel. The county approved the Preliminary Plan in 1990, and in 1998 the county issued a building permit for 155,480 square-foot hotel. Note that those two numbers are not the same and the second one is some 36,675 square feet larger. It appears that the developer had an approved Preliminary Plan for the lesser number of square feet and that its application for a building permit was for the larger square footage, which apparently was issued without benefit of anyone checking for consistency with the approved Preliminary Plan.

The developer spent about $25 million building the hotel and then invited the friendly building inspector over to do a final inspection for the certificate of occupancy when, lo and behold, it was discovered that the hotel was some 38,000 square feet larger than the approved plan. Holy smokes, how did that happen?

No problem. The building owner simply applied for several variances to allow encroachment into the floodplain and to create a little extra space by eliminating a few of those pesky, excessive, required parking spaces.

The board of adjustment, hard to believe, denied the variances and meanwhile the county refused to allow even part of the hotel to open.

The developer went, as we say in the crude metaphor of the development business, "belly up." The hotel was sold and the owner sued the county claiming a violation of due process and inverse condemnation, as well as a violation of equal protection and breach of contract. The first two claims were dismissed. The court found that denial of the certificate of occupancy did not work a taking because the hotel was, in fact, sold. Certainly, there was no physical taking. The owner had no reasonable investment-backed expectations of being able to use the 38,000 square feet it built without proper zoning authority.

We can only imagine what is going on now in this case behind the scenes with the professionals who worked with the developer. Can you say: "Check your errors and omissions coverage!"?

The **Out-on-a-Limb Award** can only go to Roderick Romero, who has built a McMansion,

treehouse style, in the Brentwood section of Los Angeles. "Not in My Neighbor's Backyard," *Los Angeles Times*, Oct. 26, 2005 at A17.

Mr. Romero has built fancy treehouses for several celebrities including Sting and Donna Karan. His treehouses are listed in the Neiman Marcus holiday catalog with the beginning price of $50,000. He started building this Brentwood treehouse for a customer, about 10' x 10' on a 20' x 30' platform, with salvaged materials and a stained-glass window.

In a classic situation, the neighbors expressed concern about their privacy. An anonymous complaint was lodged with the city, and an inspector came out, ultimately issuing a stop work order. The city allows uninhabitable structures up to 8 feet square, but this one is clearly larger. The property owners who commissioned the construction can appeal. One of those owners, a television producer, feels his rights have been violated. "We just want to make this a magical place. It's as if the city has come in and said: 'we're outlawing magic.' And where do we go from here? No viewing platforms? No climbing in trees? No swing sets? No children playing? It is, figuratively and literally, a slippery slope."

I would like to give a special thanks to my West Coast Bureau of reporters in the Los Angeles office of ZiPLeR Awards International, Michael Berger of Manatt, Phelps & Phillips, LLP, and Gideon Kanner, for this and other exceptional stories from their end of the country.

The **When-Will-They-Ever-Learn Award**, a perennial favorite and one with numerous nominees, goes to the City of Neptune Beach, Florida, for adopting a sign code permit for all signs and then adding all kinds of exemptions based on content. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005).

The plaintiff in this case had an electronic variable message center sign found to violate the code which had exemptions for signs less than two feet square in area, flags and insignia of any government, religious, charitable, fraternal or other organizational signs, signs placed "by, on behalf of, or pursuant to authorization of a governmental body," utility company signs, displays of merchandise, art works and religious displays, among others.

The Eleventh Circuit held that the sign code was unconstitutional in that it exempted certain signs on the basis of content without any compelling governmental need for the disparate treatment and that permitting decisions had no time limits.

For the last 28 years I have pounded into my land-use law students that they can regulate the time, place and manner as signs, but not the content unless there is a compelling governmental objective. The rule sounds simple enough, but admittedly when you're dealing with such differences as on-premises and off-premises commercial signs, you must necessarily deal with content. Here, however, too many hands whittled away politically at the ordinance in order to carve out little pieces they wanted to preserve for their own special interests. That process creates considerable risk.

The **Adult-Entertainment-Meets-First-Amendment-Sign-Protection Award**, the first time we've seen this mix of issues, goes to Howard White, the owner of a Los Angeles Century Boulevard strip club, for putting up an 18-foot sign "Vaginas R' Us." "Strip Club Forced into a Pole Dance with the Sign," *Los Angeles Times*, Aug. 6, 2005 at B3.

Laurie Hughes, executive director of Gateway to L.A., a business improvement district wishes the sign would come down but admitted that "about all we can do is get him on the misuse of apostrophes."

Los Angeles city officials, knowing that they could not regulate the sign on the basis of content, did order it removed, however, because it was made out of a combustible plastic vinyl. Reportedly, a worker at the sign company said he was refurbishing the sign with noncombustible material.

The **Tell-It-Like-It-Is Award** goes to a group of Santa Monica California residents who have decided to be direct concerning their feelings about operations at Santa Monica Airport. "SM Airport Complaints Aired at Meeting," *Santa Monica Mirror*, Nov. 16-22, 2005 at 1.

These folks are not happy about air quality around the airport and held a meeting in mid-November with eight experts including an acoustic engineer and air quality scientists. The noise and air pollution have become intolerable for many of the neighbors since 1984 with the growth of jet traffic from 1,000 operations in that year to about 18,000 this year.

The residents organized themselves as a group called Concerned Residents Against Airport Pollution. It is the abbreviation for this group that earns them this coveted award. Congratulations to CRAAP on their achievement.

The **Endangered-Species-Public-Transit Award** goes to wetlands expert John Zentner and an unknown second person or persons, both or all of whom were involved in moving endangered critters around for all the wrong reasons. "Arrogant move; Endangered species shouldn't be pawns in development battles," *Santa Rosa Democrat*, May 17, 2005.

Zentner was punished for moving endangered frogs from a Contra Costa County building site to save them. He put them in a nearby marsh. After he was punished, he said: "We made some pretty horrendous mistakes. For me personally, they were made from arrogance …." His arrogance cost him $75,000 in fines, three years probation, and 200 hours of community service.

On the other side of the ledger it appears that some unknown person or persons planted the endangered Sebastopol meadowfoam at a development site. A California Department of Fish and Game botanist, Gene Cooley, believes that is what happened because the plant had never been found on the property previously.

This interesting report comes from none other than Colonel Rufus C. Young, USMC (Retired), a lawyer with Burke, Williams & Sorensen, LLP, in San Diego, co-author with me on homeland security issues and the gentleman who used to prosecute drug cases from my ship during Vietnam. Thank you, Colonel. Semper Fidelis.

The **Cutting-It-a-Little-Too-Close Award** goes to the City of American Canyon, California, whose police officers and public works personnel egregiously attacked a hedge. "City Loses in Court after Chopping Hedge," *Los Angeles Daily Journal Extra*, Mar. 28, 2005. The property owner sued and won. If this hedge-possessed craziness sounds a little familiar, you may be recalling the 2002 ZiPLeRs and 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. *Los Angeles Times*, April 21, 2002 at B10.

The City of American Canyon is hardly Los Angeles, however. The City of American Canyon, incorporated in 1992, is located about 35 miles northeast of San Francisco at the southern end of Napa County. The population is 14,306 people.

The police department must be starved for some action, because in the early morning hours of September 30, 2003, acting on the code enforcement officer's statement that a court order authorized the city "to trim or remove" a hedge which had grown higher than the limitation of 41 inches under the local ordinance, police officers went with public works personnel and a backhoe, dump truck and chain saws to whack the offending hedge down to is very roots. They then attempted to kill what was left with herbicide. This must have been sort of a hedge-swat-team-type action. They doubtless wore thorn-proof vests and balaclavas, and slithered up on their bellies with the chainsaws wrapped in cloth to muffle sound as they dragged them along. After this horrifying story, I wouldn't even think of double-parking in American Canyon.

The property owner, home at the time, was not given any notice. The Federal District Court found a violation of the Fourth Amendment protection from unreasonable seizure of property by the government. The judge said that it might have been reasonable to cut the offending hedge to say 36 inches from its varying height of 66 to 96 inches, but that cutting it all away down and "pouring herbicide on the site was draconian, excessive and beyond the scope of the state-court order." *Feiner v. City of American Canyon*, 04-04472 (N.D. Cal., Mar. 8, 2005).

The national debate continues over sprawl and smart growth and whether New Urbanism is the key to solving some of these problems. Bolinas, California really does know how to turn off the tap when it comes to slowing growth. Given the municipality's extraordinary success, we reward them with the first ever **Drying-up-the-Demand-for-New-Growth Award**. "One Town Stops Time by Turning off the Water," *The New York Times*, Oct. 9, 2005, at 16 (2005 WLNR 16360993). Over the last 20 years Bolinas has not authorized a single new water meter, which is required to connect to the town water supply. There remain today exactly 580 meters, the very same number in existence in 1971 at the time the moratorium went into place in this town just 20 miles south of San Francisco.

Riding in a new hybrid cab in New York recently, I asked the driver if the taxi was his. He said it was. I asked him what he paid for his medallion. $315,000. That is a classic supply and demand effect driven by the limited number of medallions in the city. It is also almost exactly what a water meter cost in Bolinas, the last one being auctioned off for $310,000. That only gets you the meter and not the house or the land, just like the medallion in New York doesn't get you the cab.

That the limited supply is driving up prices is evidenced by the fact that a local real estate broker has listings ranging from $920,000, for a 1200 square-foot cottage on about 8000 square feet, to $8 million. One house, on a cliff side that geologists say will slip away within the next decade, recently sold for $650,000. The owner, more clever than you might think, has already purchased a lot elsewhere in town so he will have a place to park his water meter should his house disappear.

Now, what do you imagine the effect this ironfisted moratorium has on sprawl? Leapfrog development, jumping over no-growth and slow-growth areas, is the worst. Real regional planning is needed.

The **You-Could-Have-Pushed-Me-Over-with-a-Feather Award** goes to California Lutheran University in Thousand Oaks, California, which is more worried about "bird flew" than "bird flu." "Raptors Have Building Projects in Their Grip," *Los Angeles Times*, Jun. 13, 2005, at B1. The university has its $45 million College Sports Center stalled while four little red-tailed hawks figure out how to hunt and some hawk chicks finally

leave the roost. Somebody didn't tell them that there was a development plan underway. In addition to the sports complex, there is a 367-unit retirement community known as University Village which is being held up in deference to our fine feathered friends. Its developer says that it costs about $100,000 to support the hawk families, but that should be compared with the $175 million overall cost of the project.

Right after the *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (U.S. 2005), decision was handed down, I was headed out on the lecture circuit to talk about the case, while Mary Massaron Ross of Plunkett & Cooney in Detroit and I finished up editing our book on the subject. I decided to have some commemorative T-shirts made up to hand out at lectures. Along with one of the plans on the front and Sussette Kelo's house on the back, I spontaneously added this question: "Winning the battle, but losing the war?" I feel even surer today that this is the outcome looking back over these last six months. It is for that reason we award the city of New London, Connecticut, the first ever **Legion of ZiPLeR Merit with Three Bronze Clusters** for creating new wealth for the eminent domain bar and a political issue of such loose dimension that everyone can offer up vote-winning arguments. This is the case that has launched U.S. congressional initiatives to change the law and 38 states to move forward with legislation, three of them already enacted. The consternation, confusion and cacophonic debate will be with us for years to come. This is just what I had been hoping for to fund Alexander's and Lucy's college and post-graduate educations.

A couple of weeks after the decision, there were news reports of a proposal to use eminent domain to take Justice David Souter's farm in Weare, New Hampshire, for purposes of economic development, namely a project for a hotel, now known as the Lost Liberty Hotel. The initiative is reported at http://www.freestarmedia.com. It apparently, at least according to this website, takes only 25 signatures to get an initiative on the ballot. The petition appears to require the town council to exercise its eminent domain power for this economic development, not just consider it. The petition reads:

> The Undersigned Request that the following article be placed in the warrant for the 2006 March Town Meeting of the Town of Weare, New Hampshire.
>
> Shall the Town of Weare create a trust fund for legal expenses pursuant to RSA 31:19-a, accept donations into this trust fund, and appropriate the funds in this trust as a nontransferable appropriation for legal expenses related to the purpose of taking for "Public Use" by eminent domain, as defined by the Supreme Court of the United States in the "Kelo et al. v. City of New London et al." decision on June 23, 2005, a certain parcel of land consisting of 8.08 acres located on Cilley Hill Road, Map 406 parcel #21, also known as the Souter Property, for the development of an inn, and shall the Town create a second trust fund for acquisition expenses, accept donations into this trust fund, and appropriate the funds in the second trust as a nontransferable appropriation for just compensation to the owner of the property, and other related expenses? Shall the Town of Weare take for "Public Use" by eminent domain, as defined by the Supreme Court of the United States in "Kelo et al. v. New London et al." decision on June 23, 2005, a certain parcel land consisting of 8.08 acres located on Cilley Hill Road, Map 406 parcel #21, also known as the Souter property, for the development of an Inn, or take any action related thereto?

The project includes a Just Desserts Café and a Museum of Lost Freedom, along with the hotel which reportedly has pledges of occupancy by 1418 people, demonstrating, at least for the proponents, the economic viability of the project.

Public sentiment is overwhelmingly against the use of the eminent domain power for economic development, but how that general view gets translated into government action, particularly through legislation, will prove be the most interesting part of the *Kelo* fallout. It may not be accurate to call it backlash, because the sentiment has probably always been there, just not fully awakened. The move to a saner middle ground seems likely as has happened with the attempts at state legislation for regulatory takings and more recently with Measure 37 in Oregon.

The interest in the story is waning, however. I electronically monitor most news sources in the United States for any reports on *Kelo* and the daily downloads have been going from dozens of articles every day over the summer down to two or three every couple of days. As the state legislatures come back into session during this term, it is likely that there will be an increase in activity.

Conclusion

Why is it that every year seems more interesting than the last, with great new and lasting issues for land use, from disaster preparedness and mitigation, to the balancing of private property rights against the public interest, to whether the landform which we create today will serve the generations to come?

Keep those cards and letters coming, and Happy New Year.

RECENT CASES

In Adult Business Case, Sixth Circuit Strikes Down Discretionary Licensing Provisions that are not Accompanied by Accelerated Judicial Review

The Sixth Circuit upheld a variety of licensing and zoning regulations in *Bronco's Entertainment, Ltd. v. Charter Tp. of Van Buren*, 421 F.3d 440, 2005 FED App. 0752N (6th Cir. 2005), as amended on reh'g, (Sept. 23, 2005), but struck down two provisions that authorized denial of adult business license applications by government officials on discretionary grounds without providing for accelerated judicial review.

First, the court held that the township's site plan requirements, which were generally applicable to all commercial uses and were not designed to limit protected speech, posed little, if any, risk of censorship and did not constitute a prior restraint. Second, the court held that the requirement of "special approval" for adult businesses was not unconstitutional because the ordinance contained procedural safeguards that were adequate to protect against censorship. The court found that the special approval provisions satisfied the requirements of *City of Littleton, Colo. v. Z.J. Gifts D-4*, L.L.C., 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004), because the maximum allowable time for an administrative decision was 135 days (which the Sixth Circuit described as a "reasonable length of time, given the nature of the decision to be made and the type of speech that is at issue"), and because the status quo was preserved during the special approval process and any subsequent judicial proceedings. The ordinance did not establish special rules for an accelerated judicial decision, but the court stated that such rules were unnecessary under Littleton because the special approval process involved standards that were "objective and nondiscretionary." Under Littleton, the Sixth Circuit held that adequate constitutional protection would be provided by the "ordinary court rules" that apply in Michigan.

In contrast, the Sixth Circuit struck down certain provisions relating to an additional license required for adult businesses. Like the special approval provisions, the licensing regulations satisfied the *Littleton* requirements of brief administrative review (in this case, 44 business days) and preservation of the status quo. However, two provisions ran afoul of *Littleton* because they called for an exercise of discretion by government officials without assuring a prompt judicial decision. One provision required "a judgment as to whether an applicant who has been connected with a sexually oriented business during the past year 'has demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner,'" and a second provision required "an assessment of the applicant's 'fitness'" by the chief of police. Under *Littleton*, the Sixth Circuit found that where a subjective licensing assessment is involved, "ordinary court rules are not sufficient 'o prevent undue delay resulting in the unconstitutional suppression of protected speech.'" 421 F.3d at 429. The court continued, "Because of the discretion it grants to governmental officials, the township's licensing scheme requires special rules that guarantee an 'unusually speedy judicial decision.' … No such rules are provided in the ordinance or by state law." 421 F.3d at 449.

The court left standing other provisions of the licensing ordinance, because they did not involve discretionary administrative determinations that would trigger the requirement of special rules for prompt judicial review, and because the ordinance contained a severability clause.

The Sixth Circuit also upheld various geographical zoning restrictions on adult businesses. The court stated, "[W]e agree with the district court's conclusion that 27 sites—roughly one for every 900 residents of the township—provide adequate alternative channels for expression of the sort proposed by the plaintiffs." 421 F.3d at 452.

Finally, the court upheld a 182-day land use moratorium adopted by the township. "The moratorium was generally applicable, was not intended to suppress speech, and was of a reasonably short duration. Such 'interim development controls' are 'used widely among land-use planners.' They do not constitute prior restraints on speech, nor do they violate the Due Process Clause so long as they are undertaken in good faith. We have no basis on which to question the township's good faith here." 421 F.3d at 453 (citations omitted).

North Dakota Court Holds That 21-Month Moratorium Was Not a Taking

The developer of a rural residential subdivision failed to establish that a 21-month moratorium on building permits was a taking under the federal and state constitutions. *Wild Rice River Estates, Inc. v. City of Fargo*, 2005 ND 193, 705 N.W.2d 850 (N.D. 2005). Relying largely on *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002), the Supreme Court of North Dakota held that because the moratorium was temporary, it was not the kind of "extraordinary case" that would constitute a per se categorical taking under the *Lucas* test.

For various reasons, the court also rejected a *Penn Central* taking claim. It found that the developer's investment-backed expectations were unreasonable, given that the lots were prone to flooding and had not sold easily before the moratorium. Furthermore, the court found that the developer had sold more lots at higher

prices after the moratorium was lifted than it did before the moratorium became effective. The city claimed to have enacted the moratorium to maintain the status quo until it and other governmental bodies could determine whether it was safe to build in flood prone areas. The court concluded that here was no evidence that the city had acted in bad faith, or that the length of the moratorium was extraordinary under the circumstances.

Tenth Circuit Upholds Denial of Permit for Daycare Facility Operated by Church

In *Grace United Methodist Church v. City Of Cheyenne*, 427 F.3d 775 (10th Cir. 2005), a church was denied a license to operate a daycare facility in a residential zone. Asserting a First Amendment claim, the church argued that the city's zoning ordinance was not "generally applicable" because it contained individualized exceptions. The church argued further that the ordinance should be subjected to strict scrutiny. The Tenth Circuit disagreed, and rejected the First Amendment claim: "In sum, there was no evidence that the Board ever interpreted the exempt categories to include certain daycare operations and not others, or that the ordinance was enacted based on religious animus. The fact that the Board consistently concluded it was without discretion to grant variances for daycare facilities in LR-1 zones defeats the argument that it deployed a system of subjective considerations running afoul of the free exercise clause. The First Amendment simply does not entitle the Church to special treatment so that it may operate a daycare exactly where it pleases while no one else can do the same. . . . [W]e simply cannot conclude the City was engaging in a pattern of ad hoc discretionary decisionmaking amounting to a system of individual assessments that would trigger strict scrutiny. We hold that Cheyenne's zoning ordinance constitutes a neutral policy of general applicability which does not offend free exercise principles." 427 F.3d at 788.

The church also asserted a claim under RLUIPA. A jury found that the church had failed to prove that the proposed operation of the daycare center was a sincere exercise of religion belief for purposes of establishing a RLUIPA claim. The rejection of the RLUIPA claim by the district court, based on the jury's findings, was affirmed by the Tenth Circuit.

NOTED IN BRIEF

Constitutional challenges to a mobile home rent ordinance in federal court were barred by res judicata because of issues determined in previous state court litigation. *Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022 (9th Cir. 2005). "To adjudicate MHC's constitutional claims would require upsetting legal conclusions of the California courts regarding the Ordinance. . . . The Supreme Court very recently addressed res judicata in the context of a takings claim in *San Remo Hotel, L.P. v. City & County of San Francisco*, — U.S. ——, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005). There, much like here, the claims presented in federal court 'depended on issues identical to those that had previously been resolved in the state-court action.' Id. at 2495. We cannot consider MHC's claims without rejecting the California courts' conclusion that MHC will receive a fair return . . . ." 420 F.3d at 1032.

In Indiana, it is now clear that the filing of a building permit does not create a vested right that cannot be overcome by a change in zoning law. *Metro. Dev. Comm'n of Marion County v. Pinnacle Media, LLC*, 836 N.E.2d 422 (Ind. 2005), overruling *Knutson v. State ex rel. Seberger*, 239 Ind. 656, 160 N.E.2d 200 (1959). Finding that the *Knutson* decision was out of the judicial mainstream, "at least as to building permits," the Supreme Court of Indiana held that there can be no vested rights where no work has been commenced, or where only preliminary work has been done without going ahead with the construction of the proposed building. The court stated that "in logic, the filing of a building permit—an act that must be done before any work is commenced—cannot alone give rise to vested rights." 836 N.E.2d at 428.