ZONING AND PLANNING LAW REPORT

Vol. 23, No. 2 February 2000

THE 1999 ZiPLeRs: THE FIFTH ANNUAL *ZONING AND PLANNING LAW REPORT* LAND USE DECISION AWARDS

by Dwight H. Merriam, AICP

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- **Best and Worst Land Use Cases**
- **The Awards**
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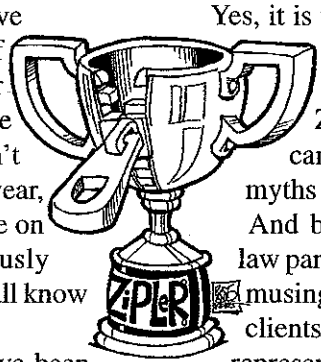
Introduction

This is our fifth year for the coveted *Zoning and Planning Law Report* (ZiPLeR) Awards celebrating zoning and planning law achievements, failures, missteps, and imponderables.

As I started to write this on December 19th, I wondered whether last year's awards might not have been the last. I was watching the launch of the space shuttle Discovery. The announcer reported that they would be back before the end of the year—Y2K problems, he said—don't want them to be up there over the end of the year, you know. Well, with that kind of confidence on the part of our government, we all nervously awaited the arrival of the New Year. And we all know what happened—nothing.



One comfort we do have is that there have been no reported Y2K land use cases in 1999, which might suggest some kind of cosmic cratering of the creativity of land use lawyers. You'll be relieved to learn, however, from reading the summaries of this year's ZiPLeR winners—the last ZiPLeR Awards of this Millennium—that land use practitioners have indeed maintained the highest levels of tomfoolery in 1999.

Yes, it is that time again, to bring you land use law's equivalent of *The Blair Witch Project*—low budget, big hype, and really scary—the 1999 ZiPLeR Awards! Grab your cameras and camping gear and let's head out to see if the myths are real.

And by the way, as I have said in the past, my law partners have urged me to remind you that these musings do not represent the position of any of our clients past, present, or future and may not even represent my views and may not make any sense regardless. Being a lawyer is such a burden at times...

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The "Beauty Is in the Eyes of the Beholder" Award

The U.S. Supreme Court's decision in *Del Monte Dunes v. City of Monterey* on May 24th has led to a new award to recognize the postdecision spinning by development and government lawyers. In case you missed the fun, the short version is the Court, for the first time ever, upheld a money damages verdict ($1.45 million) for a developer in a takings case against a municipality. Your lowly scribe analyzed the case, before and after the decision, in several articles in this august publication. *See* "Will This Mouse Roar? United States Supreme Court Takes a Takings Case," 21 Zoning and Plan. L. Rep. 85 (Dec. 1998); "The United States Supreme Court's Decision in Del Monte Dunes: The Views of Two Opinion Leaders (Part I)," 22 Zoning and Plan. L. Rep. 61 (July-Aug. 1999); "The United States Supreme Court Takes a Takings Case: The View of Two Opinion Leaders (Part II)," 22 Zoning and Plan. L. Rep. (Sept. 1999).

Contrary to most of the hoopla, the decision is more about juries than takings. Think about it—Justice O'Connor joins with progovernment justices on the jury trial issue, and Justice Stevens votes with proproperty justices. The role reversal from the usual lineup is not the result of some late-life crisis or epiphany; this decision is about federalism and juries, and it just happens to be wrapped in a takings claim, like fish and chips swaddled in yesterday's business section.

But given that it was the only decent steed for the property rights jousters to ride this year, both sides mounted it. This award is given jointly to two people who have nothing to share other than working in our nation's capital and being counted among my friends. Gus Bauman of Beveridge & Diamond, and former counsel at the National Association of Home Builders (okay, think hard—which side is he on?), and Tim Dowling of the Community Rights Council, an obscurely-named organization created in part by the International Municipal Lawyers Association, share the award.

Gus Bauman in an article in the Urban Land Institute's *Urban Land* sees the decision as a great victory for property owners:

> The significance of *City of Monterey v. Del Monte Dunes at Monterey* cannot be overstated. For the first time, the Supreme Court has upheld a finding of a regulatory taking with an award of just compensation to a developer. Moreover, since the Supreme Court handed down its landmark takings decisions of June 1987—which made governments liable for excessive land use regulation—local, state, and federal governments have lost all of the six land use takings cases that have gone before the high court.

"New Supreme Court Takings Victory," *Urban Land*, October 1999 at 20-2.

Tim Dowling, in a paper presented at the 64th Annual Conference of the International Municipal Lawyers Association, found considerable comfort in the decision for local government lawyers and urges them to use it as a sword:

> The paper...discusses six practical tips drawn from the case that should prove useful to municipal attorneys as you litigate takings claims...
>
> 1. Build an appropriate record for land-use decisions to avoid takings liability based on "bad facts."
> 2. Use *Del Monte Dunes* to show that takings claimants should litigate in state court first.
> 3. Show that *Del Monte Dunes'* jury trial ruling is limited to its unique facts.
> 4. Use *Del Monte Dunes* to demonstrate that *Dolan* and *Nollan* apply only to dedication requirements
> 5. Object to the *Agins* means-end theory of takings liability.
> 6. The "Sleeper": Move to dismiss federal takings claims filed in state court...
>
> Municipalities should use *Del Monte Dunes* and *Williamson County* to argue that takings claimants in state court may not assert a takings claim under the federal Takings Clause directly, including § 1983 claims, in state court in the first instance. Until the claimant exhausts available state-law judicial remedies for a taking, there is not a violation of the federal Takings Clause. If a takings complaint filed in state court lands on your desk, and if it includes a claim for a violation of the federal Takings Clause, move to dismiss the federal claim. No violation of the federal Takings Clause occurs until the state court rules on the request for compensation under state law.

"Six Lessons for Municipal Lawyers: City of Monterey v. Del Monte Dunes at Monterey, LTD.," *International Municipal Lawyers Association,* 64th Annual Conference, September 26-29, 1999.

The reality, like most things in life, is somewhere in the middle. The fact pattern was so horrible for the government it seemed that the only way the developer could lose in the Supreme Court was on some technical ground. As it was, six of the justices raised questions about bad faith by the government, even though the developer had never claimed such.

Gus Bauman's analysis reminds me of when I loudly cheered for myself after winning a third-place trophy in a yacht club race in which only three boats finished.

Tim Dowling's treatment of the decision is akin to a death row inmate talking about the tremendous tax ad-

vantages of the stepped-up basis for testamentary transfers of real estate to beneficiaries of a will. His advice to local governments after *Del Monte Dunes* should have been: Don't do what *Monterey* did, disavow that you would ever do anything like it and never cite the case for anything.

Even more incredible was the statement of the Monterey's City Attorney who after the decision had the temerity to say: "Will it change anything? No. It was clear we complied with the law then. We comply with the law now." "Monterey Loses Long Court Battle," *The Herald* (Monterey County), May 25, 1999, at A10.

The First-Ever "You Can't Shack Up Here" Award

This was easy. The Michigan Supreme Court didn't have any challengers close enough to threaten their obvious entitlement to this award.

You may recall that in 1997 the Supreme Court held unconstitutional the Religious Freedom Restoration Act (RFRA) as overly broad. *City of Boerne v. Flores*, 521 U.S. 507 (1997). RFRA had been a source of some merriment for those involved in trying to preserve old churches. *See, e.g., Keeler v. Mayor & City Council of Cumberland*, 928 F. Supp. 591 (1996). With RFRA out the window it was time for the U.S. Congress to come to the rescue! Last summer the U.S. House of Representatives passed a bill called the Religious Liberty Protection Act (RLPA), which would require the states to show a compelling reason for placing any "substantial burden" on the exercise of religion. Those words— "compelling" and "substantial burden"—give me, as a lawyer, real goose bumps. Just think of the arguments, the briefs, the wordsmithing; it's a legal mudpack on my brain, so weary of fighting over three-lot subdivisions.

To overcome the problems with RFRA, Congress based the new bill on its authority to regulate interstate commerce. Those who oppose the bill say it will discriminate against homosexual and heterosexual cohabitators. As of this writing, the last action on the bill was a referral to the Senate Committee on the Judiciary in November.

The law on how far landlords, based on their personal religious beliefs, can go in restricting "shacking up" by unmarrieds is a mess at the state level, which RLPA may or may not clear up. At least in California and Massachusetts, prohibiting such cohabitation may violate state fair housing laws. *See Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994).

And how's this for a case of interstate judicial chicanery worthy of this award: In October of 1998, the Supreme Court of Michigan held in *McCready v. Hoffius*, 586 N.W.2d 723 (Mich. 1998), that the Michigan Civil Rights Act does not violate the Free Exercise Clause in its application against a landlord who refused to rent to two unmarried couples because of his religious beliefs. Conversely, in January of 1999, the U.S. Court of Appeals for the Ninth Circuit decided in *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999), that a similar Alaska statute and Anchorage ordinance were unconstitutional and thus unenforceable against property owners who refuse to rent because of religious beliefs.

Then, apparently relying on the Ninth Circuit decision, John and Terry Hoffius moved for a rehearing in their Michigan case. In April 1999, the Michigan court executed a perfect judicial backflip, vacating the portion of its decision regarding the constitutionality of the Michigan law, and remanding the issue back to the intermediate appellate court. 593 N.W.2d 545 (Mich. 1999). The perversity of the situation became apparent in October, when the Ninth Circuit withdrew its opinion in the Alaska case for rehearing. So what's the answer to the question? Maybe we'll know when the courts have finished playing Twister.

The wonder for land use lawyers, of course, is what does this rights wrestling mean in the context of the sacred definition of family in single-family zoning—persons related by blood, marriage or adoption, and up to two additional persons? The Vermont Supreme Court in its landmark decision on December 20, 1999, ruled that under the Vermont Constitution, same-sex couples may not be denied the common benefits and protections that flow from marriage under Vermont law, but left the decision as to how this would be accomplished to the legislature. *Baker v. State*, __ A.2d __, 1999 WL 1211709 (Vt. Dec.

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20, 1999). "Vermont High Court Backs Rights of Same-Sex Couples," *N. Y. Times*, Dec. 21, 1999, at 1. This too will have complex impacts on single-family zoning.

The "Huh? What? Taking? I Don't See a Taking" Award

While the property rights gang was high-fiving themselves in jubilation over the *Del Monte Dunes* decision, the courts were quietly rejecting other takings claims. It's hard to pick the best of the bunch, so we make this award to three courts: the U.S. Court of Appeals for the Federal Circuit for *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), the California Supreme Court for *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188 (Cal. 1999), and in the interest of bicoastal harmony, New York's highest state court, the Court of Appeals, in *Bonnie Briar Syndicate, Inc. v. Town of Mamaronek*, 94 N.Y.2d 96 (1999).

The short version of poor Mr. Good's case was that in 1983 he had a fifty-four-residential lot and forty-eight-slip marina project in the Florida Keys with a dredge and fill permit from the U.S. Army Corps of Engineers. He renewed the permit in 1988. Controversy ensued when the Florida Keys marsh rabbit was listed as an endangered species, and when Mr. Good reapplied in 1990 for a smaller project, the Corps denied the permit based on the Fish and Wildlife Service's advice.

No investment-backed expectations (IBE) here, and thus no taking, said the court. Part of the damning evidence was found in the 1973 purchase and sale agreement that, in typical seller's language, said there were "certain problems" in getting the development permits. And then a contract with a planner said, "...obtaining said permits is at best difficult and by no means assured."

Come on now. How many "P and Ss" do you see with: "Don't sweat the permits—they won't be a problem." Or contracts with consultants: "This will be like shooting ducks in a barrel—we guarantee to get you these crummy permits." This is an everybody emptor world and lawyers get paid the big bucks to think up limiting language to save folks from being liable for unreasonably raising expectations. If there's no IBE because of such provisions, just about everyone is sunk.

As to IBE generally, it seems to have fallen into disrepute. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994), for example, reformulated it as "reasonable investment-backed expectations." At the ALI-ABA Inverse Condemnation program in Boston in September, there was a parade of smart people who said IBE never really existed, had died, or should be killed off. I think it's still useful.

And in California, a two-year delay caused by the government's mistake about their jurisdiction is not a taking. "Such delay is an incident of property ownership and not a taking of property," said the court. *Landgate* at 1204. "%@(&^%@"+(&%$#" said the property rights lawyers I know from the Golden State. They were ripping mad and doubly-bedeviled when the Supreme Court denied certiorari. I guess this type of delay, caused by the government's own error, is probably the new outer limit of what is not a taking by delay, unless you join the ranks of those who think it was wrongly decided.

In *Bonnie Briar*, the New York court held that the rezoning of 430 acres from residential to recreation, thwarting the plaintiff's plans to build seventy-one homes along a golf course, but allowing the golf course to continue as it had for seventy years, was not a taking. The court held that *Del Monte Dunes* limited the *Nollan* and *Dolan* test to exactions and dedications and applied the "substantially advances" test of *Agins*. The irony of the holding is that golf courses (and ski resorts) are often not economically possible today without related real estate development.

Also, it is interesting to note that the court may have limited two earlier important decisions in New York, *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989) and *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994).

The "What if I Owned a Tank" Award

Definitions are the heart of zoning regulations. When I write an ordinance, I spend most of time on the definitions and I put them right up front. Definitions rule. Even children know that.

When my son, Jonathan, was in the second grade, he received numerous notes from two girls: "Jonathan, I love you, meet me on the playground..." etc. He told them to stop. They didn't. He complained to the teacher. She told them: "No more notes." The next day, he gets this from one of the girls: "Jonathan, I love you. Meet me after school...P.S. This is not a note."

The award winner, Ferguson Township, Pennsylvania, wins this nifty trophy for its failure to define "motor" or "vehicle" in its ordinance. *Kissell v. Ferguson Township Zoning Hearing Board*, 729 A.2d 194 (Pa. Commw. 1999). The township prohibited motor vehicles, motorcycles, mobile homes, recreational vehicles, boats, and marine craft for sale and rent from being displayed or stored in the front yard setback.

Doug Kissell sells riding tractors and garden tractors and guess where he parks them. Right up front in the front yard setback where folks interested in buying them can see them. Makes sense, except to the zoning officer who issued a cease and desist order and won in the trial court, but lost on appeal. The appellate court found that the dictionary definition of a motor vehicle was an automobile with rubber tires for use on the highway, and riding mowers didn't fit that definition.

PS: "Motor vehicles include...riding mowers and tractors..." Problem solved.

The "Hush, Hush, Sweet Charlotte" Award

With our hands across the sea, we reach out to our brothers and sisters in Great Britain to give them this significant award.

The House of Lords has ruled that the government is in no way obligated to provide sound insulation in public housing to protect tenants from hearing sex and bathroom noises from their neighbors. *Southmark London Borough Council v. Mills and others; Baxter v. Camden London Borough Council*, 4 All E.R. 449, 3 W.L.R. 939 (House of Lords 1999).

Residents of two different blocks of flats claimed that their right to quiet enjoyment was infringed because they could hear all of the sounds made by their neighbors. Lord Hoffman commented on the problem:

> It is not that the neighbours are unreasonably noisy. For the most part, they are behaving quite normally. But the flats have no sound insulation. The tenants can hear not only the neighbours' televisions and their babies crying but their coming and going, their cooking and cleaning, their quarrels and their love-making. The lack of privacy causes tension and distress.

To be fair, the level of noise that appellants testified to would be more than any reasonable person could endure:

> I can hear...normal conversation, singing, arguments, the television, snoring, coughing, bringing up of phlegm, sneezing, bedsprings, footfalls and creaking floorboards, the pull-cord light switch in the bathroom, taps running in the bathroom and kitchen, the toilet being used...the vacuum cleaner is clearly audible as is any music played on the stereo.

Lord Hoffman's opinion, which seems to have garnered support among all of the Lords hearing the case, though sympathetic to the plight of the tenants, found the claim unsupported by the law:

> If the neighbours are not committing a nuisance, the councils cannot be liable for authorising them to commit one. And there is no other basis for holding the landlords liable. They are not themselves doing anything which interferes with the appellants' use of their flats. Once again, it all comes down to a complaint about the inherent defects in the construction of the building. The appellants say that the ordinary use of the flats by their neighbours would not have caused them inconvenience if they had been differently built. But that, as I have said more than once, is a matter of which a tenant cannot complain.

The "Rudy Finally Takes a Hit" Award

New York City's 1995 decidedly anti-adult entertainment law, especially the city's success in defending its tough restrictions, has impressed us. It's a no-nonsense law and has proved more effective than most. The City, which claims 62 of 144 sex-related businesses have closed, finally got authority to enforce the zoning resolution on July 28, 1998, when the United States Supreme Court denied an application for a stay in a related case, following a series of prior stays. *See Amsterdam Video, Inc. v. City of New York*, 146 F.3d 99 (2d Cir.), *request for stay denied*, 119 S. Ct. 4 (1998), *cert. denied sub nom., Hickerson v. New York City*, 119 S. Ct. 795 (1999).

You may recall from last year that there was at least one problem—the law didn't seem to restrict nude dancing in places that invited in children. *See* "1998 ZiPLeRS: The Fourth Annual *Zoning and Planning Law Report* Land Use Decision Awards," 22 Zoning and Plan. L. Rep. 14 (Feb. 1999)(the *Stringfellow's* case).

In 1999, the Appellate Division reversed the trial court on the children-are-invited defense (never say we don't update you in these annual reports):

> If Hollywood were writing the script or Variety the headline, the issue presented might possibly be characterized as "Ten's World Class Cabaret meets Disney World." Put another way, in a more legally oriented context, "Can an otherwise 'adult eating and drinking establishment' remove itself from restrictive zoning regulations by the simple expedient of admitting previously banned minors when accompanied by a parent or guardian?" The answer must be no.

City of New York v. Stringfellow's of New York, Ltd., 684 N.Y.S.2d 544 (1999).

But, you just can't keep a good operator closed for long, at least not in New York City. A week after the police closed the place, and with the case still pending in the Appellate Division, Ten's World Class Cabaret reopened by providing 60 percent of the floor area for taxi dancing with women in evening gowns. (More about the 40-60 rule in a moment.) Legally, I guess dancing with fully clothed women is not adult entertainment. A trial court judge approved the reopening.

Here's how it works. For $20 you can dance with a woman in an evening gown. On the other side of the room are the topless dancers. The club's lawyer says: "[T]he Mayor should be happy we're reviving such wholesome entertainment." "'Topless Club' Shuttered, Opens Again" *N. Y. Times*, Feb. 13, 1999, at B3.

I'm beginning to think the only adult entertainment in all this malarkey is the debate and posturing (should I use that term?) on both sides.

Now, back to our award! The 40-60 guideline was based on a part of the zoning resolution, which provides:

(1) the amount of such [adult] stock accessible to customers as compared to the total stock accessible to customers in the establishment; and (2) the amount of floor area and cellar space accessible to customers containing such stock; and (3) the amount of floor area and cellar space accessible to customers containing such stock as compared to the total floor area and cellar space accessible to customers in the establishment...

Mayor Rudolph W. Giuliani, our award winner, seemed invincible on the antiporn front until New York's highest court, in an opinion written by Judge Carmen Beauchamp Ciparick, reversed the trial and appellate courts by holding that the city went beyond their own guidelines in enforcing a limitation on stores, which requires them to maintain inventories of not more than 40 percent of pornographic materials in order to avoid being regulated as an "adult establishment." *City of New York v. Les Hommes*, 1999 WL 1215136 (N.Y. 1999).

The sex merchants, bless their creativity, had filled 60 percent of their shelves with old, nonporn movies, sports videos, karate films, and—you've got to love this—children's titles, solely to meet the percentages.

No good, said the city, and they tried to shut down Les Hommes, a second-story porn shop on West 80th Street, with no entrance signs on the street. As Judge Ciparick, writing for a unanimous court said:

There may indeed be situations where what a store is selling or renting cannot be considered stock under the City's guidelines. To the extent that the lower courts recognized this limitation, we would agree with them. Nonetheless, nothing in this record indicates that the non-adult videos sold by Les Hommes were not "stock." The testimony was clear that the non-adult videos were prominently displayed on racks in the front of the store. Also, there can be little question that these videos were accessible and available. No evidence indicated that these videos could not be purchased upon demand. Indeed, 52 of these videos had been bought over several months. Reliance on a sale versus rental distinction was error. The administrative guidelines treat sales and rentals in the same way. In the end, we must enforce the City's administrative guidelines as written. Either the stock is accessible or available, or it is not; either the appropriate amount of square footage is dedicated to non-adult uses, or it is not. Questions about whether the owner of Les Hommes had a good faith desire to sell non-adult products, whether the "essential nature" of Les Hommes is adult or non-adult, or whether the volume of non-adult stock is stable or profitable are not part of the inquiry here, where we are only called upon to determine whether items are accessible or available as stock. We cannot rewrite the City's guidelines to include these additional considerations.

In response to losing in court, Rudy said that at least the court "did not strike down the zone change, thank goodness. The bad news is that we have to go back and rewrite the regulation." "City Seeks Ways to Skirt Ruling on X-Rated Shops," *N. Y. Times*, December 22, 1999, at B5. Yogi Berra would probably have put it this way: "Hooray! The court didn't invalidate our zoning regulation—it only declared it unenforceable." One quick fix proposed by the city is to count actual sales, not inventory. Good luck.

The "Need for Porn Knows No Borders" Award

This new award recognizes an interesting departure from the accepted rule that provision for adult entertainment uses must be within the governing jurisdiction. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

New Jersey has a state statute prohibiting the rental and sale of adult videos and related merchandise within 1,000 feet of certain uses. You can guess what they are—churches, schools, playground, residential zones, and the like.

A. B. Family Center Inc. applied to operate an adult video store in the Township of Saddle Brook, but because of the pattern of local zoning, there were no possible locations within the township. A. B. Family Center (great name for an adult establishment, huh?) went ahead and opened anyway and defied an order to cease and desist.

Ultimately, the New Jersey Supreme Court ruled that the state statute should be interpreted to allow the township to show that alternative sites were available within the market area, even if those sites might be outside the municipality. Alternatively, the township could show that existing adult business were serving the market area adequately. *Township of Saddle Brook v. A. B. Family Center*, 722 A.2d 530 (N.J. 1999).

The "Good Neighbor" Award

Arlington, Texas is this year's proud recipient for inventing the "good neighbour" (note the classy British affectation) test in regulating sexually-oriented businesses.

Establishments that are nonconforming as to the distancing requirements may receive one-year exemptions from the location requirements if they prove at a hearing that they have been a "good neighbour" during the preceding year. Several hearings were held in 1999, and only one establishment failed to prove it was a "good neighbour." 1999 Annual Report, Municipal Operations Section, *International Municipal Lawyers Association*, September 1999.

There must be some great testimony on the record: "Yes sir, as to our being a good neighbor, our lead stripper, Bambi, baked up a heap of cookies for Mrs. Jones and her kiddies for the neigbourhood [sic] Halloween Party held at La Bump 'n Grind and Cheri is coaching

the high school cheerleading squad."

The "Ten Pounds of House on a Five Pound Lot" Award

Irwin and Mary Ackerman, whose nomination would likely be supported by The Lake Wononscopomuc Association of Salisbury, Connecticut, are the first-ever recipients of the award for proposing what some see as a "McMansion," "starter palace," or "house on steroids" on the lake.

The Association has argued that the Ackerman's should not be allowed a height variance that would enable them to build a 15,000 square-foot cottage on the lake with a height at one point, at least as claimed by the opponents, of fifty feet. Association member Michelle Bertrand said it would be like a five-story apartment building. "Lake Group Battles a Salisbury House," *Litchfield County Times*, August 6, 1999, at 1. Similar battles are ongoing across the country as stock market money pours into trophy homes.

The "For the Love of the Game" Award

We named this award in honor of Kevin Costner and his movie released in 1999. After failing on the water and as a postman, he returned to the successful formula of baseball—what will he do next as he ages, play a manager, then owner?

The award goes to Bill Ingraham of Tewksbury Township, New Jersey, who built a regulation baseball field in the backyard of his single-family home at a cost of $300,000 and invited his friends and others to come and play day and night. Spectators came to watch and professional umpires officiated. Mr. Ingraham's lawyer argued that Mr. Ingraham was just using his yard like his neighbors with their swimming pool. Oh, sure.

The judge issued an order limiting play to four days a week for small groups after finding a zoning violation and saying: "[T]he fact that baseball for kids is wholesome and patriotic does not mean that full-scale games, practices and training can be held anywhere." "Game is called on account of judge's ruling in zoning suit," *Nat'l L. J.*, June 21, 1999, at A24.

The "Carpet Baggers' Crèche" Award

Just when we think there can't be another twist on the perennial Christmastime religious-displays-on-public-property silliness, we are saved.

This award goes to Rita Warren, a religious activist and resident of Fairfax City, a municipality completely surrounded by Fairfax County, Virginia, for her success in the U.S. Court of Appeals for the Fourth Circuit. The court held that Fairfax County could not stop her from displaying a crèche in an area designated for "civic, cultural, educational, religious, recreational and similar activities." The county had argued that the park was not a traditional public forum because it had been designated as a limited public forum that had not been opened to Warren because county policy limited it to county residents. *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999).

Warren claimed the park was a traditional public forum, and the court agreed, stating that the exclusion of nonresidents served no compelling interest and was not narrowly tailored to achieve what little purpose it did serve.

The "Bigger May Not Be Better" Award

Also in the religious category, this award recognizes the extraordinary efforts of Noel Dube, 79, a World War II veteran, and recipient of the Silver Star, two Bronze Stars, and a Purple Heart, who believes the Virgin Mary saved him in battle.

Dube says the divine intervention occurred during the D-Day invasion of France in 1944. While mines sank boats around him, Dube's boat landed safely. The next day, a German sniper bullet pierced his collar, but left him without a scratch. He later lost a leg and part of an arm to a German land mine, but that did not shake his faith. In 1984, without the benefit of any building permits, he constructed a shrine in honor of the Virgin Mary in his yard in the little town of Pepperell, Massachusetts, outside of Boston.

His thankfulness was reflected in the size of the shrine that surrounds his home and includes the fourteen stations of the cross with night illumination, a 22'x 60' mural illustrating holy visions over a Portuguese village in 1917, and a 30'x 12' gold-framed billboard of Jesus. The shrine has been growing since 1991, and Dube hopes to soon add a four foot-high, ten foot-long waterfall to honor the Holy Spirit. Dube says the "Blessed Mother" told him to build it and he's spent most of his life's savings on the shrine's construction.

The shrine attracts nearly 5,000 people per year from across the country. For inexplicable reasons, his neighbor (not a recipient of the "good neighbour" award), Phyllis Symonds, claims the shrine is making it tough for her to sell her 19th century colonial.

"George Orwell was 15 years off. Big Brother has arrived in the town of Pepperell in 1999," said Mr. Dube's lawyer. Dube commented, "I don't want to go upstairs and have God ask me, did my mother ask you for something that you didn't do?"

The town ordered parts of the shrine removed after finding that they were structures, not signs. "Hero Veteran Fights Town to Keep Shrine Sign on Property," *Boston Herald*, October 29, 1999, at 12; "Board Orders Removal of Huge Religious Sign in Yard," *Associated Press State and Local Wire*, October 29, 1999; "Mass. Man Ordered to Remove Portions of Religious Shrine," *Provi-*

dence Journal Bulletin, October 31, 1999, at 2C.

The "Robin Hood" Award

Let's hear it for Indian Wells, California, this year's grand prize winner for unequaled altruism in proposing to give its neighbor, Coachella, $1.5 million in low-income housing money. I am truly moved by such generosity.

Indian Wells is a very wealthy place east of Palm Springs. Median household income is $110,000. Indian Wells is in fact the wealthiest municipality in California by some measures. Over 75 percent of the folks there live in guarded, gated communities. Coachella, on the other hand, has a median family income of $29,000.

After declaring areas of their beautiful city to be "blighted," Indian Wells used redevelopment money to fund projects (initially to build their premium golf course), and then increased taxes from increased land values repaid the cost of the improvements. The profits, however, had to go to low-income housing, and the best they could do was some senior housing, gated of course.

What to do? Easy, give the money to Coachella so low-income people could live there. When first announced before the Coachella City Council, not a single member of the audience spoke in favor, though there was some support on the council. "Rich City's Housing Funds Are Hot Potato," *Los Angeles Times*, October 27, 1999, at A1.

The "Just Say 'No'" Award

Guess what? On December 1st, a divided Coachella City Council voted 3 to 2 to refuse the $1.5 million offer. Sylvia Montenegro, Coachella's new mayor, said: "We turned away more than a million dollars last night because it was the right thing to do. Indian Wells has a responsibility to provide housing for their workers in their city. I think they can do good things. I hope they build family housing."

The Coachella City Council was disposed to approve the acceptance before the November election, but a challenger beat an incumbent by one vote and that new council member voted against the acceptance.

Indian Wells officials said they would use the money to build more senior housing. "City Will Turn Down $1.5 Million," *Los Angeles Times*, December 3, 1999, at A3. I wonder if it will have a gate?

Congratulations to our award winner, the City of Coachella,whose decision really, joking aside, was a tough one and right.

Conclusions

So there we are—another year, another decade, another century, and another millennium. And yet when we look back over the last five years of these annual summaries, we see some constant themes. The First Amendment is a major factor in many of the most controversial cases. The most intractable cases make for the strangest decisions. Many of our land use controversies, if we step back a little, are truly laughable. And through it all, we see the human capacity for both goodness and evil.

Happy New Year to you all.

NOTED IN BRIEF

In South Dakota, the only question presented to a court on certiorari is whether the lower tribunal exceeded its jurisdiction. A trial court therefore erred when it reversed the grant of a variance. *Cole v. Board of Adjustment*, 592 N.W.2d 175 (S.D. 1999). "It is quite clear . . . the trial court did not utilize the correct standard of review for a writ of certiorari. The trial court reviewed the record de novo, taking into consideration the status of the property and drawing the conclusion that there was no evidence supporting the Board's finding of a special condition to justify the variance. We have said, 'certiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding . . .'" *Id.* at 177.

In some cases, Ohio statutes permit the approval of a subdivision by a planning authority without the requirement of a plat. *State ex rel. Spencer v. East Liverpool Planning Commission*, 85 Ohio St. 3d 678, 710 N.E.2d 1129 (1999). In such a case, the Supreme Court of Ohio refused to issue a writ of mandamus "to strike a plat that does not exist." The court added, "[m]andamus will not issue to compel an impossible act." *Id.*

The denial of a subdivision application by a Virginia county board of supervisors was properly based on the applicable ordinance and was not arbitrary or capricious. *Sansom v. Board of Supervisors*, 514 S.E.2d 345 (Va. 1999). The court therefore refused to overturn the denial, which was based on a provision in the county subdivision ordinance that prohibited most "land disturbing" activities in areas containing a "substantial surface drainage course." The fact that the county might have had additional concerns about the landowner's subdivision proposal (because it contained the site of a closed landfill) did not make the decision arbitrary.