ZONING AND PLANNING LAW REPORT

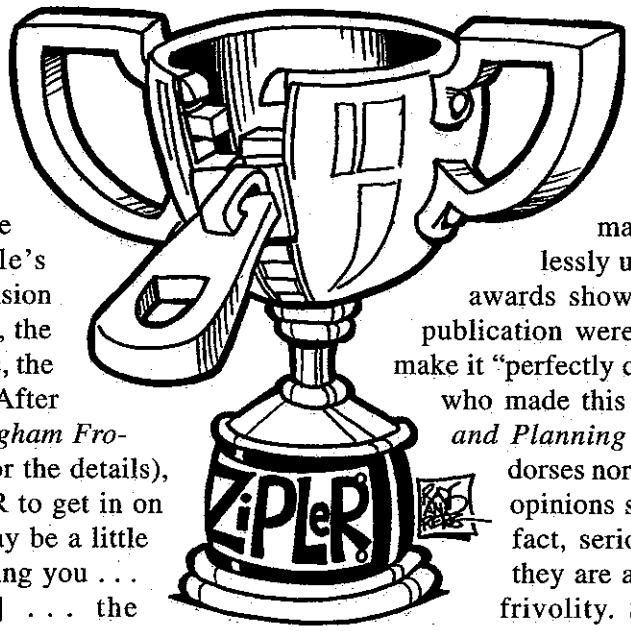
Vol. 19, No. 2 February 1996

THE COVETED ZiPLeRs: THE FIRST ANNUAL *ZONING AND PLANNING LAW REPORT* LAND USE DECISION AWARDS

Matthew J. Cholewa and Dwight H. Merriam, A.I.C.P.

Matthew J. Cholewa and Dwight H. Merriam are lawyers with the law firm of Robinson & Cole, in Hartford, Connecticut, where they practice land use and real estate law. Mr. Merriam is past president of the American Institute of Certified Planners. The award illustration is by Ray Andrews, a retired partner at Robinson & Cole.

Introduction



It seems like everyone has an awards show these days and there's an awards show for everything. Once, only Oscar, Tony and Emmy gave out awards. Now everyone's doing it. There are the Golden Globes, the People's Choice Awards, the daytime television awards (whatever they're called), the Country Music Awards, the Espys, the Clios, and a myriad of others. After hearing about the *Cipri v. Bellingham Frozen Foods, Inc.* case (stand by for the details), we decided it was time for ZPLR to get in on the action. Now, although we may be a little behind the curve, we proudly bring you . . . [imagine a drum roll here] . . . the "ZiPLeRs"—the First Annual *Zoning and Planning Law Report* Land Use Decision Awards Show.

First, as a preliminary matter, although we shamelessly used ZPLR's name for our awards show, the editors of this fine publication were rather insistent that we make it "perfectly clear" (name the president who made this phrase trite) that *Zoning and Planning Law Report* neither endorses nor encourages the views and opinions set forth in this article. In fact, serious people that they are, they are a little embarrassed at the frivolity. Second, the title of the

Zoning and Planning Law Report
is published by Clark Boardman Callaghan, 375 Hudson Street, New York, NY 10014. ISSN 0161-8113

awards show is admittedly a bit misleading. Although our awards show is called the "Land Use Decision" awards, not all of the awards are given for court decisions. We felt it would be remiss to ignore the folks in the legislative and executive branches of government, who can be just as wise or foolish as their brothers and sisters in the judicial branch.

"Pot of Gold for the Plaintiff's Bar"

The first ZiPLeR, the "Pot of Gold for the Plaintiff's Bar" Award, is given for the decision most likely to spawn endless litigation. This award goes to the New Jersey Supreme Court for its decision in *Strawn v. Canuso*, 140 N.J. 43, 657 A.2d 420 (1995), in which it held that a builder-developer of new homes and its broker have a duty to disclose to prospective purchasers, off-site physical conditions of which it knows and which substantially affect the property's value or desirability.

It is hard to feel sorry for the defendants in *Strawn* given the facts of the case. The evidence indicates that the defendants clearly knew of the presence of the Buzby Landfill, a hazardous waste dump, and were warned of the dangers of building a housing development near the landfill by the New Jersey Department of Environmental Protection and Energy. Furthermore, they maintained an active policy of nondisclosure, instructing their sales people to never disclose the presence of the Buzby Landfill even when asked about such conditions.

Although the *Strawn* defendants are not particularly sympathetic characters, we are wary of the litigation that the case will likely foster. Although the New Jersey Supreme Court attempted to limit the scope of its decision by stating that a developer would not have a duty to disclose such conditions as the "changing nature of a neighborhood, the presence of a group home, or the existence of a school in decline," it did find a duty to disclose the presence of a planned superhighway or an approved office complex. Talk about a slippery slope line drawing nightmare. The court's holding leaves the door wide open for future litigation concerning what off-site physical conditions substantially affect the value or desirability of property. It should be noted that at least the court did not find that the defendants had a duty to disclose off-site conditions of which it *should have known* (this was not an issue in the case and will likely be the subject of future litigation). One thing is certain: there will be plenty of cases in the coming years to test the limits of this particular envelope.

"We Are Family"

The "We Are Family" ZiPLeR (and two thumbs up) Award goes to the Appellate Court of Michigan for its decision in *Stegeman v. City of Ann Arbor*, 213 Mich. App. 487, 540 N.W.2d 724 (1995). This case strikes a logical and thoughtful balance between those who wish to preserve "the character" of single-family residential neighborhoods and the rights of those who opt for alternative living arrangements.

Stegeman was decided against the backdrop of the Michigan Supreme Court's 1984 decision in *Charter Township of Delta v. Dinolfo*, 351 N.W.2d 831 (Mich. 1984), which upheld the right under the Michigan Constitution of unrelated persons to live together as a functional family in a single-family residential zone. In *Stegeman*, the plaintiffs wished to rent their houses to those "most pernicious" of all living things—college students. The plaintiffs, citing *Delta Township*, challenged the validity of the city of Ann Arbor's zoning ordinance, which allowed a "functional family" to reside in a single-family zone by special permit, but which excluded temporary living arrangements such as clubs, fraternities or groups of students. The ordinance defines a "functional family" to be:

> [A] group of no more than 6 people plus their offspring, having a relationship which is functionally equivalent to a family. The relationship must be of a permanent and distinct character with a demonstrable and recognizable bond characteristic of a cohesive unit.

Ann Arbor, Mich. Code § 5.7(4). The Appellate Court noted that groups of students do not fit the definition of functional family because they "do not represent a group that is bonded together intending to live as a unit for the foreseeable future, but a group of casual friends living together for a limited duration of their education." *Stegeman* at *4-5. While recognizing that the *Delta Township* decision is controlling, the court concluded that *Delta Township* did not go so far as to protect groups of persons "whose lifestyle is not the functional equivalent of "'family' life" and that, therefore, the "functional family" ordinance is constitutionally valid as applied to the plaintiffs.

"Ozzie and Harriet Are Now Our Neighbors"

Two Fair Housing Act cases reap ZiPLeRs. First, the "Ozzie and Harriet Are Now Our Neighbors" Award goes to the United States Supreme Court for its decision in *City of Edmonds v. Oxford House, Inc.*, 115 S. Ct. 1776 (1995), in which the Court ruled that the definition of "family" found in most municipality's zoning ordinances was not exempt from the Fair Housing Amendments Act's (the "FHAA") mandate that municipalities make "reasonable accommodations" for the handicapped in their zoning ordinances.

Thus, the City of Edmonds and other municipalities will no longer be able to use a definition of family that discriminates against unrelated persons to exclude group homes for the handicapped from their single-family residential zones. Although the decision is not a shining example of legal reasoning, it is an impor-

tant victory for the rights of handicapped persons, many of whom would be unable to live in the general community without the aid of a group home atmosphere. To exclude group homes from single-family zones, which include the bulk of the single-family housing stock in the United States, would effectively bar many of the handicapped from the American mainstream.

"Home Is Where the Heart Is"

The other Fair Housing Act case to win a ZiPLeR is *Quality Care Homes, L.L.C. v. City of Ballwin*, No. 4:94CV1837SNL (E.D. Mo. Sept. 26, 1995), which earns the "Home Is Where the Heart Is" Award for ruling that while the FHAA protects the rights of handicapped persons to live in group homes in single-family zones, it does not necessarily do so if the group homes are operated by a profit-making enterprise. The group home in question was to house five elderly persons in the immediate stage of Alzheimer's disease along with two licensed caregivers.

The decision of Judge Stephen Limbaugh (cousin of some television and radio commentator name Rush Limbaugh—we don't dare touch this one) in *Quality Care Homes* was based not only on the FHAA, but also on a Missouri statute which states that any zoning definition of single-family residence shall be deemed to include "any *home* in which eight or fewer . . . handicapped persons reside, and may include two additional persons acting as houseparents or guardians . . ." Mo. Rev. Stat. § 89.020.2 (emphasis added).

The court's decision hinged on whether the group home in question constituted a "home" under the statute. The court reasoned that the "residential care facility" (as the court called the group home) did not constitute a "home" because of the facility's for-profit status and because the facility's residents did not share in the preparation of meals, performance of housekeeping duties and planning of recreational activities. *Quality Care Homes* at 16-19.

The court's decision in *Quality Care Homes* is hard to comprehend. Zoning regulations govern the *use* of property and do not concern themselves with the identity of the owner of a property. We fail to see how the tax status of the operator of a group home determines the use of the property. The court believes that because the property is being used in a profit-making manner, it is a "business," not a home. All this rule does is create mischief in business planning. We'll give you two nanoseconds to find a loophole.

Also, what of the court's reasoning that the residents' level of participation in housekeeping duties is a crucial factor in deciding what comprises a "home"—what does this mean with respect to the profoundly handicapped, who may not have the ability to assist in such chores? Are they less protected?

"Isn't That Taking Things a Little too Far"

The next three amusing tidbits were found in the authoritative legal source—Chuck Shepherd's "News of the Weird" weekly syndicated column (who says we need Lexis and Westlaw?).

The city council of Clarksville, Tennessee wins the "Isn't That Taking Things a Little too Far?" Award for giving new meaning to the sometimes squirrelly concept of "over-inclusiveness." The owner of an adult bookstore in Clarksville sued in federal court to challenge an ordinance recently passed by the city council. The council intended to prohibit operators of adult businesses from having sex on the premises of the store, but carelessly left out of the ordinance the words "on the premises." Thus, on its face, the ordinance bars the owner and his employees from having sex anywhere. Apparently, the bookstore owner was not very happy about that, but we would have to guess that unless the Clarksville police force is incredibly zealous in their enforcement of the law, his lawsuit is probably not yet ripe. Shepherd, C., *News of the Weird* (Sept. 26, 1995).

"Ultimate NIMBY"

The "Ultimate NIMBY" Award goes to the North Carolina Restaurant Association, located in Raleigh. The Raleigh City Council was apparently set to approve the rezoning of land on behalf of a restaurant, Schlotzsky's Deli. None of the neighbors had opposed the rezoning,

ZONING AND PLANNING LAW REPORT

Editor
Alan M. Forrest
Contributing Editor
Kenneth H. Young
Manuscript Editor
Ted Alvarez
Electronic Composition
Will Croxton
Production Editor
Steven Page

Published eleven times a year by
Clark Boardman Callaghan
Editorial Offices: 375 Hudson Street, New York, New York 10014
Tel.: 212-929-7500 Fax: 212-924-0460
Customer Service: 155 Pfingsten Road, Deerfield, Illinois 60015
Tel.: 800-323-1336 Fax: 708-948-9340

Subscription: $245 for eleven issues

ISSN 0161-8113

but at the eleventh hour, the next door neighbor—you guessed it, the restaurant association—opposed the rezoning, citing parking and other problems. Shepherd, C., *News of the Weird* (Nov. 14, 1995).

"That's Entertainment"

The only ZiPLeR won by a non-American goes to Mr. Justice Higgins of the High Court in Belfast, Northern Ireland. Justice Higgins earns the "That's Entertainment" Award for granting an injunction to a landlord whose tenant planned to open a proposed restaurant called "School Dinners." School Dinners, which has operated a restaurant in London for 14 years, features young waitresses dressed somewhat as English schoolgirls, but wearing short skirts with black-lace stockings and toting whips. The waitresses whip patrons' rears in mock punishment if they don't clean their plate or ask permission before going to the bathroom. Although opponents called the proposed venture immoral and sleazy, the court's decision was based on breaches of the tenant's lease because the mock spankings constitute "entertainment," thus violating the lease. Shepherd, C., *News of the Weird* (Nov. 14, 1995).

"Courage for Facing Reality"

Now, back to the real world. The Florida Supreme Court earns the "Courage for Facing Reality" ZiPLeR for holding that contamination stigma, independent of expected cleanup costs, is relevant and admissible in evaluating the fair market value of commercial property in a condemnation proceeding. Although the property in question in *Finkelstein v. Department of Transportation*, 656 So. 2d 921 (Fla. 1995), was recently contaminated, the court's decision makes it clear that its decision would also be applicable to previously contaminated properties. The court did not answer the seemingly easier question of whether remediation costs would be admissible in a valuation proceeding as the cost of remediating the property in question was being reimbursed by the state through its Early Detection Incentive program.

Two Super Superfund Cases

The two following Superfund cases win ZiPLeRs: one is decided under federal law; the other is decided under state law. The first is well reasoned and to the point; the other comes to a fairly ridiculous conclusion.

"Ok, You Win, I'll Throw in the Asbestos at No Additional Cost"

First, the good case. The "Ok, You Win, I'll Throw in the Asbestos at No Additional Cost" Award goes to Chief Judge Posner of the Seventh Circuit for writing a legally sound and amusingly acerbic opinion in *G.J. Leasing Co., Inc. v. Union Electric Co.*, 54 F.3d 379 (7th Cir. 1995). Judge Posner ruled that the sale of a building containing asbestos does not constitute the disposal of a hazardous substance within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), or even the arranging for such disposal under CERCLA. As the court puts it, simply because someone sells a product containing a hazardous substance (such as a car) does not mean that they disposed of the substance itself or even made arrangements for its disposal. *Id.* at 384.

"Don't Take Me So Literally"

Next, the not so good case and the kind of court decision that gets Newt Gingrich elected. We give the "Don't Take Me So Literally" Award to the only multiple ZiPLeR winner, the Court of Appeals of Michigan, for its decision in *Cipri v. Bellingham Frozen Foods, Inc.*, 213 Mich. App. 32, 539 N.W.2d 526 (1995). This case is a classic example of why a little bit of judicial activism may sometimes be a good thing, rather than blindly following what a court perceives to be the plain language of a statute, as the court unfortunately did in *Cipri*.

In *Cipri*, the Court of Appeals of Michigan decided that sweet corn husks may be considered a hazardous substance under Michigan's Superfund law, the Environmental Response Act (ERA). Mich. Comp. L. § 299.601 *et seq*. Just in case you thought that perhaps there was a typographical error or two in the preceding sentence, let us repeat: under Michigan's Superfund law, sweet corn husks may be considered a hazardous substance.

The facts of *Cipri* are fairly straightforward. The plaintiff owns property containing a private lake downstream from property owned by the defendant Bernard Sherburn. Sherburn, a nearby landowner who raises cattle on his property, bought sweet corn husks from the defendant Bellingham Frozen Foods, Inc. Unfortunately, he bought too many corn husks and could not fit them all in his feed bunker, which is located near a natural spring. The spring in turn drains into streams which flow to the plaintiff's lake. Apparently, leachate from the fermenting corn husks percolated into the spring and reached the lake, killing all of the lake's aquatic life.

The plaintiff brought suit against Sherburn, Bellingham and others, alleging, among other things, trespass, negligence, nuisance and violation of the ERA. The trial court granted Bellingham's motion for partial summary judgment. The plaintiff appealed the trial court's grant of summary disposition only on the ERA claim.

The relevant section of the ERA defined "hazardous substance" to include "[a] chemical *or other material* which is or may become injurious to the public health, safety, or welfare or to the environment." Mich. Comp. L. § 299.603(p)(i) (emphasis added) (this definition has since been amended). The court stated that sweet corn husks qualify as "other material" and therefore may be considered to be a "hazardous substance" under the ERA.

To its credit, the court at least knew what it was doing, acknowledging that its interpretation of the statute could cause a "huge variety of substances that are harmless in their natural state" to be considered hazardous substances and may expose anyone to liability, "even though nothing was done by either to cause a harmless product to become hazardous." Said the court, "it is not [the court's] role to make policy determinations" and arguments that a statute is unwise or makes bad policy should be addressed to the legislature.

Now, we certainly agree that the plaintiff had a right of redress against the owner or operator (no Superfund reference intended) of the neighboring property for nuisance, negligence and other causes of action, but we feel that the court went a wee bit too far in finding that Bellingham could be strictly liable under the ERA. First of all, the language is not so plain. The court did not need to interpret "other material" as broadly as it did. Furthermore, statutory language should not be interpreted with blinders on, but rather should be viewed in the context of the statute as a whole.

"You Should Have Done Your Homework"

The executive branch of government gets into the action, with the State of Florida winning the "You Should Have Done Your Homework" Award for its condemnation of about 5,600 acres of fertile, profitable Florida farmland so that the land could be flooded by the South Florida Water Management District in an effort to restore the natural sheet water flow to Florida Bay. The Florida Farm Bureau had questioned the wisdom of taking the land out of production, arguing that it wasn't necessary to take the land, or at least, all of the land, and that the Water Management District didn't have an adequate plan for its use. The state took the land anyhow.

The farmers, however, may have had the last laugh. The Water Management District has put out bids to lease back half of the land to . . . you guessed it . . . the very farmers the state took it from. According to Scottie Butler, legal counsel to the Florida Farm Bureau, "the state, like any . . . private citizen, has the right to make a stupid deal. Unfortunately, the law doesn't protect us from stupid deals." *Real Estate/Environmental Liability News*, at 5 (Sept. 8, 1995).

"The Federal Circuit Ripeness Short Circuit"

One of the most difficult issues arising in the taking claim is that of ripeness. Ripeness in the taking arena requires that the government reach a final, definitive position on what it will approve and not approve, and it also has historically required that the claimant first bring an action in state court claiming just compensation before they proceed under their Fifth Amendment claim in federal court. The ripeness rule has resulted in several bizarre decisions, which have either completely cut off the ability of a claimant to proceed for just compensation, or resulted in a forum ping-pong which seems never to end. But finally, the Ninth Circuit, with great wisdom, has cut through some of the silliness with its decision in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995), one of the most important decisions on ripeness to be handed down in recent years. For *Dodd*, we award the Ninth Circuit a coveted ZiPLeR available only to federal courts of appeal: "The Federal Circuit Ripeness Short Circuit" Award.

The Ninth Circuit in *Dodd* held that the requirement to pursue remedies available in state courts is limited to remedies based on state constitutions and does not preclude the property owner from later pursuing a federal Fifth Amendment claim in federal court. This decision is a California gold mine of citations on the ripeness issue and a truly comprehensive look at the issues.

In November of 1983, Thomas and Doris Dodd purchased 40 acres of land in the Forest Use Zone in Red River County, Oregon with the intention of building a retirement home. At the time of purchase, the Dodds were on notice that the property was zoned exclusively for forest use and that the county was in the process of adopting a restrictive zoning ordinance. The ordinance was adopted just over a year later; it required that forest dwellings be allowed in Forest Use Zones only where "necessary and accessory" to a forest use. *Id.* at 856.

Before they purchased, the Dodds had received no actual notice of the potential for change in the land use restrictions and had received a report from the County Sanitarian stating that the property was suitable for a septic system. After they purchased but before the restrictive regulations went into effect, other county officials indicated that they could build their home. Six years after they purchased the lot, they moved forward with plans to develop a home on the property. The Dodds filed and were denied applications for land use permits. They appealed all the way to the Oregon Supreme Court, along the way "expressly reserv[ing] their right to have their federal claims adjudicated in federal court." *Id.* at 857.

While this appeal process was going on, the Dodds, consistent with their reservation of rights, filed a 42 U.S.C. § 1983 claim in federal district court claiming violations of the substantive due process, equal protection and the federal taking clauses of the United States Constitution. *Id.* Before the Oregon Supreme Court decided the Dodds' case, the federal district court dismissed the Dodds' Fifth Amendment taking claim on ripeness grounds and entered summary judgment for the county and the state on all of the other counts. *Id.*

On appeal, the Ninth Circuit cogently argued that the doctrine of ripeness is principally designed to keep cases out of court that would be "illuminated by the development of a better factual record" below. *Id.* at 860. As to whether invoking ripeness to send a Fifth Amendment

case to the state courts would "illuminate" it, the court said: "The Fifth Amendment action is not more 'developed' or 'ripened' through presentation of the ultimate issue—the failure of a state to provide adequate compensation for a taking—to the state court. Indeed, such a requirement would not ripen the claim, rather it would extinguish the claim." *Id.*

The Ninth Circuit could not have put it more strongly when it said: "Reduced to its essence, to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant." *Id.*

The Ninth Circuit also rejected the state and county's argument that the Dodds' Fifth Amendment claim could be dismissed on the ground of claim preclusion (res judicata), concluding that the claim was not subject to claim preclusion for two reasons. First, there was consent or a tacit agreement for splitting the claim. Second, the Oregon courts had reserved the issue for later determination by "repeatedly acknowledging that the Dodds' federal constitutional claims were not before them and were pending in the federal district court." *Id.*

While the Dodds were taken off the claim preclusion hook, they ultimately found themselves still firmly caught on the question of issue preclusion (collateral estoppel). And no one, said the court, had yet decided whether the Oregon Supreme Court's decision on the state taking questions was an equivalent determination of the federal taking clause issue so as to collaterally estop the Dodds from proceeding in federal court. To answer that question, the Court of Appeals remanded the case to the federal district court. *Id.* at 863.

Conclusion

The many awards that have been created in the arts probably reflect the importance of the arts as media for our cultural values, human emotions and ultimately the connections which bind us all. We're dumbfounded that there isn't any similar award for land use matters because nothing touches and concerns us more, at least not physically, than the natural and built landscapes in which we live our entire existence. But maybe this first small step by ZPLR in recognizing important (and ridiculous) land use decisions will make it possible for us to consider more fully their impact on our lives.

Besides, it's just plain fun, and even a little enlightening, to see what decisionmakers have done in 1995.

Finally, we would like to make this a bit of a tradition, and to do it each year, maybe a little earlier next year than we did for 1995. If you will send us your weird, wonderful and wild land use decisions from whatever branch of government happens to be your personal favorite, we will consider them for next year's article, and we will award a prize of some insignificant and nominal value.

Note: We would like to thank Ilene Stackel, Daniel Mandelker, Mark Boatman, Chuck Shepherd and Gideon Kanner for their contributions to this article.

RECENT CASES

Nebraska Court Finds That Zoning Ordinance Ban on Liquor Sales by Convenience Store Violates Equal Protection Clause

The Supreme Court of Nebraska struck down a city zoning ordinance that would have prohibited, in certain zones, a convenience store or other retailer carrying a variety of products from selling alcoholic beverages for off-premises consumption. The ordinance would have permitted the retailing of alcohol for off-premises consumption only when conducted from "premises which are separate and distinct" from the sale of other products. *Gas 'N Shop, Inc. v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (Neb. 1995). The city's ordinance was found to be unconstitutional under the equal protection clause.

The "separate and distinct premises" requirement was to apply only to establishments selling alcohol and other products for off-premises consumption. Restaurants would be allowed to sell alcohol and food for on-premises consumption, without hindrance from the ordinance. The court stated that the city had failed to establish a connection between the off-premises consumption of alcohol and a legitimate zoning purpose. "Kearney did not present any evidence which would allow us to conclude that a separate and distinct premises requirement is rationally related to any of the specific concerns of its zoning code." 539 N.W.2d at 428.

On several previous occasions, the court had struck down similar provisions in cases involving liquor licensing laws. "The record in this case demonstrates that in the context of zoning, just as in the context of liquor licensing, '[t]here is no rationale for treating a chain restaurant, such as Pizza Hut, any differently from a chain of convenience stores . . . . The only distinction is that the alcoholic beverages purchased at the convenience store will be drunk off the premises.' [citation omitted]. In addition, this court has repeatedly found separate and distinct premises requirements in the context of liquor licensing laws to be discriminatory without justification and not rationally related to its purported governmental purpose." 539 N.W.2d at 429.

Seattle Ordinance Requiring Landlords to Share Cost of Relocating Displaced Low-Income Tenants Upheld

A federal district court rejected various constitutional challenges to a Seattle ordinance that requires a landlord to pay one-half the cost of relocating displaced low-in-

come tenants when the landlord's property is redeveloped. *Garneau v. City of Seattle*, 897 F. Supp. 1318 (W.D. Wash. 1995). The Seattle ordinance was enacted under authority of the state Growth Management Act.

The court first rejected a facial substantive due process challenge, finding that the ordinance was rationally related to legitimate government interests in protecting low-income tenants. For similar reasons, an equal protection claim was denied.

The court also rejected a takings claim advanced by the landlords. Citing a 1991 Ninth Circuit opinion, the court stated that "the takings test for 'regulations that do not constitute a physical encroachment on land' is whether the ordinance is 'reasonably related to legitimate public purposes.'" 897 F. Supp. at 1325 (quoting *Commercial Builders of Northern California v. Sacramento*, 941 F.2d 872 (9th Cir. 1991)). The court expressed a view that the Supreme Court's *Nollan* and *Dolan* opinions were not relevant because the Seattle case (a) did not involve physical encroachment and (b) involved a legislative decision, as opposed to adjudication of a permit application. Nevertheless, the court found that no facial taking had occurred, even if *Nollan* and *Dolan* were applied:

> The court finds that there is at least a 'rough proportionality' between the redevelopment of plaintiffs' property and the economic hardship placed on low-income tenants by displacement resulting from this redevelopment. The court also finds that it is reasonable to impose a portion of this cost upon the owners who choose to redevelop their property, thereby displacing their low-income tenants.

897 F. Supp. at 1326.

Finally, the court held that the ordinance did not constitute an improper tax since the relocation funds payed by the landlords would go to the displaced tenants, not the city. It was therefore enacted clearly not for the purpose of raising revenue.

District Court Reviews Seventh Circuit's Ripeness Rules

A federal district court refused to apply the Seventh Circuit's stringent ripeness rules to a First Amendment claim asserted by a tavern owner who had been denied a special exception to present live entertainment. *TJ's South, Inc. v. Town of Lowell*, 895 F. Supp. 1116 (N.D. Ind. 1995). The tavern owner had not pursued an action in state court before bringing the federal court action, and the town tried in vain to convince the court that this omission was fatal. In examining the Seventh Circuit's opinions, the district court made the following observations:

> Several themes are manifest in these Seventh Circuit cases: a plaintiff bringing any takings claim must pursue a state inverse condemnation suit before suing in federal court; a plaintiff bringing a zoning-based economic substantive due process claim typically must do the same; and state-court review may provide sufficient procedure for a zoning-based procedural due process claim. . . . The Seventh Circuit seems to view economic due process claims as plaintiffs' thinly masqueraded attempts to get around the disadvantages of zoning-based takings claims. . . . 'Call it what you want, plaintiffs,' the Seventh Circuit seems to say, 'we know it is essentially a takings claim and we will assess its ripeness accordingly.'

895 F. Supp. at 1120, 1122.

However, the court continued, "This court doubts that the Seventh Circuit would lump First Amendment challenges in with takings claims as it appears to have done with economic due process claims. . . . [T]he Seventh Circuit's apparently broad concept and dim view of takings claims do not apply." 895 F. Supp. at 1122.

Adult Businesses: Location and Licensing Regulations Upheld, but Bathing Suit Requirement for Dancers Is Not "Narrowly Tailored"

In a 1994 case reported only recently, a federal district court upheld various adult business regulations adopted by the city of Vicksburg, Mississippi, but severed and struck down a requirement that dancers in adult establishments wear no less than bikinis. *Steverson v. City of Vicksburg*, 900 F. Supp. 1 (S.D. Miss. 1994).

The court held that the First Amendment was not violated by location restrictions (prohibiting an adult business from operating within 1,000 feet of a church or certain other facilities) or by licensing fees imposed on adult businesses. Furthermore, the court held that under the twenty-first amendment, the city was allowed to prohibit alcohol in lounges featuring topless dancing. However, a provision that would have required a live dancer in an adult business establishment to wear at least a bikini, regardless of whether the establishment was serving alcohol, was found to violate the First Amendment:

> [T]he city has effectively shown how [the ordinance] combats proven secondary effects through locational restrictions placed on adult entertainment businesses. However, an outright ban on adult cabarets featuring nude and semi-nude dancing lacks such justification. Although the city has a valid interest in protecting order and morality, there is no mention of protecting order and morality through the prohibition of nudity within [the ordinance]. The Court finds that the city has not met its burden in showing how a lesser degree of nudity furthers its stated interest in curtailing harmful secondary effects. Accordingly, the City's requirement that the

> dancers/entertainers wear more clothing than pasties and g-strings is not narrowly tailored to support its asserted interest in protecting and preserving the quality of the city's neighborhoods, inasmuch as these businesses may locate throughout the city.

900 F. Supp. at 13.

NOTED IN BRIEF

It was unlawful for a county board of supervisors to condition a rezoning upon a proffer of a cash payment by the developer. Under Virginia's conditional zoning statutes, "a county is not empowered to require a specified proffer as a condition precedent to a rezoning. The statute clearly states that proffers of conditions by a zoning applicant must be made *voluntarily*." The court therefore concluded that the board had improperly denied the rezoning after the developer refused to pay the fee "recommended" by the board "to help defray costs of capital facilities related to new development." *Board of Supervisors of Powhatan County v. Reed's Landing Corporation*, 463 S.E.2d 668 (Va. 1995).

It was improper for a ZBA to deny permits to the owner of a nonconforming convenience store who sought to change the messages on store signs and to replace an internal coffee counter. *Ray's Stateline Market, Inc. v. Town of Pelham*, 665 A.2d 1068 (N.H. 1995). The court found that "the coffee counter permit would not result in a substantial change or an illegal expansion of the nonconforming use and that the sign permit would not result in any appreciable effect on the neighborhood." The coffee counter permit would allow the owner to replace the existing counter with a somewhat larger Dunkin' Donuts coffee and donuts "cart operation." The sign permit would allow existing signs to advertise Dunkin' Donuts instead of Seven-Up and Pepsi. *Id.*