ZONING AND PLANNING LAW REPORT

Vol. 22, No. 2 February 1999

THE 1998 ZiPLeRs: THE FOURTH 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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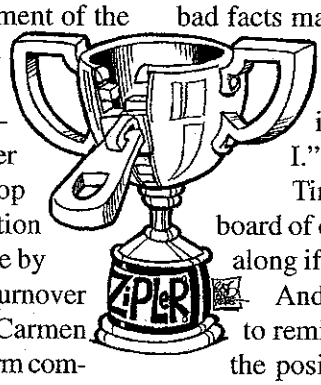
Introduction

This is, believe it or not, the fourth year for the coveted *Zoning and Planning Law Report* (ZiPLeR) Awards, celebrating zoning and planning law achievements, debacles, foibles, and just plain interesting developments.

My goodness, how the field has changed. Ten years ago, I thought that with the pace of development of the law in this area I might never keep up. But now, just in the last two or three years, compared with the changes in information technology, land-use law looks lethargic. The computer I bought not so long ago is a $3,000 doorstop and, by the time I got my new voice-recognition program running, it had been superseded twice by newer editions. The Toffleresque technology turnover is beginning to make the Dennis Rodman–Carmen Electra marriage look like the model of long-term commitment.



Ah, but you and I may find comfort in our old friend, land use law, which seems to be mutating more slowly. And this year's winners bear witness to the more things change the more they stay the same. The awards seem to fall into the same categories, courts make the same mistakes and we continue to see evidence of the axiom that bad facts make bad law. There are lessons, however, to be learned from all this and even a few chuckles—enjoyed best perhaps with a self-effacing dose of "there but for the grace of God go I."

Time to pull out all stops and play on this keyboard of crazy cases for your listening pleasure. Hum along if you know the tune...

And by the way, 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

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not make any sense regardless). Being a lawyer is such a burden at times...

The "E-I-E-I-O—Oh, WOW!" Award

Old MacDonald had a farm, but if it's in Iowa he had better watch out for his neighbors and get ready to give "Babe" a bath.

Many states have right-to-farm laws giving some farming areas limited immunity from nuisance actions by neighbors. The idea is that farms smell, tractors are noisy, dust is often stirred up, and harvesting can go on into the night, and if we're going to have farms, the neighbors will have to put up with some disturbance. Sounds fair enough, especially in Iowa. [You know what would really help in reporting this type of case?—A scratch-and-sniff patch. Please write the editors and tell them to make it available next year. I mean, if Burger King can sell scratch-and-sniff *Rugrats*' watches with their Kids Club meals, why can't West Group get us a little patch?]

Here's the immunity provision in Iowa Code section 352.11(1)(a):

> A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation. This paragraph shall apply to a farm operation conducted within an agricultural area for six years following the exclusion of land within an agricultural area other than by withdrawal as provided in section 352.9.

Remember, the immunity is limited; it does not apply if the nuisance is a violation of federal or state statutes or regulations. There is no immunity for negligent operations, for injury or damage caused before the area was designated an agricultural area under the statutes and for injury or for damage because of stream pollution, change in condition of a stream, flooding, or erosion of another's land, except by an act of God.

But in Kossuth County, Iowa, the neighbors cried "foul" (or was it "fowl?") over the designation (literally by the "flip [of] a nickel") of 960 nearby acres as an "agricultural area," claiming it was a *per se* taking—a kind of easement over their property, like an avigational easement off the end of a runway. *Bormann v. Kossuth County, Iowa*, 584 N.W.2d 309 (Iowa 1998). This "easement" effectively limited their right to bring a nuisance claim and allowed farmers to cause all kinds of awful off-site impacts—my planner friends call 'em "negative externalities"—with impunity.

Per se is *Ally McBeal* talk for "absolutely" or "in every case"—literally, "through itself." Let me explain it this way: *Bormann* was a "facial" challenge, not the easier-to-win "as-applied" challenge that seeks compensation for a taking as to a particular property. In a facial challenge the claim is that no matter where this law is applied, it is unconstitutional. Thus, "per se" roughly means the law is facially invalid (or maybe it's the other way around...); a tough way to wage a takings case, except the ripeness hurdle is avoided, but that is another story. Even *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), the first in the tiny genre of categorical regulatory takings, was an as-applied case. David Lucas knew he was not going to slay Goliath with a facial challenge.

But bless your pea-pickin' (corn-huskin'?) heart, the Iowa Supreme Court held that it was a *per se* taking; "this is not a close case," they said. Why? Because "[w]hen all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few." This view is a little confusing to me. The property right taken is the "easement" imposed by the immunity law, an easement allowing a farmer to cause a private nuisance on neighboring land. If the limitation on private nuisance claims is an easement, is not any regulation limiting the rights of property owners potentially a taking, such as view corridors or height restrictions, even if a reasonable use remains? One might say that the Iowa court has a slippery slope problem here, but there are no slopes in Iowa.

In the November/December issue of *The Environmental Forum*, Richard Lazarus of Georgetown University could not resist an "I-told-you-so" swipe at the American Farm Bureau Federation for its pro-property rights stance in several cases over the last decade. Somehow, he feels that the pro-property rights frenzy has caught even the Iowa Supreme Court. I don't think so.

The right-to-farm laws were intended to stop the little private-nuisance suits from ever getting into court and avoid the craziness of the "coming-to-the-nuisance" doctrine. Don't ask me to explain the doctrine; it takes a full class in my Land Use Law course at Vermont Law School to get through it—by the end, most of the brilliant minds of the next generation are justifiably dead asleep or in la-la land dreaming of kayaking. The short version is that if a sensitive use, like residential, expands into proximity to the noxious use, like a feed lot, the sensitive use has no claim for the adverse impacts of the noxious use; the doctrine, however, has more exceptions to it than parts of pigs that go into sausage and has been discredited in many jurisdictions.

I will bet that the Iowa trial courts will just do what they did before the law and try the cases on traditional grounds. These are fact-driven cases and there will be some winners and some losers as a result. Times have changed and the mega-hog farms and cattle-feeding operations have created such damage that they deserve no protection. Besides, the Iowa case only addressed private, not public, nuisances. The latter are interferences with the rights of the community at large. At least it will be a useful and interesting experiment to see what hap-

pens.

And last, new legislation is always possible. In fact, there was an earlier decision in 1998 in Iowa addressing county ordinances for feedlots, which suggests the difficulties, particularly as to state preemption, in local regulation of large-scale agricultural operations. *Goodell v. Humboldt County, Iowa*, 575 N.W.2d 486 (Iowa 1998).

The First-Ever "Neighborly Love" Award

Sanford Berger and Lendall Riddle, our award winner, are neighboring lot owners in Mayfield Heights, Ohio. Riddle did not appreciate Berger's failure to keep his vacant lot between their houses trimmed. Oh sure, there is the usual local ordinance that has been in place for the last thirty-five years requiring *Little Shop of Horrors*-type plants to be cut back, but, that did not do the trick as to Berger's lot. *Berger v. Mansfield Heights, Ohio*, 154 F.3d 621 (6th Cir. 1998).

Time for democracy to work its magic. Riddle's complaints over the year he first became Berger's neighbor led the council to amend the ordinance to require lots with one hundred feet of frontage or less and less than an acre in area to have their vegetation "totally cut" to a height of not more than eight inches, except for trees or landscaping. Larger lots with over one hundred feet of frontage and one acre or more in area only have to be trimmed twenty feet back from a right-of-way.

> Now here is your Jeopardy answer: "Sanford J. Berger."
>
> The question is: "Who has a lot with exactly 100 feet of frontage and 42,062 square feet?"

An acre, for those of you who forgot—and this is the high level of trivia you get with the ZiPLeR Annual Awards—is 43,560 square feet.

Predictably, Berger was cited for a criminal violation. Also, not surprisingly, Berger sued the city and others for various constitutional violations. The actions against some were dismissed and the rest were found immune, and the city won its motion for summary judgment. Wouldn't this have been a great case for Judge Judy to hear?

The U.S. Court of Appeals for the Sixth Circuit set it straight by finding the obvious, that the ordinance was arbitrary and capricious on its face and therefore unconstitutional. All of Berger's remaining claims were found to be without merit. Underneath the veneer of silliness is a pretty good analysis of the substantive due-process issue of rational relationship.

The "Count Countula" Award

The new award is named in honor of the irrepressible *Sesame Street* character who has reinvaded my home to the delight of our three-year-old rugrat. The winner is the Michigan Supreme Court for its artful decision in *K&K Construction, Inc. v. Dept. of Natural Resources*, 456 Mich. 570, 575 N.W.2d 531 (1998), *cert. denied*, 119 S. Ct. 60 (1998).

In *K&K*, the court wrestled with the "numerator-denominator" or "relevant parcel" problem in takings claims, sometimes called the "whole parcel" or "nonsegmentation" rule. If you have a large parcel or multiple parcels and only a portion (say 10 pecent of the total area) is wiped out by regulation, is it a 100 percent taking of the restricted portion (compensable) or merely a taking of 10 percent of the total holdings (not compensable)? Determining the numerator is usually not difficult, but determining what is the relevant total parcel can be a big problem.

The facts in *K&K* are better than those I have ever used in writing or lecturing on this interesting and seemingly intractable problem. In *K&K* there were four parcels. Parcel 1 of 55 acres (27 acres wetlands) was zoned commercial; Parcel 2 of 16 acres (with a small area of wetlands) and south of Parcel 1 was zoned multifamily; Parcel 3 of 9.34 acres (no wetlands) was south of Parcel 2 and zoned multifamily; and Parcel 4 of 3.4 acres (no wetlands) south of Parcel 1, east of Parcel 2 was zoned multifamily. That may be hard to follow; sometimes it is better to draw a map—when you read the case you might try to do just that.

The Court followed the important *Ciampitti v. U.S.*, 22 Cl. Ct. 310 (1991), case that set forth four factors for determining the relevant parcel. Applying the *Ciampitti* factors in a three-part scheme, the Court noted that Parcels 1, 2, and 4 were contiguous, all of the parcels were in the same ownership, and there were comprehensive plans for their development.

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The Court concluded that Parcels 1, 2, and 4 together were the relevant parcel. The noncontiguous Parcel 3 was excluded. The Court also found that there was no *Lucas*-type categorical taking for the inability to develop in the wetlands. Last, the Court sent the case back to the trial court to determine whether Parcel 3 should be included in the denominator and to apply the *Penn Central* multifactor analysis—a great case to illustrate the problem.

The "Community Self-Help" Award

Bolinas, California, our award winner, has added a new spin to the usual self-help methods a town uses to improve itself. Residents of Bolinas value the peaceful tranquility and natural beauty of their town, which is forty minutes from San Francisco.

What do you do when the state paints ugly double yellow lines on five miles of nearby Route 1? Self-help to the rescue—the town painted over the lines.

More state ugliness in the form of call boxes blocking scenic views of the ocean? The homegrown solution was to dismantle the boxes.

Growth-management controls not working? Tear down all thirty-six state-installed signs marking the way to Bolinas from San Francisco; that is even better than the custom of some locals giving wrong directions to visitors.

And what would you do if the Harbor District created to develop the local waterfront actually started to do its job? Disband it.

If you believe having a plentiful water supply stimulates development, there is not much you can do except take over the unincorporated water district and adopt a moratorium.

For more of this interesting story of land control California-style, see "Bolinas Grudgingly Opens Up," *Los Angeles Times*, December 6, 1998, at A12, and thanks to Gideon Kanner, our reporter of silliness from the West Coast, for bringing this to our attention.

The "Community Protection Extraordinaire" Award

A tough one; we simply did not know whether to select San Marino, California for the "Community Self-Help" Award or to consider it for the truly-coveted "Community Protection Extraordinaire" Award, but, when all the votes were tabulated, San Marino received this award without breaking a sweat (probably illegal to sweat in San Marino anyway). How did they rise to such a level? Over the years they adopted a series of laws that provide protection and make San Marino the envy of everyone else in the country. Even San Marino Vice Mayor Paul Crowley candidly admits: "We like to joke that everything is illegal in San Marino." "Stiff Laws Keep San Marino Tidy," *Los Angeles Times*, Dec. 1, 1998, at B12, Col. 1. Thanks again to Gideon.

San Marino's laws make it illegal to leave a car in the driveway for more than a few days, prohibit running remote control toys in the local park, outlaw spitting on the sidewalk, and prohibit placing a trash can or air conditioner in the public view. And so help you in San Marino, if you do not do an adequate job of trimming your tree, you can be ordered to attend a pruning class run by the city.

And just so no one can make ignorance of the law an excuse, there is even a law that requires purchasers of new homes in San Marino to sign that they have reviewed all of the ordinances.

Of course, San Marino is a tony place where the average home costs $650,000. A town like that deserves protective laws—and neighbors who are real good at keeping an eye on each other. With only 13,000 people there were still more than 700 code enforcement complaints last year.

Among other laws to protect the city are ones prohibiting dead lawns, chain link fences, recreational activities in front yards, leaving bicycles on the grass or against trees in the public park, and signs with more than 20 percent of the text in language other than English. Minors cannot own air guns or mini-bikes or sell their bicycles. When you water the lawn, it is illegal to wet the sidewalk. Macaulay Culkin, you can forget about moving to San Marino—it is illegal for a permanent head of household to be less than twenty-one years old, a law intended to thwart the efforts of those parents attempting to enroll their minor children in the excellent school district.

You better be ready to add at least a third bay to your garage if you have a fifth bedroom, and do not think about covering more than 40 percent of the property with your house. Tree trimmers must have a permit and both gardeners and delivery trucks must display identification tags that they can get from the city.

Tree trimming is not allowed without City permission and one resident paid a $1000 fine and had to plant a new sixty-inch diameter tree (can you imagine the cost?) because he had a laborer cut down a large canary pine without the City's permission.

Don't plan on selling your used car through a dealer in San Marino because used car lots are not permitted. And don't plan on staying there long after you die because mortuaries are not permitted either. I suppose it goes without saying, but: Neon signs aren't allowed.

Violators recieve a warning for the first violation but then can pay anywhere from $50 to $500 for infractions of such laws as using a garage space for anything other than storing vehicles.

The "I'm Sorry I Can't Help Myself, It's Another Wacko Crèche Decision" Award

Pardon my compulsion, but I must tell you about this year's leading crèche decision. You will recall that in years past, just as I have not been able to resist the wild and weird adult entertainment decisions, I have related the many problems courts have had in addressing the sensi-

tive issue of public displays of religious symbols.

This year, special recognition goes to the Commonwealth of Massachusetts for elaborating on prior rules from other jurisdictions by adding the new "forlorn Santa" standard.

Guess who helped bring the case against the Town of Somerset for the nativity scene set up by local firefighters at Town Hall for the last sixty years? "You betcha, Marge" (quote from *Fargo*), it was the American Civil Liberties Union, in an action brought by Gil Lawrence Amancio, resident of Somerset for the last fifteen years and New England Regional Director for American Atheists, Inc.

Now, you probably remember the rules of the game. If you have a nativity scene on public property, it is not a problem if the secular elements outweigh the religious ones. The principal problem in the cases from years past had to do with the Baby Jesus in swaddling clothes—no court has ever found that to be a secular symbol, but they have let just about everything else go.

The display in Somerset included a Nativity crèche, holiday lights, a wreath, a Christmas tree, and a plastic Santa Claus, which the Court noted might be a recent addition, although it was agreed that those elements were erected in the past and would be erected again if the Town of Somerset was successful in the case.

The Federal District Court for the District of Massachusetts in deciding the case reviewed the leading decisions, and for that reason alone, this decision is worth reading.

The festivities begin around footnote 8 in this short decision, when the Court feels compelled to address the town's argument that a second municipal holiday display containing a menorah, located in front of the fire station almost a mile from the town hall where the other display was located, provided a balancing effect. Apparently, the Court felt that the separation was too great for any offset. *Amancio v. Town of Somerset*, 1998 WL 846865 (D. Mass. Nov. 23, 1998).

Ultimately, the Court was drawn into an analysis based on *Allegheny v. ACLU*, 492 U.S. 573 (1989), admitting that the "fact-specific nature of its [the U.S. Supreme Court's] decisions provides a trial court with a decisional framework based, as Justice Blackmun intimates, more on a visual appraisal than on a cerebral assessment." The important factors, finds the Court, are that the crèche is displayed prominently in the seat of local government and as the focal point of the display. There is no signage indicating that anything is being celebrated other than the birth of Jesus. The Christmas tree, which the Court analyzed in another footnote as still having some Christian connections, "does not dwarf the crèche" and therefore, to the extent that it has a more secular side, does not outweigh the profoundly religious crèche. The Court also noted that there is "no superabundance of secular symbols to dilute the religions message of the crèche, only a rather forlorn Santa Claus stationed at the perimeter of the display." The Court found that the display violated the establishment clause and could not be erected.

What have we learned here? Again, the location of the display is critical, as is the size and prominence of the religious symbols, such as the crèche. The Christmas tree is an ambiguous symbol, but is probably more secular than religious and should be big. Snowpeople (the gender-neutral term for snowmen) are definitely secular and should be placed in the center and loom large over the religious symbols. And, do not ever put a single forlorn, small Santa Claus made out of plastic at the edge of the display—get a great big one and plunk him right down in the middle.

The "Now I'll Have To Buy My Own Car Radio" Award

Don't you just love the car audio systems with giant woofers, so big and so loud the trunks lids actually vibrate? Amazing to see and hear, but a quality-of-life issue.

Well, Tacoma, Washington has had enough and adopted an ordinance prohibiting playing a car audio system at a volume audible beyond fifty feet. My hapless namesake, Dwight Holland, was arrested (yes, *arrested*) for playing his radio too loud and was convicted. Can you imagine having to put that on a bank loan application where they ask if you have ever been convicted of a crime: "Yes—convicted in Tacoma for playing *Car Talk* so loud that Click and Clack could be heard over fifty-feet away."

Mr. Holland appealed and the city stipulated to a dismissal of the charges. *Holland v. City of Tacoma*, 954 P.2d 290 (Wash. Ct. App. 1998), *petition for rev. denied*, 136 Wash. 2d 1015 (1998).

That was not the end of it, however, because Mr. Holland sued under 42 U.S.C. Section 1983 and state tort law claiming the ordinance was unconstitutional and looking for damages. He lost on the city's motion for summary judgment and the trial court, on its own motion, awarded attorneys' fees to the city because it felt the claims were frivolous (very unusual).

The appellate court held that the law did not significantly threaten free speech and was constitutional. However, the court found that Mr. Holland's claims were not frivolous and set aside the award of attorneys' fees.

The "Race Is To The Swift" Award

This new award goes to the California Coastal Commission for successfully defending against a claim that a two-year "delay in the issuance of the development permit partly owing to the mistaken assertion of jurisdiction by a government agency" was "more in the nature of a 'delay'" than "a type of 'temporary taking,'" *Landgate, Inc. v. California Coastal Commission,* 73 Cal. Rptr. 2d 841, 17 Cal. 4th 1006, 953 P.2d 1188 (1998), *cert. de-*

nied, 119 S.Ct. 179 (1998).

There is a time when "normal delay" turns into a "temporary taking." The question was discussed in *First English Evangelical Lutheran Church of Glendale, Inc. v. County of Los Angeles*, 482 U.S. 304, 321 (1987) holding that compensation was required for a temporary taking of property but that it would not be required as a result of "normal delays in obtaining building permits, changes in zoning ordinances, variances and the like..." This is a subjective business—the police power hawk's "normal delay" is the property owner's eternity and a taking.

What aggravated the property rights folks from the *Landgate* case was that most of the delay was caused by the California Coastal Commission erroneously denying a building permit when it did not have jurisdiction over a lot-line adjustment. Thus, the delay was not "normal" in the sense that an agency was processing an application, but the delay was caused in part by the agency's error. At an American Law Institute-American Bar Association program in San Francisco in May of last year, Michael Berger, a property rights prodigy and lawyer who successfully represented *First English* before the U.S. Supreme Court and recently argued for *Del Monte Dunes* in the U.S. Supreme Court, was hopping mad about *Landgate*. For those of you who are privileged to know Michael, it was quite a sight.

But the government won and the United States Supreme Court has denied certification, so in California at least, two years is a "normal delay," even if the government's mistake is the cause of that delay. In the Northeast, where the permitting process has risen to a much higher art form than that practiced by those Pacific coast permitting pikers, we do not often get to a hearing in the first two years...

The "I Can't Get No Satisfaction" Award

Remember that great Rolling Stones' song from the 1960's? Well, the Home Builders Association of Mississippi, Inc. was probably singing it on the courthouse steps of the United States Court of Appeals for the Fifth District following the decision in *Home Builders Association of Mississippi, Inc. v. City of Madison, Miss.*, 143 F.3d 1006 (5th Cir. 1998).

The Court of Appeals upheld the Federal District Court's decision to dismiss the complaint in a case involving a $700 impact fee for each planned housing unit. Playing an oldie but goodie, the Tax Injunction Act of 1937, the Federal District Court had found that it lacked subject matter jurisdiction because the Act bars actions seeking a refund of taxes already paid and is designed to keep the Federal Courts from messing with (one of those technical, legal terms) state and local tax matters. To get to this position, the Court had to do a little legal alchemy and convert a valid impact fee into a tax. There is a lengthy discussion regarding the difference between fees and taxes. Given the Home Builders' uncharacteristic argument that the fees were not a tax, so they could stay in federal court, it is especially worth reading.

The "It's Child's Play" Award

The Ten's World Class Cabaret on East 21st Street in Manhattan wins this award for what Mayor Rudolf W. Giuliani characterized as "one of the jerkiest rulings" he had ever seen. "Strip Club for Minors? Giuliani Objects," *The New York Times*, November 6, 1998, Metro Section, at B4, Col. 1.

New York City has been highly successful in defending its recently-adopted zoning amendments restricting adult entertainment uses, barring such businesses from locating in residential neighborhoods or within 500 feet of churches, schools, or other sex shops.

The City of New York got hoisted by the petard of its own definition of a sex shop. The definition provides that the establishment must regularly have live performances that emphasize certain anatomical areas. Importantly, as defined, sex shops do not admit minors.

Well, you can hardly have a decent sex shop without showing some "specified anatomical areas," so what is an operator to do to avoid being labeled a sex shop? That is easy—just let a few kids in to watch.

Ten's World Class Cabaret did not let a few in, because one was enough, at least since last July and before the story broke in early November. I wonder how many minors have been there since? The lawyer representing Ten's said: "We don't encourage it. We are not sitting there booking bar mitzvahs."

The Ten's lawyer, Mark J. Alonso, was also quoted for making the compelling argument: "There is nude Shakespeare. There's movies about nudity. Why pick on Ten's?" "Loopholes In Adult Entertainment Laws Are Exposed," *The National Law Journal*, November 23, 1998, at A23

Mayor Guiliani, a master at articulate phrasing to emphasize his position was quoted as saying: "The intent of this law was to reduce the damage that sex shops do in neighborhoods. This is one of the jerkier opinions that comes out of being over legalistic. This is, like, nuts!"

Like, sure, dude; better take like special care in like drafting your definitions.

For a decision upholding the New York City ordinance, see *Buzzetti v. The City of New York*, 140 F.3d 134 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 54 (U.S. 1998).

The "Bird In The Coop Is Worth Two Before The Zoning Board of Adjustment" Award

We thank Peter A. Buchsbaum, a big time land use lawyer from Woodbridge, New Jersey, for his nomination of the winner, the Colts Neck Township Zoning Board of Adjustment in Monmouth County, New Jersey.

John Lucchese owns a home in Colts Neck in an Agricultural District developed under a residential cluster plan that allowed not only residential uses but the "continuation of farming." *Colts Run Civic Association v. Colts Neck Township Zoning Board of Adjustment*, 717 A.2d 456 (N.J. Super. Ct. Law Div. 1998).

A couple of months after Mr. Lucchese bought the house in 1996 he was told he could not maintain a coop on the property for his "racing pigeons." So, he raced off to the Zoning Board of Adjustment for an interpretation or a variance to allow him to construct a "domestic animal shelter" on his property.

While the matter was pending before the ZBA, the governing body of the Township proposed an ordinance prohibiting the accessory use. The ZBA found that the proposed "domestic animal shelter" was an accessory use and that no variance was required. Mr. Lucchese filed for a construction permit, but before he could get the permit, the new ordinance went into effect. The residential neighbors filed an action challenging the ZBA's interpretation and Mr. Lucchese filed a third-party complaint.

I guess he had some big pigeons. The proposed "domestic animal shelter" would be about 12' x 40' feet (480 square feet), located in the rear yard of his two-acre property. About fifty homing pigeons were to be cooped up there.

The Superior Court homed in on the issues without hardly ruffling a feather. With a wing and a prayer they went from problem (estoppel) to problem (the timing of the ordinance) with anything but bird-brained intellect. The Court's decision is good reading on the accessory use problem and the Court reached the correct answer: Mr. Lucchese could maintain a "domestic animal shelter" as a hobby and accessory use on his residential property because the use fit the two-pronged test of commonality and impact. As to commonality, it was incidental as a recreational use or hobby to the primary residential use. As to impact, the Court found that there were no legal impacts, even though the neighbors had raised concerns about health, aesthetics. and property value.

The "A Sign of the Times" Award

The Georgia Supreme Court in November gave us a peachy decision in *State v. Café Erotica*, 270 Ga. 97, 1998 WL 805174 (Nov. 2, 1998).

The state law prohibited "any outdoor advertising of a commercial establishment where nudity is exhibited" (can you say "content-based"?) and the Café Erotica, a twenty-four-hour nude-dancing establishment in Peach County and Sunshine Outdoor, Inc., a billboard company, sued. The state Supreme Court affirmed a lower court ruling declaring the statute unconstitutional because it went further than necessary to meet the permissible public objectives. The statute attempted to support the prohibition by stating that the highway billboards "may mislead the traveling public and cause a devaluation of the property surrounding the signs" and might "divert the attention and thus cause traffic hazards."

The "It's All In The Timing" Award

This year the Fair Housing Act winner is Assisted Living Associates of Moorestown, New Jersey who won a case against Moorestown township in the U.S. District Court for the District of New Jersey. 1998 WL 129956, *reargument denied*, 996 F.Supp. 409 (D.N.J. 1998). The case was later dismissed after settlement. 149 F.3d 1335 (D.N.J. 1998).

The developer obtained a Certificate of Need from the State in May 1996 for an assisted living facility in Burlington County and bought a 14.75-acre parcel in Moorestown for $435,000 in mid-1996.

In January, 1997 (funny how it came a few months after the developer got the Certificate of Need and bought the land) the Township adopted an ordinance requiring assisted-living facilities to be in the existing sanitary sewer service area and, two months after that, another ordinance was adopted making assisted-living facilities a conditional use. Do you see where I am going with this?

The developer brought an action under the Fair Housing Act and the Court found that the developer had standing and that both the sewer requirement and the conditional use provision were discriminatory. A dangerous business to change ordinances addressing specific uses when there is a proposal out there...

The "There Are Families and There Are Families" Award

The award goes to Joliet, Illinois for the Zoning Board of Appeals' approval of a variation in use by a 4 to 3 vote to allow seven nuns to establish a nunnery in a 3,000 square foot house.

Over one hundred people signed a petition opposing the variation, until they found out it was just seven nuns living together and then only four people showed up at the hearing in opposition. *Zoning News*, November 1998, at 4.

The controversy points out the continuing difficulty with the definition of family, which in most municipalities in most states still is "persons related by blood, marriage or adoption and up to three unrelated persons" or something similar. Sure, seven nuns may be acceptable in a neighborhood, but what happens with an extended gay or lesbian family or simply seven people unrelated but sharing common bonds, with commitment and economic ties?

We have been working on a concept of developing a special-use permit or conditional use for "functional families" that act like traditional families, but do not fit the traditional definition. Watch for our forthcoming article explaining how to protect single-family neighborhoods, but still allow for alternative families.

The "Hard Lesson Learned" Award

Sarah Dobles, a nine-year-old from Prince William County, Maryland, receives this unhappy award from having had to watch her parents, Mike and Jan Dobles, tear down her tree house. The large structure with a front porch, skylight, and electrical service was built by her dad last year for Sarah, apparently in violation of the covenants of the homeowners association and architectural guidelines. The Association negotiated with the Dobles and then sued. The case was settled with the agreement to dismantle. "The Treehouse Reduced to Lumber," *The Washington Post*, Oct. 5, 1998, at B5, Col. 3.

The "Tree House Preservation" Award

The opposite outcome was realized when Josephine County, Oregon finally conceded that Michael Garnier could keep his tree house hotel units. For that we are pleased to award Josephine County this first-ever "Tree House Preservation" Award.

Mr. Garnier built tree houses on his property without zoning approval or building permits and rented them to guests at $70-225 a night. At first, the County said that it could not give Mr. Garnier the permits because buildings had to be on foundations. The State, however, said that the County had to issue the permits if Mr. Garnier could prove that the tree houses were safe.

After paying $20,000 for engineering and court proceedings, Mr. Garnier received his permits. To prove that the trees could carry the weight, he put sixty-six people, two dogs, and a cat (totaling 10,847 lbs.) up in a tree to demonstrate its strength. As another tree house builder from Seattle said: "He's a hero. He pioneered this whole permit issue for all of us. This was more than a battle it was a war." "After Eight Years Up In The Air, Tree House Hotel Goes Legit," *The National Law Journal*, November 30, 1998, at A23.

Isn't America great?

RECENT CASES

Fourth Circuit Holds That Denial of Conditional Use Permit for Communications Towers Does Not Violate Telecommunications Act

Companies in the business of providing digital wireless communication failed to convince the Fourth Circuit Court of Appeals that denial of an application for a conditional use permit to erect two 135-foot towers in a residential zone was a violation of the federal Telecommunications Act. AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach, 155 F.3d (4th Cir. 1998).

First, the court found that the city council had not violated the statute by "unreasonably discriminat[ing] against providers of functionally equivalent services." It stated that, "There is no evidence that the City Council had any intent to favor one company or form of service over another. In addition, the evidence shows that opposition to the application rested on traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight. If such behavior is unreasonable, then nearly every denial of an application such as this will violate the Act, an obviously absurd result."

Next, the Fourth Circuit held that a provision in the statute, which mandates that a state's regulation of wireless services "shall not prohibit or have the effect of prohibiting the provision of personal wireless services," applies only to "blanket prohibitions" and "general bans or policies," not to individual zoning decisions.

Last, the court found that the decision of the city council was "in writing and supported by substantial evidence contained in a written record," as required by the statute.

NOTED IN BRIEF

A landowner did not have standing to appeal the decision of a zoning board of appeals involving the nonconforming status of adjacent property when the board had in fact granted the relief sought by the landowner, but had not based its decision on the rationale preferred by the landowner. *Brooks v. Town of North Berwick*, 712 A.2d 1050 (Me. 1998). "[D]issatisfaction with the ZBA's reason . . . does not constitute a 'particularized injury' sufficient to confer standing for judicial review . . . Having received precisely the relief he asked for from the ZBA, Brooks plainly did not suffer a particularized injury as a result of its decision." Furthermore, the court found that the appeal was frivolous and awarded treble costs to the defendants.