ZONING AND PLANNING LAW REPORT

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THE 2003 ZiPLeRs: THE NINTH ANNUAL *ZONING AND PLANNING LAW REPORT* LAND USE DECISION AWARDS

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Introduction

Nine years, but who is counting? Veteran readers will recall we started this land use law lark with the 1995 ZiPLeRs, commemorating the oftentimes wild and whacky world of land use law where life's ordinary, and odd, activities somehow become enmeshed with Constitutional principles. That's what makes this area of the law so much fun.

You seem to have enjoyed reading this annual awards issue and we (I and my network of other misguided souls who waste their time trading e-mails and clipping newspapers for this drivel) have fun putting it together. I write other things, some with lots of footnotes and footnotes about footnotes, but more people comment on the ZiPLeRs than anything else. To find out more, we took a survey of the readers and found that they fall into three groups. Our telephone survey, before everyone added us to their "do not call" list, asked subscribers: "Do you read the annual ZiPLeR issue, and, if so, what do you think of it?" The survey completely validated our hypothesis that all subscribers read the awards issue and love it.

Forty-two percent of the 143,567 respondents said they read it, liked it and actually understood it, which most felt was a marked departure from their usual experience with legal periodicals. Do you know that there is The Entheogen Law Reporter ISSN: 1074-8040

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(Davis, California—where else?)—"The Only Source for Legal Information Concerning Psychoactive Sacraments." With things like that out there, we're bound to look good.

Thirty-seven percent said they never read the issue. Just to prove they wouldn't be caught reading such tripe, most respondents gave detailed descriptions of awards they didn't know about. Said one person: "Oh, yeah, I never read that garbage, like that 1998 ZiPLeR—the 'Public Peep Show' Award—for State, Tp. of Pennsauken v. Schad, 307 N.J. Super. 493, 704 A.2d 1337 (App. Div. 1998), where Schad of former U.S. Supreme Court fame placed photographs of scantily-clad women in wooden boxes set inside the front windows of two places of business. I never read it. Ha. Ha. And the one, the 'Uzi Acres' Award the year before, the one where that nutcase in Nevada created a community for gun lovers and gave away free Uzis to those who paid upfront—no, I didn't read that either..."

That leaves twenty-one percent. Our survey team, fresh from finding weapons of mass destruction in Iraq and counting Phish fans at a Howard Dean rally, nailed this group. This last segment admitted reading the awards issue, but would not admit to subscribing. These people are like our friend who let slip that he read in People magazine that Nicole Kidman—appropriately in his view—would be the new international face for Chanel No. 5 (and also is phobic about butterflies and may announce she is engaged to Lenny Kravitz). And then he defensively added: "Of course I wouldn't actually buy People magazine—I saw it in the barbershop." Yes, these folks are the same as the twenty-one percent who are sheepishly evasive lovers of the ZiPLeR awards issue.

Nine years. Some wine is supposed to improve with age. Aged beef can cost you even more at a steakhouse. But the mere passage of time does not always make things better. I'll bet Don Zimmer (age 72) considered whether aging made things better while licking his wounds after his raging bull/paper tiger attack on Pedro Martinez (age 31) in Game Three of the 2003 American League Championship Series in which the Red Sox and Yankees fought for the pennant. See www.gorillamask.net/pedrozim.shtml for photographs of the encounter. I'm not as old (yet) or pudgy (yet) as Don Zimmer, or so imprudent to attack anything serious...so here we go again...for the year that two perennial losers, the lovable Cubbies and exasperating Red Sox, reinforced the sense of security we get from experiencing the inevitable...we bring you the incredible, entertaining, and truly educational Ninth Annual ZiPLeR Awards.

The "Direct Democracy" Award (or the "Ahhhhnold" Award)

This award goes out to all of the residents of Scarborough, Maine, who this summer dealt developers ALC Development Corp. a smack-down in a referendum overturning Town Council approval of ALC's project, the Dunstan Crossing subdivision (a.k.a. the Great American Neighborhood). The vote was a landslide rejection: 3,069 votes to 794. ALC Development's strategy, initially discouraging voter turnout so that the referendum wouldn't satisfy the required number of votes to take effect, apparently backfired. Billed as Maine's smart-growth answer to suburban sprawl, the Great American Neighborhood seems to have lost traction with the voters over traffic concerns. The people have spoken. Despite the setback, ALC Development owner Elliot Chamberlain quipped that development of the site is "guaranteed." Mark Peters, *Voters Reject "Great Neighborhood,"* Portland Press Herald, July 30, 2003 at http://wwwpressherald.com/news/local/030730neighborhoood.shtml.

The "It Was Taken By Nature Without Compensation" Award

This award goes to Sam B. McQueen, who finds himself knee-deep in the public trust doctrine. McQueen v. South Carolina Coastal Council, 354 S.C. 142, 580 S.E.2d 116, 56 Env't. Rep. Cas. (BNA) 2053 (2003), cert. denied, 2003 WL 21782117 (U.S. 2003). It'll be the only thing he wins this year. The South Carolina Office of Ocean and Coastal Resource Management denied McQueen permits to build bulkheads (seawalls) on two noncontiguous lots he owns lying along manmade saltwater canals. Of course, McQueen sued, seeking compensation for a regulatory taking. He made it to the U.S. Supreme Court in 2001 after losing in the South Carolina courts, but the Court remanded without a decision right after handing down Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592, 52 Env't. Rep. Cas. (BNA) 1609, 32 Envtl. L. Rep. 20516 (2001), wherein the Court drove a stake through the weakly-beating heart of the notice defense. The question was whether McQueen might still have a claim even though he applied for the bulkheading and filing with notice that the state law would prohibit it.

The Supreme Court of South Carolina, admitting that there had been a total taking of the land, still denied Mr. McQueen any compensation because "[t]he tidelands included on McQueen's lots are public trust property subject to control of the State...ownership rights do not include the right to backfill or place bulkheads on public trust land and the State need not compensate him for the denial of permits to do what he cannot otherwise do." *McQueen*, 580 S.E.2d at 120. What happened here? McQueen's land, from the time he bought it in the early 1960s to his permit request in the mid-1990s, reverted to tidelands by a process the court referred to as "continuous erosion." It washed away because he didn't have a bulkhead, which is what he asked to have approved. If I might quote that great modern philosopher, Homer Simpson: "Duh?"

In the parlance of another famous South Carolina case, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798, 34 Env't. Rep. Cas. (BNA) 1897, 22 Envtl. L. Rep. 21104 (1992), even a total taking is not compensable if there are "background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found." *Lucas*, 505 U.S. at 1031. It is not the property as it was 100 years ago, or a decade past or even a month earlier. It is as it "is presently found."

McQueen's case simply eroded along with his land. By the time he got in with his application to reclaim it, it was gone, having become subtidal (underwater) and beyond compensation. Maybe we should call this the "He Who Hesitates Is Lost" Award. Losing late claimers are a dime a dozen in this business. I have never heard a landowner or developer say: "Oh, if I had only waited to develop until after stricter laws were in place..." The lesson is: Apply early and often.

The "Little Shop of Horrors" or "Feed Me, Seymour" Award

This award goes to the Westwood Homeowners Association (WHA), which settled their lawsuit against developer Richard Weintraub challenging approvals he received for a development on Wilshire Boulevard. Martha Groves, *Some Question Ethics of Developer's Settlement*, Los Angeles Times, April 28, 2003 at B4. Under the settlement, Weintraub may have created an Audrey II-like monster by agreeing, among other things, to pay WHA $275,000 for a legal fund that is ostensibly going to be used to challenge future developments and $10,000 to the association president for his legal work. Not only is the WHA well organized, but also well capitalized.

This legal fund has people asking questions. One of the issues is that the settlement gives three current WHA board members, *as individuals*, veto power over how the legal fund is spent. They retain the power even when they leave the board.

Reviewing the settlement agreement at the request of the WHA board, attorney Leonard Siegel comments that he has "doubts as to the legality and enforceability of such an action," adding that "this may constitute an improper delegation of board authority." A Westwood Councilman, Jack Weiss, commented that the fund "only encourages developers to hold back in their dealings with the city and pay off the privileged few who can afford the time and money [to litigate.] The public is the real loser when a self-selected few cut six figure deals with no public oversight or accountability." Richard Agay, the WHA President who was involved in negotiating the settlement agreement, counters that the "cards are stacked [against homeowner groups] in City Hall, planning commissions and the planning department[.] The only way we are ever going to achieve getting the minimum protections...is through litigation." Without question, the litigation threat of WHA with its new legal fund is credible, but one may still ask whether the ends justify the means.

The "How 'Bout Them Polka Dots?" Award

This award goes to Stan Pike of Avondale Estates, Georgia, who painted his house lime green with purple polka dots. Why would he do such a thing? Reprisal against the local historic preservation commission for rejecting his proposal to change the steps on his front stoop into "rounded" steps (we all know how important the preservation of non-rounded steps on stoops is to the maintenance of neighborhood property values). Pike is protesting what he sees as an arbitrary decision by the commission, particularly when other homes in the neighborhood already exhibit the stoop design he desires for his home: "It's not like I'm trying to put a clock tower on the house, I'm asking for rounded stairs like other houses in this neighborhood." Rennie Sloan, *Protest Done Up in Polka Dots*, Los Angeles Times, May 21, 2003, at A20.

Suspiciously, according to Pike, the commission permitted the owner of a 1,200-square foot house down the street to plunk a 4,200-square foot addition on top of a house that now "looks like a helicopter landed on it." *Id.* Pike has appealed the denial of his application. Avondale Estates is listed on the National Register of Historic Places. Big deal. Pike's house is hereby listed in the 2003 ZiPLeRs. Now that's worth something. [Note to the West Group skinflints in the front office: When are we going to start giving these ZiPLeR winners brass plaques like those National Register buildings get?]

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The "Cacophony of Color" Award

This award goes to Ms. Elena Agostinis Patterson for bringing excitement back to sleepy Tannersville, New York. Patterson painted her home a combination of at least five colors that are something beyond vibrant. Janny Scott, *True Colors, Shining Through. And Taste?*, N.Y. Times, May 28, 2003 at B1. People are actually traveling to Tannersville just to see this artistry. Not to miss out on a once-in-a-century opportunity, the Mayor of Tannersville and many in the business community see the attention Patterson's home attracts as a way to end local economic doldrums. But some of the natives are discomforted by such talk. Hard to believe, some Tannersville residents don't like the new look. But change is already underway. Some half-dozen or so business owners in Tannersville have signed up with Patterson to refurbish their exteriors and another group will paint their premises themselves. Can't wait to see these new "painted ladies" of Tannersville!

The "Field of Bad Dreams" Award

Issaquah, Washington, is the easy winner of this one. Inspired local resident David Kelly had a rendezvous with destiny, and a Kevin Costner movie, when he decided to build a regulation-size baseball field, Kelly Field, on Kelly Ranch, owned by his mother. Tomas Alex Tizon, *No Play in This Field of Dispute*, Los Angeles Times, May 26, 2003 at A16. Unfortunately for the enthused Little Leaguers, Issaquah officials have ordered the field closed. Kelly Field and Kelly Ranch appear to be in a government-designated floodplain on which no construction is permitted until the proper studies are conducted to determine the impact of any potential development. If that weren't enough, a salmon-bearing stream flows through Kelly Ranch along the designated floodplain, requiring additional environmental review for any development activity. The town says that Mr. Kelly has created a public park, and parks are required to satisfy safety and traffic requirements. As of the latest report, the field remained closed, as no permit and review fees had been paid.

The "No Cows in My Backyard" Award

This award goes to the irate residents of sleepy Angelica, New York, who are peeved that their neighbors, the Voiths, are keeping four cows and a goat on their 2.5-acre property. Laurie Bennett, *Holy Cows, but Not to the Neighbors*, N.Y. Times, May 28, 2003 at C17. The Village of Angelica sued the Voiths for their allegedly illegal animal bed and breakfast. Local law requires a permit to keep farm animals on a property smaller than 10 acres. The Voiths have no permit. But the Voiths, practitioners of Krishna Consciousness, assert that the cows and goats are holy and should be treated as pets. Perhaps in an attempt to encourage their neighbors' understanding of their religion and to facilitate dialogue, the Voiths practiced Padayatra, a Krishna Consciousness religious ceremony, parading their cows, goat, and ox cart in downtown Angelica during Angelica's Heritage Day celebrations, no doubt endearing themselves in the hearts of tolerant Angelica residents. Some of the neighbors have not been nice. The Voiths videotaped a group near their backyard chanting gibberish while they barbecued burgers and displayed a sign: "Are you worshiping God or animals?" Someone threw a rock through their window, another went after them with an off-road vehicle, and two neighbors stood at their property line holding rifles. The Voiths appealed a state trial court ruling ordering the removal of the animals. Has anyone told them about the Religious Land Use and Institutionalized Persons Act?

The "Friend of the Amphibians" Award

This award goes to Michael Zeoli of Shelton, Connecticut. Zeoli was charged with a misdemeanor that could best be described as creating a mosquito-motel out of his swimming pool. Under Connecticut law, health officials can arrest people who fail to remove stagnant water from their property. The objective is to eradicate the mosquito-borne West Nile virus. Mr. Zeoli asserted that the predatory instincts of a large population of bullfrogs who also reside in his pool should take care of any health concerns. This is likely to become widely known as the bullfrog defense. Kudos Jeremiah. *Virus Fear Prompts Arrest*, The Connecticut Law Tribune, week of January 6, 2003, at 7.

The "When You Got the *Lemon* Test, Make Lemonade" or the "Vested Right to Violate the Constitution" Award

This award goes to residents of Chester County, Pennsylvania, who were able to reverse a permanent injunction ordering the removal of a mounted bronze plaque of the Ten Commandments from their historic courthouse. The plaque was mounted in the courthouse in 1920, more than eighty years ago, and there it has remained. With a little help from the Third U.S. Circuit Court of Appeals, it looks like the plaque may be there to stay. Freethought Soc. of Greater Philadelphia v. Chester County, 334 F.3d 247 (3d Cir. 2003). The court applied liberal amounts of the "endorsement" and *Lemon* tests. Under the endorsement test, the court determined that the reasonable observer who sees a plaque like this one would recognize: (1) its age and that nothing has been done to highlight or celebrate it; (2) it is itself historic within the context of a historic courthouse; and (3) its presence in the courthouse does not reflect a motivation to endorse religion, but rather to preserve the object simply because it has been in the courthouse for so long. *Id.* at 251. The court also found, applying the *Lemon* test, that the Chester County Commissioners had a legitimate secular purpose in refusing to remove the plaque. In making a determination regarding the purpose prong of the *Lemon* test, the Court

looked at the purpose of the County Commissioners when they refused to remove the plaque in 2001, rather than when the plaque was first received as a gift and mounted in 1920. The court found that the Chester County Commissioners "celebrated the significance of the Decalogue as a foundational legal document" and not as a religious icon. *Id.* Say, this is all so reasonable that it might not actually qualify for an award.

The "First Amendment Strut Your Stuff But Not in the Buff" Award

The hard working employees of "Sassy Merlot's 2" in Cocoa Beach, Florida, take this big award, barely. Fly Fish, Inc., the owner of Sassy Merlot's 2, appealed the entry of summary judgment against its challenge to the Cocoa Beach adult entertainment ordinance and won reversal on three grounds before the U.S. Court of Appeals for the Eleventh Circuit. Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301 (11th Cir. 2003). Of particular interest was the court's reversal of the District Court's interpretation of the zoning component of the ordinance. Cocoa Beach amended its adult entertainment ordinance in 1999. This new ordinance expanded the definition of adult entertainment to include places where dancers did their thing in close proximity to the patrons, or danced for tips. Under the prior ordinance, what went on at Sassy Merlot's 2 wasn't defined as an adult entertainment use, because its employees didn't expose the specified anatomical areas (phraseology right out of the court's decision). Think of Tony Soprano in the Badda Bing: "Hey, look at those specified anatomical areas..."

Prior to the 1999 ordinance, only three businesses were technically considered adult entertainment uses. After the 1999 ordinance, and the definitional inclusion of Sassy Merlot's 2, there were four. The new Cocoa Beach ordinance specified three locations where adult entertainment uses could operate, and Sassy Merlot's 2 was not one of them. The court determined, without adopting a bright-line rule, "that a zoning ordinance that does not provide sufficient sites for the relocation of all existing adult entertainment establishments is unconstitutional." *Id.* at 1311. Sassy Merlot 2 is saved! But not exactly. The court upheld the content-neutral ban on public nudity, citing City of Erie v. Pap's A.M., 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265, 28 Media L. Rep. (BNA) 1545 (2000). So, "exotic" dancing still goes on, but only with the specified anatomical areas covered. Go figure.

The "Tanks but No Tanks" Award

Thank you, Peter A. Buchsbaum of Woodbridge, New Jersey for first reporting on this nominee's (the Burlington, New Jersey City Planning Board) efforts to protect a historic district. He wrote about the case, Scully-Bozarth Post #1817 of Veterans of Foreign Wars of U.S. v. Planning Bd. of City of Burlington, 362 N.J. Super. 296, 827 A.2d 1129 (App. Div. 2003), in the Fall 2003 issue of State & Local Law News, for the ABA Section of State and Local Government Law, at p. 10.

The VFW post is a nonconforming use in a residential zone. The VFW wanted to expand the nonconformity by placing a surplus Army tank on the property as a memorial. The Planning Board found that it would have a substantial adverse visual impact and would destroy historic value, even on the site itself. The court upheld the Board: "Because of its imposing nature, the tank leaves a strong and lasting psychological impression."

Without all of the facts it is hard to second-guess the Board and the court, but shouldn't a memorial to war and those who died in them "leave a strong and lasting psychological impression"?

The "Let Them Dance" Award

This award goes to Freelance Entertainment, LLC, which successfully sought to enjoin the Lowndes County Board of Supervisors in Mississippi from enforcing their 2001 Sexually Oriented Business Ordinance. Freelance Entertainment, L.L.C. v. Sanders, 2003 WL 22080219 (N.D. Miss. 2003). The fledging entrepreneurs of Freelance Entertainment, who, at the time of their suit, had not yet opened their center of adult entertainment and certainly were not about to be caught with their constitutional pants down, fought the good fight to protect their First Amendment rights. It was a close battle, one for the ages.

First, although giving a nod to the "gifted imaginations" of the county supervisors, the court found unconstitutional a provision of the ordinance allowing the revocation of a license to operate an adult business, as it was overly broad. *Id.* at 4. The term "other sexual conduct" was also confusing, and conflicted with the prohibited "specified sexual activities." The court showed some restraint in not referring to President Clinton's own problems with similar definitions.

But then Freelance took a hit when the court acknowledged that while "the dancer's erotic message may not be as dynamic from ten feet" away from a patron as the result of the required ten-foot buffer and two-foot stage elevation, the provision properly promoted a governmental objective. *Id.* at 5. "May not be as dynamic" is an obvious understatement, as anyone knows who has studied the essentials of this form of popular entertainment and constitutionally-protected expression. District Judge Mills, I think, had a little fun in explaining the analysis of what was a reasonable width for the buffer: "At first blush, resolution of this issue appears to rest in the eye of the beholder." *Id.* at 6.

Freelance was brought to its knees when the court then upheld a provision of the ordinance prohibiting patrons from tipping any employees while they are nude or semi-nude (the employees, that is).

But just when all hope seemed lost, Freelance rose to win the last round and the fight. One of the provisions of the ordinance restricted a sexually oriented business from operating within 1500 feet of schools and churches, among other uses. According to the court, this restriction brought the ordinance "within the purview of a land-use restriction," and such restrictions under Mississippi law "can be adopted only as part of a comprehensive scheme or plan of zoning affecting the entire County." *Id.* at 11. Because the ordinance was not adopted as part of an overall scheme or plan, the court held it to be invalid. In other words, to stamp out smut, they must prepare and adopt a long–range comprehensive plan and zoning regulations. Even the court couldn't quite believe where it came out in the end: "Admittedly, it seems irrelevant in these proceedings whether the County should delineate roads, schools, etc. in order to satisfy its desire to regulate lap dancing and other forms of artistic expression." *Id.* at 21. Who would have thought nude dancing would actually promote comprehensive planning?

The "Vegas Déjà Vu—Not" Award

This award goes to Harvey Duro and the residents of Duroville, California, a "hap-hazard village of roughly 4,000 people and dozens of unregulated businesses that has sprouted from the desert scrub in just two years." Louis Sahagun, *A Dangerous Slum Sprouts in the Desert*, Los Angeles Times, May 30, 2003 at A1. Sounds like a nascent Las Vegas, no? While only the future can answer that question, right now Duroville is no destination for the squeamish. Located next to a toxic dump, littered with leaking sewer lines, garbage, and all kinds of junk, Duroville is a shantytown for poor farm workers who can't afford to live anywhere else. You can get there by going about 40 miles southeast on Route 11 from Palm Springs to, of all places, Mecca, on the Salton Sea. I doubt anyone leaves Palm Springs for Duroville, however.

The village is named after its founder, Harvey Duro, a member of the Torres-Martinez Band of Chuilla Indians. He says he might double the size of the struggling settlement.

Why isn't anything being done about this situation? Did I mention that it's located on sovereign Indian land beyond the legal reach of local and state government? While the government determines what it can do, if anything, about the situation (the toothless Bureau of Indian Affairs has ordered Duro to get off the land), Duroville residents continue to live in a nightmare of environmental pollution, including dioxins in the soil (children going barefoot). Billions of dollars for Iraq and nothing for Duroville.

My thanks to Gideon Kanner, the left coast reporter for the ZiPLeR Awards, for this story, and the ones on the Westwood settlement, the polka-dotted house and the Issaquah ball field.

The "Deer-in-Headlights" Award

The Town of Bay Harbor Islands, Florida, takes this one for the apparent paralysis it is experiencing over the interplay of its plans, regulations, and a moratorium. It is a three-sided battle among a citizens' coalition, the town, and developers. Terry Sheridan, *Tall Order*, Broward Daily Business Review, March 21, 2003. At issue is an inconsistency between the town's comprehensive plan and a zoning ordinance enacted in the mid-90s that encourages development. The ordinance allows 150-foot tall buildings, while the town plan "mandates lower densities and had not been amended to allow bigger buildings." Upon discovery of the discrepancy, the town approved a building moratorium that is still in place. The town attempted to amend its comprehensive plan, but their proposal is still pending with the State Department of Community Affairs, which criticized it for encouraging new development rather than redevelopment.

No idle organization, the Bay Harbor Islands Citizens Coalition drafted its own amendment to the comprehensive plan to limit building height to 75 feet, allowing for exceptions if approved by a majority of town voters in a referendum. The coalition's amendment was even approved in a town referendum, but the town council has yet to vote on the amendment itself. In addition, the coalition and some other residents have sued to nullify the inconsistent zoning ordinance and to void permits or approvals based on that ordinance. The lawsuit targets, in part, two developments—Le Nautique and Carroll Walk—that were approved under the ordinance before the inconsistency was recognized. While other developments have been suspended, somehow these two escaped the moratorium's effect—hmmm, how do these things happen?

Despite the moratorium, the town may have issued Le Nautique and Carroll Walk certificates of occupancy, which are "considered the final step in the development process." Town officials have asserted that no certificates have been issued. According to town attorney Stanley Price, certificates of occupancy "are not considered development permits, which would require compliance with the town's comprehensive plan." What will the town do? It better move fast. One developer, National Residential, caught up in the permit and approval moratorium, got tired of waiting, and has sued the town in attempt to force it to issue a building permit.

You know, one of the beautiful things about land use law is that it is hardly ever a zero-sum game where one party dominates to the exclusion of the others. Instead, there are typically multiple protagonists, partial winners and losers, and generally a free-for-all. It is to the law what the South Florida phenomenon of Jell-O™ wrestling is to the performing arts.

The "It's All in a Name" Award

Street naming has become a blood sport. Developers like

to name streets after their spouses. I know of one developer who had streets named for all three of his wives, the first in a neighborhood of 1960s split-level ranches, the second where he later built big box colonials, and the last—appropriately named for his trophy wife—is a neighborhood of Monster Houses. Streets are also often named for the resources destroyed by the development: Deer Run, Pheasant Trail, Ridge View Terrace, Hemlock Circle, and the like. Nowadays, it seems like every emergency services official has a veto power over street names to stop confusion for first responders. That they have trouble finding their way around town worries me a little as a candidate for one of their visits and CPR some day.

They got bigger problems in Conisbrough in northern England, the little place which is to receive this coveted award. *What's in a name? Everything when the Name is Butt*, The Boston Globe, www.boston.com/news/world/europe/articles/2003/10/2whats_in_a_name_everything_when_the_name_is_butt. Paul and Lisa Allot have sold their darling bungalow just 15 months after moving in, because they just couldn't take it anymore. They lost patience with pizza delivery people who thought their order was joke, and with young folks dropping trou' to be photographed at their street sign.

The new owners of the home on Butt Hole Road could not be contacted, as they have an unlisted number.

The "Get a Life" or "I Do Subdivisions for Food" Award

This is a first-time award which goes to Susan K. Friedlaender of Honigman, Miller, Schwartz and Cohn LLP in Bingham Farms, Michigan. I offered it up in the June 2003 issue of this Pulitzer Prize-winning publication (no, that's not THE Pulitzer Prize, but the Peter Pulitzer Prize, from a sole practitioner in Des Moines who mostly does variances for fast-food restaurants and has chosen to honor the most exciting land use periodicals he reads). I asked if anyone knew why the U.S. Supreme Court chose to follow a particular prior decision in deciding the IOLTA case (answer: the majority needed to keep Justice O'Connor on their side) and why, in the *Buckeye* case, the Court considered only the referendum process and not the outcome (answer: the referendum hadn't been held when the case was brought). I offered a quart of pure Vermont maple syrup for correct answers to both questions.

Indicative of this publication's deep market penetration and the spiritedness of its readership, we got no responses. Or maybe you all thought I wasn't serious. But I was, so we readvertised the contest, and lo and behold up steps Susan K. Friedlaender with exactly the right answer as to *Buckeye*. The heck with Publishers Clearinghouse and Ed McMahon at your front door, ZiPLeR's got great prizes.

And so it goes. Another year passes and my ZiPLeR award file is closed, though it still overflows with clippings and decisions illustrating what makes land use law remain interesting. Good luck in 2004, and keep sending me nominees (dmerriam@rc.com). They must be matters decided or reported in 2004. Next year I will give the "Best ZiPLeR Award Nominee" award and donate $100 to the charity of the nominator's choice. Enter early and often.

NOTE:

A special thanks to my student research assistant, Gregory F. Curtis, a third-year student at the University of Connecticut School of Law who will be joining Edwards & Angell, LLP in Providence after graduation, for his research and for pulling together the many disparate pieces that go into this survey. I'm a little worried for him, because he seems to have enjoyed this assignment too much.

RECENT CASES

Eleventh Circuit Distinguishes Between Adult Business Zoning Ordinance and Public Nudity Ordinance, and Finds Insufficient Evidence of Secondary Effects

The Eleventh Circuit Court of Appeals held that First Amendment analysis of adult business zoning ordinances should not be identical to First Amendment analysis of public nudity ordinances. Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla., 337 F.3d 1251 (11th Cir. 2003). The court also held that with either kind of ordinance, the secondary effects rationale may be successfully challenged by an adult business if the ordinance was enacted without any evidence to support it, or if the adult business presents evidence of its own to cast doubt on the rationale.

In the *Peek-A-Boo* case, a Florida county enacted a zoning ordinance ("Ordinance 98-46") that imposed specific requirements on the physical layout of adult dancing establishments, and allowed the county sheriff to search such premises without a warrant. Four months later, the county adopted an ordinance prohibiting public nudity, which broadly defined nudity to include various kinds of minimal clothing ("Ordinance 99-18"). Both ordinances were challenged by the only two licensed adult dancing facilities in the county. A federal district court found that the ordinances were constitutional and granted summary judgment for the county. The Eleventh Circuit reversed.

The Eleventh Circuit began its discussion by observing, "This case involves two ordinances, a zoning ordinance and a general public nudity ordinance, both of which are alleged to violate Appellants' First Amendment rights to freedom of expression." 337 F.3d at 1255. Before plunging into a detailed examination of Supreme Court precedents, the Eleventh Circuit lamented,

> [O]ur task is complicated because although the Court has formulated distinct standards for evaluating the two kinds of regulation enacted by the County in this case—zoning ordinances and public nudity ordinances—the Court also has sometimes collapsed the two categories into a single, overarching category of regulatory action targeting the negative "secondary effects" of non-obscene adult entertainment and drawn conclusions about this single category. . . . Additionally, the Court has occasionally borrowed specific doctrines developed in one category of case to apply to the other.

Id.

Nevertheless, the Eleventh Circuit's review of the cases led it to conclude that "while the Supreme Court has utilized closely related, and at times overlapping, analytical frameworks to evaluate adult entertainment ordinances, on the one hand, and public nudity ordinances, on the other, these two types of regulatory action, both of which may target the perceived 'secondary effects' of adult entertainment, must be distinguished and evaluated separately." 337 F.3d at 1264. Specifically, the Eleventh Circuit found that adult business zoning ordinances should be evaluated under "the three-part test for time, place and manner regulations" set forth in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29, 12 Media L. Rep. (BNA) 1721 (1986), while public nudity ordinances, "insofar as they are content-neutral, should be evaluated under the four-part test for expressive conduct" set forth in U. S. v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). Id.

Interestingly, the Eleventh Circuit derived particular guidance from Justice Kennedy's concurring opinion in the Supreme Court's 2002 plurality decision in City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670, 30 Media L. Rep. (BNA) 1769 (2002). The Eleventh Circuit found that "Justice Kennedy's concurrence represents the holding in *Alameda Books* . . . [b]ecause he concurred in the judgment of the Court on the narrowest grounds." Id. The Eleventh Circuit explained the importance of *Alameda Books* to *Renton* and *O'Brien* analysis as follows:

> The significance of *Alameda Books* is that it clarifies how the court is to interpret the third step of the Renton analysis as well as the second prong of the *O'Brien* test, which are, to a certain extent virtually indistinguishable. In deciding whether a given ordinance "is designed to serve" (*Renton*) or "furthers" (*O'Brien*) the government's alleged interest in combating the negative secondary effects associated with adult entertainment, the standard we apply is the one described in *Renton* . . . According to this standard, the government need not conduct local studies or produce evidence independent of that already generated by other municipalities to demonstrate the efficacy of its chosen remedy, "so long as whatever evidence [it] relies upon is reasonably believed to be relevant to the problem that [it] addresses." . . . However, the government's evidence "must fairly support [its] rationale." . . . Further, plaintiffs challenging the ordinance after passage must be given opportunity to "cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale, or by furnishing evidence that disputes the municipality's factual findings."

337 F.3d at 1264-65 (citations omitted).

The Eleventh Circuit then turned to the two ordinances at issue. Beginning with the zoning ordinance, the Eleventh Circuit skipped to the third part of the *Renton* test and asked itself whether the ordinance was designed to serve a substantial governmental interest, and allowed for reasonable alternative channels of communication. The court stated that this inquiry included the question of whether the ordinance was "narrowly tailored" to serve the government interest at issue. "Additionally," the court continued, "we must apply the evidentiary requirement described in *Renton* and clarified by the Court in *Alameda Books*." 337 F.3d at 1266. The Eleventh Circuit found that this "evidentiary requirement," relating to the secondary effects rationale, was not satisfied by the County:

> [E]ven if we were to decide that Ordinance 98-46 is a valid time, place, and manner regulation that is properly subject to intermediate scrutiny, the record reveals that the Manatee County Board of Commissioners, when enacting Ordinance 98-46, failed to rely on any evidence whatsoever that might support the conclusion that the ordinance was narrowly tailored to serve the County's interest in combating secondary effects. . . . Because the County failed to rely on *any* evidence linking the passage of Ordinance 98-46 to the prevention of secondary effects, it cannot be said that the County has satisfied even Renton's weak condition that it rely on evidence "reasonably believed to be relevant" to the problem of secondary effects or *Alameda Books*' condition that its evidence "fairly supports [its] rationale for enacting its ordinance." Instead, based on the record before us, we conclude that the County has not met its burden to show that Ordinance 98-46 was narrowly tailored to serve the County's interest in combating secondary effects.

Id.

The Eleventh Circuit emphasized that under *Renton* the zoning ordinance had to be supported by "at least *some* pre-enactment evidence." 337 F.3d at 1267. Therefore, the court found that the zoning ordinance could not be supported solely by evidence presented to the county

board four months after enactment of the zoning ordinance (i.e., when the board was considering the public nudity ordinance).

The Eleventh Circuit's final words regarding the unconstitutionality of the zoning ordinance were as follows:

> In sum, although *Renton*'s evidentiary burden for the passage of a secondary effects zoning ordinance is not a rigorous one and the Supreme Court has made plain its intention to give municipalities wide latitude to design and implement solutions to problems caused by adult entertainment without compiling an extensive evidentiary record, . . . this leeway is not without limits. To satisfy *Renton*, any evidence "reasonably believed to be relevant"—including a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion—may form an adequate predicate to the adoption of a secondary effects ordinance, but the government must rely on at least *some* pre-enactment evidence. Because Ordinance 98-46 is deficient in this regard, we hold that the District Court erred in finding that Ordinance 98-46 as it applies to these plaintiffs on this record survives immediate scrutiny.

337 F.3d at 1268-69.

The Eleventh Circuit then turned to the public nudity ordinance. The court stated that under the second part of the *O'Brien* test, the county was required to demonstrate that the ordinance furthered its interest in preventing secondary effects associated with adult entertainment. The court explained that under *Alameda Books*, the county could rely upon any evidence that was "reasonably believed to be relevant" to that interest, but the county could not rely on "shoddy data or reasoning," and its "evidence must fairly support [its] rationale." 337 F.3d at 1269. The court also stated that under *Alameda Books*, "[P]laintiffs must be given the opportunity to 'cast direct doubt on this rationale' with evidence of their own. . . . If plaintiffs succeed in doing so, 'the burden shifts back to the [County] to supplement the record with evidence renewing support for a theory that justifies its ordinance.'" Id. (citations omitted).

The Eleventh Circuit found that the county had submitted sufficient evidence to meet its "minimal initial burden." However, the court then found that the adult businesses had "successfully cast doubt on the County's rationale by placing into the record substantial and unanswered factual challenges to the County's findings in the specific areas of crime, decreased property values, aesthetic blight, and other secondary effects." 337 F.3d at 1271-72. The evidence submitted by the adult businesses included health and safety inspection reports, crime reports, property value reports, a commendation from the county sheriff to the Peek-A-Boo Lounge for "outstanding contribution to the community," and three expert studies showing that crime decreased and property values increased in the areas around the two adult businesses. The Eleventh Circuit stated:

> Significantly, the County has not attempted to counter the Adult Lounges' evidence with studies of its own. We are not dealing, therefore, with a case involving a battle of competing experts. Rather, as the record now stands, we have before us an ordinance adopted only on the basis of speculative findings and outdated, foreign studies whose relevance to local conditions appears questionable in light of current data Appellants have placed in the record suggesting that plaintiffs' businesses, which have operated continuously in Manatee County for over fifteen years, do not cause secondary effects. Under these circumstances, we cannot credit the county with complying with *Renton*'s narrow tailoring requirement, which requires that a secondary effects ordinance be drawn to affect only that category of business "shown to produce the unwanted secondary effects."

337 F.3d at 1272 (citation omitted).

The Eleventh Circuit then remanded the case to the district court to give the county an opportunity to supplement the record in support of the public nudity ordinance. It set forth the following instructions for the district court:

> At trial, in keeping with *Alameda Books*' burden-shifting analysis, the District Court must determine whether the County's additional evidence "renew[s] support for a theory that justifies its ordinance." . . . Stated otherwise, in light of our finding that the Adult Lounges have managed to cast direct doubt on the County's rationale for adopting Ordinance 99-18, the District Court must decide by a preponderance of the available evidence (including whatever additional evidence the County places in the record) whether there remains credible evidence upon which the County could reasonably rely in concluding that the ordinance would combat the secondary effects of adult entertainment establishments in Manatee County. The burden lies with the County in this regard. However, the District Court should be careful not to substitute its own judgment for that of the County. The County's legislative judgment should be upheld provided that the County can show that its judgment is still supported by credible evidence, upon which the County reasonably relies.

337 F.3d at 1273.

Finally, the Eleventh Circuit briefly instructed the district court to also consider whether the broad definition of nudity in the ordinance would cause it to fail under the fourth prong of the *O'Brien* test (i.e., the requirement that a restriction on protected expression be no greater than is

essential to further the government's interest). The court noted that under the public nudity ordinance, "erotic dancers in Manatee County [were] *not* 'free to perform wearing pasties and G-strings,'" unlike the public nudity laws upheld by the U.S. Supreme Court in the *Barnes* and *Pap's A.M.* cases. 337 F.3d at 1274. The district court was therefore directed to determine whether the public nudity ordinance "proscribes too much protected expression and fails to preserve 'ample capacity to convey the dancer's erotic message.'" Id. (citation omitted).

Second Circuit Holds that Removal of Controversial Billboards Might Violate Free Speech Clause

In Okwedy v. Molinari, 333 F.3d 339 (2d Cir. 2003), a Christian organization named Keyword Ministries entered into contracts with a billboard company (PNE) to display two outdoor signs in the borough of Staten Island in New York City. The billboards, which were located in or near neighborhoods with a significant number of gay and lesbian residents, contained four different Biblical translations "denouncing homosexuality as an abomination, loathsome, detestable, and an enormous sin." 333 F.3d at 340. After several days of public controversy, the president of the borough, Guy Molinari, faxed a letter to the billboard company expressing various concerns. The same day, the billboard company removed the signs. Keyword Ministries then brought an action in federal court against the billboard company and the borough president, alleging that the removal of the signs was a violation of its free speech rights. A district court dismissed the action for failure to state a claim. However, the Second Circuit vacated the dismissal and issued an opinion, "to make clear that a public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights even if the public-official defendant lacks direct regulatory or decisionmaking authority over the plaintiff or a third party that facilitates the plaintiff's speech." 333 F.3d at 340-41.

In its analysis, the Second Circuit stated that the free speech claim would turn on the question of whether Molinari's letter to PNE was an unconstitutional implied threat, or a constitutionally protected expression by Molinari of his own personal opinion. The court emphasized that this question was not necessarily answered by the fact that Molinari did not have direct regulatory or decisionmaking authority over PNE. "Although the existence of regulatory or other direct decisionmaking authority is certainly relevant to the question of whether a government official's comments were unconstitutionally threatening or coercive, a defendant without such . . . authority can also exert an impermissible type or degree of pressure." 337 F.3d at 343.

Examining the facts in the light most favorable to the plaintiff, the Second Circuit concluded that "a jury could find that Molinari's letter contained an implicit threat of retaliation if PNE failed to accede to Molinari's requests." 337 F.3d at 344. In particular, the court noted the following facts about the letter:

> In his letter, Molinari invoked his official authority as "Borough President of Staten Island" and pointed out that he was aware that "PNE Media owns a number of billboards on Staten Island and derives substantial economic benefits from them." He then "call[ed] on" PNE to contact Daniel L. Master, whom he identified as his "legal counsel and Chair of my Anti-Bias Task Force." Based on this letter, PNE could reasonably have believed that Molinari intended to use his official power to retaliate against it if it did not respond positively to his entreaties. Even though Molinari lacked direct regulatory control over billboards, PNE could reasonably have feared that Molinari would use whatever authority he does have, as Borough President, to interfere with the "substantial economic benefits" PNE derived from its billboards in Staten Island.

Id.

NOTED IN BRIEF

A federal district court erred when it dismissed First Amendment, equal protection, and procedural due process claims under the *Williamson County* ripeness requirements. Carpinteria Valley Farms, Ltd. v. County of Santa Barbara, 344 F.3d 822 (9th Cir. 2003). A landowner (Nesbitt) sought to build a residence and a private polo field. He alleged that the county attached discriminatory conditions to issuance of his residential building permit, and wrongfully required him to apply for a "major conditional use permit" for the polo field. The district court treated the complaint as an "as applied" takings challenge and dismissed the claims under *Williamson County*, because there had been no final agency decision on the landowner's applications. However, the Ninth Circuit reversed the dismissal. The Ninth Circuit stated, "If, as Nesbitt alleged, the County's requirements, conditions, delays and fees were imposed in retaliation for his exercise of his First Amendment rights to publicly criticize the County and to access the courts, Nesbitt suffered harm thereby and did not have to await further action by the County. [Citation omitted.] The same may be said of Nesbitt's claims that the County's actions violated his Fourteenth Amendment rights to equal protection and due process of law. Nesbitt alleged that the acts relating to the polo field application and the residential building permit denied him equal protection of the law because they imposed on him conditions not

imposed on similarly situated property owners and not justified by conditions on his property. He alleged he was denied procedural due process because the County's decisions regarding his applications had either been delegated to non-governmental entities or had been made by biased and unfair decisionmakers motivated to retaliate against him." 344 F.3d at 830. The Ninth Circuit concluded, "These claims are not 'as applied' takings claims. Rather, they are separate claims grounded in allegations of discrete constitutional violations." 344 F.3d at 832.

The Supreme Court of Kansas invalidated land use provisions in an annexation agreement between a mining company and the city of De Soto, because those provisions attempted to rezone land without following mandatory state and local procedures. Crumbaker v. Hunt Midwest Min., Inc., 275 Kan. 872, 69 P.3d 601 (2003). The property, which was used for rock quarrying, was just outside the city. The county had zoned the property for agricultural use, but had allowed quarrying on part of the land pursuant to a conditional use permit. The mining company sought to bypass the county restrictions, and to expand its operations, by having the property annexed and rezoned by the city. As an initial matter, the Kansas Supreme Court held that the existing agricultural zoning classification of the property did not get "wiped clean" by the annexation. "[T]he soundest way to protect continuity of zoning of property is to require that property retain its zoning classification upon annexation. . . . The quarry land annexed by the City retains its . . . agricultural zoning classification and any accompanying land use restrictions until the City changes the zoning." 69 P.3d at 607-08. Next, the court found that the quarry was not a legal nonconforming use, because it did not exist prior to enactment of the county zoning restrictions. Therefore, the company did not have a vested right to operate the quarry without restrictions, and could not expand its operations under the "diminishing asset rule." Finally, the court struck down provisions in the annexation agreement that attempted to rezone the property, "because the City's failure to follow the zoning procedures in state law and in city ordinances and regulations renders its action invalid." 69 P.3d at 611. The court found that the city had failed to comply with mandatory zoning procedures relating to notice, hearing, planning commission recommendation, and opportunity for adjoining landowners to file a protest petition.

A town was preempted by Rhode Island statutes from prohibiting commercial ferries from docking off Block Island. Champlin's Realty Associates, L.P. v. Tillson, 823 A.2d 1162 (R.I. 2003). The Supreme Court of Rhode Island found that the Coastal Resources Management Council had exclusive jurisdiction over "development, operation and dredging" activities at the pond, and the town had never received an express delegation of authority to prohibit the docking of commercial ferries. Furthermore, although the state transferred title for the pond to the town in 1887, there was no evidence of "the state's intent to abdicate its public trust responsibilities and police power over the pond." 832 A.2d at 1167. The court found that "the town's argument that it enjoys exclusive jurisdiction over the ponds holds no water." Id.

Under Minnesota and federal statutes, it was impermissible for a city to place billboards upon a municipally-owned golf course in a "public facilities" (PF) zoning district. In re Denial of Eller Media Company's Applications for Outdoor Advertising Device Permits in City of Mounds View, 664 N.W.2d 1 (Minn. 2003). Under the Minnesota Outdoor Advertising Control Act, outdoor advertising devices are restricted to those areas where business and commercial activities are conducted. The Minnesota Act is interpreted in conjunction with the Federal Highway Beautification Act, which defines commercial and industrial zones as 'those districts established by the zoning authorities as being most appropriate for commerce, industry or trade, regardless of how labeled." The Supreme Court of Minnesota held that the PF district, which "by definition designates municipal land for public use, can be considered neither a 'business area' under Minnesota law nor a district 'most appropriate for commerce, industry or trade' under federal law." 664 N.W.2d at 10. The court found substantial evidence to support the finding of the Minnesota Transportation Commissioner that "merely by creating a PF district separate and distinct from that of commercial zones, 'the city has recognized a difference between areas zoned for business and areas zoned for public purposes.'" Id.

Under the New Mexico Subdivision Act, a county was not obligated to construct or maintain subdivision roads when it had never formally accepted that responsibility. McGarry v. Scott, 2003-NMSC-016, 134 N.M. 32, 72 P.3d 608 (2003). The Act requires formal acceptance by the board of county commissioners before such an obligation arises. Furthermore, the Supreme Court of New Mexico rejected an argument, advanced by subdivision lot owners, that county acceptance could be implied because the roads were being used for postal and bus services. "[W]e conclude that public use of a road, school bus routes, and postal service do not establish an acceptance by [a county] of road maintenance obligations; such acts do not unequivocally show intent to assume jurisdiction, particularly in the face of filed disclosure forms which clearly show county rejection of maintenance obligations. . . . In other words, we cannot contemplate implying acceptance of maintenance by [a county] . . . when [the county has] expressly denied maintenance responsibility." 72 P.3d at 615.

It was proper for a town to prohibit the launching and landing of a helicopter on property that was par-

tially zoned for residential use, and partially zoned for industrial use. Town of Enfield v. Enfield Shade Tobacco, LLC, 265 Conn. 376, 828 A.2d 596 (2003). In the town's zoning ordinance, the launching and landing of a helicopter was not among the expressly enumerated permitted uses for a residential zone. The ordinance did allow bona fide farming operations in residential zones, and the landowners sought to take advantage of this provision by arguing that they were using the helicopter for crop dusting. The Supreme Court of Connecticut stated, "While spraying crops with pesticides from the air might come within the broad definition of agriculture found in the ordinance and . . . our General Statutes, we cannot conclude that launching and landing a helicopter, activities that implicate significant noise and safety considerations, are permitted implicitly in a residential zone." 828 A.2d at 600. The court also held that under the ordinance, the landowners' activities constituted operation of a heliport, which would have been permitted in the industrial zone if the landowners had obtained a special permit.

An otherwise valid rezoning that allowed a utility to build a power plant was not invalidated by the fact that the utility had offered to donate $8 million to the town if the rezoning was approved. Durand v. IDC Bellingham, LLC, 440 Mass. 45, 793 N.E.2d 359 (2003). The Supreme Judicial Court of Massachusetts held that a "voluntary offer of public benefits, is not, standing alone, an adequate ground on which to set aside an otherwise valid legislative act." 793 N.E.2d at 368. The court rejected the argument asserted by neighboring landowners that the rezoning was invalid because it was "contract zoning." The court stated that "labels such as 'contract zoning' may not be helpful or determinative in resolving the validity of a zoning enactment." 793 N.E.2d at 367. The court found that proper procedures had been followed, and the rezoning was not arbitrary or irrational. "In general, there is no reason to invalidate a legislative act on the basis of an 'extraneous consideration,' because we defer to legislative findings and choices without regard to motive. We . . . find no persuasive authority for the proposition that an otherwise valid zoning enactment is invalid if it is in any way prompted or encouraged by a public benefit voluntarily offered." 793 N.E.2d at 369.

Owners of a nonconforming commercial building were permitted as of right to expand their building vertically by two stories, despite an ordinance provision prohibiting the enlargement, expansion, or extension of a nonconforming structure that "has the effect of increasing the degree of nonconformity." Nettleton v. Zoning Bd. of Adjustment of City of Pittsburgh, 828 A.2d 1033 (Pa. 2003). The building had nonconforming status because it did not conform to subsequently-enacted yard and setback regulations. The Supreme Court of Pennsylvania found: "The vertical addition here proposed would have no effect on the existing building's footprint and, therefore, would not increase the encroachment of the building within the required front or side yard setback. Since the proposal would not have the effect of increasing the degree of nonconformity, the zoning authorities correctly determined that the addition was permitted by right[.]" 828 A.2d at 1039. Relying on its decision in In re Yocum, 393 Pa. 148, 141 A.2d 601 (1958), (which the court referred to as *Yocum Zoning Case*) the court emphasized that the proposed vertical addition would not violate any building height regulations under the city code.

The City of Minneapolis did not act arbitrarily or capriciously in designating a historic preservation district, even though the district included several "noncontributing" properties (i.e., properties without historical significance). Billy Graham Evangelistic Ass'n v. City of Minneapolis, 667 N.W.2d 117 (Minn. 2003). The Supreme Court of Minnesota noted that "cities are engaged in quasi-judicial action when they designate buildings for historic preservation." 667 N.W.2d at 123. After reviewing the record, the court concluded: "Under a higher standard of review we might reach a different result, given the somewhat marginal historic value of this area. Our decision is constrained by the significant deference that we accord the quasi-judicial actions of local governments and the broad and subjective criteria for historic designation set out in the ordinance. Because the historic designation meets the criteria in the ordinance, the City made findings in favor of its decision, and the City's findings are supported by the record, we conclude the designation . . . is neither unreasonable, arbitrary, nor capricious." 667 N.W.2d at 127.

A Michigan statute grants "sole and exclusive" jurisdiction to the state superintendent of public instruction regarding local school district construction and site plans. A plurality of the Supreme Court of Michigan held that the statute "immunizes school districts from local zoning ordinances affecting those functions." Charter Tp. of Northville v. Northville Public Schools, 469 Mich. 285, 666 N.W.2d 213, 178 Ed. Law Rep. 943 (2003). The plurality found the statutory language to be unambiguous. "It grants sole and exclusive jurisdiction to the state superintendent to review and approve plans and specifications of school buildings and site plans for those buildings. Thus, what the state superintendent approves is immune from the provisions of local zoning ordinances." 666 N.W.2d at 216. The plurality stated that "local school districts for their site plans must seek only the state superintendent's approval and need not have the approval of township zoning and planning authorities." 666 N.W.2d at 218-19. The plurality did not reach the issue of whether the statute might be unconstitutional as an inappropriate delegation of legislative authority to the superintendent.