ZONING AND PLANNING LAW REPORT

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THE 1996* ZiPLeRs: THE SECOND ANNUAL *ZONING AND PLANNING LAW REPORT* LAND USE DECISION AWARDS

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

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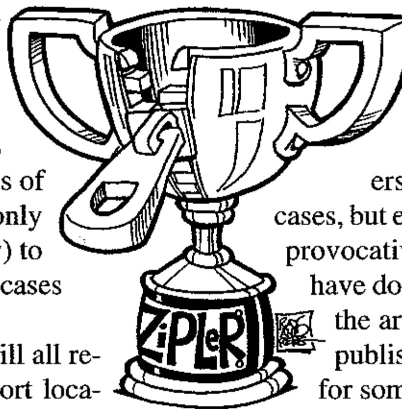
Introduction

You may recall that we started this award last year after reflecting on the many awards that are offered in other industries, such as the Golden Globes, the People's Choice Awards, the Country Music Awards, the Espys, the Clios, and many others. Again this year, we have roamed far and wide across our great country, talking with thousands of leading land use lawyers (actually we only met one guy at a rest stop in New Jersey) to find the very best (and worst) land use cases of 1996.



This year our lucky award winners will all receive expense paid round-trips to a resort location for the awards ceremony which will be broadcast nationally preempting Newt Gingrich's next telephone call. Turn on your scanners to catch the ceremony.

We admitted last year to some considerable trepidation that this serious, august publication would even entertain our musings. We are pleased to report last year's summary of awards was well-received, apparently suggesting that the ZPLR readership really cares little about the serious cases, but enjoys land use law as we do—for its more provocative and unusual controversies. We must have done something right because not long after the article was published last year our friendly publisher was able to purchase West Publishing for some enormous amount of money.

While our publisher was quite pleased with the response to last year's awards issue and is eager to con-

* and December 1995.

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This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent person should be sought.—From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers.

tinue the ZiPLeR tradition, they again asked (okay, insisted) that we make it clear that the opinions expressed herein are ours, the authors, and not those of the publisher. There—now with that out of the way, it our pleasure to share with you the winners of the Second Annual ZiPLeR Awards.

The Awards

"Think Locally, Legislate Nationally"

The only multiple ZiPLeR winner from the 1995 awards show is also the only one to win a ZiPLeR two years in a row. The Court of Appeals of Michigan shares the 1996 "Think Locally, Legislate Nationally" ZiPLeR with Congress for the court's interpretation of the Religious Freedom Restoration Act ("RFRA") in *The Jesus Center v. Farmington Hills Zoning Board of Appeals*, 215 Mich. App. 54, 544 N.W.2d 698 (1996). Along with decisions construing the Fair Housing Act and Section 404 of the Clean Water Act, the court's interpretation of the RFRA represents yet another step in the evolving federal override of local land use regulation.

The Jesus Center is a church that for several years had operated in a residential neighborhood. Recently, after determining that its religious mission included providing shelter for homeless persons, it opened a shelter at its church. According to the neighbors and accepted by the court, occupants of the shelter panhandled in the neighborhood; theft increased since the shelter opened; shelter residents loitered, trespassed, and urinated on private property; and otherwise engaged in harassing behavior. 215 Mich. App. at 57. The court still found that the town's zoning ordinance prohibiting The Jesus Center from operating a shelter violated the RFRA. *Id.* at 62.

Congress enacted the RFRA in 1993 in response to *Employment Division, Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990),[1] commonly known as the "Peyote Case," which the RFRA characterizes as having "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Pursuant to the RFRA, a strict scrutiny test is to be applied to burdens on religious exercise. The RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates that application of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1.

Thus, by its terms, the RFRA requires the court to consider four questions: (1) whether the "free exercise of religion" that is involved is affected by government action; (2) whether the action "substantially burdens" the exercise of religion; (3) whether the action is "in furtherance of a compelling governmental interest"; and (4) whether the action is "the least restrictive means" of furthering that interest. As with any strict scrutiny test, once a plaintiff prevails on the first two questions the case is, for all practical purposes, over; the government is rarely able to prove that a compelling interest exists and there are no less restrictive means available to achieve it.

Are you ready for this? The court in *The Jesus Center* ruled that it was "not at liberty" to examine the first question. The court felt it had to accept at face value the church's contention that operating a homeless shelter in its church was in furtherance of its religious mission. Thus, according to the court, only questions (2) through (4) were subject to judicial review (and remember, questions (3) and (4) are usually academic).

The court found that the Zoning Board of Appeal's actions substantially burdened The Jesus Center's exercise of religion by way of an economic burden. In *The Jesus Center*, the church was already located in the neighborhood, and the court felt that it would be a substantial burden to require the church to set up its homeless shelter in another neighborhood. In doing so, it distinguished *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1556 (M.D. Fla. 1995), in which the plaintiff had not yet located its operation. At the time The Jesus Center came to its neighborhood, however, there apparently was no indication that it intended to operate a homeless shelter in the future. This was a recent decision by the church.

The Jesus Center decision presents a classical slippery slope problem. First, the court must accept the plaintiff's contention that the prohibited activity is necessary to the free exercise of religion. From there, it is not a difficult step to proving that the activity is substantially burdened. Where the Michigan Appellate Court slipped up in *The Jesus Center*, and what earned them an unprecedented third ZiPLeR, is the court's ready acceptance of a fairly ordinary economic burden as a "substantial burden." The case Congress was reacting to when it passed the RFRA, the Peyote Case, involved an outright prohibition on an activity necessary to the free exercise of religion. The zoning regulation at issue in *The Jesus Center* merely said, "You're free to do it, just don't do it there." We do not believe this is what Congress had in mind by a "substantial burden."

[1] To be fair, if the ZiPLeRs were in existence in 1990, we would have definitely awarded one to the United States Supreme Court for its decision in *Smith* (and it wouldn't have been because of the wisdom of the decision). However, the religious activities at issue in *Smith,* the ceremonial ingestion of peyote, did not have a negative effect on others. That is clearly not the case in *The Jesus Center.*

[2] For the uninitiated, golfers take a "Mulligan" when they don't like their first drive and tee off a second time without counting it as a stroke—not permitted by the rules, but a custom of casual play.

Congratulations to the Court of Appeals of Michigan for their unparalleled ZiPLeR success.

"Should've Taken a Mulligan"

The "Should've Taken a Mulligan"[2] ZiPLeR and a free round of golf at Augusta National goes to the Appellate Court of Washington for its holding in *Hansen v. Chelan County*, 81 Wash. App. 133, 913 P.2d 409 (1996), that it was "arbitrary and capricious" for the Chelan County Board of Adjustment to conclude that development of a golf course, as opposed to a residential development, would have a greater tendency to promote conversion of adjacent properties to residential use.

The Board denied the plaintiffs' application for a conditional use permit to develop an orchard into a golf course based in part on the Board's findings that the golf course would encourage adjoining landowners to convert their orchards to residential uses and that the project was in conflict with the county's comprehensive plan as it would tend to reduce the agricultural base in the area. *Id.* at 136-37. Overturning the trial court, the appellate court concluded that there was no evidence that the effects of the proposed golf course were any greater than what would occur if the plaintiffs used the property for uses permitted outright, such as single-family or multifamily housing. *Id.* at 139. That is, the court could not fathom that people would prefer to live near a golf course rather than near a multi-family housing development.

Perhaps Washington just does not have any good golf courses. Or, then again, perhaps the court is right. So, before any more money is lost we had better warn all those foolish developers building golf course communities in Florida, Myrtle Beach, Hilton Head, and elsewhere that people just do not want to live on a golf course.

"The Fair Housing Act Indecision Decision"

As was the case last year, two Fair Housing Act cases win ZiPLeRs this year. First, the "Fair Housing Act Indecision Decision" ZiPLeR goes to the Ninth Circuit for its decision in *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996). We feel that we should point out that we are not accusing the Ninth Circuit of being indecisive; rather, we are the ones guilty of indecision. Despite several heated arguments, we were unable to agree on whether *Turning Point* is a good decision or a bad decision, although we did agree that it deserves a ZiPLeR. Thus, in addition to the ZiPLeR, the Ninth Circuit gets one thumb up (Cholewa) and one thumb down (Merriam).

The federal district court ruled that an occupancy limit for a homeless shelter was set so low that it constituted a failure to make a reasonable accommodation for the handicapped. In doing so, however, the district court imposed the condition of an annual review of the special use permit allowing the occupancy. The district court reasoned that regular review of the special permit is justified because accommodations reasonable at one time may later become unreasonable due to a change in circumstances. *Id.* at 944.

On appeal, the Ninth Circuit found that there was no persuasive justification for the condition of an annual review, stating that contingencies to which the district court had alluded appeared to be controllable under the city's power to declare and abate nuisances. Thus, the district court was ordered to eliminate the annual review requirement.

First, the thumb up: The decision makes sense because to require the shelter to undergo an annual review of its occupancy limit would seriously hamstring the shelter's efforts at long-range planning. The shelter would not know from year to year how many people it would be able to house. With such an uncertainty, the City is hardly "accommodating" the shelter.

Next, the thumb down: The operative language in the Fair Housing Act is "reasonable," as in "reasonable accommodation." The Fair Housing Act requires the City to accommodate the shelter by bending the rules it applies to others. Why is it unreasonable to think that circumstances in the City or in the neighborhood may change over several years such that it would be unwise to lock the City into an occupancy limit that may be too high given changed circumstances. This is another example of a Fair Housing Act case where the court pays lip service to the "reasonable accommodation" language, but instead requires a municipality to simply capitulate.

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"We Can Be Very Accommodating, but . . ."

The other Fair Housing Act case to earn a ZiPLeR is *Brandt v. Village of Chebanse*, 82 F.3d 172 (7th Cir. 1996) which wins the ***"We Can Be Very Accommodating, but . . ."*** ZiPLeR for the Seventh Circuit Court of Appeals.

Delores Brandt is a residential housing developer. After her husband Floyd became disabled, she built a triplex apartment in a single-family zone with the help of a variance from the Village of Chebanse. One unit of the triplex had been modified to accommodate Floyd's wheelchair. *Id.* at 173. Ms. Brandt then pursued the building of a second multi-family dwelling at the same intersection where the first dwelling was located. She proposed to demolish a century-old single-family dwelling and build a four-unit two-story building. The two units on the first floor would be built to accommodate handicapped persons. The Village Board was unwilling to grant a second variance so close to the existing triplex, but proposed an alternative site for the building. Brandt rejected their offer and instituted an action against the Village under the Fair Housing Act. *Id.*

Brandt argued that the Village discriminated on the basis of the potential tenants' handicap in violation of the Fair Housing Act, implying that the Village would have assented to the construction of a four-unit building that would not accommodate handicapped persons. The Village, however, had in fact turned down a request by Brandt a few years earlier to build a four-unit building (that was not designed to accommodate handicapped persons) at the same location, and the trial judge did not believe that the Village's reasons for denial were pretextual. *Id.*

Thus, what Brandt's argument came down to was a claim that the Fair Housing Act renders all single-family zoning unlawful whenever the developer is willing to make the first-floor units accessible to persons in wheelchairs. Note that the Fair Housing Act requires developers to make the first floor units of *all* four-unit dwellings handicapped-accessible. 42 U.S.C. §§ 3604(f)(3)(C) and (7)(B). Therefore, all Brandt was proposing to do was build a four-unit building to the minimum standards required by federal law. So, to accept Brandt's position would be to accept the proposition that single-family zoning is abolished for all developers who wish to build four (or more) unit buildings. 82 F.3d at 174-75. Needless to say, the Seventh Circuit upheld the Board's denial of her variance request.

Several court decisions stretching the reaches of the Fair Housing Act have apparently made some persons believe that the Act has no limits and that courts will construe it to accomplish ends never envisioned by the Act's drafters or supported by its plain language. With the Fair Housing Act, as with many remedial statutes, it will simply take time and many decisions to delimit its reach.

"I Can't Define Obscenity, but I Know It When I Download It"

The ZiPLeRs embrace technology and head into cyberspace with the "I Can't Define Obscenity, but I Know It When I Download It" ZiPLeR, which, along with a 57.6 Kbps fax modem, a color laser printer and a copy of Internet Explorer™, we award to the United States Court of Appeals for the Sixth Circuit for its decision in the Tennessee case, *United States v. Thomas*, 74 F.3d 701 (6th Cir.), *cert. denied* 117 S. Ct. 74 (1996). Tell the good judges of the Sixth Circuit that their ZiPLeR is in the E-mail.

While this case does not directly pertain to a land use matter, it relates to the issue of obscenity which may be of interest to those readers involved in matters relating to the regulation of adult business and newsracks. Also, we are intrigued by what cyberspace may do to land use—if "community standards" can zap across the country at the speed of light, what will be next to collapse the on-the-ground jurisdictional boundaries as we know them? For these reasons, we felt it appropriate to include this case. Besides, everyone is talking about cyberspace these days. Why should this newsletter be any different?

In *Thomas*, the Sixth Circuit affirmed the conviction of Robert and Carleen Thomas for violating federal obscenity laws in connection with their operation of an electronic bulletin board from their home in Milpitas, California, featuring sexually explicit pictures taken from adult magazines. Persons dialing into the bulletin board could view introductory screens of the system, but access to the juicier materials was limited to those who paid a $55 membership fee and submitted a signed application containing the applicant's age, address, and telephone number. In July 1993, a postal inspector from Memphis, Tennessee, with too much time on his hands, sent in his membership fee along with an executed application form. Defendant Robert Thomas phoned the inspector and gave him his personal password. After the postal inspector spent some time collecting evidence, the federal government brought an obscenity prosecution against the Thomases. They were found guilty of violating federal obscenity laws by a jury in Memphis and the Sixth Circuit affirmed. 74 F.3d 701. The Supreme Court denied the defendants' petition for certiorari.

As Robyn Blumner pointed out in her editorial in the November 10, 1996 issue of the *Saint Petersburg Times*, what is most troublesome about the *Thomas* decision is that the court applied the community standards of Memphis, Tennessee, to a computer bulletin board located in Northern California. The Thomases contended that the computer technology used required a new definition of "community," one that was based upon the "broad-ranging connection among people in cyberspace rather than the geographic locale of the federal judicial district of the criminal trial." 74 F.3d at 711. The Sixth Circuit side-

stepped the constitutional question, stating that since the defendants knew they were dealing with someone in Tennessee, the court need not consider the Thomas' "cyberspace community" argument. 74 F.3d at 712. This reasoning is flawed, however, because if cyberspace constitutes a separate community for First Amendment purposes, it matters little whether the Thomases knew they were dealing with someone from Memphis or from New York.

Although the Sixth Circuit weaseled out of exploring the issue of whether there is a new and unique cyberspace community that transcends geographical boundaries, we of course are not so hesitant. Operators of computer bulletin boards generally have no way of selecting who is able to retrieve materials posted on their bulletin boards. Thus, if there is no separate cyberspace community, in order to avoid prosecution under federal obscenity laws the operator of a computer bulletin board in New York must censor his materials so as to conform to the standards of the most restrictive community in the country, which we will call "Puritanville." Otherwise, the bulletin board operator runs the risk of having a zealous postal inspector cart his laptop and modem to Puritanville, dial in to the New York bulletin board, and bring a federal prosecution. Moreover, what if Puritanville is just not intolerant enough for the government's liking? The inspector, working in concert with the Saudi Arabian postal authorities, could then access the bulletin board from Riyadh and then move to extradite the wayward bulletin board operator for violation of Saudi Arabian obscenity laws. But seriously folks, how will cyberspace change what we think of as our "community"?

"You're Liable Because You're an Insurance Company"

The "You're Liable Because You're an Insurance Company" ZiPLeR (and this year's "Plaintiff's Pot of Gold" award) also has co-winners. The award is shared by the Court of Appeals of California for its decision in *Martin Marietta Corporation v. Insurance Company of North America ("INA")*, 40 Cal. App. 4th 1113, 47 Cal. Rptr. 2d 670 (Dec. 5, 1995) and the United States District Court for the Northern District of Mississippi for *Great Northern Nekoosa Corporation v. Aetna Casualty & Surety Company*, 921 F. Supp. 401 (N.D. Miss. 1996). Both courts will also receive copies of the home version of the ZiPLeR board game and a use variance in the city of their choice.

In *Martin Marietta*, the issue was whether INA was obligated to defend a remediation claim for contaminated property cleanup costs under an automobile and personal injury insurance policy. The trial court granted summary judgment in favor of INA after determining that under the policy there was no potential for coverage for the claims at issue. The policy defined "personal injury" as including "wrongful entry or eviction, or other invasion of the right of private occupancy." 47 Cal. Rptr. at 672. The California Court of Appeals rejected the defendant's reasonable contention that the coverage was only for "classic landlord/tenant-type disputes." *Id.* at 675. Noting that the policy in question did not contain a "pollution exclusion" clause and blindly following the general rule that ambiguous language is construed in favor of coverage, the court of appeals reversed the judgment.

Hard to believe, but the United States District Court for the Northern District of Mississippi went even further in *Great Northern Nekoosa Corporation v. Aetna Casualty & Surety Company*, 921 F. Supp. 401 (N.D. Miss. 1996), wherein the court held that similar policy language created a duty to defend and indemnify the plaintiffs for allegations of trespass, nuisance, *and emotional distress* liability for contamination of groundwater. This was despite the fact that the policy in question, unlike the one in *Martin Marietta*, did contain a pollution exclusion clause.

"Lawyer Liability Award"

The "Lawyer Liability Award" is proudly presented to the Appellate Court of Illinois for its decision in *Village of Lake Barrington v. Hogan*, 272 Ill. App. 3d 225, 208 Ill. Dec. 705, 649 N.E.2d 1366 (1995), *cert. denied*, 116 S. Ct. 1422 (1996). In *Village of Lake Barrington*, the court found that a lawyer and his municipal client may be subject to sanctions and liable under Section 1983 of the Civil Rights Act, 42 U.S.C. § 1983, for bringing a SLAPP suit against residents who challenged the validity of a public procedure to create a special purpose district. If you do not know what a SLAPP suit is, shame on you for not reading each and every action-packed issue of *Zoning and Planning Law Report*. *See* Darrell F. Cook and Dwight H. Merriam, "Recognizing a SLAPP Suit and Understanding Its Consequences, *ZPLR*, Vol. 19, No. 5 (May 1996).

James Hecht, representing Mary Hogan and two other residents opposed to the creation of a special purpose district, had a series of communications with the Village attorney, James Bateman. During these communications, Hecht purportedly threatened litigation if the Village established the proposed district. Village Attorney Bateman advised Hecht that if his clients brought an action the Village would, in turn, file an action against the opposing villagers (the "Village People"?) for $6 million in damages. Because of the threat of litigation the villagers brought no action.

Still, Hecht's posturing had its effect—it kept the Village from closing on the sale of bonds in connection with the special district. 649 N.E.2d at 1371-72. The Village and Village Attorney Bateman carried out their threats and filed suit against the villagers, alleging that they were liable for tortuous interference for having threatened litigation regarding the validity of the ordinances. *Id.* at

1372. The court dismissed the tortuous interference actions, finding that the villagers' actions in protecting their property rights and exercising their First Amendment right to petition the government for redress of grievances was conditionally privileged. As the plaintiff was unable to establish that the villagers' actions were done without justification and with a desire to harm, the Village could not defeat the privilege. *Id.* at 1374.

Now, here is the ZiPLeR zinger—we will call it "Barrister Bateman's bluster blunder"—the court upheld the imposition of sanctions against the Village and Attorney Bateman pursuant to Illinois' version of Rule 11, finding that their tort claims were filed without any reasonable basis in law, did not represent a good-faith argument for the extension or modification of existing law, and were filed for the purpose of intimidating the defendants into withdrawing their objections to the special service area. *Id.* at 1375.

Finally, the court found that Attorney Bateman did not enjoy qualified immunity from the Section 1983 suit. The villagers' counterclaim alleged that the Village, Attorney Bateman, and the Village president all violated Section 1983 of the Federal Civil Rights Act by attempting to deter the residents from seeking a judicial determination of the validity of the ordinances. *Id.* at 1375. Bateman and the Village president argued that they enjoyed qualified immunity from suit as public officials. *Id.* at 1376. For all you lawyer-phobes here is where it gets good. Qualified immunity, said the court, protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* Applying these standards, the court found that the Village president was reasonable in relying on the attorney's advice, but that the immunity did not extend to the attorney who should have known better. *Id.* Ouch!

"This Is Your Court, This Is Your Court on Drugs"

The "This Is Your Court, This Is Your Court on Drugs" ZiPLeR and a week's stay at The Lorraine Apartments (see below) goes to the Appellate Court of Florida for its decision in *City of St. Petersburg v. Bowen*, 675 So. 2d 626, (Fla. Dist. Ct. App. 1996), *petition for cert. filed*, (Nov. 27, 1996). In *Bowen*, the court ruled that a municipal order that completely closed an apartment complex for one year to curtail illegal drug use was a compensable taking.

In 1991, William Bowen acquired ownership of The Lorraine Apartments in St. Petersburg. In 1993, the City filed an administrative complaint with the City's Nuisance Abatement Board, alleging that the apartments were a public nuisance by virtue of the use of drugs by tenants and other persons at the property. *Id.* at 627. After a hearing, the Board ordered the apartments closed for a period of one year. As a result, Bowen was unable to put the property to any economic use for that year and the property's fair market value was substantially diminished. Bowen filed a complaint for inverse condemnation against the City, alleging a taking under the federal and state constitutions. *Id.* at 628.

The City pleaded an affirmative defense of the nuisance exception set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, the Supreme Court stated that a landowner is entitled to compensation unless the government shows that "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interest was not part of his title to begin with." That is, according to the Florida court, in order for the City to prevail on its affirmative defense, the City had to prove that when Mr. Bowen purchased the property, he had no reasonable expectation that the apartments could be used as rental apartments, because that was the use that the City was prohibiting. *Id.* at 630. Obviously, the City could not meet this burden. Thus, the court found a compensable taking. This logic leaves our heads spinning. The Board did not close an apartment building, it closed a crack house.

What then is a municipality to do when confronted with a situation like the one in *Bowen*? Two passages from the *Bowen* decision give us a hint. First, the court took issue with the fact that the Board "did not really proscribe any particular nuisance," such as enjoining the sale or use of drugs on the premises. The court reasoned that such an injunction enjoining injection or ingestion would leave other legal uses available to the plaintiff. Also, the court noted that the action of closing the apartments completely was one of the most invasive methods of abating the purported nuisance, and therefore the issue before the court was a rather narrow one. *Id.* at 629. Perhaps what the court is hinting at is that the Board should have addressed the problem in steps.

For one, the Board could have enjoined the illegal drug use on the premises. While this may sound a little silly because drug use is already illegal, it would give the plaintiff a chance to remedy the situation and, if not remedied, the injunction would be violated. Second, the Board could have issued a mandatory injunction and ordered the plaintiff to evict any tenants using drugs. If the plaintiff failed to carry out the Board's order in either circumstance, then the Board would shut the building down. This way, the Board would give the plaintiff a reasonable opportunity to cure the offensive situation. Furthermore, if the building is eventually shut down, it is not simply because the building is a public nuisance, it is because the injunction was violated. Thus, the use that the City is prohibiting is not the use as an apartment building, but the drug use.

"Paul Bunyon Memorial"

The "Paul Bunyon Memorial" ZiPLeR and a Douglas Fir sapling is given to the Federal Court of Appeals for the Second Circuit for its decision in *County of Westchester v. Town of Greenwich*, 76 F.3d 42 (2d Cir.

1996) wherein the wise judges ruled that the growing of trees did not constitute a public nuisance.

This decision may have finally put an end to an interstate border war between the Westchester County Airport and its wealthy Greenwich, Connecticut ("wealthy" is probably redundant), neighbors that has been raging since at least the early 1980s, if not as far back as the early 1960s. The airport had grown from a casual local field to a jetport to meet the demands of executives who dreaded the ride to LaGuardia or JFK. Meanwhile, trees on the neighboring private properties grew into the mandatory "clear zone" at the end of the runway, preventing use of the runway by larger aircraft (exactly what the residents wanted). Despite losing one battle after another, the County continued to litigate this case over the past several years. By late 1994, the final claim remaining in their depleted arsenal was that the defendants' trees constituted a public nuisance under Connecticut law.

The elements of a public nuisance claim are as follows: (1) the condition complained of has a natural tendency to create danger and injury to person or property; (2) the danger is a continuing one; (3) the use of the land is unreasonable or unlawful; (4) the existence of the nuisance proximately causes the plaintiffs' injuries; and (5) the nuisance interferes with rights enjoyed by the public. *Id.* at 45. The County successfully established all but one of these elements, namely, that the growing of trees on the defendants' property is an unreasonable use of their property. While the County vainly argued that the growing of trees next to an airport is unreasonable, the court concurred with the neighbors that it was the County that had been unreasonable by owning and operating an airport without securing the necessary property rights to keep it operational. *Id.*

The court noted that if the County were to prevail on its nuisance claim, then it would have taken the defendants' property without just compensation. Further, if a normally unobjectionable activity such as tree-growing can be turned into a nuisance by the act of building an airport without the necessary airspace easements, then there would be no reason for airports to pay for property rights necessary to operate. *Id.* at 46.

Conclusion

Thank you, thank you, thank you—all you wonderful, profit-seeking landowners, marauding developers, angry neighbors, and capricious courts for giving us such a great 1996 and a treasure trove of cases from which to pluck a few gems. Keep those cards and letters coming, readers. Perhaps next year you could walk off with a coveted ZiPLeR, perhaps giving one of those acceptance speeches that touches us all: "I want to thank all you wonderful people for believing in me, my mother for teaching me all I know about zoning, my father for helping me understand some of life's great mysteries like the meaning of estoppel clauses in leases, and. . . . "

RECENT CASES

Growth Management Ordinance Held Unconstitutional

Developers in Ohio successfully met the difficult burden of showing that a growth management ordinance, as applied to certain developers, was arbitrary and irrational and therefore in violation of the substantive component of the due process clause. A federal district court granted a preliminary injunction against enforcement of the unconstitutional ordinance against those developers. *Schenk v. City of Hudson Village*, 937 F. Supp. 679 (N.D. Ohio 1996).

The ordinance placed a limit on the amount of zoning certificates that the city could issue each year. The preliminary injunction against enforcement of the ordinance was granted in favor of developers of lots that had already received preliminary or final plat approval.

The court found that the plaintiffs had established a strong likelihood of proving at trial that there was no rational relationship between the city's asserted growth management goals and the denial of zoning certificates to owners of already platted lots. The court stated that there was little doubt that the city would incur significant infrastructure expenses in the future regardless of whether the zoning certificates in question were granted.

"There is insufficient evidence that these lots' proportional contribution to the City's overall financial problems merits the City's denial of zoning certificates . . . . Thus, while Hudson argues that infrastructure problems are the root of its growth management plan, the ordinance fails to make any rational connection between those perceived problems and its purported solution, i.e., a limit on new construction unrelated to the specific infrastructure problems. Plaintiffs have established a likelihood of proving at trial that the indiscriminate nature of the ordinance, failing to consider the specific impact of the proposed developments on the City's legitimate needs, renders it irrational to owners of already platted lots." *Id.* at 690.

The court also found that its conclusion was "buttressed by the limited case law regarding growth control ordinances. . . . [T]he cases generally support the proposition that growth control ordinances are permissible only if they are 1) limited in duration and 2) tied to a specific and prompt plan for whatever corrective action is needed to lift the control on growth." *Id.* at 691.

Massachusetts Courts Enjoin Enforcement of Adult Business Ordinances Against Video Store

The Supreme Judicial Court of Massachusetts upheld a preliminary injunction granted to an adult video store against enforcement of adult entertainment ordinances enacted by the City of Revere. *T & D Video, Inc. v. City of Revere*, 423 Mass. 577, 670 N.E.2d 162 (1996). The ordinances imposed various location restrictions, setback

and lot size requirements, and sign regulations on adult businesses.

The court found that the trial judge had not abused her discretion when she concluded that the city had failed to show that the ordinances were designed to serve a substantial government interest. The trial judge had found that:

> Revere made no attempt to justify its Adult Entertainment Ordinances by reference to the secondary effects of sexually oriented businesses while the ordinances were under consideration by the City Council. The legislative record is barren. Neither did Revere seek to explain the intent and purpose of the Ordinances themselves. Revere's only effort at defining the purpose and intent of the Ordinances came during this litigation, well after enactment and enforcement of the laws. 670 N.E.2d at 165-66.

The Supreme Judicial Court also upheld the trial judge's finding that the restrictions failed to meet the requirement that "alternative avenues of communication not be unreasonably limited." The trial judge had found that the various restrictions, "taken together, all but foreclose the possibility of opening and operating any of the enumerated adult uses in the city of Revere." 670 N.E.2d at 166.

In upholding the preliminary injunction, the court affirmed the finding that the likely infringement of the plaintiff's First Amendment rights constituted irreparable harm.

NOTED IN BRIEF

A developer acquired vested rights in its construction project after it obtained a building permit and spent over $4 million on improvements for the land and building. *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 665 N.E.2d 1061 (1996). Its permit was unlawfully revoked by the town "solely to satisfy political concerns." The revocation was arbitrary and capricious, and constituted a violation of substantive due process. The town argued that the developer's § 1983 claim was not ripe under the exhaustion of remedies doctrine, but the court of appeals explained that a "substantive due process claim based on arbitrary and capricious conduct is subject only to the final decision requirement." Finally, the court upheld an award of damages based on the Wheeler formula.

A reviewing court was incorrect to reverse a decision of the board of county commissioners denying a subdivision application. *Board of County Commissioners of Routt County* v. *O'Dell*, 920 P.2d 48 (Colo. 1996). Competent evidence supported the board's decision, and it was inappropriate for a court to reweigh the evidence. The state Supreme Court stated that in a zoning action of this type, "[w]e have long held that . . . a reviewing court must uphold the decision of the governmental body 'unless there is no competent evidence in the record to support it'. . . . 'No competent evidence' means that the governmental body's decision is 'so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority'. . . . [C]ourts should not interfere with the decision of zoning authorities absent a clear abuse of discretion." 920 P.2d at 50 (citations omitted).

A setback requirement under a shoreland zoning ordinance was applicable to a deck that was attached to a residential house. *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996). Because it was attached to the house, the deck was considered part of the principal structure, and not an accessory structure. Employing various rules of statutory construction, the court also concluded that the setback should be measured horizontally, as opposed to using an "over-the-ground" measurement method. "Requiring the shoreland setback to be measured along the horizontal plane results in structures being placed further back from the high water mark and thereby best serves the protective purpose of the shoreland setback."

An action to prevent a rezoning initiative from being placed on the ballot was rejected by the Supreme Court of Ohio. *Christy v. Summit County Board of Elections*, 77 Ohio St.3d 35, 671 N.E.2d 1 (1996). The court stated that its conclusion "comports with the principle that 'provisions for municipal initiative or referendum should be liberally construed in favor of the power reserved so as to permit rather than preclude the exercise of such power, and the object sought to be obtained should be promoted rather than prevented or obstructed.'" 671 N.E.2d at 5 (citations omitted).

QUICK CASE NOTES

- **United States**: A landowner did not have a ripe takings claim against the Tahoe Regional Planning Agency when the agency refused permission to build a home. The claim did not satisfy the "final decision" ripeness requirement because the landowner had not applied for a transfer of development rights. *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996).
- **Connecticut**: The Supreme Court of Connecticut reaffirmed its long-standing interpretation of "aggrieved person," under which any taxpayer in a municipality has automatic standing to appeal from a zoning decision involving the sale of liquor in that community. The trial court was wrong to reject binding precedent as "flawed" and "anachronistic." *Jolly, Inc. v. Zoning Board of Appeals of City of Bridgeport*, 237 Conn. 184, 676 A.2d 831 (1996).