ZONING AND PLANNING LAW REPORT

Vol. 25, No.2 February 2002

THE 2001 ZiPLeRS: THE SEVENTH ANNUAL *ZONING AND PLANNING LAW REPORT* LAND USE DECISION AWARDS

by Dwight H. Merriam, FAICP

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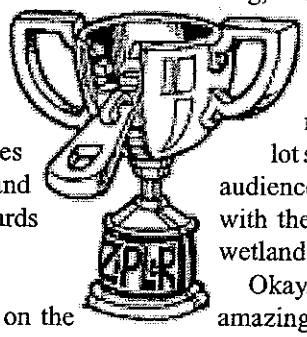
Introduction

I've got the seven-year itch. Yes, hard to believe, but this is the seventh year for the coveted ZiPLeR Awards. And, oh, how popular these awards have become. Folks who think their pitiful travails merit consideration besiege us throughout the year. It has become the veritable Ripley's Believe It or Not™ of land use law.



In case this is your first exposure to the ZiPLeRs, let me explain that what we do is gather up all the unusual, bizarre, sometimes important, and hopefully always amusing land use cases from the previous year and give awards to the best among them.

Why, the only things to eclipse our efforts on the entertainment front have been Harry Potter and the continued speculation as to why Tom Cruise and Nicole Kidman split. The ZiPLeRs are even more exciting than going shopping with Winona Ryder. I am pleased to announce that negotiations have begun for the sale of the rights in the ZiPLeR Awards to a filmmaker. Think about it—your family asks about your job. You tell them how exciting, even dangerous, it is. Now you can take them to a movie where we will show actual recreations of folks pleading economic hardship for variances, surveyors beguiling commissioners with the demonic details of two-lot subdivisions and developers leaving cheering audiences of neighborhood supporters spellbound with their compelling story of how paving over a wetland will actually improve the environment.

Okay, I made some of this up. But what is really amazing is that I have several file folders stuffed with real cases from this last year that are as good if not

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better than the ones from all the years before. Just when I think I've seen it all at the advanced age of 55, yet another case of uninhibited tomfoolery pops up. And when I think my little land-use-law-centric world has been left hopelessly humorless, I find that planners are out fighting kitty litter mines. The inertia of lunacy is too much to be stopped.

The President told us the best thing we could do to help our beloved country is get back to normal. I agree, and normal for us in the land use business is more than a little weird . . . so, waving our American flags, linked arm in arm, united in our efforts to go on as we must, we proudly announce The 2001 ZiPLeRs.

The "You Made Your Bed, Now Sleep In It" or the "Haste Makes Waste" Award

Remember, always listen to your mother. She said: "Haste makes waste" and offered that other one about sleeping in the bed you made. My mother once said to me: "Cast your bread upon the waters." My reply? "Who wants soggy bread?" This was the first indication I was destined to be a lawyer.

The folks at Pinecrest Lakes, Inc., the hapless recipient of this ZiPLeR award, should have listened up when mom lectured. This is by far the most disastrous and unbelievable land use case of 2001. Put some duct tape around the top of your socks, because this one will otherwise knock them off.

The short version, for those with attention span problems, is that a Florida appellate court held that a developer's partially completed $3.3 million final phase of a luxury residential complex of 136 units in 19 two-story buildings wasn't consistent with the county's comprehensive plan, so—check the duct tape—the units completed thus far have to be demolished. Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. Dist. Ct. App. 4th Dist. 2001).

Come back after you all check your errors and omissions coverage and I will tell you how this horrible thing happened.

The developer started the project 20 years ago on 500 acres in Jensen Beach, a suburban community of 11,000 in Martin County on Florida's east coast. The developer was Pinecrest Lakes, Inc. They later sold Phase Ten, where the demolition is to occur, to a limited partnership called The Villas at Pinecrest Lakes. Like the court, we'll just call them the developer.

Phase One, where the plaintiff Karen Shidel and her husband bought a single-family lot 20 years ago and built a detached home in 1986, was designated on the county plan and developed as a single-family home area at a density of not greater than two units per acre. Phases One through Nine were all developed as single-family homes on individual lots at low densities. The 21-acre Phase Ten abuts Karen Shidel's lot. My palms (the ones on my hands, not the trees in Karen Shidel's yard) are sweating as the excitement builds. You can see it coming, you can feel it, like the smell of the air right before a lightning storm. Pretty exciting, huh?

Phase Ten was designated on the county plan as medium density, with up to eight units per acre. So what would most smart developers do? Apply for approval to develop at that density. Karen Shidel and her neighbors in 1988 opposed the first application at just under eight units to the acre. The county approved it but it wasn't built.

Five years later the developer applied for just 29 single-family detached units on the 20 acres, and the county approved, but two years later the developer returned with a multi-family plan.

Karen Shidel and her neighbors fought at the county level, but the county approved 136 units in 19 two-story buildings at a density of 6.5 units per acre. She appealed and, based only on the record of the county hearing and not a de novo review, the trial court held that the approval was consistent with the plan.

"De novo" sounds like a new model Chevy, but it just means you get to present the whole thing over again, everything done during the local hearing and whatever else Ally McBeal would throw in.

Predictably, Karen Shidel appealed the trial court decision. The developer pulled building permits for five of the buildings and began construction. Karen Shidel wrote the developer and told them she would seek removal of the buildings if she won.

Sounds like a big, dumb move by the developer, doesn't it? But it may not always be. I had one fast food restaurant client build while the approval was on appeal. Why? That terrific location would net enough in the first year to pay the cost of construction. Recently, a client built a gas station during an appeal. I had another deal, a $54 million project, that went forward during an appeal that theoretically could have gone the wrong way, but the reward was so high and the risk so low it was simply worth it.

I'm bothered a little by a footnote in the decision: "We express no view on the propriety of Martin County issuing building permits while the case was pending in court." (Note 6.) The plain fact, known by everyone in this business, is that opposition sometimes wins by mere delay. If developers want to take the risk, they should not be held back by an appeal unless the construction would cause irreparable damage. Anyone building during an appeal should be able to demonstrate that they can successfully remove the improvements. But beyond that, let them build.

In 1997 the Fourth District court, in its first decision in the case, held that a de novo hearing was required, and reversed the trial court's finding of consistency. Poulos v. Martin County, 700 So. 2d 163 (Fla. Dist. Ct. App. 4th Dist. 1997). The case went back to the trial court, but the developer kept on building and received certificates of occupancy on two buildings and rented units to new residents who moved in.

The trial court found Phase Ten not consistent with the plan. How could that be? The plan has a "tiering" policy (not the tearing up of the kind the developer had at the news of the decision). Where there are low-density uses already established, new abutting development must be comparable and compatible. The eight-unit, two-story buildings of Phase Ten adjacent to the single-family detached units of Phase One were not comparable and consistent.

The trial court held that the developer had acted in bad faith in going ahead after losing in the Fourth District, and ordered the buildings removed. At the time of the order, five buildings of eight units each were built, most completed and two had certificates of occupancy with 15 of the 16 units occupied. Further construction was stayed, the residents were allowed to remain until the expiration of their leases, leases executed for unoccupied units would be honored, but no new leases could be made.

The Fourth District, as I revealed at the outset, upheld the trial court and the imposition of the injunction to demolish the 40 units. "Citizen Hands Developer a Defeat" St. Petersburg Times, Oct. 12, 2001 http://www.sptimes.com/News/10220/State/Citizen_hands_develop.shtml.

The last few pages of the decision are a good analysis of why the injunction is available in zoning enforcement and why violators shouldn't be able to buy their way out of violations. The case now goes to the state supreme court. Anyone in the market for used building products in Florida?

This may seem to be way out of the ordinary, but the Florida court cites a similar 1943 case, Welton v. 40 East Oak St. Bldg. Corp., 70 F.2d 377 (C.C.A. 7th Cir. 1934), and there have been other cases elsewhere. The most dramatic is Parkview Associates v. City of New York, 71 N.Y.2d 274, 525 N.Y.S.2d 176, 519 N.E.2d 1372 (1988), in which a New York City developer ultimately had to lop off 12 stories of a 31-story building because of a failure to follow the zoning requirements.

And according to an authoritative source, Peter Buchsbaum, the land use guru from the home state of The Sopranos, a developer had to take down a 50-unit condominium at Seaside Park in New Jersey. These cases are land use law's equivalent of the Darwin Awards. See http://www.darwinawards.com.

The "Planners-Don't-Pussyfoot-Around" Award

Consider cat litter, that surprisingly light and seemingly inert material useful for all kinds of things. It's great for picking up oil drippings on garage floors. In the North, some folks even carry it in their cars to use instead of sand. It never occurred to me (did it to you?) that this stuff has to come from somewhere.

Well, apparently it comes from cat litter mines in Nevada, a state better known for gambling and other adult diversions. I can see and hear the old prospector now with a gleam in his eye and a wizened face taut with excitement: "There's kitty litter in them hills, boys!" This year's first ever Planners-Don't-Pussyfoot-Around Award recognizes the Washoe County, Nevada planners for putting their paws down to stop Oil-Dri Corp. of Chicago from mining the clay used in kitty litter and processing it. http://24hour.newsobserver.com/24hour/nation/story/198754p-1928053c.html.

The project was proposed for 300 acres of Bureau of Land Management land and would create 100 jobs and $12 million a year for the local economy.

After a seven-hour hearing with concerns expressed about traffic, pollution, and water shortages, the planning commission denied the special use permit. Oil-Dri will appeal to the county commissioners and claims a right to mine the property under their mining claim.

What's so special about this fabulous buried treasure of future kitty litter is that the deposits in rain-starved Hungry Valley, north of Reno (just seven inches of rain a year) have an extraordinary absorption rate.

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The "Soapbox and Suntan Oil" Award

This award goes to the Connecticut Supreme Court for its decision in Leydon v. Town of Greenwich, 257 Conn. 318, 777 A.2d 552 (2001), in which it held that a beach was a public forum and had to be opened to non-residents. "Is That a Welcome Mat?", The New York Times, Sec. 14CN, Page 1, Col. 1 (November 4, 2001) www.nytimes.com.

I was retained by one of the parties after the decision, so I tread lightly, but I feel compelled to report the case because of its remarkable departure from the normal course. Necessarily, I will leave the polemical analysis to you readers, but let me offer this background.

A disgruntled law student (that may be redundant) from nearby Stamford brought the action, claiming he should be allowed to go to the beach with the Greenwich residents in part because the public trust required it and in part because he wanted to exercise his free speech rights. Specifically, he said he wanted to speak about speaking at the beach. Can you spell "tautological"?

He did a pretty good job for a law student and won in the appellate court on the public trust theory.

The Connecticut Supreme Court, however, held solely on traditional public forum grounds that the beach should be open to all because a few candidates had campaigned there over the years and it was essentially a public park.

I've been to that beach and the free speech I hear is only things like: "Got any Doritos™ to go with the drinks?" Or, "Give me the Frisbee™, sweetheart." I don't think the founding fathers had this in mind.

Even legal newspapers failed to understand some of the complex underlying issues, especially relating to an access easement.

The implications of the decision are enormous for all Connecticut towns, and when state courts elsewhere pick up on it, there will be mischief. Brenden Leydon, now a lawyer, when asked about the setting of entrance fees to the park, said: "The odds of Greenwich being reasonable are so low that I'd be better off playing Powerball [a state lottery game]." It doesn't look like the dispute is at an end.

The "No Justice, No Peas" Award

Mayor Giuliani will be remembered for his great leadership at the end of his term as mayor of New York City, not for the "gardeners' revolt of 1999" arising out of the city's plans to develop city-owned lots with housing. The award goes to New York Attorney General Eliot Spitzer, who joined the fight on the side of the gardeners. I thank my friend, Gideon Kanner, for calling the dispute to my attention. The name of the award, which doesn't make a whole lot of sense to me, is from a chant by the gardeners who went so far as to chain themselves to fences and to buried pipes to stop the gardens from being cleared. "31 Arrested as City Garden Turf War Grows Ugly," The New York Post, Page 018 (February 16, 2000); "Judge Upholds Court Order Protecting Gardens on City Properties," New York Times, Final, Section B, Page 3, Column 2 (July 26, 2001); http://query.nytimes.com/search/abstract?res=FA0D10F93C590C758EDDAE0894D9404482 "Judge Lets Gardens Grow Denies City Bid to Lift Ban on Development," Daily News, Suburban, Page 1 (July 26, 2001); "War of the Roses," Village Voice, Page 28 (July 31, 2001); and "New York City's Garden Weasels," Daily News, Editorial, Page 44 (August 3, 2001).

Here's what happened. The community garden movement started in the 1970s when the city "loaned" city-owned lots, where burned-out or abandoned buildings had been, to neighborhood groups for gardens.

In 1999, Mayor Giuliani reminded the neighbors that these lots were merely on loan. At the same time he told the Department of Housing Preservation and Development to look at some of the lots for affordable housing s ttorney General Spitzer got an injunction requiring the city to do environmental impact studies on the lots before converting them to housing.

Giuliani and the city, unhappy with Spitzer's attempt to broker a deal and feeling that the AG had no business deciding which gardens should be developed, went back to court to have the injunction lifted. Brooklyn Supreme Court Judge Richard Huttner told the city lawyers: "My heart doesn't bleed for the city," and denied the motion to lift the injunction. He called for negotiations.

Time Magazine's "Person of the Year" is probably relieved to be leaving this mess behind him.

The "Green Thumb" Award

The other prisoners called our award winner "Shrub." John Thoburn, the owner of a Reston, Virginia golf driving range, went to jail on February 16, 2001 and spent 95 days there because he hadn't planted all 700 trees required by his zoning approval and hadn't completed other requirements. He had been held in contempt of court and sent off to the slammer. Fox News covered the story extensively. You can search its database at http://fn.emediamillworks.com/fox/search/SearchAll.php. Put in "John Thoburn" and it will list the stories.

The most animated account is at John Thoburn's own website www.freejohnthoburn.com, which even has photographs of the scene of the crime.

In the end, Thoburn was sprung from the pokey when it was decided that planting 200 trees would fix the problem. Within 24 hours of Thoburn's being freed, eight landscapers and two plainclothes police officers (I guess to keep the trees from escaping) showed up and started

planting. The court had given the county permission to plant the trees and send Thoburn the bill. The dispute continued over whether he was going to pay the bill. "Landscapers Storm Driving Range Early," The Washington Post, Page B01 (May 26, 2001). For more than you could possibly want to know on this story, go to www.google.com and enter "John Thoburn." Looks like half the world has been following this.

In Memoriam

This is not an award, but a brief respite from them and a fond remembrance of "The Fox," who died of complications from his diabetes on October 3, 2001, at age 70 in Aurora, Colorado.

The Fox was James F. Phillips, an environmental activist and saboteur who, as a mild-mannered middle school science teacher, developed techniques later mimicked by Greenpeace and others.

He plugged sewer outfalls, left skunks on the doorsteps of executives of polluting companies, and capped smokestacks. He left notes behind signed "The Fox" with a smiley face in the "o."

At one point he attacked U.S. Steel by posting a sign in a coffee shop window: "Making steel is my business, murdering your environment is my sideline." http://www.earthsharega.org/pr5.nsf/newsdocs/32A175AE3E54B04A85256AEF004C7EC8?OpenDocument.

The "Steeple Chase" Award Update

We follow up on our stories. Last year we brought to your attention the fight of a band of neighbors in Belmont, Massachusetts, to keep the Mormon church from building a steeple that would extend 139 feet into the air, shorter than planned but twice as high as the town's bylaws allow. This year we have a resolution. A First Circuit Court of Appeals decision, and a decision of the Massachusetts Supreme Judicial Court, ended the controversy in the church's favor. Boyajian v. Gatzunis, 212 F.3d 1 (1st Cir. 2000), cert. denied, 531 U.S. 1070, 121 S. Ct. 759, 148 L. Ed. 2d 661 (2001). The First Circuit held the Massachusetts law exempting religious institutions was not an impermissible endorsement of religion, but rather protected religious institutions from discrimination by local governments.

The Massachusetts Supreme Judicial Court decision held the amendment applied in this case because the structure as a whole had a religious purpose, overturning the trial court that had analyzed the religious purpose of the steeple alone. Martin v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints, 434 Mass. 141, 747 N.E.2d 131 (2001). The $30 million temple already sits on a hill, and when completed the steeple should be visible not only to those meddling neighbors, but from communities all around.

The "Constitution Isn't Child's Play" Award

This first-ever award goes to the Village of Tinley Park, Illinois, for its attempts to stop children from playing. A local ordinance made it unlawful "to play any games upon any street, alley, or sidewalk, or other public places except when a block party permit has been issued by the president and the board of trustees." Tinley Park Munic.Ord. Code § 99.103. "Public places" included streets, cemeteries, parks, schoolyards, and bodies of water. Maybe this award should have been named the "What Were You Thinking?" Award.

The plaintiffs, including some parents who were ticketed for "parental irresponsibility" for letting their kids play in a cul-de-sac ("Hey, you, mom and dad, hands up and stand back from that soccer ball."), sought a permanent injunction preventing the enforcement of the law. The district court judge found the ordinance to be "hopelessly vague and substantially overbroad" because the law didn't even define a "game," and was a blanket prohibition on free assembly and probably free speech, and not a mere time, place, and manner restriction. The court said it could not imagine a conceivable basis that might support the ordinance. He granted the injunction over the defendant's argument that the issue was now moot because the ordinance had been repealed. Rather, because the defendants refused to recognize their culpability or the unconstitutionality of the ordinance and made no assurance that the ordinance would not be reinstated, the judge ruled the issue was not moot. Considering the potential harm involved, confining children to the homes and yards for the entire summer, the judge felt the injunction appropriate. Weigand v. Village of Tinley Park, 129 F. Supp. 2d 1170 (N.D. Ill. 2001).

The "Crossdresser" Award

Ricky Canty, from Cardiff County, Wales, has been pursuing his land use case for over 20 years, apparently with little success. For the last 17 months, to call attention to his need for justice, the former car salesman and our newest award winner has shown up every day at the local courthouse to demonstrate in some way. He is there like clockwork 9:15 to 3:00, taking an hour-and-a-half lunch break.

He normally just hangs up a bed sheet across from the courthouse listing his accusations. On his more creative days, he has dressed up in a kangaroo suit representing his views of the court. He has put on a judge's robe and a shoulder length wig and called himself "Judge Justice Denied." In July, dressed that way, he shimmied up a lamppost and climbed onto a ledge, but was talked down by the police and taken into custody. In total he has spent over a month in jail over his protests, but he has no plans of stopping any time soon. Mr. Canty said it best: "I feel like a lion. I'll go on forever. I've spent all my family's

money, but I won't give up on this farce." "Man Who Gave Himself a Life Sentence at the Court" (December 3, 2001) http://icwales.icnetwork.co.uk/0100news/0200wales/page.cfm?objectid=11458316&method=full

The "It Depends Upon Your Point of View" Award

We can't let the year go by without at least quick reference to some of the silly sex cases around the country.

This award goes to Tampa which lost in its attempt to shut down the "Voyeur Dorm" operated out of a house in an upscale neighborhood. Voyeur Dorm, L.C. v. City of Tampa, Fla., 265 F.3d 1232 (11th Cir. 2001). Subscribers to "www.voyeurdorm.com" pay $34.95 to watch young women cavorting or whatever around the house, live 24 hours a day as seen by 30 cameras in the residence. For $16.00 more a month, subscribers can chat with the 25-30 women who have been there on and off. Five live there at any time. Total revenues—are you ready for this, it even surprised me—have been about $3.2 million.

The court's decision quotes the web page: "The girls of Voyeur Dorm are fresh, naturally erotic and as young as 18. Catch them in the most intimate acts of youthful indiscretion."

Now, what's the zoning violation? Is this a business conducted in a residential zone? The court concluded that no adult entertainment is provided in the house, but only through cyberspace, so there is no zoning violation and no need to reach the constitutional issues. [Editor's note: See also the discussion of this case on the last page of this newsletter.]

The "Ah, That's the Rub" Award

Our international awards committee went north of the border to give this award to the City of Vaughan in Ontario, Canada for enacting and successfully defending an ordinance that limits a body rub business to one per premises and the area to 150 square meters and not more than 15 percent of the total floor area. Body Rubs of Ontario Ltd. v. Vaughan (City), No. C34635 (Ont. C.A. Jan. 4, 2001). I'll bet the City of Vaughan has no shortage of applicants for the job of Zoning Enforcement Officer.

The "Keep Your Distance" Award

The City of Rahway, New Jersey wins this one for successfully shutting down Do-Wop, an adult entertainment business. Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 773 A.2d 706 (2001). What's interesting is the interplay of state and local law with the vesting of a nonconforming use.

Do-Wop, trading as Razzle Dazzle Fantasy Runway, opened in 1991. In 1993, Rahway enacted an ordinance with a separation requirement—sex businesses had to be at least 1,000 feet away from other adult uses, churches, and residential areas, among others. The 1993 law gave businesses two years to conform or close. Do-Wop was less than 1,000 feet from a residential area, but for two years renewed its license under this amortization provision.

Now in steps the state in 1995 and, unrelated to what was going on in Rahway, enacts a state separation law with a 1,000-foot separation requirement from several uses, including residential, "except as provided in a municipal zoning ordinance."

One other fact—New Jersey has a land use law protecting nonconformities forever, a law obviously inconsistent with the two-year amortization provision in Rahway.

Have you figured out the answer yet? Is Rahway's amortization provision legal? If not, what does Do-Wop do or not do? And what's the to-do today over Do-Wops doings?

The state law on separation trumps all. It is not a land use statute, so the state protection in the land use statutes for nonconforming uses doesn't apply. Rahway's preexisting two-year amortization for adult uses only protects the uses from local regulation for two years and cannot protect it from the reach of the state law. Do-Wop does not get to renew its license in 1996 and thereafter.

The "It's a Cover Up" Award

This award goes to Boise, Idaho, which lost out in federal district when it went way beyond City of Erie v. Pap's A.M., 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (which, as you may recall, upheld the requirement of pasties and a G-string). Nite Moves Entertainment, Inc. v. City of Boise, 153 F. Supp. 2d 1198 (D. Idaho 2001).

Now it is cold in Boise, no question about it, so the city passed an ordinance requiring exotic dancers not to show any "cleft of the buttocks" or any part of their breasts "below the top of the areola," leaving just about everything to the imagination.

You've gone too far, said the court. This "conservative dress code precludes any expressive nude conduct."

One Final Warning...

Please remember that these musings are just that and nothing more, certainly nothing to do with my law firm's clients past, present or future. I do have opinions on the outcome of some of these matters, but I don't express them because I truly believe it is more respectful to our readers to let them consider the possibilities without the overburden of one person's views.

Conclusions

This has been an extraordinarily difficult and permanently unsettling year for all of us. Still, we can find some solace and even a good laugh in the land use stories that inevitably pop up like playful prairie dogs to amuse us with their antics. Keep the faith, and send me your cards and letters (dmerriam@rc.com) with nominees for next year's 2002 ZiPLeR Awards.

New Jersey Court Strikes Down Arbitrary Lot Size Requirement, But Finds No Temporary Taking

In Pheasant Bridge Corporation v. Township of Warren, 169 N.J. 282, 777 A.2d 334 (2001), the Supreme Court of New Jersey held that a zoning ordinance that increased the minimum lot size requirement for single-family homes within an environmental protection zone was arbitrary and capricious as applied to the plaintiff's property. The ordinance increased the minimum lot requirement from one-and-one-half acres to six acres.

There was no dispute that the ordinance was facially valid because of various environmental concerns in the area, including subsurface rock formations and a seasonal high water table. However, the trial court determined that the ordinance was arbitrary as applied to the plaintiff's property because "few of the environmental concerns which justified the passage of the ordinance apply to this apparently unique piece of property." 777 A.2d at 340. In particular, the trial court found that the plaintiff's property had "unique access to the sanitary sewer's system, circumstances which could resolve any concerns about all environmental issues." Id.

The Supreme Court of New Jersey found "ample support" in the record for the trial court's conclusion that the six-acre requirement, as applied to the plaintiff, did not bear a real and substantial relationship to the ostensible purposes of the zoning provision. It found that the trial court had made detailed findings "based on substantial, credible evidence concerning the nature and extent of environmental constraints affecting plaintiff's property." 777 A.2d at 341. It stated, "The dearth of environmental limitations on plaintiff's property leads us to conclude, as did the trial court, that the ordinance is arbitrary, capricious and unreasonable as applied to plaintiff." Id.

The state Supreme Court therefore held that the zoning ordinance "fail[ed] to accomplish its purposes when applied to plaintiff's property." Id. It made particular note that a lot contiguous to the plaintiff's property, but outside the border of the environmental protection zone, had "essentially identical physical characteristics, yet . . . is zoned to allow development at the one-and-one-half acre density that previously applied to plaintiff's property. The Township offers no justification for distinguishing between the two parcels." Id.

Although the state Supreme Court invalidated the ordinance as applied to the plaintiff, the court rejected the plaintiff's claim that it had suffered a temporary taking of its property. The court held that the plaintiff was therefore not entitled to compensation for the period between adoption of the ordinance and invalidation of the ordinance as applied. It stated, "[W]e are confronted with plaintiff's assertion that it experienced a temporary taking merely by having been subjected to an invalid ordinance during the time it took to challenge successfully the ordinance's application. Case law, including the decision in *First English,* does not support that conclusion[.]" 777 A.2d at 343.

The court found that the process of challenging the validity of the ordinance was equivalent to the kind of "normal delay" intended by the United States Supreme Court to fall outside of the scope of the *First English* decision. The New Jersey court stated: "[W]e see no distinction justifying the need to provide for interim monetary damages between regulatory delay in securing a change in, or variance from, a zoning ordinance and delay occasioned by resort to judicial processes to challenge application of a zoning ordinance to one's property. [Citations omitted.] If such a distinction were accepted, it could have a chilling effect on land-use planning, for the adoption of an invalid ordinance could prove financially devastating to a municipality that was unsuccessful in its defense to a drawn-out constitutional challenge." 777 A.2d at 344.

Additionally, the court found that no temporary taking had occurred, because there was undisputed evidence that the plaintiff's property had retained some economically beneficial use for agricultural purposes while the invalid ordinance was still in place. Citing numerous cases from various jurisdictions, the court noted, "The overwhelming weight of authority from the federal courts and other state courts, and of prior holdings of this Court, therefore, requires that a plaintiff demonstrate deprivation of all or substantially all economically beneficial uses of property to sustain a claim for a temporary taking. Here, the record indicates that plaintiff has not—and could not—make such a demonstration." 777 A.2d at 346.

Planning Board Can Waive Subdivision Requirements, But Not Zoning Ordinance Requirements

In York v. Ogunquit, 769 A.2d 172, 2001 ME 53 (Me. 2001), abutting landowners challenged a subdivision plan that had been approved by a town planning board. In particular, the abutting landowners argued that the planning board had improperly waived five subdivision requirements: a 32-foot road width requirement; a six percent road grade requirement; a cul-de-sac dead end street design requirement, a two street connections requirement, and a five-foot sidewalk requirement.

The Supreme Judicial Court of Maine held that four of the waivers (all but the road width requirement) were permissible because they were waivers of the

town subdivision standards, but not waivers of the town zoning ordinance. The court stated, "The Planning Board does have the authority to waive strict application of Subdivision Standards in certain circumstances, on a Board finding of extraordinary and unnecessary hardship *or* because of the special circumstances of a plan." 769 A.2d at 176 (emphasis in original). The court found that the record was "replete with evidence that there are special circumstances . . . necessitating these four waivers." 769 A.2d at 177. For example, the court found evidence that the waivers would operate to better serve aesthetic and environmental interests (including protection of clam beds and vegetation), and to reduce potential flooding problems. The court added that it was of no importance that "some of the rationale for the waivers could apply to any plan." Id.

In contrast, the court found that the fifth requirement (the requirement that connecting streets be at least 32 feet in width) was mandated not just by the town subdivision standards, but also by the town zoning ordinance. Referring to its earlier decision in Perkins v. Town of Ogunquit, 709 A.2d 106, 1998 ME 42 (Me. 1998), the court stated, "[a]lthough the Board may waive Subdivision Standards requirements, it is not granted the authority to waive Zoning Ordinance provisions. This is the basis of our holding in *Perkins,* that Zoning Ordinance provisions are specifically subject to the variance analysis mandated by state statute[.] Thus, deviation from Zoning Ordinance provisions may be obtained only when the requisite finding is made by the Zoning Board of Appeals. There is no dispute that the Board of Appeals made no such finding in this case. The Planning Board's grant of a waiver of the street width requirement, therefore, was beyond its authority." 769 A.2d at 177-178.

The court then held that the one erroneous waiver by the Planning Board did not require disapproval of the entire subdivision plan, "but only that limited portion of the plan that violates the street width Zoning Ordinance requirement." 769 A.2d at 178. The court remanded the case either for compliance with the street width requirement, "or for the Board of Appeals to consider a variance." Id.

Eleventh Circuit Holds that Residence Providing 24-Hour Internet Broadcast is Not an Adult Business

In Voyeur Dorm, L.C. v. City of Tampa, 265 F.3d 1232 (11th Cir. 2001), the Eleventh Circuit Court of Appeals held that the definition of an adult use under Tampa's city code did not apply to a company ("Voyeur Dorm") that operated a web site that provided a 24-hour-a-day Internet transmission showing the lives of women in a Tampa residence. The residence was fitted with 30 Internet cameras in various rooms, including bedrooms, bathrooms, and a shower. Voyeur Dorm paid the women to reside at the location, and subscribers to the web site paid a monthly fee to Voyeur Dorm to watch the residents. Subscribers paid an additional fee to "chat" with the women. Generally, five women resided simultaneously at the location, although over time 25 to 30 different women were employed by Voyeur Dorm.

The Tampa City Code defined an adult entertainment establishment as "any premises . . . on which is offered to members of the public or any person" specified types of entertainment. The city took the position that the activities at Voyeur Dorm constituted a public offering of adult entertainment under the code's definition, and that therefore Voyeur Dorm could not operate in a residential zone. However, the Eleventh Circuit disagreed because the public was not physically present at the location:

> The residence . . . provides no "offering of adult entertainment to members of the public." The offering occurs when the videotaped images are dispersed over the Internet and into the public eye for consumption. The City Code cannot be applied to a location that does not, itself, offer adult entertainment to the public. As a practical matter, zoning restrictions are indelibly anchored in particular geographic locations[.] It does not follow, then, that a zoning ordinance designed to restrict facilities that offer adult entertainment can be applied to a particular location that does not, at that location, offer adult entertainment. Moreover, the case law relied upon by Tampa . . . concern adult entertainment in which customers physically attend the premises wherein the entertainment is performed. Here, the audience or consumers of the adult entertainment do not go to [the residence] or congregate anywhere else in Tampa to enjoy the entertainment. Indeed, the public offering occurs over the Internet in "virtual space." 265 F.3d at 1236-1237.

The Eleventh Circuit stated that because it was holding that Voyeur Dorm was not operating an adult use as defined in the city code, "it will not be necessary for us to analyze the thorny constitutional issues presented in this case." 265 F.3d at 1235.