ZONING AND PLANNING LAW REPORT

ROBINSON & COLE LIBRARY

MAR 1 2 2001

Vol. 24, No. 2 **February 2001**

THE 2000 ZiPLeRs: THE SIXTH ANNUAL *ZONING AND PLANNING LAW REPORT* LAND USE DECISION AWARDS

by Dwight H. Merriam, AICP

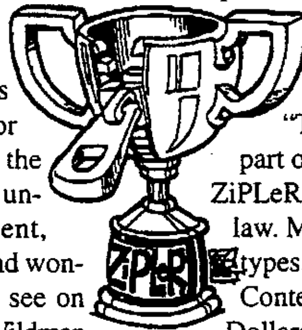
Dwight H. Merriam is a lawyer with the law firm of Robinson & Cole, LLP, in Hartford, Connecticut, where he practices land use and real estate law. Mr. Merriam is past president of the American Institute of Certified Planners and will be inducted next month as a Fellow of the Institute. He is co-author of The Takings Issue *(Island Press, 1999). The award illustration is by Ray Andrews, a former partner at Robinson & Cole, LLP.*

- **Best and Worst Land Use Cases**
- **The Awards**
- **The Yearly Tradition Marches On**

Introduction

It's hard to believe I have been writing this annually for six years. This review of the most ludicrous, bizarre, extreme and troubling land use cases started as a lark, more than anything else, to see if the editor would let anyone write such stuff. Well, they let me, and you readers liked it, perhaps because you, as I, need a break from saving the world every day.

Or maybe the acceptance, even popularity, of this annual back lot tour is because it makes our own work seem normal by comparison or at least relieves our concern that we may be the only ones with weird cases, unusual clients or unheard-of causes. My good friend and client, Frederick Starr Wildman, Jr., a wine expert and wonderful person who passed on this year (you see on many wine bottles; "imported by Frederick S. Wildman and Sons"), once said to me that if people seem normal, you don't know them well enough. So too with much of our work — the "ordinary" matter that walks in the door takes on a more honest and unique persona when we get to know it better.



Or it may be that West had a prescient predecessor six years ago (remember when there was more than one law publisher?) that got tuned into the emerging trend of reality television of the "Who Wants to Marry a Millionaire" and "Survivor" variety, recently reaching its sure-to-be-topped zenith in "Temptation Island" and thought they should be part of it. Make no mistake about it — the Annual ZiPLeR Awards are all about the reality of land use law. Maybe Fox will have a new show for land use types: "Zoning Board of Appeals Follies: Watch Contestants Vie for Variances Worth Millions of Dollars with No Conceivable Hardship."

Whatever the reasons for starting and continuing this

Zoning and Planning Law Report
is published by West Group. 375 Hudson Street. New York. NY 10014. ISSN 0161-8113

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.

run, this is great fun to research, write and share. I scan the media throughout the year for the tidbits that might lead to winners. Gideon Kanner, the lovable curmudgeon of property rights law, has been a leading source of numerous nominees. Thank you, Gideon

As for me, I'm thinking of checking into the Betty Ford Center after this one. It's becoming too compulsive, trying to get the next jolt of a wacko land use case. I find myself now reading the reporters for the odd case instead of the thread of reasoned law. My wife fears I'm becoming the Robert Downey, Jr. of writers in this field, especially after my selection of one of last year's winners, **The "Hush, Hush, Sweet Charlotte" Award**, an English case in which tenants claimed government liability for their hearing unmentionable things (which I mentioned, of course) through apartment walls (the court held that the government was not required to provide soundproofing).

West's marketing surveys show that this annual review is land use law's answer to *Sports Illustrated*'s swimsuit issue, a wild sellout with librarians worrying about how they are going to keep their precious few copies from disappearing and folks demanding and getting obscene amounts of money on the auction websites for complete sets of all five ZiPLeR Award issues. **Warning:** to avoid purchasing cheap reproductions, never buy without expert advice or a certificate of authentication.

To be honest, the popularity of this edition is not based on actual numbers of people surveyed, but on electoral votes. Regardless, here they all are: land use cases so amazingly complex that they make the genome project look like the intellectual equivalent of tic-tac-toe, public policy issues more important than the federal health care system ... and questions of such subtlety that they are far beyond the merely arcane ones, like "Why *is* Chief Justice Rehnquist wearing those stripes on his robe?"

My partners asked me to remind you that my opinions are my own — who else would have them anyway — and not those of our clients or law firm. I can't imagine anyone would be so foolish as to use the ZiPLeR Awards issue against our clients, but who knows.

For all the strange goings on, things are quite good in our area of the law. The new urbanism movement is enabling the creation of more livable landscapes; water quality policy is finally beginning to address nonpoint sources in a way that might bring improvement and efficiency; and regional planning efforts are showing enough benefit in some areas to spawn elsewhere. Maybe, just maybe, we are capable of learning from our mistakes and if that's true, then the ZiPLeR Awards may be instructive. Really now, after you read the Darwin Awards aren't you a little more careful? http://www.darwinawards.com.

"Time to Fold Your Tent" Award

Just as the Academy Awards start with some lesser award, such as "Best Second Assistant Set Dresser," we begin with a bit of a lightweight, but interesting still because it shows the importance of definitions.

The award goes to Richard Weintraub, a California developer who got a construction permit in 1994 from Los Angeles County to build ninety-five Mongolian-style yurt tents on a ninety-three-acre retreat in a Malibu canyon. Yurts are round, framed tents with domed roofs. Local planners had initially approved the permit and extended it last year because they thought the state Coastal Commission approval was all that was needed.

Neighbors objected. The county's chief elected official labeled the development a conference center, not a campground ("The tents are not really tents, they are more like cottages."), revoked the permit and ordered it subject to new, tougher local regulations. The neighbors cheered. The developer threatened suit. "Yurt Tent Permits Revoked by County," *The Los Angeles Times*, March 14, 2000, at B12. My advice is that you check your community for illegal yurts. You could have a campaign even, or maybe a yurt-free zone, or a yurt cluster zone, or....

The "Uzi Acres" Award

We wanted to name this one the "It Takes a Village" Award, but West's lawyers said someone had already used the title. Planners have been wringing their hands over gated communities, private enclaves with one way in and one way out for people of like minds and exclusive tastes. Some find them the anathema of community. But finally we have, as recognized by this special award, a gated community with true American values, where we can raise our children and live our lives in the democratic ideal under the protection of the United States Constitution. Better yet, it is touted as the safest town in the country with no crime.

Dr. Ignatius Piazza, a forty-year-old chiropractor turned developer, is building a 550-acre gated community — Front Sight, Nevada — forty-eight miles from Los Angeles. Dr. Piazza has invested $3 million in infrastructure. The community of 350 townhouses, 177 lots selling at $275,000 a shot, a church, a K-12 school and convenience store, has its initial approval and will be completed in 2002. Yawn. More smart growth, Nevada-style, you say?

Well, this little village of like-thinking, right-thinking folks will also have ten shooting ranges, a five-story SWAT assault tower, a defensive driving track, eight 360 degree live-fire training simulator ranges, a 5000 foot airstrip, a pro shop, 400 yards of training tunnels and a gourmet restaurant (they gotta eat, you know). Street names in-

clude: Sense of Duty Way, Trigger Avenue, Barrel Boulevard and Second Amendment Avenue. "The man is a visionary," says the former public relations director of the National Rifle Association. "Developer Plans Nevada Mecca for the Gun Toting," *USA Today*, April 18, 2000, at 6A. If you pay in full upfront, you get a free Uzi. Dr. Piazza'a credentials include his certification, only the second in the world, as a Four Weapons Combat Master. Any mom would be proud.

His project has received widespread coverage. *See* "Perspectives: Learning the Art of Mastering a Hot Uzi," *Financial Times (London)*, Aug. 26, 2000; "Would You Buy a Home on Barrel Boulevard?" *Mail On Sunday*, Aug. 29, 1999, at 3; "Gun Resort Aims for the Top," *The Times (London)*, Jun. 8, 1999; "Gun City, U.S.A.," *The Mirror*, June 4, 1999, at 25; "Gun Lovers Hit Bullseye in 'Uzi-Land,' " *Scotland on Sunday*, May 14, 2000, at 21; "Circling the Wagons at a Home on the Firing Range," *The Herald (Glasgow)*, Mar. 2, 2000, at 15; "Gun Buffs Trigger Shooting Haven in the Desert," Calgary Herald, June 11, 1999, at A17; "A 'Sun City' for Gun Enthusiasts," *The New York Times*, May 15, 1999, at A10; "Gun Enthusiasts: Head to the Country Club, then 'Ready, Aim, Fire!' " *The Associated Press*, Apr. 25, 1999; "Arts and Entertainment," *Pittsburgh Post-Gazette*, Jul. 8, 2000, at B18; "A Builder With a Target Audience: Gun Lovers," *Chicago Tribune*, May 15, 1999, New Homes at 1; "Can Shooters Find a Home?" *Outdoor Life*, Oct. 1, 1999, Vol. 204, No. 3, at 16; "RECOIL: Pro-gun Housing Development Near Pahrump, Nev.," *Builder*, Jul. 1, 2000, Vol. 23, No. 9, at 44 (Quoting Dr. Piazza: "Wouldn't it be nice to live in the safest town in America? We won't have any crime at Front Sight, not with everyone trained in firearms and most everyone owning them."); "Front Sight Misfires in Effort to Affirm Rights of Gun-Users," *University Wire Daily Bruin* (UCLA) May 23, 2000.

Dr. Piazza's public spirit seems to know no bounds. In response to a new California law requiring registration of assault weapons, he has offered to provide free storage — if you take his courses. "California and the West: A Planned Community for the Gun Enthusiast." *Los Angeles Times*, Dec. 13, 2000, at 3A; "Group Offers Free Assault Weapon Storage for California Gun Owners," *U.S. Newswire*, Nov. 29, 2000. After the Columbine High School shootings in Littleton, Colorado, he offered to provide free firearms training for school administrators, teachers and staffers. http://www.frontsight.com/free_tr.htm.

For more information on this wonderful opportunity, including site plans and architectural renderings of this homey, kid-friendly haven, go the website http://www.frontsight.com/facility.htm. Front Sight's motto? "Any gun will do — if you will do!"

The "Shocks the Conscience" Award

This award, in recognition of a possible new test for substantive due process violations in land use cases, goes to the City of Norton Shores, Michigan, successful in fending off McDonald's Corporation in federal court in an action claiming a taking, violation of equal protection and violation of substantive due process in the denial of, what else, a Mickey D's. *McDonald's v. City of Norton Shores*, 102 F. Supp 2d 431 (W.D. Mich, 2000).

McDonald's applied for site plan approval of a restaurant with a drive-through window in a K-Mart shopping center in a zone where it was a permitted use. There are nine fast-food restaurants with drive-through windows in the city. The city approved a sit-down restaurant at the same K-Mart shopping center just prior to McDonald's application.

The Planning Commission denied the approval, only the third denial of any kind in the last five years (the others — a construction yard and senior housing), on three grounds: traffic, protection of the nearby residential neighborhood, and "This use is not aesthetically desirable." Shortly afterwards, the Commission approved a Chili's (sit-down) restaurant across the street.

As you would imagine, the takings claim evaporated on ripeness grounds. The equal protection claim was held not to fall under *Olech v. Village of Willowbrook*, 528 U.S. 562 (2000), because there was a rational basis for the denial and no other restaurants "similarly situated" — an argument worth reading as a remarkable feat of judicial prestidigitation.

But as to the substantive due process claim — was the denial reasonably related to some legitimate govern-

ZONING AND PLANNING LAW REPORT

Editorial Director
Elllen Hwang
Contributing Editor
Kenneth H. Young, Esq.
Editor
Jodi Green
Electronic Composition
Jodi Green

Published eleven times a year by
West Group
Editorial Offices: 375 Hudson Street, New York, NY 10014
Tel.: 212-929-7500 Fax: 212-807-6209
Customer Service: 610 Opperman Drive, Eagan, MN 55123
Tel.: 800-328-4880 Fax: 612-340-9378

Subscription: $283 for eleven issues

Copyright 2001 West Group.
All rights reserved.

ISSN 0161-8113

mental objective — the court reiterated its holding in *G.M. Engineers & Associates v. West Bloomfield Township*, 922 F.2d 328, 332 (6th Cir 1990) "that local zoning actions would fall to substantive due process attack only if they shocked the conscience ... because the terminology ... more apt for cases involving physical force ... is useful in the zoning context ... to emphasize the degree of arbitrariness required to set aside a zoning decision by a local authority — and to underscore the overriding precept that 'arbitrary and capricious' in the federal substantive due process context means something far different than in state administrative law."

The court found that even though there was no traffic evidence contrary to McDonald's expert testimony that the traffic could be readily accommodated, the concerns of the neighbors about traffic formed a rational basis for denial. The state claims survived the motion for summary judgment and were remanded to state court.

The "Beauty Is in the Eye of the Beholder" Award

Beauty runs skin deep, but not deep enough to be a requirement of zoning under Maine's constitution. We present this award to Eric Kosalka, a clam digger, and his wife, Patricia, who won their case against the Georgetown Planning Board and can now go ahead and develop their eight-trailer recreational vehicle campground in the 100-year floodplain on land owned by Eric's mother. Maybe they can hang their coveted ZiPLeR over by the dump station illuminated with tiki torches.

Georgetown allows campgrounds subject to nine criteria, including that development "conserve natural beauty." The problem, said the court, is that "[n]either developers nor the ZBA are given any guidance on how to interpret the 'conserve natural beauty' requirement. Instead, developers are left guessing at how much conservation is necessary, and the ZBA is free to grant or deny permits as it sees fit." *Kosalka v. Town of Georgetown*, 752 A.2d 183 (Me. 2000); *see also* "Ruling Clears Way for RV Park on Bay," *Portland Press Herald*, June 2, 2000, at 1B; "Court Strikes Down Beauty Provision of Shoreland Zoning Ordinance," *The Associated Press State & Local Wire*, June 1, 2000; and "Campground Battle Heads for High Court," *Portland Press Herald*, Mar 28, 2000, at 1A. The dispute was seen as pitting a family with roots to settlers against latecomer summer residents. As Eric Kosalka was quoted after his victory: "I think a lot of people come from out of town and from out of state, move into an area and try to tell people what they think should happen to their property, and I don't think that's fair." A lawyer for one of the defendants described it, "It's a classic Maine story in a lot of ways. On the one hand you have families who have summered here for generations, and year-round people who feel they have the right to do what they want to with their land. When you put the two together you have a pretty volatile mix."

Most would agree this decision is correct, but how could the outcome have been avoided? The other eight criteria were more substantive and most involved issues of public health and safety. If one or more of them were invoked instead of or in addition to the natural beauty criterion, Georgetown would have been saved. Or "conserve natural beauty" could have been further defined in terms of land coverage, scenic vistas, or specimen tree preservation so that some measurable criteria would have been available.

The "Bare Knuckles and More" Special Environmental Activism Award

Dona Nieto, whose stage name is La Tigressa, was head and chest above all contenders for this special award for environmental activism. Not content to write letters to politicians or even wage class action suits to save California redwoods, she took to the streets — dirt haul roads actually, stood in front of logging trucks in her wood-nymph outfit, and removed the top of her faux tiger skin sarong while reciting her pro-environment poem: "Suck Any Strawberry." ("I am the goddess, I speak now from the mouth of all women ... get down on your knees and worship me.") [Author's note: The ellipsis denotes a passage even I can't bring myself to report.]

Apparently, it's working. The truckers are stopping, at least to take pictures. And La Tigressa's campaign of "Striptease for the Trees" has received much publicity. She claims to lead a Goddess Squaddess up to similar things in the region, but I can find no accounts of their exploits. "Clear-cutting vs. breast-baring," *Los Angeles Times*, Nov 11, 2000, at A3; "Logging protests escalate with 'striptease for trees,' " *Chattanooga Times*, Nov. 13, 2000, at A5; "Bare-Breasted Poet Takes on California Loggers," *Reuters*, Oct. 19, 2000, http://www.foxnews.com/science/101900/poetess.sml; and many other articles too numerous to list — email me at dmeriam@rc.com for the rest if you simply must read them all — and before you ask, only the LA Times article has a photo, taken from the rear).

The "Citizens Behaving Badly" Award

Michael Joseph Murphy of Delta, Iowa, easily wins this award. He's a man you may want to avoid when you visit Iowa. And on behalf of all of us who appear before local voluntary boards and commissions, represent them, or serve on them, we extend our regrets to the Delta City Council for what they suffered. "Man Dumps Waste at Council Meeting," *AP Online*, July 12, 2000.

It seems Murphy was upset about a sewer line problem. In one of the worst incidents of public meeting rage in 2000, he dumped a five-gallon bucket of raw sewage on the table, splattering several people around it and

nearby.

He was arrested and jailed on a charge of improper disposal of hazardous waste (clever pleading, huh?), criminal mischief and one count of assault for each person splattered. He pleaded to willful disturbance, fifth-degree criminal mischief and five counts of simple assault after the County Attorney dropped the charges of illegal disposal and two counts of simple assault. He ended up serving sixty-four days, paid a $250 fine and $180 in restitution, and other costs. "Man pleads guilty in sewage-dumping incident," *The Associated Press State & Local Wire*, September 13, 2000.

The "Citizens Behaving Badly Overseas Runner-Up" Award

Brian Statham of Barlestone, England, wins this award for attacking the cars of planning officers who came to his property to enforce ordinances against the illegal storage of a scrap car, metal tanks, wooden pallets and a petrol pump. Previous attempts to get him to clean up what a neighbor described as a "scrap yard" had been unsuccessful.

Statham attacked the planning officers' cars — a Volvo, a Ford Fiesta and a Daewoo — with a forklift, overturning them and causing an estimated GBP 10,000 in damages (we know you're such a sophisticated audience you'll make the conversion to U.S. dollars in your heads). The officials were not injured, but were described as "shaken and shocked." Statham pleaded guilty to three counts of criminal damage to the cars. "GBP 10,000 temper!" *Leicester Mercury*, Nov 25, 2000; "Bid to clear site takes new twist," *Leicester Mercury*, Dec 29, 2000, p. 17. Sentencing in the case has been deferred until February so Statham can be treated for a long-term illness. "Farmer's Fury in a Forklift," *The Mirror*, Jan. 6, 2001, at 30.

The same theme seems to run in this case as that from Maine. An editorial by Alexander Chancellor in *The Daily Telegraph*, Oct 13, 2000, at 29, has a certain universal ring to it:

> Farming is a messy business. Only the rich who are willing to lose money on it can afford picket fences and neatly clipped hedgerows. Most ordinary farmers struggle along amid tangles of barbed wire, patches of mud, broken gates and piles of rusting machinery. That is how they earn their livings. Of course, it is distressing to people whose primary interest in the countryside is aesthetic, not economic, such a weekenders and commuters, who go there in search of the rural idyll. They regard untidiness by their neighbours as an affront to their dream, and they will act ruthlessly, if necessary to stop it.
>
> The action taken by the residents of the village of Barlestone in Leicestershire was to conduct a two-year campaign against Brian Statham, a potato farmer, to get him to clean up the yard in front of the bungalow from which he conducts his business. The campaign gathered heat when Barlestone was nominated for a "Leicestershire in Bloom" award, and Hinckley and Bosworth borough council responded to the chorus of protests by issuing an enforcement notice against Mr. Statham. When he failed to comply, council officers turned up on Wednesday in three cars to start clearing the yard of potato pallets.
>
> Mr. Statham's response was robust. The officers ran for cover as their cars were picked up by a forklift truck and flung on their sides in a hedge. Mr. Statham may be a slob, for all I know, but he will also be a bit of a hero to farmers everywhere who don't give a fig for such baubles as a "Leicestershire in Bloom" award.

The "Grim Reaper Unemployment" Award

We had to reach across the Atlantic to make this award, all the way to the French Riviera and the village of Le Lavandou, our proud recipient. There, the village government and an environmental group have been battling over the location of new cemetery, now that the existing one is full. "If Villagers Die Laughing, They'll Break the Law," *The New York Times*, Nov. 24, 2000, at A4.

A Nice court held that construction on the village government's planned site would violate a coastal protection law. The environmentalists have proposed an abandoned quarry in the hills, something the mayor finds to be affront to the dead.

The mayor found a short-term solution to the space shortage, really more to needle the environmentalists, by enacting a law prohibiting dying in the village. Fortunately, the only person to die since the law went into effect already owned a plot in the cemetery. The appeals of the lawsuit may take three years, and an average of eighty people die each year in Le Lavandou, which has 5,000 permanent residents and 100,000 summer tourists. The mayor has conceded that no punishment will be levied for dying.

The "Steeple Chase" Award

This is not going to someone from the horsey set. That would be too easy. No, this award goes to a small group of neighbors in the town of Belmont, Massachusetts, population 25,000 and ten miles northwest of Boston, for their four-year battle in federal court with the Mormon Church to keep it from building a steeple shorter than originally planned, but at 139 feet or thirteen stories, still twice as high as the town's by-laws allow. "Steeple Is at Center of Legal Battle," *The Boston Globe*, Aug 27, 2000, at A28.

This is a big project. The temple is three stories and 94,000 square feet, with six spire towers and a main steeple with the angel, Moroni, at the top, blowing his horn heralding the return of the gospel. The temple is complete, although spire/steepleless, while the battle goes on.

At the center of it all is not, as you might have guessed, the Religious Land Use and Institutionalized Persons Act enacted by the U.S. Congress on July 27, 2000, and signed into law by the President as a replacement for the Religious Freedom Restoration Act. No, say the litigants, the new law is of tangential interest only.

What is at stake is the amazing fifty-year-old, so-called "Dover Amendment" enacted in response to and named after a suburban Boston town that in 1946 banned conversion of private homes for the purpose of religious education. *See* M.G.L. 40A §3. The Dover Amendment prohibits local zoning from restricting land for religious and educational purposes when it is owned by a church, nonprofit educational organization or the state. Local governments can have some reasonable regulation over bulk, dimensions, parking, open space and the like. This is an extraordinarily protective law, especially considering that this is liberal Massachusetts, not the Bible Belt. Here's the Dover Amendment in pertinent part:

> No zoning ordinance or by-law shall ... regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. M.G.L. 40A § 3.

The statute originally addressed only religious uses but has been amended to provide protection for other uses, such as day care, agriculture, solar energy, and group homes for the disabled. The District Court observes in a footnote that the defendants have described the neighborhood opposition to nonresidential uses "as the 'not in my back yard' or 'NIMBY phenomenon.' " Then the court gives a case cite, as if NIMBYism is not in the lexicon of those in the federal judicial system. *Boyajian v. Gatzunis*, 1999 U.S. LEXIS 15610, at n.6. You see, if it were not for the weighty and otherworldly issue of the Establishment Clause, and this were merely a zoning case, the federal courts would more likely give it short shrift. It is important that the statute includes nonreligious uses, and the Court of Appeals says as much in its decision in upholding the law for its secular purpose of stopping NIMBYism against a variety of uses.

The Town of Belmont approved the steeple, three neighbors sued and the First Circuit upheld the Dover Amendment as not violating the First Amendment's Establishment Clause. *Boyajian. v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000). The neighbors filed a certiorari petition in the U.S. Supreme Court on September 20, 2000, and briefs were in on December 5, 2000. The Court's decision on the petition is likely in January or February of this year. Stand by. For more information, *see* http://www.bostontemple.org and the article in the Salt Lake paper, "Mormon Milestone," *The Salt Lake Tribune*, Sep 30, 2000, at B1.

Of particular interest in this case is how its outcome, should the Court grant certiorari, may help land use practitioners and churches find their way out of the bi-coastal confusion with *Saint Bartholomews* in New York upholding the government's right to stop a demolition, 914 F.2d 348 (2d Cir. 1990), and the *First United Methodist* case in Seattle, 916 P.2d 374 (Wash. 1996), coming to a different conclusion in holding that the designation of a church as an historic landmark was unconstitutional. *See also* the recent decision in *East Bay Asian Local Development Corporation v. California*, No. S077396, (Ca. Sup. Ct. Dec. 21, 2000), in which a California exemption of noncommercial property owned by religious groups from historic landmark preservation laws does not violate the Establishment Clause, despite the fact that secular nonprofits are not similarly exempt.

This is a difficult area and guidance from the Court could be helpful.

The "Secular Angel" Award

This award goes to Attorney John Maher, the town attorney for Arlington, Massachusetts, for his legal opinion that an eight-foot statue of the angel, Moroni, may be displayed on town property without violating the Establishment Clause. As our regular readers know, just about every year we have the same parade of manger cases, with constitutional nuances as to whether it is empty or there is a baby Jesus present in swaddling clothes, the latter usually violating the Establishment Clause.

What could the Mormons do with the statue created by Arlington sculptor Cyrus E. Dallin 110 years ago to go on the top of the unbuilt steeple while the litigation ground on? Offer the town the temporary use of the eight-foot angel along with the thirty-inch replica version. The big one could go in the Arlington Town Hall Garden and the little one in the Cyrus E. Dallin Art Museum at the Jefferson Cutter House in the town's center.

Moroni is believed to have appeared before Joseph Smith, the church's founder, in 1823, and it is also thought among Mormons that Moroni is one of the authors of the Book of Mormon.

In August 2000, the Arlington Board of Selectman asked their town attorney for his opinion on the display of these two figures. Tough question. He opined that the

[illegible] permissible. Having it in the museum is cleaner because no one would ever presume anything there is a religious statement, [b]ut I also think the selectman would be on firm grounds displaying it in the Town Hall Garden because it would be part of Dallin Statues." "To Avoid Fight, Mormons Shift Plans for Statue," *The Boston Globe*, Sep. 10, 2000, at 1.

I think I understand the rule: An eight-foot Mormon angel in the town's garden is okay, but a thirty-inch replica in the town museum is more okay, and neither are Establishment Clause problems because they were created by a local artist of some repute. My heart goes out to all local government lawyers called on to render such opinions. I'm going to use this question in my final exam in my Land Use Law course at Vermont Law School next summer.

The "Takings Shuffle" Award

The 'takings shuffle" is a result of the ripeness rules. A case started in state court may be removed to federal court by a defendant municipality. The federal court might dismiss the action or send it back to the state courts on ripeness grounds because the property owner either had not received a final, determinative position by the government or had not sought a state compensation remedy.

This year's award, and we see several of these cases each year, goes to the U.S. District Court for the Northern District of Illinois for its decision in *Vigilante v. Village of Wilmette*, 88 F. Supp. 888 (2000).

Ms. Vigilante (great name for a federal taking claim plaintiff, is it not?) bought two lots in Wilmette, demolished the single house built across the boundary of them and then applied to allow separation of the ownership of the lots to build two separate single-family units. The Village denied the petition and she sued in state court claiming, among other things, a taking.

The crux of the case is in this one quote: "The Village removed the action to this court, and now moves to dismiss for lack of subject matter jurisdiction or failure to state a claim. I grant the motion." *Id.* at 889.

The best part comes next. You see, once Ms. Vigilante loses in state court (am I presuming too much?), she will try to go back to federal court and the federal court will close the door to her on the basis of claim/issue preclusion — you tried your case in state court and lost, so there's nothing left to be tried here. *See Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) and 136 F.3d 1219 (9th Cir. 1998). It's just like the children's game of musical chairs, but the ripeness issue has only one player and no chair, and when the music stops....

The "Ayuh, No Takin'" Award

The Maine Supreme Court wins this one easily and a second award for the "World's Shortest Full Decision in a Takings Case." Heck, the name of the award is almost longer than the decision. *Wyer v. Board of Environmental Protection*, 747 A.2d 192 (Me. 2000). It reminds me of the one where the tourist asks the local in Maine if he knows how to get to wherever, and the only response is: "Ayuh." The decision has a classic New England frugality to it. The severely-restrictive State Sand Dune laws do not take the property where the owner can still park, picnic and barbecue on it, there is appraisal evidence of some value, and the neighbors would have an interest in buying it.

Oops, I think my summary is longer than the decision.

The "You're Out!" Award

The City of Springfield, Massachusetts, goes down swinging in the state trial court and wins this award. *City of Springfield v. Dreison Investments, Inc.*, 11 Mass. L. Rptr. 379, 2000 WL 782971 (Mass. Super. Feb 25, 2000). The city took three parcels by eminent domain to enable a private nonprofit baseball corporation to build, own and operate a minor league baseball stadium on the property. With minor league baseball and stadium mania nationwide and the casual way in which municipalities seem to be using their eminent domain power, it seemed inevitable that someone would eventually run straight into an outfield wall — and Springfield did in this case.

The court found that the takings were not a valid exercise of the city's eminent domain powers because the team owner was the primary beneficiary. Further, the project area was not blighted. This pitch is low and inside, but over the plate. Watch out for it. There are limits.

Another year...

So ends another year and recognition of these significant achievements in land use law. We are blessed with so many interesting stories and a field of study loaded with issues central to our daily lives. Keep those cards and letters coming...

Endnote: And a thank you to my Land Use Law Clerk, Pam Logsdon, for running down the many threads of these unusual stories.

RECENT CASES

Fifth Circuit Finds that Contract to Purchase Land Does Not Create Constitutionally-Protected Property Interest for Developer; Also Rejects Selective Prosecution Claim

A Mississippi developer failed to convince the Fifth Circuit Court of Appeals that his federal constitutional rights were violated when a city's mayor and aldermen took various actions (including repeated vetoes of site plan approvals) to thwart his plan to build the first apartment complex in the city. *Bryan v. City of Madison, Mississippi*, __ F.3d __ (5th Cir. 2000). The court found that the developer's contract to purchase land did not

create a protected property right for purposes of a substantive due process claim:

> The nature of the interest the buyer secures [under state law] is extremely limited. It is an interest in the land. But what rights does that interest entail? Merely a right to get the down payment back if the seller does not make good title. This interest does not give one the right to enter the land, to exclude others from the land, or to build anything on the land. . . . Thus, it is apparent that Bryan never had the right that he claims the defendants denied him. The interest in the land that arose when he signed the contract to purchase did not give him the right to develop the land. So the defendants did not deny him his right to develop apartments because he never had such a right in the first place. __ F.3d at __.

The Fifth Circuit also rejected a claim under the equal protection clause. The Fifth Circuit found first that the developer did not establish a "standard" equal protection claim because he did not allege that similarly situated individuals were treated differently. The court then found that the developer had also failed to establish a claim of selective prosecution under the equal protection clause because he had not proven that the "government official's acts were motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right." The court continued:

> Neither his complaint nor his brief explains why the mayor and aldermen's motive to block his plan were improper. He does not allege that they did so because of his race, his religion, his attempts to assert his constitutional rights, or just personal vindictiveness. The most we can garner is that the mayor and aldermen acted in response to the public petition against the development. If the public opposition were based on improper motives, such as race, then it might be that responding as the mayor and aldermen did to block the development would have implicated constitutional rights. But Bryan has failed to allege any such motive. And, in a democratic republic, responding to the voice of the public is expected and is not, standing alone, a malevolent motive for selective enforcement purposes. __ F.3d at __.

The Fifth Circuit's opinion included two interesting footnotes regarding selective enforcement claims. In one footnote, the Fifth Circuit briefly discussed the meaning of the Supreme Court's holding in *Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000), that equal protection claims may be brought by a "class of one." As read by the Fifth Circuit, Olech "merely stands for the proposition that single plaintiffs may bring equal protection claims. They need not proceed on behalf of an entire group. But this statement has nothing to do with whether they must assert membership in a larger protected class. The decision does not, therefore, alter our requirement of an improper motive, such as racial animus, for selective enforcement claims." __ F.3d at __, fn. 17.

In another footnote, the court acknowledged that the Seventh Circuit Court of Appeals has "included personal vindictiveness as an improper basis for selective enforcement in the equal protection context." On this subject, the Fifth Circuit stated only that, "We have never specifically addressed whether such a motive would be enough to support an equal protection claim without some other class-based discrimination, but that issue is not before us here because Bryan has failed to allege it." __ F.3d at __, fn. 18.

NOTED IN BRIEF

A landowner who was denied approval of a subdivision plat application did not have a protectible property interest for purposes of a federal due process claim because the city council had discretion to deny the application. *Hyde Park Company v. Santa Fe Council*, 226 F.3d 1207 (10th Cir. 2000). "Hyde Park [the developer] argues it has a protectible property interest in the approval of its proposed plat because the City Council had a non-discretionary, mandatory duty to approve the plat. . . . While we are not altogether unsympathetic to Hyde Park's quandary, we conclude that the applicable ordinances read as a whole fail to place any discernible substantive limitations on the City Council's discretion in this matter, and thus fail as a matter of federal constitutional law to establish more than Hyde Park's unilateral expectation that the City Council would approve its approved plat." 226 F.3d at 1212.

The failure of a county board of supervisors to comply with statutorily required public notice and hearing requirements deprived the board of subject matter jurisdiction to approve a proposed zoning change. Osage Conservation Club v. Board of Supervisors of Mitchell County, 611 N.W.2d 294 (Iowa 2000). The rezoning was therefore void. The requirement of a public hearing prior to a zoning change is mandatory and jurisdictional. Furthermore, the board's lack of jurisdiction may be raised in court even though it was not raised before the board itself. The court relied on its 1973 decisions in Bowen v. Story County Board of Supervisors, 209 N.W.2d 569 (Iowa 1973), and B. & H. Investments, Inc. v. City of Coralville, 209 N.W.2d 115 (Iowa 1973), and also cited 1 Anderson's American Law of Zoning 4.03 at 247-49 (for the proposition that statutory procedural requirements are regarded as mandatory, and failure to substantially comply with such requirements renders a zoning ordinance invalid).