ZONING AND PLANNING LAW REPORT

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THE 2004 ZiPLeRs: THE TENTH ANNUAL *ZONING AND PLANNING LAW REPORT* LAND USE DECISION AWARDS

by Dwight H. Merriam, FAICP, CRE

- Best and Worst Land Use Cases
- The Awards
- Fabulous Information You Can Put to Use Every Day and Also Entertain Your Friends at Cocktail Parties
- Cutting Edge Inside Information that You Would Not Otherwise Have Because It Would Be Caught by Your Spam Filter

Introduction

Yes, folks, this is the 10th anniversary of the acclaimed ZiPLeR awards. It all started because the publishers of ZiPLeR began to receive reports in the mid-1990s that the readers were dozing off while operating heavy machinery after having read the usual fare of case summaries and lead articles with such intellectual pizzazz as "Why Alexander the Great Never Applied for Variances" and "The Nollan, Dolan, Schmollen Tripartite Takings Test." Afraid of lawsuits over the numbing effects of the usual discussion of land use law topics and anticipating stiff competition from many new law reporters and legal websites, including such doozies as www.footlaw.com (where lawyer-podiatrists hang out and exchange really interesting stuff), West simply had to come up with something bombastic.

Unable to think of anything else truly entertaining that was also legal and decorous, we settled on this format of looking at the best and worst cases of the last year, and the land-use initiatives that we saw as, shall we say, somewhat out of the ordinary.

The result has been 10 years of reality land use. Just when I think I have seen everything after 26 years in this business, I discover something even more outrageous. Just last month, for example, the chief elected official of a town stood up at a public hearing to oppose a development project on the grounds that it would adversely affect endangered species, and pulled out of his pocket the shell of a box turtle (one of the critters he pledged to save by blocking the development). He explained that he found a box turtle on the site. Wonders never cease.

Last summer, while hiking with my family on the Appalachian Trail in the White Mountains of New Hampshire, we were settling down for dinner at Mizpah Hut when my wife told me that the hut master had received a radio call from headquarters that there was an urgent call from my office. This must be something, I thought. Zoning lawyer summoned from mountaintop.

It is considered exceedingly bad form to talk on your cellular phone while hiking in a wilderness area, so my phone was off and in the bottom of my pack. I took it out, climbed to the other side of the mountain where I could get access to a signal, and called in. It turned out that a lawyer from another firm working on a project with us had inadvertently hit that all-time killer button in electronic mail: "REPLY ALL " and had sent not only to the inner circle of the development team, but also the

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chairman of an agency considering the application, a scathing message which might most charitably be described as "highly critical" of the chairman. We shifted into "damage control" mode and with several calls and an appropriate apology from the miscreant, we were back on track. This is the stuff that makes day-to-day land-use practice a challenge. I propose we have an annual "E-mail Blunder Award" for similar incidents. How many of you are willing to step up and share yours with the rest of us?

All of the awards this year have been approved by both the blue and red states. We also intend to sign up a deal with Paris Hilton to have her host a video presentation of the awards. I'm reviewing her past performances now to determine if she would be a suitable presenter of these fine awards. We have had problems in the past with unruly people at the award ceremonies, so we've found it necessary to hire some security. Surprisingly, we were able to get some members of the Detroit Pistons and Indianapolis Pacers who apparently have time on their hands. They are reported to have some experience in crowd control.

Not only is it hard to decide who gets what award, but the order in which we present them is a challenge. In surveys of our readership we have found that the large majority are especially interested in constitutional issues, particularly the First Amendment and its protection of expression. There appears to be great appreciation of the performing arts, especially dance. What a classy group of readers we have. In recognition of that intellectual curiosity, we get right to work on the First Amendment, performing arts, dance cases...

The **"World's Biggest Cover-Up"** Award goes to the city of Rockford, Illinois for enacting an ordinance that restricted "exotic dancing nightclubs" and subjected them to special use permit requirements. Exotic dancing nightclubs are expressly not to be confused with "sexually oriented businesses" the way Rockford defines them. R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402 (7th Cir. 2004).

The city lost big-time in the Seventh Circuit because the Seventh Circuit knows something about exotic dancing and exotic dancing can't be regulated if the performers keep their clothes on.

Most regulation of adult entertainment uses has been based on the avoidance of so-called "secondary effects." Secondary effects are the bad things that happen when you have a primary activity like nude dancing. Plenty of studies have shown that nude dancing results in dangerous and illegal activities nearby, such as public drunkenness, rapes, assaults, robberies and mayhem. In the interest of furthering my studies of constitutional law, I have made an extensive analysis of the potential for the secondary effects, principally by spending many evenings on Bourbon Street in New Orleans.

Now, here's how Rockford get into trouble in trying to regulate exotic dancing nightclubs. All these studies of secondary effects were done in areas adjacent to adult entertainment businesses where the performers were dancing without any clothes, naked as jaybirds. If people dance without clothes, there is pretty good evidence that there will be problems in the clubs and problems in the streets. Ah, but you know what? — there are apparently no studies of any secondary effects from people dancing around with their clothes on. (I'm sure some people get into trouble now and again dancing with their clothes on, but I wouldn't say those problems ever created adverse secondary effects.) Without the evidence of secondary effects, Rockford's ordinance didn't have a leg, with or without mesh stockings, to stand on.

The court strongly hinted that if Rockford could come up with some studies of secondary effects, it might be able to successfully defend the restrictions on location: "If Rockford had presented more convincing evidence to show that some businesses featuring clothed entertainers produce adverse secondary effects, a different result might ensue." 361 F.3d at 413.

To add to its embarrassment, the Seventh Circuit caught Rockford with its pants up. The court said that the ordinance was unconstitutional under a test of intermediate scrutiny because it was not narrowly tailored. Don't you just wonder how these judges use terms like "narrowly tailored" with a straight face when they're talking about clothed and unclothed exotic dancers? Here is how the court put it:

> Under a narrow reading, the Ordinance regulates all persons performing an erotic dance (or other specified movements) at a business establishment while wearing more or less the equivalent of short shorts and, if female, an opaque bra. While understandably aimed at entertainers of a more 'adult' persuasion, there exists the potential that mainstream performances could fall under the purview of the Ordinance. Simply, Rockford has not presented justification why it is essential to regulate such a wide universe of dance. 361 F.3d at 413.

But okay, you purists, you lovers of First Amendment arcana, if that wasn't good enough, we now award the first-ever and likely last-ever award for "naked karaoke." I don't make this stuff up; I just report it. It is from right nearby home in the town of Berlin, Connecticut. There is an unpublished opinion. St. Pierre v. Town of Berlin, 2004 WL 772082 (Super.Ct. 2004).

This first-ever **"Sing-along with the First Amendment"** Award goes to Marvin St. Pierre for his creativity in unknowingly merging First Amendment speech and dance expression. He operates a nice little establishment known as the "Berlin Station Cafe" in Berlin. Please don't pronounce it like the German city. Nutmeggers say: "BURR-lynn." Berlin has an ordinance regulating sexually oriented businesses, that describes the activities in the usual way.

St. Pierre had a pretty nifty idea. How about giving a prize to someone who does a little karaoke singing with their clothes off? From what I heard, St. Pierre suggested a contest, but he was then visited by town officials who told him that he better not have any "naked karaoke" at the Berlin Station Cafe or he would be arrested and prosecuted for violating the sexually oriented business ordinance.

St. Pierre started this action to get the ordinance declared invalid so that he could go on with his innovative concept. Think about it. Most of us are pretty embarrassed with the whole karaoke thing. Can you imagine adding to that one of the ultimate anxiety dreams — been caught somewhere with your clothes off — as some type of entertainment? I don't think so... but apparently St. Pierre thought the people in BURR-lynn would like the idea and he was right. www.cnn.com/2003/us/northeast/10/31/offbeat/naked.ap/

Superior Court Judge Robinson ought to get this year's **"They Didn't Tell Me About This in Judges' School"** Award for writing his decision without falling off the bench. The long and the short of it is that Judge Robinson in Solomon-like

fashion sliced this naked karaoke baby down the middle, finding that most of the ordinance was valid, but the misdemeanor arrest for violation of its provisions was ultravires. The most punishment that could be meted out for naked karaoke was a fine of $100. For those of you haven't suffered through three years of law school, ultravires is not an expensive laundry detergent or some tropical disease. It just means that it is beyond the power of the enabling statute. St. Pierre's patrons better keep their clothes on while they're singing. I've been to Berlin, Connecticut, and I think that's a pretty good idea.

The **"Democracy Run Amok"** Award goes to Beverly Hills, California. A special thanks goes to my good friend, Gideon Kanner, from Los Angeles, who sends me articles and cases throughout the year which delight and intrigue me, especially from my staid perch here in the state known as the "Land of the Steady Habits." The Los Angeles Times on August 14, 2004 at page B1 reports in an article entitled "Hotel Fight Gets Taken to Beverly Hills Parking Lots" on a most unseemly process. These days in California, you can hardly brush your teeth without a referendum. Shoppers are reportedly accosted by those seeking signatures to force every variety of referendum. A photograph accompanying the article shows and describes in the caption a woman soliciting signatures in support of a referendum and behind her stands a "blocker" trying to convince the hapless victim of the solicitation not to sign anything.

The Los Angeles Times article reports on the efforts of Beverly Hills residents and merchants to get 10% of the registered voters, about 1,500 people, to force a referendum on a proposed $200-million five-star hotel.

I have encountered on more than one occasion petitions for and against something signed by the same person. Many people don't care and understand what they're signing anyway. Is this the best way to be making land-use decisions?

The first-ever **"Person of Principle"** Award goes to Wally Klump of Willcox, Arizona, a 70-year old rancher who is cooling his heels in jail because he has refused to remove 28 cows from federal land. For 28 Cows and Precious Water, a Man's Got to Sit in Jail, New York Times, May 9, 2004 at 12. We make this award to point out what is likely to be the largest land-use issue of the coming decades — availability of potable water.

Willcox is a dry place in the southeastern corner of Arizona on Interstate 10. Wally Klump has some land in the area, but not enough to support his cows. About 20,000 ranchers in the West graze their cattle on federal land. How the government applies and enforces its regulations determines whether those cows live or die. Another rancher, Wayne Hage of Nevada, describes it this way: "The essence on Western lands is water and water has reached the status of oil. The easy way for the government to get it is take away your grazing rights. We won't let that happen without a fight."

The population of Arizona is likely to increase by 40% over the next 20 years. The water wars have only just begun.

The **"Deadly Serious Business of Zoning"** Award goes to Granby, Colorado. If I may, I would like to shift from an attempt at humor to the serious note prompted by this most bizarre case. It was widely reported in June 2004. Marvin Heemeyer went berserk and drove a homemade tank through town tearing up many properties in anger over some zoning problems. He ultimately killed himself while trapped in his contraption.

The video shown on television was astounding. Heemeyer, a skilled welder, had spent many months building his tank. His friend described him as "vindictive." Heemeyer was reportedly angry over losing in a dispute over zoning of land near his muffler shop. The city also fined him $2500 for his failure to have a septic tank and other zoning violations. He paid the fine with a check and enclosed a note in which he referred to local officials as "cowards."

In his rampage he tore through the muffler shop, a cement plant, a newspaper office, the town hall-library, a bank, a hardware store, and a utility office where he became trapped in the rubble. Police officers heard a gunshot. When they ultimately extricated Heemeyer, he was dead from a self-inflected wound. "Heeymeyer ate, slept and lived his revenge," Denver Post, June 13, 2004, www.denverpost.com/Stories/0,1413,36%257E53% 257E2208253,00.html

More often than not, we fail to fully appreciate the importance of real property to people. Folks who are better off economically can be geographically footloose. If they don't like regulation or their neighbors, they have the money to move on. Their homes are important to them but they're not the end-all. They have the money to hire lawyers and do battle if need be.

For the large majority of people, however, their real estate is the largest and most important investment. They do not have the economic and psychological reserves to absorb the adverse consequences of regulation. They do battle for themselves and are often frustrated by the power of those they oppose.

I was involved as the lawyer for a party in a neighborhood dispute that went on for years over a shared driveway. One man taunted and baited the other. The other shot back with angry words. The bullying neighbor had a hidden tape recorder and went to the police with the recorded exchange. Seemed

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like a set up to me. In the end, the angry man plea bargained the threatening charge, but was so devastated by the whole experience that he sold the house he loved and moved on. These disputes can ruin lives, even kill people.

So long Marvin Heemeyer. We are sorry to see your life end in this way, but maybe if any good comes from it, it will be that the rest of us will be more sensitive to how distraught people may become from what government does, rightly or wrongly. For another side of Heemeyer, see "Acquaintances describe two different two different sides to Heemeyer," Rocky Mountain News, June 5, 2004 www.rockymountainnews.com/drmn/state/article/0,1299, DRMN_21_2940402,00.html

The **"It's a Dog's Life"** Award goes to the Town of North Haven, Connecticut (I'm really troubled by the fact that I've never had more Connecticut awards in 10 years than I have this year; what is going on?). "Canine discrimination?" The Connecticut Law Tribune, April 19, 2004 at 4. It seems that the town of North Haven, Connecticut, proposed to limit the number of cats and dogs that homeowners could have. That would be five cats and three dogs. Local zoning officials ultimately rejected the proposal. As Curt D. Anderson, who has lived in the town for 20 years and at one point was the president of the Elm City Kennel Club said: "Dog number limits are unfair to dog owners, dog rescue organizations, animal shelters and dog breeders, and exhibitors."

The **"It Stinks, but It's Historic"** Award goes to the State of Hawaii Historic Preservation Division for taking the position that putrid water, or some kind of water anyway, must remain at the 35-year-old Capitol because the pools designed with the building were intended to make one think of the ocean.

I know this building and the pools. I moved to Hawaii in 1969 and was there when the new Capitol was built and the pools constructed. My 33-year-old daughter, Sarah, was born there in Honolulu. The new Capitol and the pools were gorgeous when completed. The building has enormous white pillars. The House and Senate chambers rise up like volcano domes from two large pools, symbolic of the Pacific Ocean. The architecture and the idea are magnificent...but it doesn't work.

The pools have become stagnant because the water from underground wells is brackish. Fresh water is in short supply. All kinds of treatments have been tried and have failed. Alternatives include filling the pools and grassing them over, covering them with sand or tile, or just making them gardens. Preservationists have rejected such alterations because it would destroy the symbolic ocean. A full fix-up would be $6 million (I don't know if that estimate comes from the people who did the estimates for the Big Dig in Boston, but if it does, you can multiply that number by 100 times, more or less). "In a Sparkling State, Goo Fills the Symbolic Pools," New York Times, May 30, 2004 at 12.

Congratulations, by the way, to Henry Eng, FAICP, on his recent appointment as the director of the Department of Planning and Permitting for the City and County of Honolulu. He is president of HE Land Planning Services, and worked on land use and planning issues for the James Campbell Estate for 15 years. "Hannemann names 6 to Cabinet," The Honolulu Advertiser, December 22, 2004, http://the.honoluluadvertiser.com/article/2004/Dec/22/ln/ln16p.html. Henry, can you fix this pool business?

The **"Trust Me, this Won't Be Helpful, So Help Me God"** Award is shared by the states of Texas and Kentucky, as well as the American Civil Liberties Union, the American Humanist Association and Liberty Counsel. The U.S. Supreme Court agreed in October to hear two Ten Commandments cases (I guess that's 20 Commandments...). Remember last term when everybody got quite excited over the "under God" phrase in the Pledge of Allegiance, only to have the Court toss the case out on standing grounds? Some might argue that the Court took a dive, rather than decide the incendiary question.

The Kentucky case, American Civil Liberties Union of Kentucky v. McCreary County, Kentucky, 361 F.3d 928 (6th Cir. 2004), concerns the display of the 10 Commandments on the walls of two courthouses. They were placed on those walls separately in 1999 by two different judges. In an apparent effort to somehow secularize the 10 Commandments, the judges placed along with them the Bill of Rights, the Mayflower Compact, "Lady Justice" in her usual appearance, the Declaration of Independence, and the words from "the Star Spangled Banner."

One is unfortunately reminded with this scenario of the many ludicrous nativity scene cases in which much judicial time has been spent over what secular symbols are permissible for display in public places without violating the establishment clause, and what symbols are religious and therefore prohibited from display. Santa Claus, the three wise men, shepherds, sheep and even the nativity scene where it is devoid of Baby Jesus in swaddling clothes have all been held to be secular symbols and therefore not violative of the establishment clause when placed in a public location. A menorah has been held to be a secular symbol, as well. Can it be that these Kentucky judges somehow tried to neutralize the effect of placing the 10 Commandments in the courthouse by throwing on a dog pile of other symbols? The Sixth Circuit found an establishment clause violation.

The Texas case, Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003), cert. granted, 125 S. Ct. 346 (U.S. 2004), is physically even more dramatic. The Fraternal Order of Eagles placed a granite monument with the 10 Commandments, six feet tall, on the grounds of the Texas Capitol in 1961. The Fifth Circuit refused to find a violation of the First Amendment in a suit brought by a homeless atheist.

The **"Backlash Beyond Belief"** Award goes to the Oregon voters who somehow managed to enact a law by referendum that enables property owners to seek compensation or get waivers of the law when environmental or zoning regulations have depreciated their property. Measure 37 passed 60 to 40 percent. This is a big victory for the property rights end of the spectrum.

"People understood we can have planning and treat people fairly at the same time," said David Hunnicutt, executive director of Oregonians in Action, a property rights organization which spearheaded the movement. "That's been what's missing." For extensive coverage, see their website http://measure37.com and www.oia.org.

The way Measure 37 works is this. Any drop in value due to regulation from the time ownership began entitles that owner to compensation or waiver of the law as it applies to that property. Estimates of what it will cost just to assess claims – and not a dime for compensation – range from $54 to $344 million.

Measure 37 is a statutory reincarnation of Measure 7, a constitutional change approved by the voters in 2000 but then invalidated by the Oregon Supreme Court.

Those who have held their land for generations and are in highly restricted areas will benefit the most and the greatest effect will be either in expensive buyouts or a complete reversal of fortune. Among these owners are farmers in the Hood River Valley, 60 miles east of Portland. The valley includes the Columbia River Gorge. If ownership in the family goes back three or four generations, really to a time when there was no regulation whatsoever, the cost of preserving those now-essentially-unregulated farms will be substantial. Alternatively, the changes in use, from farm to residential subdivision, will eviscerate the urban growth boundary (UGB) concept which has served Oregon so well, albeit at the expense to some extent of these multi-generational property owners – some of whom may have actually benefited economically by growth management.

Oregonians in Action addresses FAQs on their website and offers the following as to the UGBs:

> 23. How will Measure 37 affect Urban Growth Boundaries (UGBs)?
>
> Measure 37 does not change UGBs, or give property owners the right to demand that the UGB be altered. Although Measure 37 restores development rights that were taken from property owners, there is nothing in the measure that requires local governments to extend urban services like roads, water and sewer to development outside the UGB.
>
> Measure 37 will not allow urban type developments in rural areas, like large retail stores, shopping malls, apartments, or large factories. Rural areas will remain rural, and urban areas will remain urban.

Perhaps others might argue that suburban development will indeed occur, with inadequate infrastructure. Any way you look at it, whether you are a farmer now permitted to do a residential subdivision or a preservationist trying to save open space and farming, implementation of Measure 37 has gutted the Oregon planning system. Will it survive implementation? Will it survive judicial challenge?

Now here are a couple of comments from the far ends of the spectrum. From Michael Berger, the Grand Master of takings issue appellate litigation and an icon of the property rights bar:

> One lesson from Oregon seems to be that, eventually, you end up voting in favor of so many restrictions on so many discrete groups that you have collectively riled a group large enough to say, "Enough!" The blunt truth of land use regulations, particularly as practiced in jurisdictions where "urban limit lines" are popular, is that those on the outside of the lines are paying so that those on the inside can enjoy having a scenic backdrop for their own more intense development. .... The greatest lesson from Oregon may be that it is time to take some of the sound and fury out of land use disputes. There is not only merit to both sides but also reasonable compromise that usually can be made. The problems arise when one side gets an upper hand and insists on an extreme conclusion, like drawing arbitrary lines on the ground that enrich people on one side and impoverish those on the other. In the end, it doesn't work. Not even in a blue state. "Passage of Land-Use Initiative Is Political Wake-Up Call," Daily Journal, December 2, 2004.

From the pro-government Community Rights Counsel:

> It will be interesting, if not nerve-wracking, to see what Measure 37 brings in the months ahead. Because the Measure requires compensation only for those who own affected land before the challenged regulation was enacted, it remains unclear just how much land is covered. And a minimum, state and local officials might well be gun-shy about enacting new community protections for fear of triggering compensation claims. http://www.communityrights.org/PDFs/Newsletters/November2004.pdf

Recent reports suggest that it is not a disaster and some middle ground may be found. The Oregonian newspaper is the best source for current information. http://www.oregonlive.com; See article on December 26, 2004 "Measure 37 Yet to Result in Upheaval for Land Use."

I like what the Bob Clay, AICP, President of the Oregon Chapter of the American Planning Association had to say to members in an e-mail on November 7, 2004:

> We must work to find an acceptable balance between land use planning and individual property rights. I'm told that the Chinese use a single character to denote "crisis" and "opportunity." We clearly find ourselves in crisis. Our challenge now is to find the opportunity. Although none of us would have chosen this outcome, we have an opportunity to re-engage Oregonians in the land use planning system. To do so, we will need to actively listen and find practical solutions for legitimate grievances. Our mission is to revitalize the public's commitment to planning for the common good. ... We have an opportunity to re-engage Oregonians in the public debate about what planning means to livable and prosperous communities. As we sometimes say in soccer after picking ourselves up after a slide tackle, "Play on."

While Measure 37 is a dramatic win for property rights through a referendum, Adam Brothers Farming Inc. gets this year's **"Jury-Grown Cash Crop"** Award for the $5.5 million award it won from a Santa Maria jury against Santa Barbara County. The county had designated 95 acres as protected wetlands and thereby kept the company from raising vegetables on it.

The jury found that the actions of the planners and wetlands consultant were intentional, despicable and done with "malice, oppression or fraud." They were whacked with punitive damages on top of the bigger award to be paid by the county.

While the dispute as to the county's mapping was ongoing, the company went ahead and cleared and graded the land anyway. The federal Environmental Protection Agency claimed a violation and is now seeking restoration and penalties with the trial about to begin. "County loses $5.5 million land-use case," Santa Barbara News Press, November 23, 2004. http://comm.newspress.com/npcommerce/registerForm.htf?hst=news.newspress.com&fwd=%2Ftopsports%2F112304adam.htm

And the runner up for local government liability and the recipient of this year's **"The Terror of Zoning Error"** Award goes to the town of Middletown, Rhode Island. "Town Subject To Court Suit Over Zoning Error," September 13, 2004,

www.rilawyersweekly.com; Patnaude v. Brown, et al., Lawyers Weekly No. 61-113-04.

The plaintiff, John Patnaude, has survived the town's motion to dismiss and can now go to trial on his tort claim against the town and its building official. He had entered into a purchase and sale agreement to buy a parcel in Middletown, contingent upon the property being zoned for automobile sales and service. As you would expect, he dropped in to see Middletown's building/zoning official, Jack Maloney. He gave Maloney a written request for confirmation that the property was a nonconforming use and that there was a vested right to open up a car dealership and service center on the site.

Maloney answered the same day in writing: "use of the property as a 'used car' dealership would be allowed as a pre-existing nonconforming use." That certainly seemed to complete the zoning due diligence for Patnaude.

Patnaude closed on the property and began renovations. But like many cases, along came an abutter who appealed the zoning certificate to the Zoning Board of Review. The ZBR – you guessed it, zoning horror of horrors — reversed Maloney's determination that there was a vested nonconformity. The ZBR found that the prior used car dealership use had been abandoned in 1979 when the former owner applied for a variance to change that use to light industry. Patnaude sued the town and Maloney, claiming that Maloney intentionally or negligently failed to consider documents within his control or available to him and as a consequence injured Patnaude.

Finding liability for a municipal official or a town in a case like this is certainly out of the ordinary. The judge, in denying the town's motion to dismiss, found that Maloney owed a special duty to Patnaude because Maloney knowingly embarked on a course of conduct which endangered Patnaude or Maloney had knowledge such that he could have foreseen injury to Maloney. Once the judge found that there was a special duty, she then went on to discuss the issue of negligence and ultimately held that Patnaude might succeed at plenary trial if he was able to show that the town and Maloney were negligent.

So, if you are a building official or zoning enforcement officer, at least in Rhode Island and perhaps many other states, you had better be careful before you issue a written opinion to a prospective purchaser about what he or she can do with the property...

The **"First Amendment Finds a Home"** Award goes to the Fifth Avenue Presbyterian Church in New York City for fighting for and winning on its claimed right as part of its religious ministry to provide for the homeless by letting them sleep on the church steps and landings. Fifth Avenue Presbyterian Church v. New York City, No. 01 Civ. 11493, 2004 WL 2471406 (S.D.N.Y. Oct. 29, 2004). The church had been allowing this since 1969. Starting in 2001, the city claimed nuisance concerns, told the church it would not allow the homeless people to stay there, and began arresting and dispersing the homeless.

The court granted summary judgment and a permanent injunction for the church and the homeless on constitutional grounds, ruling that the city's ejection of homeless people was unconstitutional. Noting that the city adopted a group approach to individual violations of public nuisance laws, a fact that was "constitutionally problematic," it found the city's interests could have been addressed by restrictions stopping far short of a flat prohibition. The court found that the homeless at the church were being singled out, that others elsewhere were not treated the same and the law was underinclusive and not generally applicable.

The **"Just My Cup of Tea"** Award goes to the New Mexico church, O Centro Espirita Beneficiente Uniao do Vegetal (oh sure, that's easy for you to say...) for its big win in the U.S. Supreme Court allowing the church to use hallucinogenic tea in its services, at least for the time being. John D. Ashcroft, Attorney General, et al. v. O Centro Espirita Beneficiente Uniao Do Vegetal, et al., No. 04A469, Application (04A469) for stay of injunction or, in the alternative, to recall and stay denied by the Court (December 10, 2004). All the court actually did was lift a temporary stay from 10 days previous, enabling the church to celebrate its Christmas with the holy sacrament of the tea.

Attorney General John Ashcroft (so long, John...) for the Bush administration argued that the church's use of hoasca tea was dangerous and illegal. The church took the position that the tea was a sacrament and central to the religion.

Hoasca tea is probably not the tea your grandmother served you, unless she was one of the 140 members in the United States and 8,000 worldwide to practice a religion that is a potent mixture of Christian beliefs and traditions from the Amazon basin. If you are to brew a pot, you'll have to get the plants from the Amazon River Basin. From what I've read, the tea has a little "kick" in the form of DMT (N,N-diemethyltryptamine, Nigerine, desoxybufotenine, 3-(2-dimethylaminoethyl)-indole), a controlled substance under an international treaty. http://www.a1b2c3.com/drugs/dmt01.htm "Church Wins One Round In Fight Over Hallucinogenic Tea," ABQjournal.com, http://abqjournal.com/news/state/aptea12-10-04.htm (December 10, 2004).

The **"Going Loopy Over RLUIPA"** Award goes to Canterbury House in Ann Arbor for having the temerity to use RLUIPA to try to bludgeon the local Historic District Commission into approving the demolition of an historic building so that it could build a larger facility. Episcopal Student Foundation v. City of Ann Arbor, 341 F. Supp. 2d 691 (E.D. Mich. 2004). RLUIPA (Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc) is to the litigation of religious expression cases under the First Amendment as spandex is to the resolution of wardrobe problems – they have amazing abilities to stretch to fit many situations, but the results can be ugly.

Canterbury House is a "religious organization serving students attending the University of Michigan in Ann Arbor, Michigan, and other Ann Arbor residents." The dispute arose over the proposed demolition of Canterbury House's current worship facility and construction of a new building in its place. The current facility is located in the Old Fourth Ward Historic District, one of the oldest districts in the city. The Commission denied the demolition permit and the proposed new building in part because "the proposed new building altered the character of the neighborhood, which the Commission believed should be historically preserved."

Ultimately, the dispute ended up in court with the only remaining issue being the RLUIPA claim.

The decision of the federal trial court provides a good analysis of the law in what is becoming a fairly typical case — a church trying to use RLUIPA to override local zoning and local historic preservation regulation.

In deciding Ann Arbor's motion for summary judgment, the court first held that Canterbury House had met the threshold jurisdictional requirement by demonstrating that the Historic Commission's denial of Plaintiff's permit application constituted an individualized assessment under a land use regulation.

The court then turned to the second requirement of a substantial burden on Canterbury House's free exercise of religion. It granted summary judgment for Ann Arbor. I quote from this part of the decision in full because it is one of the best expositions I have read of the substantial burden analysis:

> In sum, even accepting as true the burdens alleged by Canterbury House, and viewing them in a light most favorable to it, those burdens do not substantially burden Plaintiff's free exercise. The denial of Canterbury House's permit application to demolish its existing facility does not force Canterbury House to choose between pursuing its religious beliefs and incurring criminal penalties or forgoing government benefits. Nor does the City's denial itself prevent Canterbury House from engaging in religious worship, or other religious activities. It merely prevents Canterbury House from engaging in one aspect of its faith — worship as a whole — at one time per week at its West Huron facility. Even that statement is speculative given Canterbury House's admission that it only exceeds its current capacity "at times".
>
> In addition, the record reveals that Canterbury House's spacial constraints are not as dire as it alleges. Canterbury House admits: (a) that it currently provides certain services (i.e., meditation, concerts, etc.) at its current facility, and (b) that one half of its current space is leased to commercial tenants.
>
> Finally, any financial burden imposed on Canterbury House to locate alternative property — rental or otherwise — does not rise to the level needed to prevail on its RLUIPA claim. The fact that alternative suitable properties may exceed Canterbury's budget, or that it may incur additional rental expenses to facilitate its religious mission, are not the type of severe burdens on one's religious free exercise that the RLUIPA seeks to protect. Accordingly, the Court finds summary judgment is appropriate in favor of the Defendants on Plaintiff's RLUIPA claim.

You know, spandex just doesn't look good on everyone...

The **"Students as a Protected Class"** Award goes to the liberal college town of Austin, Texas, for its housing ordinance that protects students against discrimination in housing. http://www.ci.austin.tx.us/hrights/ According to their website: "This ordinance protects individuals from discrimination based on their race, color, sex, creed, religion, national origin, age (18 years or older), status as a student, physical and mental handicap, parenthood, sexual orientation, gender identity and marital status." Actually, there are many places that prohibit discrimination against students. Los Angeles is among them. Los Angeles Ordinance 156, 426. https://och.lmu.edu/system/CHODiscrim.Policy.htm

More often in other places, the objective is to keep the students from outbidding traditional and alternative families. College towns look for lawful ways to discriminate against students. As Slippery Rock University tells its students:

> You should know some important information regarding housing discrimination. There is no law forbidding discrimination against students (as students). However, the Pennsylvania Human Relations Act, as well as University policy, protects your rights and forbids discrimination on the basis of race or color, sex, religious creed, ancestry or national origin, handicap or disability, or use of a guide dog due to blindness. http://www.sru.edu/pages/5473.asp

The **"You Asked for It, You Got It"** Award goes to Connecticut State Representative Gail Hamm (D-East Hampton) for slipping in an amendment to the state's zoning enabling statutes late at night at the end of the annual session of the General Assembly. Public Act 04-248 started out as an attempt to save some small stores from being displaced by a proposed large supermarket. This legislation and its unintended consequences is a good lesson for everyone all across the country in why amateurs shouldn't muck about with our zoning enabling laws.

Enacted at 3 a.m. the last night of the legislative session, "An Act Concerning the Board of Assessment Appeals for the Town of Somers, the Time for Filing of Certain Exemptions in East Hartford, Zoning Near Certain Lakes, Validation of Executive Nominations and Submission of the State Plan of Conservation and Development," had a dandy little ringer buried in the middle of it:

> On and after April 1, 2004, the zoning regulations of a municipality... shall not authorize the construction of structures, accessory structures and other improvements, the total area of which is more than 12,000 square feet, within 2,000 feet of the boundary of any lake that exceeds 500 acres.

The concept was that a cluster of little shops on Lake Pocatogpoug would be protected if a proposed large supermarket could not be built. The dimensional requirements in the amendment to the enabling statute were designed specifically to encompass the small shopping center.

Unfortunately, it left many questions unanswered and affected large areas of the state, effectively freezing those areas from any further development or redevelopment. Because the legislation was slipped by in the dark of night, there was no legislative history whatsoever. No one could figure out what some of the terms meant. How was the "total area" to be measured? Was it within a single building or contiguous buildings or could it include separate buildings in a unified development? How would you measure 2000 ft. from the boundary of any lake when the high water mark of lakes varies throughout the year? How would you measure whether a lake exceeds 500 acres when the area of a lake generally changes with the seasons and with the amount of precipitation?

Ultimately, the irony of this legislation, which is likely to have been repealed by the time this article is published is that the very shop tenants who are supposed to be protected were precluded from developing and occupying a replacement center nearby because it exceeded 12,000 square feet and was within 2000 feet of the lake.

As Judge Gideon J. Tucker said (though it is often attributed to Mark Twain): "No man's life, liberty or property are

safe while the legislature is in session." http://cltg.org/cltg/barbara/2003/03-07-24_Quest%20for%20quote.htm

The U.S. Supreme Court gets an award this year; somewhat unusual, but certainly justified because they granted certiorari in San Remo Hotel, L.P. v. San Francisco City and County, 364 F.3d 1088 (9th Cir. 2004), cert. granted in part, 125 S. Ct. 685 (U.S. 2004), decided by the Ninth Circuit earlier this year. The **"Movin' On Up to the San Remo Federal Suite"** Award goes to the Court for its willingness to consider the important issue of whether once you have had a shot with your takings case in the state courts, you have the right to move out of that low-budget place into the upscale realm of the federal courts.

The City of San Francisco restricted the conversion of "residential" hotels, an important part of the single room occupancy, low-income housing stock in the city, to "tourist" hotels (essentially prohibiting the conversion from long-term occupancy to short-term). The hotel owner sued and was driven to the state courts by the doctrine in Williamson County Reg. Plan. Agency v. Hamilton Bank, 473 U.S. 172 (1985), which requires exhaustion of state court remedies first before proceeding in federal court.

The state courts upheld the regulations and San Remo went to the federal courts which held that the California Supreme Court's decision regarding the state claims was an "equivalent determination" of federal claims, thereby prohibiting relitigating identical issues. http://www.sfgov.org/site/cityattorney_page.asp?id=24177

Here's how this ripeness business works now. Someone with a takings claim under the U.S. Constitution is required by Williamson County to pursue state compensation first. Smart claimants attempt to reserve their federal claims for later through a so-called England reservation. England v. Louisiana State Board, 375 U.S. 411, 421-422 (1964). In some federal circuits this actually may work and a claimant who loses in state court may still be able to pursue a remedy in federal court, but those cases are few and far between.

Instead, what happens in most cases is that the claimant attempts to reserve the federal claim while in state court, tries the taking claim in state court, loses in state court and then goes to the federal court. There, the doors are closed to them, usually on the theory of issue or claim preclusion as in the San Remo case — that they had an opportunity to try all of the issues in state court or all of the issues were indeed addressed in state court and the state court's decision is dispositive on the merits of the federal claim. These bars to federal review include res judicata, collateral estoppel, *Rooker-Feldman*, and other waiver, preclusion, or federalism doctrines.

When someone has the gumption to attempt to start in federal court, they are sent to state court and then after they lose in state court, they are rebuffed by the federal court. This process has been pejoratively labeled the "ripeness shuffle."

Regardless of how anyone may feel about the issue of private property rights versus the government's need to regulate under the police power, this state compensation or ripeness prong of Williamson County is a doctrinal mess. We can only hope that the Court in San Remo will straighten it all out. Like many things procedural, however, this is likely to be a zero-sum game with some rights granted and some rights taken away.

The **"Comply or Pay Up"** Award goes to construction companies building some of the largest shopping centers in the Denver area. We might have named this the **"We Know You Knew Better"** Award, because they certainly knew better. "Colorado Shopping Center Builders Fined for Stormwater Runoff," Denver, Colorado, December 20, 2004 (ENS) http://www.ens-newswire.com/login/index.asp?q=/ens/dec2004/2004-12-20-09.asp

Twelve companies paid a total of $426,256 to settle claims brought against them under the Clean Water Act for violations of stormwater regulations. Among their misdeeds were not obtaining a proper permit, not having and implementing a storm water management plan, not having and implementing best management practices, and not conducting proper site inspections.

The award winners this year include: Midcities Enterprises, LLC of Colorado, Coalton Acres, LLC of Delaware, The Mills Corp. of Delaware, and JDN Intermountain Development Pioneer Hills, LLC, of Georgia.

Hello? Hello? Anyone home? The stormwater regulations have been in place for a decade, yet we still see sophisticated developers overlooking some of the basic requirements. This enforcement action began during George W. Bush's first term in office, so it is reasonable to expect that we will continue to see such actions.

And so it goes...

Another year of land-use law fun and frolic has passed. Enough silliness to delight us all has entertained us throughout the year. Once again, we have enjoyed a peculiar sense of security reinforced by the repetition of the usual mistakes, the untenable positions staked out in land-use controversies and the cartoon-like characters who still show up at public hearings. The real and important changes are so subtle that we sometimes miss them.

The significant issues in land-use law we will face in 2005 have been building for years: Affordable housing, global warming and sea level rise, smart growth, new urbanism, sustainable development, energy conservation, farmland preservation, aquifer protection, water resource allocation, providing for an aging population, and governmental fiscal stability.

But as to land-use law, I would guess the most critical development will be the President's appointments to the U.S. Supreme Court. So long for the next 12 months. Keep those cards and letters coming — maybe your nominee will be a winner of a ZiPLeR Award next year.

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