# ZONING AND PLANNING LAW REPORT

Vol. 21, No. 2 February 1998

## THE 1997 ZiPLeRs: THE THIRD ANNUAL *ZONING AND PLANNING LAW REPORT* LAND USE DECISION AWARDS

**by Dwight H. Merriam, A.I.C.P.**

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- **Best and Worst Land Use Cases**
- **The Awards**
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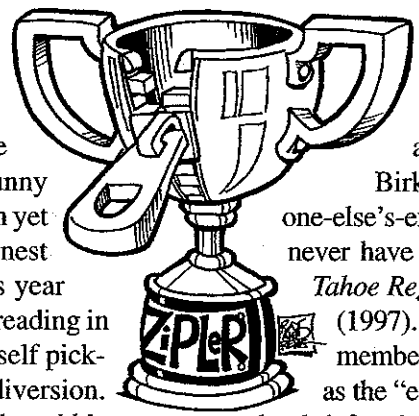
### Introduction

This is the third year for the coveted *Zoning and Planning Law Report* (ZiPLeR) Awards recognizing the most important, strange, unusual, and sometimes regrettable developments in zoning and planning law during the past year.

This has been somewhat of a lackluster year for land use. The big cases turned out to be not so big, many of the weird cases seemed ordinary, and the funny ones weren't much more entertaining than yet another Ellen DeGeneres joke. To be honest (as if I weren't honest all the time), this year while doing my obligatory professional reading in my easy chair at home I often found myself picking up the VCR operations manual as a diversion. Still, we have gleaned a few gems from the rubble.




Onward and upward. Maestro—a drum role and fanfare; readers—imagine me entering the way Kramer slides into Jerry's apartment, with an armful of great land use reading.

### The "Tempest in a Teapot" Award (and First Runner-up for the "Enough Is Enough" Award)

Let's face it—and I don't care if you're a Waco-style property rights advocate or a Birkenstock-clad save-everything-at-someone-else's-expense type—Bernadine Suitum should never have been put in the spot she was. *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997). Here's an eighty-two-year-old widow (remember Florence Dolan, who self-styled herself as the "elderly widow" in the opening sentence of her brief to the U.S. Supreme Court?) before the land's highest court asking for a chance to try her taking case. Jus-

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tice O'Connor during the oral argument was clearly exasperated with the situation: "My goodness, why not give this poor elderly woman the right to go to court and have her takings claim decided?" Most other right-thinking folks would agree.

With two corners of the same mouth the Tahoe Regional Planning Agency (TRPA) said her case wasn't ripe and the value of her transferable development rights, small as the value was, couldn't be determined. The Agency had determined her property was ineligible for development, so all she had was the allocated TDRs. She claimed a taking.

While TRPA had submitted an appraiser's affidavit as to the value of the TDRs, it also argued that the actual benefits of the program could only be determined if she pursued a transfer application.

The U.S. Supreme Court held that her claim was ripe because the government had reached a final decision. The Court never reached the second prong of ripeness—that she had sought compensation through state procedures—because it wasn't addressed in the courts below.

There was an enormous amount of hand-wringing at both extremes of the property rights debate over this case, because it was the only one available as a forum. What a waste of energy and money. Remember the *Lucas* case of a few years ago, the hapless fellow with two valuable waterfront lots who couldn't build on them? He ultimately recovered his legal fees of $514,000. Move that forward a few years, multiply by two—there are at least two sides to every lawsuit—and then add a couple of dozen amicus briefs that probably cost $50,000 a shot to put together, and we are pushing $4 million.

Oh sure, you say, justice has no price. Fine, but this case was a poor choice for both sides. The time and money would have been better spent on trying to straighten out that mare's nest known as the ripeness doctrine. The common law development of this doctrine has given us a pair of bum's pants, an ugly patchwork of inconsistent patterns. The doctrine as it stands simply doesn't work for anyone and until it is fixed through legislation or some clear decision making by the courts, cases like Mrs. Suitum's will continue to draw resources away from constructive work.

### The "How to Make Prisoners and Historic Preservationists Unhappy" Award

The Religious Freedom Restoration Act of 1993 (RFRA) was enacted by Congress in response to the Supreme Court's decision upholding a state law criminalizing peyote use, which resulted in the loss of unemployment benefits to Native American Church members who used peyote in their religious ceremonies. Last time I checked, about a year ago, there were some 275 RFRA decisions, quite a number in such a short time. I was looking for historic preservation cases because churches had been using the RFRA to fend off restrictions on their use of church property with mixed results. But what I found, not surprising perhaps, was that the large majority of cases had nothing to do with land use. They addressed mostly the garb and grooming of prisoners.

Regardless, the case before the Supreme Court challenging RFRA turned out to be a historic preservation case. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). The Catholic Archbishop of San Antonio was denied a building permit to enlarge a church in Boerne (pronounced "bernie" I think), Texas. The historic district regulations were the basis for the denial.

The Court found, in a narrowly drawn and nearly impenetrable decision, that RFRA exceeds Congress' power. For land use types, it's not worth reading. In one fell swoop, however, it wiped out some of the newly minted individual freedoms and took away the stick that some churches had used to beat back the preservationists. As with *Suitum* there were numerous amicus briefs, cast with the usual doom and gloom.

The reality is that not much was won or lost in terms of planning and zoning. Religious institutions still have their constitutional protections that will support many challenges to historic preservation initiatives and governments must continue to respect the exclusively ecclesiastical needs of churches.

### The "Four Cheers" Award

Four cheers for four decisions in the same day tidying up New York's takings jurisprudence as to preexisting conditions goes to that state's highest court. Nice work. We hope that other states follow your guidance.

In *Anello v. Zoning Board of Appeals of the Village of Dobbs Ferry*, 89 N.Y.2d 535 (1997), the village adopted a steep-slope ordinance in 1989. The ordinance had the effect of reducing the area of the lot available for development. For the lot in question, which was purchased by Rose Anello more than two years after the ordinance went into effect, the buildable area was less than 4,200 square feet, below the building-code-required 5,000 square feet.

What else could poor Rose do but go for an area variance? After all, didn't she have a hardship in that her lot was unbuildable? The late Professor Donald Hagman opined that 90 percent of variances given are granted "illegally" in that they don't meet the practical difficulty and unnecessary hardship tests. Most of us would agree with that statistic, and with those odds, why not take a shot at it?

The Zoning Board of Appeals denied the variance and before the state's highest court the main argument was that the denial effected a taking. Neatly blocking the way to the slippery slope problem (you were waiting for that easy shot, weren't you?), the court of appeals made this conclusion:

> [The] takings claim must fail because she never acquired an unfettered right to build on the property free from

> the steep-slope ordinance. . . . [The] restriction thus encumbered petitioner's title from the outset of her ownership and its enforcement does not constitute a governmental taking of any property interest owned by her.

Well, of course, that's exactly what *Lucas* holds if you believe, as I do, that the requirement in *Lucas* that the restriction "must inhere in the title itself" may comprehend local land use regulations only a couple of years old at the time of acquisition.

Just as important as the court's finding that a recent ordinance change could encumber the title à la *Lucas* is the court's plainspoken analysis of what it describes as the "hopelessly circular" problem of determining "investment-backed expectations" as that phrase was used in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Writing for the majority, Judge Carmen Ciparick puts it in terms even the biggest dolt can understand (thank you Judge Ciparick for clearing a path through this thicket):

> To illustrate based on the facts of this case: If petitioner's title was defined without regard to the steep-slope restriction, then her investment-backed expectations would include the possibility of winning a compensatory takings lawsuit as a result of the Village's enforcement of the ordinance. However, the success of her compensatory takings lawsuit would depend largely on the extent to which the ordinance interferes with her investment-backed expectations, which would in turn depend on the possible success of the compensatory takings claim, and so on. This inevitable circularity points up the analytical flaw in permitting a subsequent purchaser to assert a compensatory takings claim based on a property interest that has already been defined out of the owner's title.

Importantly, Rose Anello did not challenge the validity of the steep-slope ordinance, which she had the right to do even though she purchased after the ordinance.

The *Anello* court offered an obvious solution to avoid similar problems: The purchaser should contract to close only after the owner wages the takings challenge to a conclusion. I've tried to structure similar arrangements to preserve standing in land use cases and it is unwieldy—who pays?, who controls?, how long do you fight?, who settles?, does the owner really want to be tied up for years?, does the buyer expect market changes that will make the project uneconomic regardless?—you are welcome to add your own questions to this parade of horribles.

My friend, Gideon Kanner, the editor of *Just Compensation*, calls *Anello* a "bizarre ruling." As soon as this piece is published, I know I'll get a blast from Gideon, but such is the price we pay. . . .

One of the other four cases decided that day in New York, *Gazza v. New York State Dep't of Envtl. Conservation*, 89 N.Y.2d 603 (1997), *cert. denied*, 118 S. Ct. 58 (1997), found that there was no prohibition on a subsequent purchaser challenging previously enacted regulations as being beyond the government's legitimate police power. Unfortunately, in some states this "right" would be barren because an as-applied challenge would have to be brought within statutory time limits. That would leave some purchasers with only a difficult facial challenge, probably harder to win than most as-applied takings claims.

Admittedly left open for another day, said the court in both *Gazza* and *Anello*, are the questions of whether an owner may separately transfer a compensatory takings claim to a successor-in-interest (tough question; there may be some ways to do this now with property held by corporations) and the right of a decedent's estate to assert such a claim (I would hope it could).

The third decision, *Kim v. City of New York*, 90 N.Y.2d 1 (1997), *cert. denied*, 118 S. Ct. 50 (1997), held that enforcement of a preexisting statutory lateral-support obligation was not a taking of a property interest because the obligation was a "prevailing rule of the State's property law."

The fourth decision, *Basile v. Town of Southampton*, 89 N.Y.2d 974 (1997), *cert. denied*, 118 S. Ct. 264 (1997), held that wetland regulations and covenants predating the purchase by the current owner restricted the property and limited the compensation in a condemnation proceeding. Over 95 percent of the twelve-acre parcel was tidal wetlands. The owner sought $960,000 and the trial court awarded $117,500, which was affirmed in the appeal.

### The First-Ever "Motion for Nunsuit" Award

Early in my career I took on a most difficult and troubling case—a major airline pilot retained me to sue a


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small order of nuns. His claim? That they had failed to tell him, after fair inquiry he alleged, that abutting the country home he purchased from them was an airport with a runway aimed straight at the house. He learned of it the first Saturday morning in the house when he awoke to weekend pilots in their small planes dragging themselves into the air over his roof peak. Happily, the case, which takes two beers and twenty minutes to detail in its full glory, settled favorably for all concerned except the broker's insurance company, which took the biggest hit.

Now comes a report that an order of nuns has sued another order of nuns over a real estate deal gone bad. In February 1997, the Chicoutimi, Quebec Sisters of Our Lady of Good Counsel brought suit against the Sisters of the Good Shepherd from Quebec City over an investment of some $30 million (Canadian) in a shopping center. Chuck Sheperd's News of The Weird, Aug. 22, 1997, No. 498, http://www.nine.org/notw/notw.html.

**The "Proud to Be an American (and Car Salesman)" Award**

Jeep Eagle of Schaumburg, Illinois, wins this prestigious award and a salute worthy of General Patton for beating back the Village of Schaumburg with the mighty sword of the First Amendment. Just about every time I give a speech on First Amendment freedom of speech issues in land use regulation, someone will ask what to do about the local car dealer with the humongous 'Merican (that's the way they say it) flag obviously used to attract customers. At that point I usually observe that we are out of time and I can't cover every question. . . . The flag cases are tough ones, indeed.

The Jeep dealer was flying, count 'em, not one or two or three, but thirteen four-by-six-foot flags from poles extending nine feet above the roof. The Village permitted only three flag poles on a lot. The Jeep dealer ultimately won. *The Village of Schaumburg v. Jeep Eagle Sales Corporation*, 285 Ill. App. 3d 481 (1996) [released Jan. 15, 1997, just under the wire for this year's hot competition].

What happened? The Village got a little too artful in trying to distinguish between corporate and official (includes governmental) flags and all other flags. The former types were subject to the three-pole rule. The "others" were simply prohibited. Those other flags presumably could have included banners with "Vote for Joe," "Jesus Saves," or "Stop the War" on them. Now, the problem is obvious. Here we have content-based regulation that favors commercial speech over some pure speech. Big mistake. Limitations on the number and height of poles and total area of signs, flags, and banners is probably defensible, but only if it is content-neutral.

**The "Unreasonable Accommodation" Award**

The Fair Housing Act (FHA) has given us many interesting and difficult cases as it tries to balance local regulation against national needs to accommodate many protected classes, including the elderly handicapped. To the Court of Appeals for the Fourth Circuit we say "thanks" for upholding Howard County, Maryland's appropriate refusal to waive its zoning requirements to allow an as-of-right eight-person facility to expand to a fifteen-person "nursing home." *Bryant Woods Inn Inc. v. Howard County, Md.*, 124 F.3d 597 (1997). The court provides a good discussion of how to analyze the "reasonable accommodation" requirement.

First, said the court, Bryant Woods Inn failed to show that the county was unreasonable in finding that undue congestion would result given the lack of parking on the site, which was less than one-third the size of other nursing homes for fifteen residents in the county.

Second, and of greater importance, the court found that the expansion wasn't "necessary" (as the FHA requires) because there were thirty other as-of-right eight-person facilities in the county and the vacancy rate was between 18 to 23 percent.

**The "But Who Will Feed the Cows?" Award**

Have you noticed how crazy everyone has become over the siting of cellular antennas? The providers are fighting for locations and market share. The technology is requiring more antennas. Local governments are struggling to avoid visual blight. But American ingenuity always saves us in the end.

This award goes to the Town of Mendon (New York) Zoning Board of Appeals for approving and successfully defending a cellular antenna "silo"—the quotes are from the decision, presumably indicating that it only looks like a silo, but isn't really a silo. *Village of Honeoye Falls v. Town of Mendon Zoning Board of Appeals*, 654 N.Y.S.2d 534 (N.Y. App. Div. 1997). The court said the decision of the ZBA was rational and supported by substantial evidence, and that the fake silo "mitigated a significant impact, namely the visual impact of a 150-foot monopole. . . ." There are going to be some disappointed cows in Mendon.

**The "So Why Don't You Just Change the Law if You Don't Like It" Award**

I had only to look out the back window of my office at the Connecticut State Capitol building where the General Assembly convenes each year to realize we had an award winner right here. Unfortunately, we don't know their names, so we will award it to the General Assembly as trustee for the proponent of the legislation in absentia.

The assembly added new language to § 8-13a of the Connecticut General Statutes. Section 8-13a was first enacted at the request of bankers who worried about the value of mortgaged properties. In its first incarnation, it created legal nonconformities for properties with dimensional illegalities, such as a porch encroaching into a sideyard, if no enforcement action was initiated within three years of construction. Nice idea.

Section 8-13a was then amended to include protection for violations of minimum lot area. But now hold onto your seats, and read no further if you have such infirmities as would keep you from riding Space Mountain at Disney World, this year the General Assembly amended § 8-13a to expressly protect wrecking and demolition yards, concrete product manufacturers, asphalt plants, and refuse operations that are on fifteen-acre or larger parcels, not permitted by local zoning, "established and continued in reasonable reliance on the actions of the municipality" and in existence for twenty years without institution of a court action to enforce the zoning. I don't know who had the "juice" to get this enacted, but I've got to try to get me some of this kind of legislation this session.

**The "Hello? Hello? Anyone Hear Me?" Award**

To Leonard and Barbara Dible of Lafayette, Indiana, goes this new award and our condolences for how they have been treated by the city. To the city: Shame on you, this is not the way to do business by anyone's book. *Dible v. City of Lafayette*, 678 N.E.2d 1271 (Ind. App. 1997).

Read the facts of this case and you will be left shaking your head in disbelief. Basically, the city, illegally through a private contractor, tore up the Dibles' lot cutting down seventeen large trees and ultimately building a new sewage lift station over the written and oral protests of the owners. One of the more outrageous parts of this sad story is that after Mr. Dible had expressed his concerns over the tree cutting and excavation and before the lift station was built, and while he was on vacation, the city published notice in the newspaper of a public meeting to accept comments on the project. No one showed up except the city representative and the contractor. Then, the city through its contractor filed an application with the state for approval of the project without identifying the Dibles as potentially affected persons. Unbelievable.

Fortunately, the Indiana court recognized the procedural due process violation and ordered further proceedings to provide either appropriate compensation for the Dibles or judgment for the city if it can demonstrate public necessity and no abuse of its rights under the easement over the Dibles' land.

**The "Annual Creche Crisis and Menorah Madness" Award**

We could give one or even several of these each year. Why municipalities continue to pick this fight is beyond me. But to the City of Jersey City goes this award. May the force be with you. *American Civil Liberties Union of New Jersey v. Schundler*, 104 F.3d 1435 (3d Cir. 1997), *cert. denied*, 117 S. Ct. 2434 (1997).

The result—the Establishment Clause of the First Amendment prohibits a city from placing a creche with the baby Jesus and a menorah on the front lawn of city hall—is as expected. What helps this decision rise above the rest is the Third Circuit's apparently straight-faced analysis of the district court's absurd decision and a good summary of many of the relevant cases.

Believe it or not, the district court, in what the Third Circuit described as a "hypertechnical Establishment Clause analysis," held that the addition to the display of a four-foot plastic Frosty and Santa, along with a red sled, "demystified" the religious message. These secular symbols were tossed into the scene after court decisions elsewhere permitted religious symbols to remain if the display was predominantly secular. The district court even required that if Frosty, Santa, or the red sled should absent the scene that they be replaced within twenty-four hours lest the demystification be lost. So help me Hanna (is that secular enough?), that's what they decided.

The court of appeals quoted with approval from the ACLU's brief on the district court's analysis:

> At most, a reasonable observer would construe [Frosty and Santa] to be background witnesses to the Miracle of the Oils and the Birth of Christ, respectively. However confusing the presence of a snowman in Bethlehem may be from a canonical perspective, a reasonable observer informed of the history and context of religious displays in front of City Hall would invariably characterize them for what they are—attempts at evasion of constitutional prohibitions through superficial secular tokenism.

One would think that this insanity simply emerged from the ether, but it actually reflects numerous other cases high and low that have toyed with juxtaposing the ecclesiastical with the secular, like poison and antidote, to create with alchemy some constitutionally neutral soup. Our hope for the new year is that we have no more of these truly unnecessary cases.

**Conclusion**

So ends another year of profundity and peccadillo. The usual suspects—sign regulation, the takings issue, the Fair Housing Act, and the Establishment Clause—were rounded up and dutifully interrogated with mixed results. For the third year in a row we have had to create numerous new awards simply to fit the emerging categories within the broad range of typical cases.

It's easy to love land use law, as these recent developments illustrate, because the practice seems to touch all aspects of our lives at some time. May we be wise in how we use the law as it affects the use of land.

## RECENT CASES

**Eleventh Circuit Will Reject "Substantive Due Process Taking" Claims**

An important decision by the Eleventh Circuit Court of Appeals has made it exceedingly clear that it will not entertain what it characterizes as "substantive due pro-

cess taking claims." *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997). In *Leon County*, the court rejected constitutional claims by landowners against a rezoning that took away their right to build high-density apartment complexes. As stated by the court:

> The most significant holding on this appeal is that, other than a due process claim based on arbitrary and capricious action, there is no "substantive due process takings" cause of action available in such a case, separate and apart from a cause of action under the Takings Clause of the United State Constitution. . . . [I]f a challenge to a "regulatory taking" states a claim upon which relief may be granted at all, it is a cause of action under the Takings Clause, subject to the ripeness prerequisite of exhaustion of the state-court inverse condemnation remedy.

*Id.* at 611-12.

The court based its holding on the Supreme Court's decisions in *First English* and *Lucas*, "which, read together, firmly place all the constitutional constraints on regulatory takings recognized by this Court under the Takings Clause alone." *Id.* at 613. The court also cited its own decisions in *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066 (11th Cir. 1996) and *Bickerstaff Clay Products Co. v. Harris County, Georgia*, 89 F.3d 1481 (11th Cir. 1996).

As explained by the court, an important consequence of its holding is that landowners may not use a substantive due process argument to get around the principle that a taking claim must be considered in light of the remaining use of the property as a whole.

Finally, on the merits, the court quickly rejected the claims that the rezoning was arbitrary and capricious or in violation of the equal protection clause.

**Vindictive Zoning Actions Reach Rhode Island High Court**

Developers who had been denied subdivision approvals for improper personal reasons successfully sued the town in *L.A. Realty v. Town Council of the Town of Cumberland*, 698 A.2d 202 (R.I. 1997). The developers prevailed on a number of claims that are generally difficult to prove. However, in this case there was an unusual amount of evidence of official animus and misconduct directed toward the developers. For example, in order to deny the developers' applications, town officials illegally altered an improperly adopted referendum and distributed the falsified ordinance to the relevant planning and zoning boards. As stated by the state supreme court, "It is evident that this case does not represent the routine developer's claim or zoning denial." *Id.* at 214.

The state supreme court affirmed a finding that the town had tortiously interfered with prospective contractual relations since the "actions of the mayor and the town solicitor demonstrated an obvious intent to interfere with plaintiffs' legitimate expectancy of developing their property under the regulations in effect when plaintiffs filed their subdivision applications." The supreme court also found that the town would not be protected by government immunity. "We are of the opinion that the town's adoption and enforcement of an invalid ordinace in order to interfere with plaintiffs' legitimate expectations regarding their property amounted to egregious misconduct, and consequently deprived the town of governmental immunity from tort claims." *Id.* at 208-09. However, the amount of damages available for the tort claims were limited to $100,000 under the Governmental Tort Liability Act.

The state supreme court also found for the plaintiffs on procedural and substantive due process grounds with respect to certain subdivision applications. The court concluded that the developers had a constitutionally protected property interest in the subdivision approvals because they had complied with all valid regulations, and had been denied the approvals solely because of invalidly adopted requirements. On the procedural claim, the court found that the hearings afforded to the developers had been "a sham in which officials rendered decisions that were preordained to deprive plaintiffs of their constitutionally protected property interest." Therefore, the court held, "the animosity and actions of some town officials resulted in a procedural due process violation." On the substantive due process claim, the court found for the developers because "the town, through its officials acted egregiously, as well as with animus, and without actual or legal basis." Finally, the court found that the plaintiffs were entitled to damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988, respectively.

**NOTED IN BRIEF**

**Denial of a special permit to mine thirty-two acres on Cape Cod did not constitute a taking.** *Daddario v. Cape Cod Comm'n*, 425 Mass. 411, 681 N.E.2d 833 (1997). The Supreme Judicial Court found that the property had substantial value for other uses. In addition, the taking claim was not ripe under the *Yolo County* and *Hamilton Bank* decisions because the permit denial by the Cape Cod Commission did not necessarily preclude approval of a less extensive sand and gravel operation.

**The Supreme Court of Rhode Island rejected takings and substantive due process claims in a § 1983 case** in which a town had refused to correct the allegedly erroneous zoning designation of a landowner's property. *Brunelle v. Town of South Kingstown*, 700 A.2d 1075 (R.I. 1997). On the takings claim, the court found that the landowner did not have an investment-backed expectation because (1) the landowner's intended use of the property as a ministorage or self-storage business would not have been permitted as of right under the town's zoning ordinance in any district at the time the landowner purchased the property, and (2) the landowner's lot was substandard (since it lacked the street

frontage necessary to obtain a legal building permit). On the substantive due process claim, the court found that the town's refusal to rezone "was not the type of abitrary or capricious behavior sufficient to rise to the level of a constitutional violation."

**Because the trial court was not "palpably wrong," the Supreme Court of Alabama upheld a judgment** that a rezoning was not arbitrary or capricious. *Ex parte City of Jacksonville*, 693 So. 2d 465 (Ala. 1996). It was sufficient that the record contained credible evidence to support the trial court's holding. The court also rejected an argument that the city should be estopped from rezoning the complainant's property. "Persons dealing with agencies of government are presumed to know the legal limitations upon their power and cannot plead estoppel on the theory that they have been misled as to the extent of that power." *Id.* at 467 (citations omitted).

**Large lot zoning on the island of Martha's Vineyard was upheld** in *Johnson v. Town of Edgartown*, 680 N.E.2d 37 (Mass. 1997). The court found that preservation of the area's unique historical, cultural, and ecological values outweighed the exclusionary effects of the zoning. Under the zoning in question, about half of the town of Edgartown is subject to a three-acre restriction.

**The Supreme Court of North Carolina dismissed an appeal on grounds of mootness** after the property in question was sold. *Messer v. Town of Chapel Hill*, 485 S.E.2d 269 (N.C. 1997). The action had been started to challenge the constitutionality of a rezoning. The court found that the plaintiff lacked standing after the sale. Furthermore, the sale, which was for $1,500,000, "establishes beyond peradventure that the property continued to have a 'practical use and a reasonable value' following the amendment to the zoning ordinance." *Id.* at 270.

**In two cases, the Supreme Court of Georgia rejected challenges to adult entertainment ordinances.** In *Quetgles v. City of Columbus*, 491 S.E.2d 778 (Ga. 1997), the court upheld an ordinance that prohibited businesses from providing "one-on-one lingerie modeling." The court found that the evidence considered by the city council was sufficient to support its interest in "protecting property values and preventing criminal activity in areas near the one-on-one lingerie modeling shops." In *Chambers d/b/a "Neon Cowboy" v. Peach County, Georgia*, 492 S.E.2d 191 (Ga. 1997), the court upheld an ordinance prohibiting adult business licensees from serving alcohol.

**Applying the "rational basis" and "fairly debatable" standards, the Supreme Court of Georgia** upheld the constitutionality of an ordinance "requiring land lots at least one acre in size for the keeping of a Vietnamese pot-bellied pig as a domestic pet." *City of Lilburn v. Sanchez*, 491 S.E.2d 353 (Ga. 1997). The court found that the ordinance "obviously serves a legitimate public purpose, as it regulates and controls some of the more unpleasant aspects of living with or near swine." The court therefore reversed a ruling by the trial court that the city had violated the substantive due process rights of the pig owners.

**The Supreme Court of Washington construed the statute extending the vested rights doctrine to short subdivision** applications in *Noble Manor Co. v. Pierce County*, 943 P.2d 1378 (Wash. 1997). The court held that "upon the submission of a complete application for a short subdivision, the applicant has the right to have that application, including both the request to divide and the request to develop the land, considered under the zoning and land use laws in effect on the date of the application." The vested development rights are limited to those uses that are disclosed in the application.

**When a court finds that a local zoning action is unconstitutional and remands the matter** to the local government with directions to rezone, the process is, in essence, begun anew. Therefore, another hearing is required by statute. *City of Cumming v. Realty Dev. Corp.*, 491 S.E.2d 60 (Ga. 1997). "Even if the local government were inclined on remand simply to grant the desired zoning classification, a hearing would be appropriate to provide the public a meaningful opportunity to be heard."

**A town's zoning ordinance was found to be invalid because its adoption was not preceded by the adoption of a comprehensive plan.** *Town of Jonesville v. Powell Valley Village Ltd. Partnership*, 487 S.E.2d 207 (Va. 1997). The court rejected the suggestion that the ordinance itself could satisfy the comprehensive plan requirement. The ordinance and all subsequent amendments were therefore void ab initio. The court also found that it was not necessary to exhaust administrative remedies before making this kind of challenge to the validity of a zoning ordinance. Finally, the court affirmed a writ of mandamus for issuance of a building permit that had been denied solely for lack of a zoning permit under the now-invalid ordinance.

**The denial of billboard permits by a Community Appearance Board was arbitrary and an abuse of discretion.** *Peterson Outdoor Advertising v. City of Myrtle Beach*, 489 S.E.2d 630 (S.C. 1997). The board failed to apply any of the specific criteria enumerated in the ordinance that created the board. Instead, the board improperly based the denial on the broad statement of objectives and purposes contained in the ordinance. The court found that the ordinance objectives "fail to provide any guidance to a potential applicant of the basis for denial or actions necessary to

obtain . . . approval. . . . What one person may find unsightly and inharmonious may be pleasing to another."

**A landowner did not acquire a vested right to build townhouses** before enactment of a zoning ordinance amendment requiring a special permit for townhouses. *Town of Rocky Mount v. Southside Investors, Inc.*, 487 S.E.2d 855 (Va. 1997). The landowner failed to identify any significant governmental act approving its proposed development. A previous rezoning of the property, which would have allowed townhouses as of right, was not such an act. "That amendment merely changed zoning classifications and did not authorize any specific plan for development of the property. A significant governmental act . . . authorizes the specific use to be made of the property, rather than the general categories of development allowed in a given zoning classification." *Id.* at 857.

**The Open Meetings Act of Maryland required a county board of appeals to conduct its deliberations in open session** when considering a development plan. *Wesley Chapel Bluemount Ass'n v. Baltimore County*, 347 Md. 125, 699 A.2d 434 (Md. 1997). However, under the statute, a court can void a public body's action only upon a finding that the public body willfully violated the Act. The case was therefore remanded for determination of whether the board's violation of the Act was willful.

**Substantial evidence did not support the decision of a city planning and zoning commission to grant a conditional use permit** to allow an off-street parking lot in a high-density residential zone. *Heiss v. City of Casper Planning & Zoning Comm'n*, 941 P.2d 27 (Wyo. 1997). The agency failed to create a record of material and substantial evidence. Furthermore, its decision was arbitrary as a matter of law because it failed to consider all relevant factors required by the city zoning ordinance for issuing a conditional use permit. In particular, the commission failed to consider traffic implications.

**Change in ownership of a lawful, nonconforming salvage yard did not constitute a termination** of the nonconforming use. *Poole v. Berkeley County Planning Comm'n*, 488 S.E.2d 349 (W. Va. 1997). "A change of ownership of land to which a nonconforming use has attached does not affect the right to such use although the change occurred after the restrictive ordinance became effective." *Id.* at 353-54 (quoting 1 *Anderson's American Law of Zoning* § 6.40 (4th ed. 1996)). However, the case was remanded "for the making of a specific finding upon the question of whether the salvage yard was expanded or altered by the appellant following his acquisition of the property."

**A music school was found to be a "private" school as opposed to a "trade" school** within the meaning of zoning regulations that permitted the former but not the latter in R-1 districts. *Neighbors on Upton Street v. District of Columbia Bd. of Zoning Adjustment*, 697 A.2d 3 (D.C. Ct. App. 1997). "Although some music school graduates become professional musicians, music schools generally do not exist just to teach students a trade. 'In fact, the teaching of music has been described as an educational use entitled to locate wherever educational uses are permitted.'" *Id.* at 8 (quoting 2 *Anderson's American Law of Zoning* § 13.12 (4th ed. 1996)).

**The New York Court of Appeals held that a property owner who had previously obtained a use variance could not transfer** its original as-of-right development rights without approval of the Board of Standards and Appeals (BSA). *Bella Vista Apartment Co. v. Bennett*, 89 N.Y.2d 465, 678 N.E.2d 198 (1997).

> The City correctly argues that if the owner of Lot 185 is permitted to retain the commercial use variance, and then also to sell off its as-of-right development rights under the original residential use authorization, the predicate findings by the BSA would be undermined as would the general over-all Zoning Resolution Plan. . . . In other words, if a landowner retains the bonus option to sell surplus development rights as they existed before the use variance is acquired, the variance might not have been the "minimum variance necessary to afford relief," and the lack of any "reasonable possibility" of a "reasonable return" is retrospectively placed in considerable doubt. . . . [T]he premium, on top of its acquired variance, from its sale of development rights, contradicts the no-reasonable-return predicate finding, necessary to have garnered the use variance in the first place.

678 N.E.2d at 200.

**A Wisconsin city acted outside the scope of its authority when it conditioned preliminary plat approval** for a residential subdivision on the annexation of the property to the city. *Hoepker v. City of Madison Plan Comm'n*, 563 N.W.2d 145 (Wis. 1997). The property, which was within three miles of the city's corporate limits, was subject to the city's extraterritorial plat approval jurisdiction. However, the Supreme Court of Wisconsin found that the city, by imposing the annexation condition, was guilty of "unduly influencing a property owner to sign an annexation petition, contrary to the safeguards provided in [chapter 66 of the Wisconsin statutes, governing annexation standards]." *Id.* at 151. On a separate issue, the court found that the property owners' claim that an "open space" condition on plat approval constituted a regulatory taking was not ripe. The city was found not to have made a "final determination" on the plat approval, and the property owners had not utilized Wisconsin's inverse condemnation procedure.