ZONING AND PLANNING LAW REPORT

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THE 2006 ZIPLERS: THE TWELFTH ANNUAL *ZONING AND PLANNING LAW REPORT* LAND USE DECISION AWARDS

Dwight H. Merriam, FAICP, CRE

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. He is past president and a Fellow of the American Institute of Certified Planners, a member of the American College of Real Estate Lawyers, a Counselor of Real Estate and Fellow of the Royal Institution of Chartered Surveyors. He is the author of The Complete Guide to Zoning (2005) available in bookstores everywhere and through www.dwightmerriam.com, and co-editor of Eminent Domain Use and Abuse: Kelo in Context (2006). The award illustration is by Ray Andrews, a former partner at Robinson & Cole, LLP.

Dedication

Daniel C. Curtin Jr., the dean of the California land use bar and one of the country's preeminent land use lawyers, passed away at the age 73 in November. Everyone who was lucky enough to know him loved him. His Irish impishness delighted all and infused his practice. He had a mannerism, for example, of turning up his hand with his fingers together and twisting it as he explained a nuance in the law, signaling some subtlety or contrary perspective missed by most. A little smile came with it.

I was with him in October at a meeting of the ABA State and Local Government Law Section in Madison, Wisconsin, and he was hale and hearty, offering sage advice when solicited with his astonishingly strong and booming, yet somehow gentle, voice.

He was as playful in his attire, tending to shorts and tropical shirts, like some lost beach boy. Dan was at once respectful and a little irreverent, the latter evidenced by his fondness for the ZiPLeR Awards. He never failed to write me after each year's offering and say something nice. It was like a late Christmas present for me to have his commendation.

He was passionate about his family, his friends, his religion and the law. In meetings Dan was often the first to speak what was on the minds of many of us too wary

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to be critical when we knew we should be. He was at many times our conscience.

Dan's accolades, achievements, and lifetime body of work are too great to catalogue here. He chaired the ABA's State and Local Government Law Section and received the Section's highest award for Lifetime Achievement. Likewise, the International Municipal Lawyers Association awarded him its Lifetime Achievement Award and the American Planning Association recognized him with its Distinguished Leadership Award. Together, these are the Triple Crown of land use and municipal law practice and the only person ever to win all three. What more can you say? Dan, thank you for making the world a better place and for your friendship.

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Introduction

I'm reminded of that *Brokeback Mountain* line by Jack Twist: "I wish I knew how to quit you." Here we are, you and me, in the twelfth year A.Z. (Anno ZiPLeRi), and I am still reading and writing about the strangest or at least more dramatic land use cases of the year. For the uninitiated, these awards were created to look back over the last 12 months and identify the more unusual and sometimes important land-use decisions. The cases tend to be in the lower courts and hearing rooms, not the Supreme Court, because the action is nearly all down there. By the time land use cases get to the Supreme Court, they have been so sliced and diced, they make Ron Popeil look like a piker. It is much more fun to look at the raw product of human conflict over what is most important to us – the land and how it is used. Volume-wise, this has been an astonishing year.

The **Little-Wonder-There-Is-Eminent-Domain-Backlash Award** goes to Los Angeles City Councilman Bernard C. Parks for advocating that private property taken by eminent domain for a public animal shelter now be sold to a manufacturer for a new plant.[1] The city paid a furniture manufacturer, the 20-year owner of three buildings on three acres, $5.8 million for the property. Regrettably, the cost of the new shelter got out of control with skyrocketing construction costs. With a build out expected to be $17 million, the shelter began to look untenable. Doesn't sound so bad on its face, does it? Plans and needs change, right? Government needs to be flexible.

But now throw in these facts: The proposed new owner is another furniture manufacturer and a market competitor of the company which lost the property. Executives of the prospective new owner have political connections and have made over $17,000 in political contributions to leading local officials. The likely sales price would be less than the costs already incurred. Jon Coupal, president of the Howard Jarvis Taxpayers Association, sees it this way: "It strikes me as an extraordinarily blatant abuse of eminent domain."

Thanks to my law partner, Michael Giaimo, for nominating this next ZiPLeR winner from a Massachusetts Supreme Judicial Court case, Rattigan v. Wile.[2] This first-ever **Grown-Ups-Acting-Badly Award** (seems to me we have seen hundreds of candidates for this one over the years) goes to Evan Wile, the owner of a waterfront lot in a neighborhood of luxury homes in Beverly, Massachusetts, for trashing his own yard apparently to punish his next door neighbors, John Rattigan and Jeffrey Horvitz, for challenging the issuance of a building permit.

Both lots are on a sandy beach with commanding views of the water. The Rattigan/Horvitz home, commonly known as Edgewater, is a luxurious residence, with a pool and manicured grounds. The undeveloped Wile lot is about 2.9 acres and its only access to a public

street is over the Rattigan/Horvitz lot. Wile outbid Horvitz at a foreclosure auction to buy his lot in 1992, just a year after Rattigan and Horvitz bought their abutting property at a foreclosure auction. Remember, this time period was in the shadow of the disastrous real estate bubble burst of the late 1980s.

Now suppose you own a fabulous waterfront estate and you lose the opportunity to buy the abutting open land the only access to which is a right of way over your estate? Bingo! You challenge the right to develop the open lot on the basis of a lack of legal access rendering it unbuildable under the zoning rules. Rattigan did just that on behalf of the Edgewater House Trust and lost. Wile viewed these efforts and other attempts to convince city officials to deny the development as "harassment." Then, after Rattigan and Horvitz filed a challenge to Wile's building permit, which ultimately was successful, Wile began retaliating. While the appeal was pending, Wile, a building contractor, decorated the boundary of his empty lot with "broken concrete blocks, used pipe, and rusted metal components including a crane bucket, and … [later]… a red, metal ocean container…." Turning the other cheek, Horvitz threw up screening – a few shrubs and later a six-foot high trellis fence. Wile countered by moving the debris into view, for example, by putting the crane bucket on top of the shipping container. "On a portion of the boundary of his property not protected by visual barriers, the defendant placed the detached bed of a pick-up truck that at one point held a large truck tire, and an unusual wire frame or rack from which hung a yellow detergent bottle and several plastic figures including a duck, a goose, and an owl." A judge later ordered the rack removed.

It gets worse. Horvitz erected a fence to protect his swimming pool users from catcalls from Wile's lot. Wile moved a construction trailer next to the fence and jacked it up on concrete blocks and then put smelly porta-potties next to the fence. The coup de grace was a tasteful 15-foot high yellow and white tent that Wile put up to block the ocean view from Edgewater. A judge ordered removal.

It gets worse. Over two summers Wile hosted beach parties, which he didn't attend himself, for 150 to 200 people from a local youth center. The trial judge concluded that the parties were "not born[] of a desire to be a charitable citizen in Beverly but, rather, was part of the campaign that was being waged against the Horvitzes to create a difficult and destructive neighborhood."

You think that was the end of it? Nope. Wile, a licensed commercial helicopter pilot, used his lot as a heliport. He put up this sign on the fence by the pool in bold red lettering: "WARNING HELICOPTER OPERATIONS -- AUTHORIZED ACCESS ONLY." Debris was blown around during take-offs and landings onto the Edgewater property striking Horvitz's stepson and Horvitz's youngest daughter. After a judge ordered him to cease landing there, Wile still flew over the lot to "check the property."

Rattigan and Horvitz sued in nuisance, and won a total recovery of $532,035.05 and an order for Wile to remove the debris and not harass. The Supreme Judicial Court affirmed the holding of a private nuisance and tweaked the money damages and injunction.

The **I-Don't-Know-It-When-I-See-It Award** goes to the South Dakota Supreme Court for its incredible, as in it has no credibility, decision that an ice making plant is not a manufacturing use.[3] Thank you again to Michael Giaimo for this one. Tour Ice makes 100,000 pounds of ice a day, 24/7, in a central business district zone with refrigerated trucks coming and going to deliver the cubes and blocks in a 140-mile-radius market area.

A near neighbor living in an apartment couldn't stand the irregular, loud, grinding clamor of compressors and fans going on and off with noise levels measured at 70-74 decibels.

She sued claiming a nuisance and zoning violation. At trial, the company's owner, Stephen Ellwein, conceded, "Just so . . . everybody understands what we are talking about, we manufacture ice. I mean, that's a given." Pretty much as you might expect, right? The trial court,

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Editorial Director
William D. Bremer, Esq.

Contributing Editors
Patricia E. Salkin, Esq.
Lora Lucero, Esq.

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Editorial Offices: 50 Broad Street East, Rochester, NY 14694
Tel.: 585-546-5530 Fax: 585-258-3774
Customer Service: 610 Opperman Drive, Eagan, MN 55123
Tel.: 800-328-4880 Fax: 612-340-9378

however, found the ice making operation to be a pre-existing and therefore legal use, and chose not to declare it a private nuisance.

The Supreme Court affirmed. "Manufacturing" was not defined in the applicable zoning ordinance, so the court looked to other cases in many jurisdictions, some of them tax cases, and found a difference of opinion. The court seemed to like the reasoning of one Pennsylvania court in holding that the artificial production of ice on a commercial basis did not constitute manufacturing because there is no lasting change when water is frozen:

> Ice is not a new article. It is still what it was originally—water. In fact, if it is allowed to remain in a warm temperature it reverts to water without any human or mechanical interposition. This cannot be said of any product which is generally accepted to be a manufactured product. . . . The appellant argues that since, through the process which it applies to water, water acquires a new shape, the resulting product must, therefore, be a manufactured article, but the new shape which we find in a manufactured article must be a permanently new shape.[4]

In the end, the South Dakota Supreme Court gave the greatest judicial deference to Pierre's staff: "To now impose a court-made definition would have the effect declaring unlawful an existing thirty-two year business. We would be supplying a meaning to a word in the ordinance that the city has never given to it.…Even if we were to declare today that the making of ice constitutes manufacturing as that term is used in the Pierre zoning ordinances, we would exceed the powers granted under the writ of mandamus to require Tour Ice to cease or curtail operations."

If anything, this decision is illustrative of the fine line between judicial deference and abdication of authority. You decide which side this court chose.

For our next award we need to cross the pond to St Fillans, Perthshire, England. We present the first ever **Do-You-Believe-In-Fairies Award** to the local villagers who protested a housing project on the grounds that it would "harm the fairies" living under a rock. Although it was only a small colony in fairies, it was sufficient to force the developer to give up its building plans and initiate a new design.[5] We thank Bill Ethier, CAE, Executive Vice Pres./CEO of Home Builders Association of CT, Inc., for his extreme vigilance in following every threat to homebuilding here and abroad and bringing this new risk to developers to our attention. We have encountered habitat preservation for endangered species, the need to preserve vernal pools, limitations on encroachments into view corridors, and we obviously all should have a special concern not to disturb the fairies. Everyone should have a reminder on their predevelopment checklist to make sure that no fairy homes will be damaged or destroyed by the proposed project.

Jeannie Fox, council chairman, said: "I do believe in fairies but I can't be sure that they live under that rock. I had been told that the rock had historic importance, that kings were crowned upon it." The Planning Inspectorate does not have fairy protection standards. Someone from the office did say that: "Planning guidance states that local customs and beliefs must be taken into account when a developer applies for planning permission." The developer, no doubt with a sigh and shrug of the shoulders, said: "We had to redesign the entire thing from scratch. The new estate will now centre on a small park, in the middle of which stands a curious rock. Work begins next month, if the fairies allow. "

The **Permissible-Drive-By-Shooting Award** goes to the South Dakota Supreme Court for upholding a state statute allowing hunters to kill game on private property while standing on the public right-of-way.[6] The case came up on the basis of a takings claim by the private property owners who somehow felt it was an invasion of their private property rights for the state to enable by statute the killing of game on their property by others.

Plaintiffs Robert and Judith Benson live on and operate a ranch primarily for agricultural purposes including the raising of livestock and a variety of crops. They have a private hunting lodge and maintain a private hunting preserve on their property. A portion of the parcel has been cultivated exclusively for pheasant habitat.

South Dakota law requires hunters to get permission from property owners before hunting on private properties. However, hunters may shoot small game from highways and other public rights of way without the permission of abutting landowners. The law allows "The shooting at or taking by legal methods of small game… that are in flight over private land if the small game has either originated from or has taken flight from the highway or public right-of-way or if the small game is in the process of flying over the highway or public right-of-way." How could you ever enforce such a law? Even football referees require instant replays to determine if a receiver steps out of bounds. Envision a pheasant zigzagging anywhere near the boundary between the public right-of-way and private property.

The court decided that the physical invasion, if any, was temporary and intermittent, and that even the shot left lying on the private property was not permanent. No taking.

Speaking of physical invasion, have you ever wondered whether golf balls flying into your backyard are a trespass or a nuisance or neither? Pat Randolph, a profes-

sor at the University of Missouri Kansas City School of Law, moderator of Dirt List (DIRT@LISTSERV.UMKC.EDU) and golf aficionado, posted a 2005 decision in 2006 (the reason why we allow it to be considered for the 2006 ZiPLeRs): Amaral v. Cuppels, 64 Mass. App. Ct. 85, 831 N.E.2d 915 (2005), review denied, 445 Mass. 1102, 834 N.E.2d 256 (2005). Here's how Professor Randolph, mostly in his own words, explained the case, for which we award the **Errant-Spherical-Physical-Invasion Award** to the Middlebrook Country Club along with 100 hours of free instruction at an indoor golf driving range this winter for the worst offenders:

Homeowners filed suit against the owners and operators of the Middlebrook Country Club. Shortly after moving into new homes adjacent to the ninth hole, the homeowners discovered that golf balls were hit onto their property at a frequent and alarming rate. Unable to resolve the issue with the club, the homeowners went to court for an injunction. The trial court found no nuisance. But the appeals court gave them the injunction, finding the stream of misfired balls to be a continuing trespass. Analogizing the facts to those in Hennessy v. City of Boston, 265 Mass. 559, 164 N.E. 470, 62 A.L.R. 780 (1929) (involving persistent landing of baseballs from neighboring baseball field onto plaintiff's property) and Fenton v. Quaboag Country Club, Inc., 353 Mass. 534, 233 N.E.2d 216 (1968) (involving an annual average of 250 errant golf balls from neighboring country club landing on plaintiff's property), the Appeals Court found that the regular and frequent non-permissive propulsion of physical objects onto an adjacent property constitutes a continuing trespass.

The Appeals Court rejected the club's defense that the homeowners knew of the risk of errant golf balls prior to purchasing their homes, finding that while the notion of barring nuisance claims based on a "coming to a nuisance" defense is well accepted, there is no similar notion of "coming to a trespass." In order to prevent future instances of trespass, the Appeals Court held that the club must either acquire the land onto which the golf balls are currently landing or acquire the right to use the land for that purpose.

Professor Randolph, almost always perceiving issues others miss, asks whether one can establish a prescriptive right to conduct such a trespass? In Massachusetts, the prescriptive period is 20 years, and the defendants didn't quite make that period for operation of their golf course. Further, the court noted that in the precedent golf course trespass case, where the course had operated for more than 20 years, there had been no discussion of prescriptive rights. The court reached no conclusion on the point, but Professor Randolph speculates that a prescriptive use could be created. Certainly the activity meets all the requirements, unless one can argue that golf balls landing on vacant land are not an "open and notorious" use. As a professor, of course, Pat Randolph cannot miss the chance for a mini-lecture: "Some courts will characterize a continuing trespass as a nuisance, but of course it is a special kind of nuisance - one constituting a trespassory, rather than a non trespassory, invasion of use and enjoyment. Lawyers frequently make the mistake of lumping trespasses and nuisances together. Don't do it. A nuisance involves a balancing of two presumptively legitimate uses that just conflict with one another. A trespass involves a non-legitimate invasion of the acknowledged possession of one owner's rights by another party. It doesn't matter that the trespass is initiated from the invading party's space - it is still an invasion of the plaintiff's space."

The **Tell-It-Like-It-Is Award** has to go to the Second Circuit Court of Appeals for beginning its decision on yet another Christmas season public display case: "No holiday season is complete, at least for the courts, without one or more First Amendment challenges to public holiday displays." Skoros v. City of New York.[7] The City of New York Department of Education led with its chin on this one by promulgating a policy on holiday displays in public schools.

In an effort to play to all the major religions, the Department allowed the display of a menorah as a secular symbol of Judaism and Chanukah, the star and crescent as a secular symbol of the Islam and Ramadan, and a Christmas tree, presents, and Santa Claus as secular symbols of Christianity and Christmas. Crèche and nativity scenes were not permitted.

Predictably, a parent sued claiming an Establishment Clause violation. The City of New York won at trial and in the Second Circuit, which did not say the City could or could not permit the crèche and nativity scene, but said that not including further symbols of Christianity was not dismissive of that religion. It's tempting to describe this case as damned if you do and darned if you don't, but given the religious nature of the conflict, that might well be blasphemous, and even as a Unitarian I don't want to take the risk.

If you are uneducated about the world's major religions, this decision is a primer in all aspects with fabulous definitions like this in footnote 9: "Latkes are potato pancakes customarily served during Chanukah because the oil in which they are fried serves as a reminder of the miracle of oil associated with Chanukah. See County of Allegheny v. ACLU, 492 U. S. at 585 n. 26 (plurality opinion) (Blackmun, J.) (citing M. Strassfeld, The Jewish Holidays 168 (1985))." As the court ultimately held:

We hold only that where, as in this case, defendants permissibly include a religious symbol in a holiday display that unquestionably serves the secular purpose of pluralism, the Establishment Clause does not necessarily demand that they employ a religious symbol for every holiday that has a religious as well as a secular component.... In sum, even if the DOE erred in characterizing the menorah and the star and crescent as "secular" symbols, and whether or not the DOE is correct in its assessment that the crèche would be more difficult than the menorah or the star and crescent to incorporate into a secular holiday display in New York City public schools, no reasonable objective observer would perceive from the totality of the circumstances in this case that the purpose of the challenged display policy was, in fact, to communicate to City schoolchildren any official endorsement of Judaism and Islam or any dismissal of Christianity.

The court further held:

In short, an objective observer would conclude that the effect of displaying the menorah and star and crescent, together with Christmas trees, Christmas wreaths, candles, stars, kinaras, snowmen and a host of other holiday symbols in integrated holiday displays was simply to familiarize schoolchildren with the fact that all these symbols are used by certain members of the community to celebrate holidays at the end of the calendar year, that the various traditions reflected in these holidays are entitled to everyone's respect, and that the diversity of these traditions enriches the community for all members…. To summarize, we conclude that New York City's holiday display policy, both on its face and as applied by the defendants, comports with the Establishment and Free Exercise Clauses of the First Amendment and does not violate a parent's right to control the religious upbringing and education of her children. With respect to Establishment, we apply the three-part test outlined in Lemon v. Kurtzman, 403 U. S. 602, and conclude:

> 1. The holiday display policy serves a secular purpose: teaching pluralism by celebrating the City's rich cultural diversity and by encouraging schoolchildren to show respect and tolerance for traditions other than their own.
>
> 2. Although the policy mischaracterizes the menorah as a secular symbol, the policy nevertheless adequately ensures that the menorah is displayed in public schools only with a variety of other holiday symbols to promote pluralism and tolerance, not to endorse religion. The same conclusion applies to the policy's treatment of the star and crescent.
>
> 3. Because the City's secular characterizations of the menorah and the star and crescent discipline only government speech with no government authorities, We hold that no different conclusion is dictated by the City's decision not to allow the crèche to represent Christmas in public school holiday displays.
>
> We do not here decide whether the City could, consistent with the Constitution, include a crèche in its school holiday displays. We conclude only that the defendants do not violate the Establishment Clause when, in pursuing the secular goal of promoting respect for the City's diverse cultural traditions, they represent Christmas through a variety of well recognized secular symbols at the same time that they represent Chanukah through the menorah and Ramadan through the star and crescent. With respect to Free Exercise, we conclude that no record evidence supports Skoros's claim that the City's holiday display policy coerced her children to embrace Judaism or Islam or to renounce their Catholic faith. Finally, because the City policy does not violate the Establishment and Free Exercise Clauses, we conclude that it does not impinge Skoros's right to control the religious upbringing and education of her children.

On the one hand it would be easy to say that the Department of Education should have taken the smart route and not allowed any displays. Then again, if you read this interesting decision in its entirety and see what a valiant effort was made to teach children about the pluralistic religious culture of the world's greatest city, you might decide the risk of litigation was worth the reward in education and understanding.

The **Condo-Muzzle-Broken Award** goes to the Appellate Division of the New Jersey Superior Court for holding that a condominium association was essentially a government for purposes of First Amendment freedom of speech protections.[7] Twin Rivers is a one-square-mile planned unit development ("PUD") with 2,700 residential units and 10,000 residents in East Windsor, New Jersey. It has a village-like commercial area with dry cleaners, gas stations and banks. It even has a state highway through it and public buildings including schools, a county library and a firehouse. Like all condos, the homeowners association runs the place with all kinds of rules and regulations which owners agreed to in buying their homes. They can be fined for violating the rules. Twin Rivers provides many recreational amenities and

some municipal kinds of services, like trash disposal, snow removal and street lighting.

Some residents sued to determine just how far the homeowners association could go in limiting their speech and otherwise regulating their lives. They wanted to post political signs on their lawns, have equal access to the community newspaper run by the Board of Trustees, and use the community room for meetings by dissidents. Is the homeowners association simply a mutually-agreed upon private entity not subject to constitutional protections or an ersatz mini-government essentially supplanting small municipalities of old with its residents protected by the constitution?

Here is how the court charged itself: "We are called upon to determine whether the standard-setting and standard-applying exercises at issue are essentially in performance of public functions or impact with sufficient directness upon public interests to call into play the constitutional limitations that classically apply to public sector actors, but which the New Jersey Constitution applies more broadly." The court looked at state precedent in the shopping center cases to the effect that such centers took the place of traditional downtowns and had become public forums such that owners of private property had to allow non-profit advocacy groups to solicit petitions and distribute educational material. Where the court was headed as at this point was obvious:

> The manner and extent to which functions undertaken by community associations have supplanted the role that only towns or villages once played in our polity mirrors the manner and extent to which regional shopping centers have become the functional equivalents of downtown business districts.... It follows that fundamental rights exercises, including free speech, must be protected as fully as they always have been, even where modern societal developments have created new relationships or changed old ones. Expressive exercises, especially those bearing upon real and legitimate community issues, should not be silenced or subject to undue limitation because of changes in residential relationships, such as where lifestyle issues are governed or administered by community associations in addition to being regulated by governmental entities.

As the court reported in its decision, over 1,000,000 New Jersey residents and some 20% of new homebuyers live in these homeowner association communities. Nationally, 42,000,000 live in such communities, many like Twin Rivers. Sure, the First Amendment provides for heavy duty rights, but what will be the result of this type of decision if it catches on elsewhere? Associations will now battle time, place and manner issues: "Yep, you can put up a political sign, but only on the community building kiosk." The covenants often limit even painting. Our single-family-detached subdivision has that. We are limited to "colonial" and "earth tone" colors, whatever they are. I know pink is not one of them, but if pink is my way of expressing my sensitive side as a metrosexual land use lawyer, can I now paint my house pink to the horror of my neighbors who literally bought into this scheme to maintain some semblance of aesthetic protection? One effect of this decision may be to limit or eliminate convenience retail uses in mixed residential projects out of concern of falling within the shopping center forum trap. Without shopping there is more automobile travel and sprawl. Can you say "unintended consequences"?

The **Best-Zoning-Relief-You-Can-Buy Award** with a special Ka-Ching, Ka-Ching ribbon goes to Montgomery County, Maryland for accepting more than a quarter of a million dollars to let a developer keep a development that allegedly violates zoning.[9] The developer built townhouses higher than permitted. It agreed to the payment to avoid conceding a violation. Most of the homes in the development exceed the 35-foot maximum and could be as high as 39 feet. The developer first offered $92,250 to settle, but was driven up in negotiation. Homes in the 59-unit development sell for up to $600,000. The plans submitted showed buildings over 35 feet, but it was missed in the review. As almost always is the case, the builder is responsible for complying with the regulations even if a public official approves illegal construction. One of the county commissioners said the builder "knew or should have known or they should have found out" what the rules are.

This is the scary part of the development process. We double, triple check the regulations before construction and seldom rely on staff interpretations. In one case, we had a client who built a small shopping center in the rear yard setback because the copy of the regulations they bought was not up to date. Even the town's version on their own website was not up to date. The developer faced having to carve off 25 feet of the building until he managed to convince the board to grant a variance and settled with the complaining abutter. This is not a comfortable way to do business. Check the list of amendments and ask to see the most recent ones to confirm your copy is up to date.

A thank you to our friend Michael Berger of Manatt, Phelps & Phillips LLP in Los Angeles of the ZiPLeR Awards Left Coast Bureau for nominating the Placerville, California City Council for the **Warring-Over-Peace Award**, which the Council has won by acclimation.[10] It seems that the El Dorado Peace and Justice

Community and Friends of Peace proposed to install a "peace pole" on city property. This peace pole business, new to us, originated with an international organization, the World Peace Prayer Society. This particular pole would be a four-sided cedar post approximately six feet tall with the statement "May peace prevail on earth" appearing in four different languages – English, Spanish, Miwok and Japanese – on each side of the pole. While Council members seemed to understand that the message was not religious, "The council tabled the idea earlier this month, worried that allowing a peace pole on public property would open the door for other requests from groups wishing to display less palatable messages." There is some precedent for similar monuments. The city has a Druid Monument on public property (yes, a Druid Monument, go figure) designed by an architect and presented to the city in 1926.[11]

The **Wait'll-This-One-Pops-Up-On-Your-GPS Award** goes to Traverse City, Michigan for the wackiest street name in the country.[12] Losers in a poll conducted by Mitsubishi Motors on TheCarConnection.com website included Farfrompoopen Road, the only road to Constipation Ridge, and Divorce Court. You will love this list of real street names, and it will comfort you some just when you think your own local decision makers have gone over the edge in street naming:

10. Tater Peeler Road in Lebanon, Tenn.
9. The intersection of Count and Basie in Richmond, Va.
8. Shades of Death Road in Warren County, N.J.
7. Unexpected Road in Buena, N.J.
6. Bucket of Blood Street in Holbrook, Ariz.
5. The intersection of Clinton and Fidelity in Houston
4. The intersection of Lonesome and Hardup in Albany, Ga.
3. Farfrompoopen Road in Tennessee (the only road up to Constipation Ridge)
2. Divorce Court in Heather Highlands, Pa.
1. Psycho Path in Traverse City, Mich.

Lots of animal cases arise in the world of zoning – too many, too big, wrong kind, environmental impacts from runoff and so on. This year's ZiPLeR award for an animal case, **A-Dog-In-Pigskin Award**, goes to Judge Robert S. Blasi of Philadelphia for his decision to relegate the family pet to the status of bacon and barbeque ribs.[13] Charles Saunders was given a pot-bellied pig by his co-workers upon his retirement from the U.S. Postal Service. These critters, as you may know, are often kept as household pets. They are smart and clean and friendly as a golden retriever.

Saunders lives in a row house, and his little porker "Jackie" comes and goes through a doggie door to a 20-foot square backyard. Jackie also has full access to the Saunders' garage, laundry room and recreation room. Judge Blasi, observing that city law has but one class of pigs, found that "it is reasonable to prohibit the ownership and keeping of a pig in the city of Philadelphia." "This court cannot and will not legislate to distinguish between different types of pigs," Judge Blasi wrote. "This is purely a power that rests in [the] legislative purview of the Philadelphia City Council."

The **Man's-Best-Friend-Is-An-Accessory-Use Award** goes to the Town of Killingworth, Connecticut for successfully litigating its position that dogs are an accessory use.[14] The Connecticut Supreme Court upheld a cease and desist order, which required Nicole S. Graff to reduce the number of pet dogs on her property to four or less in accordance with the Killingworth zoning regulations. Graff owns a single-family home on a nine acre parcel in a rural residential district. Neighbors complained about the number of dogs, which they said numbered 20, and noise from them to the town zoning enforcement officer, who found 14 dogs at the property. Some of the dogs were found roaming unattended on the neighbors' property. The ZEO told Graff she believed Graff was operating a commercial kennel. Graff said the dogs were pets. A check of town records by the ZEO revealed that there were 195 residences with two dogs, 43 with three dogs, seven with four dogs, three with five dogs, one with seven dogs, and one – Graff's – with 14 dogs. The Zoning Commission resolved that keeping four or fewer dogs was an accessory use in a residential zone, any more than that was not. The case went up on a cease and desist order.

The result was essentially pre-ordained as the Connecticut Supreme Court had determined in another case that a zoning board of appeals had correctly determined that 26 chickens and two goats were not permitted accessory uses to residential property. The court cited supportive case law in other jurisdictions and secondary sources: "Obviously, pets, such as dogs, cats, birds or fish, ordinarily or customarily kept at a dwelling would be considered allowed accessory uses in residential areas under accessory use provisions in zoning ordinances." 2 A. Rathkopf & D. Rathkopf, Law of Zoning and Planning (2005) § 33:16, pp. 33-31 through 33-32. "[A]nimals can be kept in a residence district as an accessory use, where the main use is residential. The keeping of a dog, horse, cow, or a reasonable number of hens under such circumstances is a customary accessory use." E. Bassett, Zoning: The Laws, Administration, and Court Decisions During the First Twenty Years (1940), p. 103. In the end the court said: "[T]he town regulations are not uncon-

stitutionally vague, and provided the plaintiff with sufficient notice that household pets, including her fourteen dogs, could be regulated as an accessory use."

A **Man's-Best-Friend-Might-Just-Be-A-Cow-Or-A-Goat Award** goes to the Village of Angelica, New York.[15] The Appellate Division of the New York State Supreme Court affirmed the village's ban on cattle on parcels less than 10 acres, even though the owners, who are members of a Hindu sect, claimed they were kept for religious purposes.

There is a carrying capacity way to regulate animals called "animal units' which might work with larger parcels so long as the total number is capped and doesn't rise to the level of becoming a kennel or a real farm operation.[16]

The **May-I-Drop-In-And-Borrow-A-Cup-Of-Sugar Award** goes to the more randy neighbors of Hayvenhurst Avenue in Encino, California, who may wish to drop in on the filming going on at a house on the 3600 block of Hayvenhurst.[17] About 3,900 porno films are shot in Los Angeles each year. You need a permit, and no one asks if you are doing a documentary on penguins as pets or a sex fantasy. On Easter Sunday, a film crew moved into a rented house to make "The Alphabet," a catchy little movie in which sexual acts are performed by 21-year-old identical twins in alphabetical order. The only condition on a permit for an adult film that varies from the usual is that the public cannot see or hear any activity inside or outside the location. In the Encino case, the producers – seems there were at least three producers and many films made over two to three weeks – met that condition.

"I'm a human being, and I don't see what the big deal is," said one of the porn starlets. "The person in the next house should get a life, because we're shooting inside and it doesn't harm them. It was just a normal day. I did what I had to do and went home and had dinner with my family."

The **Just-Listen-To-Ten-Minutes-Of-A-Dan-Mandelker-Lecture-On-Sign-Regulation-Will-You-PLEASE Award** goes to the State of California for its Outdoor Advertising Act which seems to give commercial speech preference over pure speech, like religious or political speech. The act prohibits billboard advertising along a "landscaped freeway" except to advertise goods or services with an on-premises sign. Federal district court judge Charles Breyer recognized the potential preference afforded commercial speech.[18]

Professor Daniel Mandelker is a preeminent authority on sign regulation, and you can't get 10 minutes into one of his lectures without knowing that you can never give pure speech, like "Vote for Robin," a back seat to commercial speech, like "Buy a Muffler from Jan." The judge didn't invalidate the act, but he said he wanted it made crystal clear that building owners can post non-commercial billboard messages -- such as "In God We Trust" and "Help Stop Terrorism." As Judge Breyer said: "The court is also concerned that unless and until the state amends [the statute], to comply with the First Amendment, the act will continue to have a chilling effect on the exercise of the constitutional right to free speech."[19] The case arose when a property owner was cited for a non-commercial message on a sign on his property. C'mon now, any "C" student of a land-use law course knows that government cannot favor commercial speech.

We have two, yes two, winners of the **If-You-Can't-Beat-Them-Buy-Them Award.** First, one for Warrenton, Virginia, a town of 8,000 folks, for taking $22 million from developers, about half of the town's annual budget, as part of a deal to approve 300 luxury homes for seniors starting at $850,000.[20] The deal included annexation and sewer service. The payment is $74,000 per unit, about double what is usually received as a development exaction.

The second winner is Briny Breezes, Florida, which has simply put itself up for sale. That's right; you might just be able to buy a town.[21] Briny Breezes is 43 acres with 488 mobile homes between the Intercoastal Waterway and the Atlantic Ocean. Briny Breezes Inc. is the only owner of property in the town. Its shareholders are the populace. Briny Breezes received an unsolicited $500 million purchase proposal, and the shareholders voted to put out a request for proposals. Everyone has their price.

We have a nomination, which is a winner, from Rufus Calhoun Young, Jr., Colonel, USMC (Retired) of the law firm of Burke, Williams & Sorensen LLP, who sent us this case and as an honorable Marine admitted right up front: "I'm shamelessly angling for a favorable mention in your next ZiPLeR!" Everybody wants their name in the ZiPLeR Awards. The Colonel and I have a relationship going back to the Vietnam War when he used to prosecute the drug cases coming off my ship, as I learned some 20 years later. The **Its-All-How-You-Spin-It Award** goes to the Los Angeles firm of Jeffer, Mangels, Butler & Marmaro for declaring victory in a case which looks to be one their clients lost.[22] The firm settled a big environmental case two years ago for some apartment owners, at the time calling it a "phenomenal victory." This year a court set aside that very settlement, and the firm issued a press release in which it quoted the executive director of the apartment owners trade association (the clients were members of the association) as saying that the association was "thrilled with the out-

come." My meager intellect is dimming with age, but I don't get it.

The case arose when tenant advocacy groups sued landlords over their alleged failure to properly warn of the presence of cancer causing and reproductive damaging agents as varied as second-hand tobacco smoke, brass keys, urinal odor cakes and automobile exhaust. The settlement paid the organizations about a half million dollars, most of it for attorneys fees. The owners agreed to post signs and give out brochures about the potential exposure and the tenant organizations said they wouldn't sue again on the issue. The trade association worked hard to preserve this settlement. It was the California Attorney General who fought to unwind the deal because he thought the fees paid were out of line and the agreement not to sue in the future was improper. In setting aside the settlement, Justice David G. Sills said that the apartment trade association "wanted to buy its peace and was willing to pay off the [apartment owners'] law firm to obtain it, in return for which the owners would get a favorable deal with regard to any future litigation concerning alleged Proposition 65 violations." In the judge's view the settlement "represents the perversity of a shake down process in which attorney fees are obtained by bargaining away the public's interest in warnings that might actually serve some public purpose."

But when Justice Sills threw out the settlement, calling it contrary to the public interest, the law firm was quick to praise the outcome. In other words, the lawyers were happy to reach a deal, but just about as pleased to see it go away. "Appeals Court Dismisses Prop. 65 Case Against California Apartment Owners And Managers," proclaimed a law firm partner in an e-mail to reporters. Supervising Deputy Attorney General Edward Weil, who had represented the Attorney General in successfully attacking the settlements, couldn't resist commenting that "for them to argue that they love this decision is law firm marketing." Really, it would seem that the law firm liked a bit of both results for their clients – first, some immunization from future suits, and second, the dismissal of the initial claims. One lesson, one that took me just a couple of decades to learn, is that there is little upside to talking to the press about potential, pending, or past cases. Better to leave your pontificating and self-aggrandizing to matters in which you are not involved and never will be.

Every year, ZiPLeR Awards readers clamor for more and more adult entertainment or sexually oriented business cases, I guess that is because of your abiding interest in the tensions between free speech and the need to protect sensitive people. Usually, we have many to pick from. This year it has been slim pickings – maybe global warming is causing most everyone to strip down – but we have one award, the **Keep-Your-Pants-On-And-Don't-Be-A-Nuisance Award** goes to the owners of the swingers club "Guys & Dolls."[23] The City of Phoenix made live sex acts illegal and banned swingers clubs to prevent the spread of disease. A club owner who received less income from the use of a building after the ban sued claiming a taking. Interestingly, and in an application of the rule from the Lucas case that even a complete wipe out of value is not compensable if the use would be a public nuisance, the Arizona court threw out the claim. "We readily conclude that the conduct proscribed by the Ordinance could have been prohibited as a common-law public nuisance. Relying on the extensive information presented to it and the public hearings it held, the City concluded that live sex act clubs would contribute to the spread of sexually transmitted diseases and were contrary to public morals. That the potential spread of STDs was a matter of substantial public concern is highlighted by the fact that, according to an affidavit submitted by appellant Markus in the federal district court proceedings, Guys and Dolls had 7,000 members…. Two similar clubs, Club Chameleon and Encounters, had 27,000 and 9,000 members, respectively.... Members paid a nominal annual fee; most of the clubs' income was derived from per visit fees ranging from $20 to $30… Under these circumstances, even without addressing the question of public morality, appellants' business clearly fell within the type of conduct that could have been abated at common law as a public health hazard. Therefore, because the Ordinance does not 'proscribe a productive use that was previously permissible under relevant . . . nuisance laws,' Lucas, 505 U.S. at 1030, live sex act businesses fall within the Lucas 'nuisance exception' to the Takings Clause. Such activity constitutes a public nuisance per se …. Therefore, no further development of the factual record is necessary and the City is entitled to judgment as a matter of law."

Zoning enforcement is almost as much fun as live sex and never likely to be declared a public nuisance, even if it is sometimes. The **I-Wiggled-My-Way-Out-Of-The-Bind-I-Was-In Award** goes to the zoning enforcement officials in Cromwell, Connecticut, who first banned a boy from selling worms he dug up. This little bait business ultimately was allowed to continue after an uproar of "oh come on now's" from all around.[24] Thanks to my assistant, Diane McGrath, for making this nomination.

Joey Cadieux, a 13-year-old who has been digging up night crawlers and selling them for a little spending money, was told by local authorities he didn't have the authority under local zoning to have such a business. The story caught on internationally and by the time the zoning commission unanimously rescinded the order there were already 36,000 hits on Google under his name. The

Associated Press and newspapers as far away as Finland covered the story.

Lastly, Paul McCartney wins the **You-Got-Me-Over-A-Barrel Award** for offering to tear down one of his homes and two decrepit barns in exchange for the government allowing him to keep a two-bedroom cabin, which reportedly cost more than £1 million, he built without permission in Peasmarsh, near Rye.[25]

So ends another eventful year, with more stories than we can possibly pass on. Please keep those cards and letters coming. dmerriam@rc.com. Next year we will have a special by John Kerry on joke telling and a Mel Gibson commentary on the importance of diversity training in a pluralistic society (hard to believe the New York City Board of Education didn't hire him as a consultant). If the ZiPLeRs provide a real service to land use practitioners, it is that we all experience the same kinds of foibles no matter where we live and work and regardless of what side we may be on. Keep you perspective and enjoy the practice.

NOTES

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4. Atkinson, 706 N.W.2d 791, citing Com. v. American Ice Co., 406 Pa. 322, 178 A.2d 768, 771-772 (1962).
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6. Benson v. State, 2006 SD 8, 710 N.W.2d 131, 36 Envtl. L. Rep. 20023 (S.D. 2006), cert. denied, 126 S. Ct. 2971, 165 L. Ed. 2d 953 (U.S. 2006).
7. Skoros v. City of New York, 437 F.3d 1, 206 Ed. Law Rep. 525 (2d Cir. 2006), petition for cert. filed, 75 U.S.L.W. 3094 (U.S. Aug. 22, 2006).
8. Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 383 N.J. Super. 22, 890 A.2d 947 (App. Div. 2006), certification granted, 186 N.J. 608, 897 A.2d 1061 (2006) and certification denied, 186 N.J. 608, 897 A.2d 1061 (2006), order corrected and superseded, 188 N.J. 357, 907 A.2d 1016 (2006).
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11. See http://www.co.el-dorado.ca.us/stories/Druids.html.
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16. http://www.das.psu.edu/pdf/ZoningGuidelines20050712.pdf.
17. Claire Hoffman, "Porn Shoots Get Under Their Skin:Encino neighbors may object to the filming, but there's little recourse if city permits are in place," Los Angeles Times, April 30, 2006 (2006 WLNR 7402545).
18. Julie O'Shea "Federal Judge: Calif. Billboard Law Limits Free Speech," The Recorder, March 27, 2006. Maldonado v. Kempton, 422 F. Supp. 2d 1169 (N.D. Cal. 2006).
19. Maldonado v. Kempton, 422 F. Supp. 2d at 1178.
20. Sandhya Somashekhar, "Town Reaps Hard Cash for New Houses: Warrenton's $22 Million Deal Signifies High Stakes for Developers," Washington Post, July 16, 2006.
21. Ushma Patel, "Oceanfront Briny Breezes is for sale, but future as a town is uncertain," South Florida Sun-Sentinel, June 29, 2006.
22. Dennis Pfaff, Losing Firm in Prop. 65 Case Proclaims Victory, Daily Journal, April 7, 2006.
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24. Jodie Mozdzer, "Cromwell's Can Of Worms Ends Happily For Teenager," Hartford Courant, August 16, 2006.
25. Michael Horsnell, **"**McCartney prepared to flatten house to keep log cabin privacy," The Times, August 22, 2006.

RECENT CASES

Sign ordinance limiting size and height of new billboards is not de facto exclusionary.

Exeter Township's sign ordinance limited freestanding signs to 25 feet with a sign face of no more than 25 square feet on each side. A billboard company wanted to build sign structures with either 300 or 672 square feet of signage per side and forty-four feet high.

After its eleven applications were denied, the company challenged the constitutionality of the sign code, arguing that it was de facto exclusionary because billboard industry standards were much larger than allowed by the township's sign code. The zoning hearing board (ZHB) agreed and concluded that the applicant had to be granted relief unless the township could prove the proposed use would be injurious to the public health, safety and welfare. The Board of Supervisors appealed; the trial court affirmed.

The appeals court reversed, noting that sign ordinances using "objective standards will be upheld when they are reasonably related to the clearly permissible objectives of maintaining the aesthetics of an area and fostering public safety through preventing the distraction of

passing motorists." The ZHB improperly allowed industry standards to control local conditions; and the applicant failed its burden of showing that the township's sign code effectively excluded a legitimate use. (*Township of Exeter v. Zoning Hearing Bd. of Exeter Tp*., 2006 WL 3077702 (Pa. Commw. Ct. 2006).)

Standing to seek equitable relief from a decision of the board of zoning appeals requires appellant to show special damages.

A landowner objected to the county's issuance of a building permit to a neighbor for construction of a barn, arguing that a barn was not a permitted use under the county's zoning ordinance. The objecting landowner sought both a declaratory judgment and injunctive relief. The trial court granted the county's motion to dismiss and the court of appeals affirmed.

The Georgia Supreme Court accepted review to clarify the two conflicting lines of cases that governed whether "special damages" are needed to establish standing when a party seeks equitable relief to attack or enforce a zoning determination. The first, established in *Snow v. Johnston*, 197 Ga. 146, 28 S.E.2d 270 (1943), found that no special damages were required to establish standing. Two years later, the Georgia General Assembly passed comprehensive zoning and planning legislation which required a "substantial interest" to establish standing to challenge a decision of the board of adjustment. *Tate v. Stephens*, 245 Ga. 519, 265 S.E.2d 811 (1980) established the second line of standing cases, requiring a showing of "special damages." Although the amendments made in 1981 by the General Assembly did not carry the *Tate* standing test forward, the Georgia Supreme Court concluded that the standing test in *Tate* was not affected by the statutes' demise and that "the first requirement for standing is that a person claiming to be aggrieved have a 'substantial interest' in the zoning decision." Therefore, the court held that the lower courts correctly dismissed the case because the objecting landowner failed to show special damages to establish his standing to challenge the issuance of the building permit. (*Massey v. Butts County*, 6 Fulton County D. Rep. 3368, 2006 WL 3150980 (Ga. 2006).)

Planning board improperly applied reasonableness standard, rather than the zoning ordinance's more restrictive standard, when it approved residential subdivision that would impact traffic offsite.

The Town of Ogunquit's planning board approved a developer's application to build a retirement community of thirty-five new homes on fifty acres located on the northern and southern sides of Berwick Road. The traffic studies indicated the intersection at this location was already operating at an LOS (level of service) "F" – a failing intersection. A neighboring landowner appealed the planning board's approval.

The developer argued that the planning board properly applied the reasonableness standard found in state law 30-A M.R.S. § 4404, which stated that the "proposed subdivision will not cause unreasonable highway or public road congestion or unsafe conditions." The town's subdivision regulations mirrored the state standard. However, the town's zoning regulations imposed a more stringent traffic requirement, which read: "The street giving access to the lot and neighboring streets which can be expected to carry traffic to and from the development shall have traffic carrying capacity and be suitably improved to accommodate the amount and types of traffic generated by the proposed use. No development shall increase the volume:capacity ratio of any street above 0.8 nor reduce the streets Level of Service to "D" or below." Ogunquit, Me., Zoning Ordinance § 8.13(A)(3). The neighboring landowner argued that the more stringent standard in the zoning ordinance applied. The Superior Court agreed with the neighbor and vacated the planning board's decision.

The state's highest court affirmed and held that the more restrictive standard in the town's zoning ordinance applied, noting that the intersection was already failing with an LOS "F," so adding any more traffic would adversely impact its LOS. Furthermore, the planning board was required to make written factual findings to explain why it waived the requirement for two-street connections to the subdivision. This failure also warranted vacating the decision. (*Bodack v. Town of Ogunquit*, 909 A.2d 620 (Me. 2006).)

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