ZONING AND PLANNING LAW REPORT

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THE 2007 ZIPLERS: THE THIRTEENTH ANNUAL ZONING AND PLANNING LAW REPORT LAND USE DECISION AWARDS

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- find out why Grammys and Oscars are nothing compared with ZiPLeRs
- attend the gala award ceremony at Stuckey's Route J & I70, Nelson, Missouri
- learn how buy land for $4.6 million, build nothing, and be paid $36.8 million for it
- make 13 your lucky number
- see how you can turn a parking space into a park
- get to know more about the law of goat sacrifice
- have an excuse to go to Kink.com
- overcome parking problems with your F-150 pickup

Introduction

The thirteenth annual ZiPLeRs. Who would have thought? It started as a lark. When I realized maybe I didn't have the corner on all the really dumb planning and zoning cases, I asked Thomson West if I could gather them up from elsewhere and present some bogus trophy for the best of the worst from around the country.

For whatever reason, they agreed. They must have had downtime and space to fill between their latest multi-volume treatise on The Law of Arthropods and a flashy new e-mail newsletter on personal injury claims arising from poorly-designed women's high fashion shoes: "The High Heel Injury Law Reporter."

Anyway, my network of fine friends around the country and overseas started sending me the latest developments, so many now, that I can only choose a small portion of them for awards. Thank you all for your support.

Think about it. Thirteen years ago O.J. Simpson was found innocent (when will they ever find the real killer?); Jerry Garcia died (his memory lives on through Ben & Jerry's "Cherry Garcia," the company's number one seller;[1] compare "Peanut Butter and Jelly" which was scrapped[2]); Netscape went public and started the dot.com boom; Sheryl Crow's Grammy-winning "All I Wanna Do" was brand new with exceptional poetry ("I like a good beer buzz early in the morning. And Billy likes to peel the labels from his bottle of Bud."); and the Academy Award for Best Picture went to Braveheart over contenders Apollo 13, Babe, The Postman, and Sense and Sensibility. Would the Academy make the same choice today? I think not.

And of course we will all never forget that in 1995 Martin Lewis Perl won the Nobel Prize in physics "for the discovery of the tau lepton," which contrary to popular belief was not a new Korean-made sport coupe or an herbal tea. Quite a year it was, 1995, indeed.

Our very first original award in that very first seminal year was the "**Pot-of-Gold-for-the-Plaintiff's-Bar" Award** which went to the New Jersey Supreme Court for holding that a developer and real estate broker were liable for failing to tell buyers about an off-site hazardous waste dump. I checked recently and that decision resulted in the enactment of the 1995 New Residential Construction Off-Site Conditions Disclosure Act,[3] which in turn has been the subject of judicial interpretation.[4] I am reminded of the late Gilda Radner playing Emily Litella on Saturday Night Live: "My father always used to say, 'it's always something. If it's not one thing, it's another.'"

So it is with our coveted ZiPLeRs.

My office building doesn't have a 13th floor. It goes from 12 to 14. I wonder if there isn't something in between there, maybe just a little floor, like in the movie Being John Malkovich (1999). Twenty years ago, when we bought our top floors in the building, it got very confusing for a while during the closing because the numbered floors in the deed varied from the numbers on the actual floors.

Anyway, the point is many people are put off by the number 13 and the Thomson West board deliberated over a three-day period as to whether we should just call these the "Fourteenth Annual" Awards and be done with it (look at the law treatises—how many volume 13's do you see?). The groundless aversion to the number 13 was reported, 20 years ago even, to cost our economy $1 billion a year in absenteeism and cancelled train and airplane reservations each 13th day of the month.[5] Regardless, in the interest of rigorous truthfulness, we are publishing this Thirteenth Annual. I am not put off by the repeated evidence in nature of Fibonacci numbers such as the 13 bumps in the counterclockwise spirals of a pineapple.[6] Don't get me started.

Fact is, 13 is not necessarily an unlucky number, and only came to be thought of as such from medieval times, principally on the basis of the Last Supper alone. Historically, 13 has been a lucky number. In ancient Mexico the lunar month was divided into three 13-day segments and the number 13 came to symbolize life, the sun, and masculine power. In Mayan culture, 13 was associated with deities. In the Hebrew tradition, 13 has also been sacred and auspicious. The Cabala regards it as lucky, referencing 13 heavenly fountains, 13 gates of mercy, and 13 rivers of balsam that the pious will find in paradise.[7] The Magi came to Christ on the 13th day after his birth, on which 13th day is kept the feast of the Epiphany.[8]

May this most propitious Thirteenth Annual Zoning and Planning Law Report Land Use Decisions Awards issue bring an end to triskaidekaphobia.

The Inverse-Condemnation-"Full Monty" Award goes to the city of Half Moon Bay, California, for creating wetlands on a 25-acre parcel that destroyed the potential for development of a previously vested 83-home residential subdivision. Half Moon Bay has been ordered to pay $36.8 million.[9] Reportedly, paying the judgment will cost each and every resident of the city of Half Moon Bay $3000.[10] The term "Full Monty" is invoked not only in deference to the name of the winner,[11] but also because of the bare facts supporting the decision. Special recognition goes to Edward G. Burg of Manatt, Phelps and Phillips, LLP of Los Angeles, who waged the case on behalf of Palo Alto-based developer Charles J. Keenan.

The property had been zoned for residential use since the 1970s and the city approved a vesting tentative map

in 1990. A development moratorium followed in 1991 because of inadequate sewage treatment facilities. The moratorium was extended 11 times and the proposed subdivision was subjected to a lien of $1 million to help pay for the expansion of the sewage treatment plant.

During the 1980s the city borrowed fill from the subdivision site for construction of a storm drain project on and around the site. The excavation left depressions... and what happens with depressions? Runoff fills the depressions... and then what likes to grow in those depressions? Wetlands plants grow in the depressions leading to the emergence of regulated wetlands. It's the you-give-a-mouse-a-cookie kind of thing.

It happens. I once had the brutal task of advising a client that what had previously been a perfectly good office site had been rendered largely undevelopable as a consequence of the construction of a nearby interstate highway 18 years earlier. The work created an artificial impoundment resulting in the ponding of water on the site, and the emergence of a new red maple swamp. Even though this little swamp of little trees was just 18 years old, it had become jurisdictional.

So too with the proposed subdivision site in Half Moon Bay and the city's fatal decision to refuse to issue a coastal development permit shortly after the lifting of the sewer moratorium and just 10 years after the city had acknowledged the vested right to develop by its approval of the tentative map.

Federal district court Chief Judge Vaughn R. Walker ordered the city to pay $36.8 million because the city had created the wetlands: "What was once an approved 83 home subdivision is now a wetlands preserve." To put that $36.8 million number in perspective, you might wish to know that the developer only paid $4.6 million for the 24 acres in a 1993 foreclosure sale.

The award was what the developer requested to reflect the difference between the fair market value of the land with the 83-lot subdivision and its open space value as a wetlands preserve. The developer still has an opportunity to recover his attorneys' fees, interest, and costs.

The city was stunned by the judgment. "We're still looking at this to determine exactly what this means," City Manager Marcia Raines said. "We don't know at this point."

Surprise! An appeal is expected.

The first annual **One-Person's-McMansion-Is-Another-Person's-Cottage Award** goes to the city of Los Angeles for its proposal to enact anti-mansionization regulations to stop the pattern of scrape offs that have become a threat to the scale of older single-family neighborhoods, and thank you to Mike Berger for sending this nomination. One of the residents disturbed by the trend said: "Look at this thing. It's a behemoth. It's even worse on the side... are they going to put a gun turret up there?" He was referring to a 3,000 square foot house.[12] Near the Angeles National Forest most of the lots are around 4,000 square feet. The proposed regulations would limit development in some areas to a total square footage of half the lot size. This will result in homes being no larger than 2,000 square feet on these lots.[13] The average house size in this country is about 2,248 square feet.[14]

This is to be compared with some of the larger homes being built today, including one at 55,853 square feet that approximates the size of the White House.[15] What Los Angeles is missing is the importance of context. Remember the famous quote from the very first zoning case to make its way to the U.S. Supreme Court?: "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[16] Unless anti-mansionization regulations consider context, they miss the mark. Also, floor area alone is a poor surrogate measure of bulk, when you consider that so many homes have soaring two and three-story entrance foyers which only have a footprint and floor area of a half or one-third of the effective bulk.

The **Sometimes-There-Isn't-a-Price-for-Everything Award** goes with great regret to Briny Breezes, a little south Florida town. Essentially a mobile home park of individually-owned lots, Briny Breezes had agreed to be

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sold in its entirety for $510 million to a developer who planned a new community with 900 condominiums, 300 timeshares, and a 349-room hotel, all on just 49 acres. The density of the project was probably its undoing, as residents of two wealthy areas to the north and south of Briny Breezes ganged up (can you say "Not In My Back Yard"?), and began to fund an effort to fight the plan which included midrise buildings of 12 to 20 stories.[17]

This is the first time ever in ZiPLeR Award history that the same award winner has been honored twice. Even more remarkable, and this will go down in ZiPLeR history, is that it won the award last year for its success and this year for its failure. Here's how we reported on the pending deal last year:

> 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.[18] 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.

Many of the residents of Briny Breezes were relieved: "The community is split 50-50 on this. Half are happy, half are upset," said one resident who reported further: "My wife is getting ready to pop a bottle of champagne right now."

I checked the Briny Breezes official town Web site in late December 2007 and cannot find any mention of any pending deals. It appears from the Web site that the only significant item of controversy right now is what the best way is to publicize new police numbers:

> Mayor Bennett indicated that at the last meeting there was discussion regarding magnets for refrigerators with the new police emergency and non-emergency numbers on them to pass out to residents. The Town Clerk was asked to check into the cost of stickers and/or magnets.[19]

Let's see here: sell your town for $510 million or decide on refrigerator magnets? Such is the range of local government issues.

The **Put-Another-Quarter-in-the-Meter,-Throw-Me-the-Frisbee,-and-I-Will-Have-Ketchup-on-That-Burger Award** goes to the organizers of "Park(ing) Day Los Angeles" for their efforts to dramatize the need for more public open space in the city. On September 21, 2007, mostly white outsiders arrived in a predominantly Latino neighborhood on the west side of Los Angeles. They came loaded with quarters, picnic baskets, lounge chairs, and artificial turf. They took over parking spaces and laid each one out—neat and square—as micro-parks. Their objective was to dramatize the need for more parks beyond the city's existing 15,700 acres, particularly in low income areas where a recent report had revealed that there were fewer park and recreational opportunities.

Some of the parking space improvements were extensive and included adding new fill, sod, trees in pots, umbrellas, and sofas.

One of the "park builders" is Ron Durgen of Beverly Hills, who came into the neighborhood and announced that he had "commandeered this parking space and turned it into a park." He admitted "this is a street, you know. It's not good to put that there, but wouldn't it be nice if this was really a park?"[20]

A special thanks to Professor Emeritus Gideon Kanner for making this nomination. As Professor Kanner observed in his detailed and carefully documented nomination package: "Enjoy this bit of new, new urbanism. If Mr. Durgen were to try this caper in his own Beverly Hills, he'd be arrested in, oh, say 37 seconds."

The **Lawyers-in-Defense-of-First-Amendment-Free-Speech Award** goes to attorney Corri Fetman of Chicago for the large billboard she put up in the Rush Street area known as the "Viagra triangle."[21] We thought about asking the American Civil Liberties Union to join us in making this award, but on further investigation we determined that this was less about civil liberties than it was about advertising liberties.

Attorney Fetman is a divorce lawyer. She has received much attention from the billboard which shows a scantily clad man and woman, both with something less than 2% body fat and the advertising tagline: "Life is short. Get a divorce."

Billboards, of course, even when they carry commercial speech have some protection under the First Amendment, but that same protection allows others to offer their own critique. An advertising executive characterized the billboard in this way: "It's kind of the equivalent of wearing a clown suit to a funeral—you get everybody's attention, but to what end?"

On the other hand, some lawyers are frankly envious. One of them said: "I wish I'd thought of it first. When your advertisement generates publicity, you've hit a home run."

Attorney Fetman presents herself as offering help to people: "If you are in an unhealthy relationship and you don't want to be in it anymore, you need to be honest with yourself. And, we provide a solution to that problem." [22]

The billboard didn't stay up long, just a week, but you can still see it by going to the cited reference (this

is the only way I ever get anyone to even look at the footnotes…).[23] We wonder how much business it generated for Attorney Fetman. It's hard to imagine how you could create the same buzz for planning and zoning lawyers...[24]

If there is any smug satisfaction for those of us relegated to the legal waste bin of zoning (lighten up, just kidding), it is that none other than our old friend Burt Natarus, a Chicago Alderman and zoning guru regrettably beaten in the last election, had the thing torn down because it violated zoning:

> A city alderman who lives nearby found a technical reason to jettison the sign.
>
> "I called the building inspector and told him to do his job and he did," said Alderman Burton Natarus. "It has nothing to do with content or anything else. They did not have a permit and they were ordered to take it down."
>
> Fetman and Garland say they're upset the sign was removed.
>
> "They ripped our billboard down without due process," Fetman said. "We own that art.[25] I feel violated."
>
> Despite its brief run, the sign apparently was good for business. Since it went up last week, the two attorneys said calls to their law firm have gone up dramatically.

The **Robert-Frost-Mending-Fences**[26] **Award** goes to Francisco Linares of Rolling Hills Estates in Los Angeles County who has been convicted and now sentenced to six months in jail for erecting a 180-foot long fence while building his dream home in the hills of Palos Verdes Peninsula.[27] That sentence works out to one day in jail for each foot of the fence. Mr. Linares, a 51-year-old insurance company district manager who has never had a traffic violation observed: "This is nothing that you should be taken to court for."

The city of Rolling Hills takes its zoning seriously and filed misdemeanor charges against Linares for refusing to remove the fence. The city claimed it was too high and impeded the passage of maintenance vehicles on an adjacent trial.

Linares had spent 142 hours and $50,000 building the fence which replaced a termite eaten one on the one-acre lot he bought in 1998.

The latest news we can find is that Mr. Linares has not yet gone to jail, but is out on $100,000 bail.[28] Thanks to Bob "Elroy Blues" McMurry of Paul Hastings in Los Angeles for this nomination.

The **May-I-Have-a-Transfer-and-Some-Matzo? Award** goes to the Building Department of Spring Valley, New York, for dragging its feet in issuing a building permit to Rabbi Aaron Winternitz such that he was held back, at least as a matter of law, from firing up the wood-burning bus-turned-oven connected to his house and making matzo, the unleavened bread carried by the Israelites fleeing Egypt during the reign of Pharaoh Ramses II, and celebrated during the eight-day Passover festival.[29] The controversy has even made it to YouTube, with a video worth watching.[30] There are also some great stills on line which you will find truly remarkable, I guarantee.[31] We have Patricia Salkin of Albany Law School to thank for this fine nomination that was an instant winner. As she entitled her forwarding email to me; ""I couldn't even make this up!" If you truly feel that way about a ZiPLeR nomination, you can be sure you have instant winner.

The Building Department had given the Rabbi one week to provide engineering certification or some documentation that the oven had been properly installed inside the oven-on (really in and integral to)-the-bus that is attached to his house. Passover wouldn't wait so the Rabbi fired up the oven, which then resulted in excess smoke and a call to the Spring Valley Fire Department which responded and extinguished the fire: "We don't even allow people to have a bonfire that's contained, let alone have a fire in a bus that's attached to a structure. The neighbors feel unsafe about it, and so do we," said the fire chief.

The Rabbi defended his bus-turned-oven concept, claiming that it was not only legal but it had five levels of protection, firebricks four inches thick, and two layers of insulation to shield the 7200 degree heat, all covered with two layers of stainless steel. As the Rabbi explained: "I may not be a licensed engineer, but I know how to do this. I've been doing it ever since I was born. There is no danger, none whatsoever."

Rabbi Winternitz is the inventor of the oven-in-a-bus concept, having chosen the school bus because it is built to high standards. He never got to the point of actually baking matzo, though he had hoped to produce 40 pounds of it for Passover, before the excessive smoke incident resulted in the call to the fire department. He admitted that the oven did emit a lot of smoke at the beginning but he explained that it would dissipate as it heated up.

The oven-on-a-bus concept may seem unusual, but it is certainly not the first time. A man who has become our friend, Curtis Tuff, first started making pork ribs alongside an old blue bus in Putney, Vermont, some 40 years ago and is still there today. We see him as we go back and forth to our Vermont home, and now his daughter and son-in-law have opened a similar facility in more conventional quarters in Chester, Vermont. Take a look at his Web site.[32] I'm not sure you will see a corporate

merger with Rabbi Winternitz, however, even as similar as their entrepreneurial spirit may be…matzo and pork ribs…too much fusion…

The first-ever **Doesn't-Play-Well-with-Others Award** goes to the Eureka Citizens for Responsible Government, which really ought to be renamed the Eureka Citizens for Irresponsible Use of the Court System and the Environmental Review Process.[33] The Court of Appeal of California, First Appellate District, did the right thing in upholding a trial court decision to deny the petition filed by a citizens group and neighborhood residents. Judge Bruiniers aptly summarized the case in the first sentence of the opinion: "In this matter, a school playground has become a neighborhood battleground."

A citizens group and neighborhood residents challenged a superior court judgment that denied their petition for a writ of mandate seeking to set aside the certification of an environmental impact report (EIR) under the California Environmental Quality Act (CEQA) and respondent city's approvals based on that certification. Appellants challenged the use by respondent applicant, a church and its related school, of a portion of its property as a school playground. The church had been on the property for over 50 years and had operated a school there for the last 26 years, limited to 70 students in grades kindergarten through eight. Way back in 1980 the city had issued a conditional use permit to the church to operate the school, conditioning the permit on a requirement "that all school related activities be conducted within the buildings or at neighborhood playgrounds."

You know what happens after what was in this case 22 years—there was no institutional memory of the condition. Volunteers in the summer of 2002, ignorant of the condition, constructed an outdoor playground in an area 63 by 42 feet, a total of 2,646 square feet on the corner of the school property, surrounded it with a four-foot high masonry fence and installed a prefabricated play structure and wood chips on the ground to protect the children from falls. The neighbors complained, the city noted the condition on the prior approval, and the church then responsibly applied for a modification of the permit condition to allow the playground. City staff studied the project and recommended adoption of a mitigated negative declaration and the planning commission accepted the staff recommendations and approved it. The city council, after a public hearing, ordered the preparation of an environmental impact report, with particular emphasis on the noise impacts as raised by the neighbors. The city council received and responded to 144 public comments, 138 of those in favor, and ultimately approved the project subject to certain mitigating conditions, including requirements for landscape screening, restrictions on the hours of use, and limitations on school enrollment.

The neighbors appealed and the trial court ruled for the city. On appeal, the court upheld the trial court and found that the EIR was sufficient for its required purposes. The city considered the project's conformity to the policies of the city's general plan and noted a sufficient factual basis for its ultimate findings that the noise levels generated by the project would not have a significant environmental impact. The evidence cited by appellants did not create the possibility that the project would in some way make any structure less historic. The city determined that the project's aesthetic impacts would be insignificant, and the EIR contained, as required, statements addressing the reasons for that conclusion. The court found nothing inadequate in the responses provided by the city to public comments, and no showing by appellants that any alleged inadequacy in the responses was prejudicial.

Thank you to Bryan Wenter of Morgan, Miller, Blair in Walnut Creek, California, for this excellent nomination. He obviously doesn't have enough to do around the office (Patricia Curtin, please take note), because he has sent us several nominations this year, including this next winner.

This is not the first-ever **Field-of-Dreams Award** for ZiPLeR, but the town of Danville, California, is so deserving that at the three-week meeting of the ZiPLeR awards committee in Cannes earlier this fall, there was hardly any debate about the nomination and virtually unanimous approval (Thomson West Accounting Department—our expense forms will be in shortly).[34]

David Lowe built the field without the necessary permits along a major ridgeline. He did it for his 11-year-old son, who was a Little Leaguer. The elaborate project includes artificial turf, 14-foot fences and an enclosed batting cage with a motorized pitching machine. The neighbors complained because the field spoils their view. The neighborhood opponents call the ballfield "Guantánamo Bay" because of the high fences. Neighbor Teri Russo, while pointing to the black fence from her backyard, asked: "Is the next guy going to put a football field on the ridgeline?"[35] The pictures of this facility are really quite remarkable and worth viewing.[36] The planning commission voted seven to zero to deny the permits for the already-completed facility.

The result is that Mr. Lowe can tear down the field and then start an application process. He also can appeal the decision to the town Council. A call to him has thus far gone unanswered, but the City Attorney responded by e-mail to explain: "After the Planning Commission hearing, the Lowe's did remove the fences, lights, etc. so that

the field is no longer visible to anyone. They are working with the Town's engineering department and their immediate neighbors to legalize the grading they did on the ridgeline-that appears to be largely resolved."[37]

In our special category of historic preservation, we have this year's **Adaptive-Reuse-Stripped-Bare Award** going to Kink.com which purchased the 200,000 square foot state armory in the Mission District of San Francisco for $14.5 million and turned it into a movie studio for its fetish films.[38] Try going to Kink.com if you dare. It is only for adults.[39]

The old armory has a special attraction for the production of S&M movies: "the basements in particular have a creepy, dungeony feel that is quite appropriate," said Peter Acworth, Kink.com founder.

Kink.com would not get the award if there weren't some controversy, and there is plenty. The neighbors and city leaders are asking questions about the propriety of having such a studio right in the middle of a working-class neighborhood. Mayor Gavin Newsom said: "While not wanting to be prudish, the fact that kink.com will be located in the proximity to a number of schools gives us pause."

As to the neighbors concerns, Acworth said: "under no circumstances would they know more about what goes on in the armory than they do about their neighbors' sex lives. The walls of the armory are so thick, the idea that anyone would have any idea what's going on inside is ridiculous."

What has made the whole business of the disposition and adaptive reuse of this armory all the more acrimonious is the fact that low income housing advocates had been successful in stopping a plan to have the armory converted into offices or apartments. Local merchants are of a mixed view. On the one hand they figure the movie production use could give an economic boost to the neighborhood and on the other hand they are worried about the use attracting undesirable people.

This is another Mike Berger nomination for which I thank him. He points out that it demonstrates what can happen as a result of neighborhood opposition, in this case resisting the offices and apartments and ending up with a pornographic movie studio. Sometimes maybe land-use decision-making should follow the idiom "Better the devil you know, rather than the devil you don't."

The **But-I-Love-My-Truck,-Man Award** goes to Lowell Kuvin of Coral Gables, Florida, for waging a successful battle against that city which had attempted to prohibit the parking of his Ford F-150 pickup truck on the street in front of his rented home. A broad local ordinance banned all "trucks, trailers, and commercial vehicles" from being parked in any residential area except inside a garage.[40] Mr. Kuvin is a recent graduate of St. Thomas University School of Law in Miami. In doing my own fact checking, I use Internet search engines to find the latest and greatest, and lo and behold…Mr. Kuvin has his own Web site on his truck and his budding career as a lawyer.[41]

Mr. Kuvin was truckin' through some new constitutional territory with his claim that the strict enforcement of a broad local regulation discriminated against a certain class of citizens, namely owners of pickup trucks. Go look in the U. S. Constitution for the "right to travel"—it can't be found explicitly—though it is assumed, implied, hinted at, and otherwise widely accepted that it exists—except maybe in Article 1, Section 6 which guarantees to the right to travel to and from Congress.[42] Certainly, I can't find anything about Ford F-150 pickup trucks, but since the F series is the world's second best selling vehicle ever after the Toyota Corolla (30 v. 32 million)[43] and the best selling vehicle, period, in this country last year,[44] there just might be fairly implied a contitutional right to park your truck right out in front of your home. Interestingly, the best selling car in 1993 (over 600,000)[45] and one of the top five in 1997 (313,000)[46] will never have a problem parking in Coral Gables. It is the plastic red and yellow "Cozy Coupe" made by Little Tykes.

The Third District Court of Appeals reversed the trial court judge's decision which had found for the city, ruling that the city had "unconstitutionally crossed the line" and had caused an "impermissible interference with the personal rights of its residents."

The lawyer representing the city said: "We're not saying everyone should ban pickup trucks, but the decision of this city to do so is not irrational." When a lawyer uses a double negative, doesn't it make you think twice?

As Judge Alan Schwartz said in his opinion on behalf of the majority: "Perhaps Coral Gables can require that all its houses be made of ticky-tacky and that they all look just the same, but it cannot mandate that its people are, or do. (sic, some kind of gator-speak I guess). Our nation and way of life are based on a treasured diversity, but Coral Gables punishes it."

While we're down in Florida, we may as well pick up the first-ever ZiPLeR **Doesn't-That-Just-Get-Your-Goat Award** which goes to, you guessed it, our perennially neat and tidy, upscale, not-in-my-backyard and not-parked-on-the-street-either, Coral Gables.[47] A special thanks to Lora Lucero for bringing this matter of nationwide importance to our attention. She entitled her nomination "Lukumi Babalu lives on" making reference to a case with that name from Florida invalidating local

regulations which precluded animal sacrifice as part of a religious ceremony.[48]

While it does not appear from the news reports that there were any arrests in the raid of the single-family home at 1801 Casillas Street in Coral Gables, it must have been quite a scene on June 8, 2007. Officer James Banks walked up to the home, knocked on the door, and the door opened in front of him to reveal a man dressed in white, covered in blood, with a knife in his right hand. Another officer went around the back of the house and noticed two black men with animal carcasses all around them.

The ceremonial sacrifice and its origins are described by Justice Kennedy in the 1993 decision:

> This case involves practices of the Santeria religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santería, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called *oris has,* through the iconography of Catholic saints, Catholic symbols are often present at Santería rites, and Santería devotees attend the Catholic sacraments.
>
> The Santería faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *oris has.* The basis of the Santería religion is the nurture of a personal relation with the *oris has,* and one of the principal forms of devotion is an animal sacrifice. The sacrifice of animals as part of religious rituals has ancient roots. Animal sacrifice is mentioned throughout the Old Testament and it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son.
>
> According to Santería teaching, the *orishas* are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santería rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals.
>
> Santería adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santería and its rites remains infrequent. The religion was brought to this Nation most often by exiles from the Cuban revolution. The District Court estimated that there are at least 50,000 practitioners in South Florida today.[49]

Had the police officers asked what was going on, they would've been told that all of this was part of a ritual by which the homeowner, Noriel Batista, was being inducted into the priesthood of the Church of the Lukumi Babalu Aye. Had the police officers read the Lukumi Babalu decision by the United States Supreme Court in 1993 on the subject of animal sacrifice, that probably would have been the end of their investigations. But no, some two dozen other police officers arrived in SWAT gear, along with zoning enforcement officers, all without warrants, and surrounded the home which, like its neighbors, was well-kept and valued at around a half million dollars. Talk about party crashers …

According to the news reports, some 20 Santería members were made to stand on the front porch at gunpoint and have their pictures taken. The officers took pictures of the sacrificed animals. Importantly, it is contrary to Santerían religious beliefs to photograph animals sacrificed and to do so is considered a desecration.

The ritual that day included the sacrifice of 44 chickens, 11 goats, and two rams, all of which had been brought to the backyard in cages. Somewhere around the middle of the day, when the animals to be sacrificed had arrived, a neighbor made an anonymous call complaining about squawking chickens and bleating goats.

The same controversy seems to be underway in Dallas. There a Santería priest is seeking court approval to perform the animal sacrifices. The city offered to settle—go with the chickens but forget about the goats. The priest rejected the proposal. I am trying to think if there is a middle ground here. Is there something bigger than a chicken but smaller than a goat so maybe the city can say: "Okay, we can let you go with the raccoons and an occasional armadillo, but nothing bigger…."[50]

The Santería claim that their slaughtering is humane and that as long as health laws are not violated, they should be able to practice their religion. Seems the First Amendment of the U.S. Constitution goes that far. And now with the Religious Land Use and Institutionalized Persons Act,[51] if I was in city government I would think twice about sending in SWAT teams at the bleat of a goat.

The ceremony itself was held inside a closed garage with dense tropical landscaping all around, thus

as a practical matter precluding anyone from observing the sacrifice or the ceremony which involves hours of prayers and ultimately the feasting on the freshly slaughtered and cooked animals.

In the end, and after three hours of diligent police work, no arrests were made, no citations were given and no notices of violation were served upon the property owner or any others on the scene. As I write this, I'm hearing in my head "Alice's Restaurant" by Arlo Guthrie. Go watch it on YouTube.[52] The net result of all this enforcement posturing was that at the end of the day the devoted Santería had their ceremony ruined.

Surprisingly, or maybe not so surprisingly given the nature of politics, Coral Gables Mayor Don Slesnick apparently won't let go of the issue. He said he was "appalled that there might have been a case of animal cruelty in the Gables." "I am determined to find out what our legal situation is. I'm a lawyer and a mayor, and it is my intent to follow the law. But we don't even let farm animals live in our city, much less destroy them. My position on this probably is going to be changed by court decisions." He described receiving several e-mails from residents who requested that he enforce city regulations against the Santería practices and he seems to lean strongly toward the side of the opponents: "Some residents can't understand that anything like this would happen in Coral Gables."

An anonymous opponent wrote to the Mayor: "Thank you for not apologizing to the Santerían. You are perfectly correct. In fact I would say that you did not go far enough."

You have to hand it to the police chief who said he was sorry that the invasion by a SWAT team interrupted the sacred ceremony, although he did defend the way his officers handled it. Chief Michael Hammerschmidt (I'm going to guess somewhat recklessly on the basis of his last name alone that he's not a Santerían himself) probably has the most realistic self appraisal of the situation: "But let's face it, we're in the middle. Residents are upset we didn't do anything, and the congregation, they are saying we desecrated a sacred space. It is a lose-lose situation for us."

Attention please. Would someone please check Bryan Wenter's billable hours for 2007? An audit of the ZiPLeR Award nomination process has shown a third nomination by him has been selected. He apparently has little else to do on the "left coast" other than look for ZiPLeR's. Regardless, we thank him once again for this great nomination. The **Chainsaw Massacre Award** goes to the City of Glendale, California Neighborhood Services Administrator for the $347,600 fine levied on Ann and Mike Collard, who as law-abiding citizens paid $3,000 to a tree trimmer to remove about 15% of the foliage from 13 trees to bring them back into compliance with the requirement that they maintain five feet of "vertical clearance between roof surfaces and overhanging portions of trees."[53]

Ready for this? Here is an example of how the Internet has become a powerful tool of political persuasion—the Collards have created a substantial Web site, far better I must say than our young lawyer-to-be Mr. Kuvin, where they argue their case and present damning evidence.[54] Check it out and next time the government ticks you off, maybe you'll want to set up your own cyberspace mouthpiece. They even have RSS (Really Simple Syndication) feeds on it so you won't miss any exciting developments in this tree-trimming caper gone terribly wrong.

Ann Collard was in the last two months of her pregnancy, to have her third child, when she received a notice from the Glendale Fire Department ordering her and her husband to trim the trees back to the 5 foot vertical clearance required by law. So they hired a tree trimmer and asked him along the way if a permit was required. He said no and went ahead and had largely completed the three-day job when one of Glendale's urban foresters happened along, saw the trimming, nearly went into cardiac arrest, and issued a cease-and-desist order.

It turned out that what Ann Collard had missed was a note on the Fire Department notice to the effect that she should get a permit, which the city would provide free, for any trimming of oak and sycamore branches larger than one inch in diameter.

The city then sent an arborist to assess the damage and suggested that maybe the Collards ought to hire a lawyer. The Collards figured they might get a fine, but the trees were largely intact, as can be seen from their Web site. The city ultimately sent them a letter stating that the Collards had improperly pruned 13 trees and that the fine would be twice the value of the damaged trees, in this case $347,600. To get to that astounding number the city found that some of the trees were worth as much as $100,000.

After too much bad publicity, the city attorney decided to drop the case against the Collards, although the mayor said that they still might be fined, perhaps $10,000 or less, with the possibility that the tree trimmer would bear most of the burden of paying that fine. Here is the latest posting on the Collards' Web site on November 28, 2007:

> Today we received this notice [PDF copy linked to site] from the Glendale City Attorney. It was also read aloud at the Glendale City Council meeting tonight. It seems that Glendale City Council has decided to drop the pending fines while they re-

view the ordinance. We are SO grateful to all of you who helped get the message out about our situation. Whether by writing to City Council, signing our petition or whatever else… we are truly indebted to you.

You can watch the discussion from the Glendale City Council meeting here [linked]. The discussion takes place between minutes 28:00 and 42:00.

The Glendale City Manager will be presenting some proposed changes to the Indigenous Tree Ordinance in the Glendale City Council meeting on December 18th. Let's make sure we have an ordinance that is strong, well advertised and enforceable… not abusive. I encourage all Glendale residents to attend this meeting. If you cannot attend, but would like to provide some ideas, you can post them here [linked]. Depending on the amount and quality of ideas provided I will present them to City Council at the meeting.

In the meantime, the Collards had paid $1,200 to a lawyer and were traumatized.

The **Nothing-Is-More-Entertaining-Than-Adult-Entertainment-Law Award** goes to the state of Alabama for first adopting an anti-obscenity law in 1998 banning the distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for anything of pecuniary value" and then successfully defending the law through the U. S. Court of Appeals.[55] The U.S. Supreme Court has declined to hear the case, so the law stands.

You can still own sex toys in Alabama when you purchase them elsewhere and bring them into the state. Inspectors of the Transportation Security Administration probably have had some fun checking the bags of passengers bound for Alabama. A search under "sex toys" on the TSA Web site yields no items. A careful analysis of the "prohibited items" list doesn't reveal anything within the reach of Alabama's anti-obscenity law (I did have to look up "Kubatons," however).[56] Traveler's tip: TSA says "snow globes and like decorations regardless of size or amount of liquid inside, even with documentation" can be packed but never carried on. You learn something everyday, especially when you read the ZiPLeR Awards.

The decision by the U. S. Supreme Court to deny review is definitely not the end of the controversy in Alabama. Take this tough talk, for example, from Sherri Williams, owner of Pleasures stores in Huntsville and Decatur: "My motto has been they're going to have to pry this vibrator from my cold, dead hand. I refuse to give up."

The **Education-Trumps-Sex Award** goes to the city of Hartford, Connecticut, for its decision regarding a site that I can see looking right out my window to the south.[57] A special thanks to my assistant, Diane McGrath, for catching this important story. Hartford has a regulation that requires adult establishments be located at least 1,000 feet from "any public or private school, or any other educational facility attended by persons under the age of eighteen, including, but not limited to, after school programs, children's museums, camps, and athletic leagues."

Successful entrepreneurs in the sex business, who already own or participate in the Penthouse Boutique in Milford Connecticut, the Luv Boutique in Hartford, the Erotic Zone in the North Meadows of Hartford, and two Kahoots strip clubs in East Hartford and Vernon, Connecticut, now want to do an adult retail store in an industrial area backing up to the Brainard Airport in the South Meadows area of Hartford. They plan on selling adult books, videos, and clothing.

Also located in the South Meadows area is a regional trash-to-energy plant and the offices of its operator, the Connecticut Resources Recovery Authority. At the offices of the CRRA is located a Visitors Center and the Trash Museum. Some 20,000 visitors, mostly elementary school students, visit the Trash Museum each year. As you guessed it, the Trash Museum is located right on the same street as the proposed new adult retail store and just a little less than 1,000 feet away.

Shifting now from adult play to child's play, we offer for the second year in a row an award recognizing the efforts to suppress the play or economic activities of children. Last year's award was for a town that brought an enforcement action against a young boy who was digging and selling earthworms from his yard. This year, the **Zoning-Enforcement-Is-a-Serious-Business Award** goes to the town of Stonington, Connecticut, for vigorously enforcing its accessory building regulations to prohibit a 48-square-foot playhouse.[58]

Martha and Alex Slater bought the playhouse for their daughter's 10th birthday. Martha Slater went to see the Zoning Enforcement Officer and was told she didn't need permission to put the playhouse in the yard. The ZEO later said he thought she was talking about a much smaller, plastic playhouse.

This playhouse, however, was a lot more elaborate. It cost $2,200, and has window boxes and a deck. The Slaters decorated it with a small couch and chairs.

The town decided that the structure exceeded the floor area ratio allowed in the zone, was a building requiring a building permit, and failed to comply with the flood hazard regulations. The ZEO denied the zoning permit

and the Zoning Board of Appeals denied a variance. The fines levied against the Slaters totaled $55,000. In the face of the crushing enforcement action, the Slaters ultimately removed little Chloe's playhouse.

The **Preeminence-in-Geographic-Analysis Award** goes to the Supreme Court of Georgia for its excellent decision on November 21, 2007, in the case of *Mann v. Georgia Department of Corrections*, holding that a Georgia law prohibiting convicted sex offenders from living within 1,000 feet of a school, church, childcare facility, or other place where children congregate caused an illegal regulatory taking.[59] What follows is paraphrased and quoted from the Georgia Supreme Court's summary of its decision.[60]

Anthony Mann, a convicted child molester, sued the state Department of Corrections in Clayton County Superior Court, challenging the constitutionality of Section 42-1-15 of the Official Code of Georgia, which restricts where sex offenders can live and work. When Mann and his wife purchased their current home in Hampton, Georgia, there were no prohibited facilities nearby, and he was in compliance with Georgia's Sex Offenders Statute. Similarly, when Mann entered into a business agreement as half owner and operator of a barbecue restaurant in Lovejoy, Georgia, there were no facilities nearby where children would possibly congregate.

Subsequently, two different day care centers were built within 1,000 feet of his home and his business. His probation officer demanded that Mann physically remove himself from his business and his home or face arrest and revocation of his probation. Mann previously challenged the same statute, and the Supreme Court ruled against him. In that case, he was living at his parents' home at the time and paying no rent when a day care center opened within the restricted space.

In the 16-page opinion, written by Presiding Justice Carol Hunstein, the Court affirmed the part of the trial court's order involving Mann's business, but reversed the part involving his home. Under the statute, "it is apparent that there is no place in Georgia where a registered sex offender can live without being continually at risk of being rejected," the opinion says. The decision notes that unlike Alabama and Iowa, which have exceptions in their laws, in Georgia, sex offenders who comply with the law when they establish residency, "face the possibility of being repeatedly uprooted and forced to abandon homes…" to remain in compliance. Under the Georgia law, a registered sex offender who refuses to move commits a felony punishable by no less than 10 years in prison.

The Court makes a distinction between its November 2007 ruling and its 2004 ruling in Mann's earlier case. "Although we earlier determined appellant's property interest in his rent-free residence at his parents' home to be 'minimal,' …we find appellant's property interest in the [current] residence he purchased with his wife to be significant." Furthermore, the statute "looms over every location appellant chooses to call home, with its on-going potential to force appellant from each new residence whenever, within that statutory 1,000-foot buffer zone, some third party chooses to establish any of the long list of places and facilities encompassed within the residency restriction," the opinion says. "While this time it was a day care center, next time it could be a playground, a school bus stop, a skating rink, or a church."

"We therefore find that OCGA § 42-1-15 (a) is unconstitutional because it permits the regulatory taking of appellant's property without just and adequate compensation," the opinion says. "Accordingly, we reverse the trial court's ruling denying appellant's request for declaratory relief in regard to the residency restriction."

The Court concluded that the trial court did not err in rejecting his challenge to the statute's work restriction. The Court found that "Although the statute's work restriction does directly deprive appellant of his right to work at the physical location of the business, there was no showing that appellant's property interest in the business depends on his physical presence." The Court concludes that Mann "failed to establish that the economic impact of the work restriction, as applied to him, effected an unconstitutional taking of appellant's property interest in his business."

The business of returning sex offenders to the community is nearly intractable. The Human Rights Watch entitles its compelling report "No Easy Answers."[61] The rearrest rate for rapists for all crimes is not much different than for other types of offenders, but at 46% it is the source of legitimate concern. The arrest rate for rapists for rape within three years of release is only 2.5%. But does distancing help reduce repeat offending? How long does it take to walk 1,000 feet, or take a bus, or drive a car?

The Human Rights Watch recommends that there be no state or local blanket restrictions on entire classes of offenders, but that any restrictions be tailored to the individual offender as a condition of their release or probation.[62]

So ends another great year. Keep those cards and letters coming. Please discount what Senator George Mitchell said in his investigative report on the use of performance-enhancing drugs by the ZiPLeR crew. Sure, the incidental injection of steroids, human growth hormone, and testosterone happened, but it was just to get past the pain of the Carpal Tunnel Syndrome[63] caused by all the typing and the torn rotator cuff[64] suffered from flipping through so many nomination packages. It should not affect the awards or any of our ZiPLeR Hall of Fame winners.

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RECENT CASES

Homeowner must pay $714,000 in fines for intentionally enlarging house in violation of land development regulation, but decision not to order abatement is not abuse of discretion. Following more than four years of appeals and two remands between the trial court and the Supreme Court of Wyoming, a homeowner in Teton County has finally learned that he can keep the home improvements he made but he will be required to pay a hefty penalty ($714,000) for intentionally violating the Teton County Land Development Regulations (LDRs) when he enlarged the habitable space of his home from 8,000 to 11,000 square feet.

Immediately after he received an occupancy permit for his new 8,000 square foot home, the homeowner enlarged it by converting porches to habitable space, and by flooring in rooms with cathedral ceilings. County officials sought to abate the violation, but the trial court concluded the LDRs were unconstitutional as applied to the homeowner. In 2003, the state's highest court reversed and remanded, declaring the LDRs constitutional. In 2006, the state's highest court reversed and remanded again, requiring the trial court to reconsider the fines, and to more meaningfully address the abatement issue. On the second remand, the trial court again declined to order abatement and Teton County appealed.

The Supreme Court of Wyoming concluded that the trial court's balancing process resulted in a reasoned decision and was not an abuse of discretion. "The court properly considered the size, character, and use of the house and the interest the County has in enforcement of its regulations." The footprint of the house was not enlarged, and the house was not a "20 story edifice or garish eyesore completely out of character with the community." The neighbors had not complained and the house complied with the subdivision's restrictive covenants and all other requirements in the LDRs. The fine assessed against the landowner far exceeded any fines previously assessed on a residence anywhere in Wyoming. However, the fact that others may have been allowed to exceed the maximum square footage was not an "equity" that should be balanced in the homeowner's favor and any confusion in interpreting the LDRs did not justify violating the regulations. (*Board of County Com'rs of Teton County v. Crow*, 2007 WY 177, 170 P.3d 117 (Wyo. 2007).)

Maryland's Highest Court rules county board of appeals has authority to issue time variance. A nonprofit developer received approval of a special exception and variances to build a nursing home but had difficulty complying with the time limits established in the Anne Arundel County Code which required that action to implement the use be initiated within one year of approval and that the use be completed and in operation within two years of approval. Failure to meet these deadlines would render the approvals void. Prior to the first deadline, the developer requested a variance from the time limits to authorize an extension of the variances and special exception. The Hearing Officer approved the requested time variance and the Board of Appeals did as well. Neighboring landowners appealed, arguing that the Board of Appeals did not have the authority to grant such a variance.

The Circuit Court affirmed, and after issuing a writ of certiorari on its own initiative, the Court of Appeals affirmed, holding that the board of appeals had authority to extend by variance the county zoning code's deadline for the implementation and completion of the proposed project. The general rules of statutory construction require the court to look at the language in the county code itself, construed according to their "ordinary and natural import." Article 3 of the code allows for the variance of any of the provisions of Article 28, including the time limitation provisions. Furthermore, the court noted that Anne Arundel County has issued more than 130 time extension variances since 1995. (*Lanzaron v. Anne Arundel County*, 402 Md. 140, 935 A.2d 689 (2007).)

Georgia statute prohibiting registered sex offender from living within 1,000 feet of childcare precludes appellant from having any reasonable investment-backed expectation in the house he purchased. Georgia's sex offender statute, OCGA § 42-1-15, prohibits registered sex offenders from residing or loitering within 1,000 feet of a childcare facility, church, school, or areas where minors congregate; or being employed by any business or entity within the same distance restrictions. A registered sex offender satisfied these distance restrictions when he and his wife purchased a home for their residence; and also when he purchased a half interest in a business that operates a barbeque restaurant. However, childcare centers later located near his home and business, putting him in violation of OCGA § 42-1-15 and subjecting him to immediate removal from the premises. If he failed to move, he would commit a felony punishable by imprisonment for not less than 10 nor more than 30 years. There was no "move-to-the-offender" exception in the statute.

Appellant challenged the statute as an unconstitutional taking of his property without adequate compensation. The Georgia Supreme Court agreed with him, as to the impact of OCGA § 42-1-15 on his home because the statute "does not merely interfere with, it positively precludes appellant from having any reasonable investment-backed expectation in any property purchased as his private residence." The court noted the statute effectively puts the state's police power in the hands of private third parties who have access to the sex offender registry which requires sex offenders to publicly register the location of their residence and work. The state's highest court held OCGA § 42-1-15 does not constitute an impermissible taking with respect to his half interest ownership in the restaurant because appellant is not forced to sell his interest, he just can't work on the premises. (*Mann v. Georgia Dept. of Corrections*, 2007 WL 4142738 (Ga. 2007).)

In Pennsylvania, proposed construction of billboards does not constitute land development within meaning of the Municipalities Planning Code and township subdivision and land development ordinance. The billboard company wished to erect six billboards on four lots used for commercial purposes it leased in Upper Southampton Township. Each billboard would be free-standing, V-shaped, double-sided signs measuring 14 x 48 ft, attached to a single pole and illuminated by indirect lighting. The company had earlier challenged successfully the township's ordinance which banned all billboards. (*Baker v. Upper Southampton Tp. Zoning Hearing Bd.*, 830 A.2d 600 (Pa. Commw. Ct. 2003).)

After the Baker appeal, the billboard company submitted applications for a sign permit and a building permit, which the zoning hearing officer rejected because he concluded the sign company was required to submit land development applications pursuant to the township's subdivision and land development ordinance. The company appealed that decision to the zoning hearing board, which ruled in its favor and concluded that the proposed construction did not require land development approval. The township appealed and the trial court reversed because it concluded that the erection of billboards on the properties which contained existing commercial structures, constituted "an allocation of land or space between two or more occupants" under subsection (1)(ii) of the Municipalities Planning Code's (MPC) definition of "land development." The trial court concluded that "[e]ach fixed sign location will have a use entirely distinct and independent from the uses already existing on these properties." The Commonwealth Court affirmed.

On appeal to the state's highest court, the billboard company argued that the two lower courts had used an "artificially narrow and hyper-technical reading of the statutory definition of land development." If the owner of the commercial property had decided to erect a billboard, rather than leasing it to the billboard company to erect the sign, there would have been unity of ownership and no land development plan would be necessary. The state's highest court noted that the question of whether the construction of billboards is "land development" under the MPC and

the township regulations involves a pure question of law regarding statutory construction, and the court's review is plenary and non-deferential. The court reversed, and held that construction of billboards is not land development within the meaning of the MPC. Billboards don't give rise to the same issues and concerns that might arise with a housing development, condominiums, or building groups, the court concluded. And the zoning officer and Department of Licenses and Inspections posses broad authority to enforce other zoning and licensing laws. (*Upper Southampton Tp. v. Upper Southampton Tp. Zoning Hearing Bd.,* 934 A.2d 1162 (Pa. 2007).)

New York's highest court rules open space restriction recorded on final subdivision plat is enforceable against subsequent purchaser. In 1962, two developers received final plat approval from the Town to divide their property into seven parcels, including parcels B and E, which were designated the buffer area where open space would be located. The words "Open Space" were written on parcels B and E on the plat. Furthermore, the plat was subject to eight conditions, one of which prohibited building permits for parcels B and E. The approved plat was filed with the town and also filed with the Dutchess County Clerk's Office.

Parcels B and E remained undeveloped for nearly 40 years. In 2000, appellant purchased parcels B and E for $29,500 at an in rem tax sale intending to build ten single family houses on the property. No mention of the open space restriction was provided on appellant's title policy. In 2002, appellant's surveyor prepared a survey of parcels B and E. Although the surveyor saw the open space restriction noted on the recorded plat, he ignored it and never included a notation about the restriction on the survey. The town issued a building permit for the first house and then issued a temporary certificate of occupancy when it was completed.

The son of one of the original developers noticed the construction and told a councilman about the violation of the 1963 plat. The building inspector issued a stop work order but allowed appellant to finish the exterior work on the house. Appellant filed a §1983 claim in federal court and argued that the open space restriction had to be recorded under Real Property Law § 291 to be enforceable against him. The district court ruled in his favor and concluded that the town had violated his right to substantive due process, entitling him to damages.

On appeal, the Second Circuit dismissed the § 1983 claim but held that the process of approving and recording the 1963 plat complied with both Town Law § 276 and Real Property Law § 334. Because there was no controlling precedent whether the filing of a plat is enforceable against a subsequent purchaser, the Second Circuit certified that question to the New York Court of Appeals, which held that an open space restriction placed on a final subdivision plat pursuant to the Town Law, when filed in the Office of the County Clerk pursuant to the Real Property Law, is enforceable against a subsequent purchaser. (*O'Mara v. Town of Wappinger,* 2007 WL 3375579 (N.Y. 2007).)

Massachusetts' highest court rules town zoning bylaw allowing special permits for storage in single-family residential districts is a valid delegation of authority to the zoning board of appeals. Homeowners operate a landscaping business out of their home and requested an amendment to their permit to allow them to store vehicles, materials, supplies and equipment in connection with their landscaping business in the barn on their property. The zoning board of appeals approved their request but a neighbor objected and sought review by the Land Court. The Land Court concluded the board of appeals exceeded its authority because it relied on a section of the town's zoning bylaw which the court determined to be invalid because it grants unbridled discretion to the board.

Section V.B.5 of the bylaw provides: "Storage for Commercial and Business Activities: In Single Family Residence Districts the Permit Granting Authority may issue Permits for the storage of vehicles, materials, supplies and equipment in connection with commercial or business activities principally carried on in the Town and providing services essential to the uses of premises permitted in the residence districts…" The neighbor argued that provision provides no standards to guide the discretion of the board of appeals and the Land Court agreed. The state's highest court vacated the decision and remanded. The bylaw does not require a definition of "storage"—a common word with a well-understood ordinary meaning, and the bylaw limits the board's authority to permitting only storage for certain uses, not all or any uses. (*Fordham v. Butera,* 450 Mass. 42, 876 N.E.2d 397 (2007).)

Proposal to replace a conventional billboard display with a LED display requires a zoning permit and site plan approval. In January 2005, the sign company applied for a permit to remove the conventional display on its billboard and replace it with a light emitting diode (LED) display. Four months later, the community development director informed the company in writing that its application was incomplete and requested additional information which the company supplied a week later. In August, the sign company sent a letter to the director asserting that its application was "deemed approved" because the city had failed to take formal action. In September, the director again notified the sign company that its application was incomplete and advised the company that a conditional use and site plan approval would be required. In October, the sign company filed a mandamus action. Meanwhile, the sign company filed 17 separate sign applications with the city to change the existing billboard displays to LED displays.

The community development director denied all of the sign permit applications maintaining that a conditional use and site plan approval was required before building permits could be considered. The zoning hearing board (ZHB) affirmed the decision and concluded that an LED screen was

not just a change in the sign face, "because it requires electric services and cables, as well as air conditioning units that will be permanently bolted to the billboards." The trial court affirmed the ZHB's decision and denied the request for a writ of mandamus.

The sign company found no relief from the appellate court which held that its application for a permit was not deemed approved under § 502(a) of the Construction Code Act because there is no "deemed approval" provided for billboard permits or under § 508 of the Municipalities Planning Code because the sign company did not raise this particular argument below. There was no evidence in the record to conclude that the billboards were nonconforming uses, but even if they were, the sign company failed to submit the proper application. Reviewing the terms and provisions of the city's zoning ordinance, the court found that the conditional use and site plan requirements applied to the request for an LED display. (*Lamar Advertising Co. v. Zoning Hearing Bd. of Municipality of Monroeville,* 2007 WL 4372790 (Pa. Commw. Ct. 2007).)

Elected city official is found guilty of accepting gratuity from real estate developer. A real estate developer was planning a multimillion dollar mixed use project which would require a rezoning to allow more retail space. An elected city official solicited $100,000 from the developer. Following another conversation with the elected official, the developer contacted the FBI and began acting as a cooperating witness. He wore a wire and recorded subsequent meetings with the elected official. At one such meeting, he also wore a hidden camera. The two discussed how the developer might make campaign contributions by using straw donors.

In July 2005, the city council unanimously denied the developer's rezoning request. The elected official explained there had been strong opposition to more retail in that area; but there were further conversations between the two about receiving city approval for a new mall. In September, the FBI confronted the elected official who at first denied having received any money from the developer, but after hearing the audio recordings and seeing the video tape, he admitted receiving payments of $5,000, $1,200, and $1,000 from the developer. A federal grand jury returned a four count indictment. At trial, the government called the FBI agents and the developer. The elected official testified on his own behalf and also called 16 witnesses to show entrapment. He was convicted of three out of the four counts, and sentenced to 30 months in jail on each count to run concurrently.

The Eighth Circuit Court of Appeals affirmed. The elected official argued that 18 U.S.C.A. § 666(a)(1)(B) requires the government to make a threshold showing that the city expended at least $5,000 in considering the developer's rezoning application, but the court disagreed, citing *Salinas v. U.S.,* 522 U.S. 52, 61, 118 S. Ct. 469, R.I.C.O. Bus. Disp. Guide (CCH) P 9382 (1997), in which the Supreme Court held that "§ 666(a)(1)(B) does not require the government to prove the bribe in question had any particular influence on federal funds…". The elected official also argued that the government did not provide sufficient evidence that a quid pro quo was intended in his dealings with the developer, but the court noted that he was indicted for, convicted of, and sentenced for accepting gratuities rather than bribes. The government was not required to prove any quid pro quo. The court also rejected his arguments of entrapment. (*United States v. Zimmermann,* U.S. App., 8th Cir., No. 07,1062 Dec. 20, 2007.)

Urban Renewal Authority cannot be ordered to exercise its power of eminent domain but its contract with developer is not void; claims for breach of contract remain. Developer and urban renewal authority had a contract by which the authority agreed to acquire five parcels, by eminent domain if necessary, and sell them to the developer so he could build a Walgreens store. The authority's failure to acquire four of the five parcels within the specified time prompted the developer to file a civil action alleging breach of contract and claims of equitable and promissory estoppel. The developer requested specific performance requiring the authority to exercise its power of eminent domain. The district court granted the developer's request for preliminary injunction but dismissed the claim for specific performance. The court of appeals affirmed, but reversed the dismissal of the specific performance claim.

The Supreme Court of Colorado, En Banc, reversed. Although the contract between the developer and the authority required the government to exercise a core governmental power (eminent domain), it was not the same circumstance as requiring the government to surrender its power of eminent domain in contravention of the reserved powers doctrine. The contract was not void, as the authority argued, but as a matter of first impression, the court decided it could not order specific performance and require the authority to exercise its power of eminent domain. "The discretion to exercise the power of eminent domain in the public interest must remain with the body to which it was delegated, and not the courts." The developer might obtain relief through its breach of contract claim which was remanded to the district court. (*Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L .C.,* 2007 WL 4225821 (Colo. 2007).)