

ZONING AND PLANNING LAW REPORT

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THE 2013 ZiPLeRs: THE NINETEENTH ANNUAL ZONING AND PLANNING LAW REPORT LAND USE DECISION AWARDS

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Here are some of the issues that led us to this year's big winners, chosen from among thousands of nominations from around the globe:

- How to keep from going Koontz crazy
- Ducks and donkeys, pigeons and pachyderms, what's up on the pet front
- Recent developments in chicken rescue
- Buildings burning sunbathers, chaise lounges and cars
- Naked haunted house – you think you have zoning problems!
- The First Amendment and bikini tops
- Polygamist retirement communities
- Greenmail
- SpongeBob SquarePants gravestones



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The Koontz Corner

We need to take a moment away from the usual business of this annual report on the most bizarre yet possibly educational and important developments in zoning and planning law to bring to your attention a pandemic sweeping the country, threatening the very foundations of effective planning and zoning. We haven't seen anything like it before except perhaps after First English Evangelical Lutheran Church of Glendale v. Los Angeles County,¹ one of the 1987 Takings Trilogy cases. First English, which scared the heck out of public sector planners, pales in its impact in comparison to the crippling angst now being suffered by so many.

The recent strange malady swept across the community of land-use practitioners during the last half of 2013 and continues its alarming spread. The outbreak apparently occurred in late June after a certain decision by the U. S. Supreme Court, *Koontz v. St. Johns Water Management District*,² but for reasons that no one seems to understand completely, it only strikes those whose lives are dominated by planning and zoning. It appears that all others, even some who are tangentially associated with land use and real estate, are entirely immune. Building inspectors, for example, whose daily jobs involve checking for the proper installation of wiring, plumbing and the like, do not even recognize the word "Koontz." Similarly, a study of over 1,000 tort lawyers specializing in dog bite cases and a like number who do driving-under-the-influence defense work revealed that 93.6% of them cannot spell "Koontz," and not a single one of them has evidenced even the slightest symptoms of this newly-discovered debilitating disorder.

The very short version of *Koontz* is that it clarified and perhaps extended the reach of two prior exaction nexus cases (*Nollan* and *Dolan*)³ by holding that what a number say are the somewhat heightened standards of qualitative and quantitative nexus in those two cases do apply to exactions of money (not just in-kind exactions, such as requiring an open space set aside) and to exactions where the application is rejected (not just exactions where an application is approved with an onerous condition).

Koontz has bolstered the bravado of property rights advocates nationwide. At the other end of the spectrum, government-sided people—Professor

Daniel R. Mandelker characterizes them (and himself) as “police power hawks”—have succumbed to one of the most frightening diseases ever experienced in modern times. It has come to be called “Koontz Catatonia” and the tragedy of it is there appears to be no effective treatment and no way to stop it from spreading and paralyzing the community of land-use planners and regulators.

Koontz Catatonia is a state of apparent unresponsiveness to external stimuli in a person who appears awake. There are three types of Koontz Catatonia: (1) catatonia associated with another mental disorder (catatonia specifier), (2) catatonic disorder due to another medical condition, and (3) unspecified catatonia.⁴

It is frightening to watch someone slip into Koontz Catatonia. Seemingly normal at one moment, in a flash they become frozen at their desks, immobilized at their drafting tables, and turned stone-like during commission meetings. Often their skin takes on a lifeless pallor not unlike that of Lenin’s embalmed body lying in state in his tomb in Red Square, which I recently had occasion to view on a trip to Russia to learn more about how to do better land-use planning in this country (the short answer is we probably need a tsar or dictator).

Individuals with Koontz Catatonia often cannot provide a coherent history; however, collateral sources may be able to relate relevant historical information. A history of behavioral responses to others usually includes the presence of the following:

- Mutism
- Negativism
- Echopraxia
- Echolalia
- Waxy flexibility
- Withdrawal

Echopraxia, as of course we all know (or maybe you know it as echokinesis or are more familiar with its close cousin, echolalia) is the involuntary repetition or imitation of another person’s actions. Why, I saw this just the other night at a zoning hearing when a developer’s lawyer pointed her finger at the commission and snarled “this exaction is part of an out and out plan of extortion and is a taking of my client’s property.” The planner, his face cladded with consterna-

tion, found himself uncontrollably imitating the lawyer and exclaiming “this exaction is part of an out and out plan of extortion and is a taking of the applicant’s property.” A sure sign of Koontz Catatonia. Nearly everyone present gasped in astonishment and pulled away from the planner out of fear of contagion.

How did this happen? What can be the cause? Where is Dr. Gregory House when we need him? Back in 1987 with the decision in *First English* there was widespread concern among those in the planning community that the U.S. Supreme Court had greatly expanded liability for public land use regulation. The day of the decision a reporter from a national newspaper called me while I was in a meeting outside the office and asked for my opinion on the decision. She gave me an overview of what the Court decided. Remember, there was little commercial internet then and we awaited faxed copies. You couldn’t just read it on your smartphone. I had not read the decision and I said I could not comment. I asked her with whom she had spoken and she gave me the names of three or four of the usual suspects. I asked her about their opinions and she sketched them out for me. I then asked her if those who had commented on the decision had read it. She said they had not.

The next day that newspaper reported on the decision on the front page, column one below the fold, describing the grave concerns that people had regarding the impact of the decision. The day after that, the newspaper editorialized about the possible likely adverse impacts of the decision on public regulation. People read and believed there would be great change. Not really comparable, at least not in degree, but still illustrative of how we can believe something as true and even panic is the October 30, 1938 “War of the Worlds” radio drama by The Mercury Theater of the Air directed and narrated by Orson Wells based on H. G. Wells’ novel.⁵

The fact is that *First English*, which was a case essentially about whether California had to pay money damages rather than merely invalidate a government decision when it was a taking under the Fifth Amendment, was never tried. It went up on the pleadings principally on the narrow issue of money damages. It was remanded to the California courts where it was decided, again without a trial. The decision? No taking. No compensation for the temporary shutdown of the camp for handicapped children while the government determined what the base flood elevation

was, so it could be sure the children would not be put into harm's way.

The day after the Koontz decision, one of the most knowledgeable and highly regarded advocates of government regulation of land-use, Prof. John Echeverria of Vermont Law School, had his comments on the decision published in *The New York Times*.⁶ It was widely read, shared, and republished. There was no rebuttal receiving equal attention in the media. The reiteration of Professor Echeverria's commentary reified his claims that Koontz had created a disaster for planning and regulation.

Professor Echeverria and I have known each other since we attended the same law school a couple of years apart in the 1970s and I have always appreciated his scholarship and insights, but he has a decided view on takings. One commentator said that Professor Echeverria has never seen a taking he liked. He hews to a line that supports nearly limitless governmental power to regulate private land. We need people like him to advocate with high contrast and high resolution, just as we need the archetypes in the parallel universe at the opposite end of that continuum, such as Prof. Gideon Kanner, who has been the most profound and colorful spokesperson for compensating when government takes property.⁷ Bright lines at each end illuminate the great middle ground.

Contrast and compare the two professors' views on Koontz:

Echeverria:

He describes it as "a blockbuster decision" and says that "the Supreme Court's ruling is likely to do some serious real-world damage." "As Justice Kagan correctly explains in her dissent, the decision will very likely encourage local government officials to avoid any discussion with developers related to permit conditions that, in the end, might have let both sides find common ground on building projects that are good for the community and environmentally sound. Rather than risk a lawsuit through an attempt at compromise, many municipalities will simply reject development applications outright — or, worse, accept development plans they shouldn't." "[T]he revolutionary and destructive step taken by the court in Koontz is to cast the burden on the government to justify the mandates according to the heightened Nollan-Dolan standard. This is contrary to the traditional court approach of according deference to elected of-

ficials and technical experts on issues of regulatory policy. Moreover, this heightened standard will result in a huge number of costly legal challenges to local regulations." "After Koontz, developers have a potent new legal tool to challenge such charges because now the legal burden of demonstrating their validity is on the communities themselves."

Kanner:

In his first post on the decision, he offers: "Our favorite passage from the majority opinion: 'Extortionate demands for property in the land use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.' Well said."

In a later post, he observes: "Predictably, government types and their groupies are in a tizzy. They have picked up on Justice Kagan's dissenting lamentation in the *Koontz* case that the cost of government will go up. But the problem with that lamentation is that it is an argument that proves too much. Liability under *Koontz* can only ensue where the government demands money or property from an individual, *where the thing demanded has no rational connection with the public detriment brought about by the proposed private development*. In other words, Koontz was asked to perform work on a public project located miles from the subject property and having nothing to do with it."

We saw this same over-reaction based on the lack of knowledge of how a decision would be interpreted and applied by the courts in another takings case five years after *First English*. The esteemed land-use law scholar, Norman Williams, Jr., a professor at Vermont Law School, had concerns about what he saw as expanded liability and fettered land use decision-making as a consequence of the Court's 1992 *Lucas v. South Carolina Coastal Council* decision. The *Lucas* decision created a new type of taking, a categorical regulatory taking, when overregulation rendered property valueless. Categorical takings are compensable in the same manner as the per se physical invasion taking — no Penn Central three-part balancing.⁸ Prof. Williams expressed his broad concerns in a two-part article in this publication in 1993.⁹ His worries about a major shift toward over-protection of private property rights were similar to those Prof. Echeverria has regarding Koontz. I disagreed with Prof. Williams and wrote a rebuttal

in which I analyzed all of the decisions citing Lucas in the 12 months after it was handed down.¹⁰ Lucas turned out to be a toothless tiger. It really has had little or no impact. Name one case in the 21 years since the decision where money damages have been paid for a Lucas categorical taking. I don't believe there are any, although a law professor who has recently reviewed 1,800 cases citing Lucas has identified several where Lucas was central to finding a taking. We will honor anyone who cites us a decision awarding damages on a purely Lucas basis in which the government wrote a check with a head table seat at the annual ZiPLER Awards dinner and prominent recognition, unless your errors and omissions insurer forbids it, in the 20th anniversary issue of the ZiPLERs next year.

Numerous planners have told me it will be business as usual post-Koontz. Developers don't care about Koontz. They may lay claim to some leverage, but they don't want lawsuits—Koontz has been going on for almost 20 years, Koontz himself has died, and the case is back on remand. Developers want speed and certainty and they bargain for both in making deals with regulators. Finally, none of the cases decided thus far indicate any real effect.

The net effect of Koontz will be:

- More pre-application meetings to negotiate before there might be a claim to a property interest.
- More “gaming” of regulations, that is, testing before they are formally adopted to make sure they work and provide adequate nexus for exactions.
- More impact fees because they can be more precisely tailored than in-kind exactions.
- More special tax districts – taxes are outside of Koontz.
- More fees – fees are also outside of Koontz.
- More discretionary processes such as planned development districts because the pure bilateral bargaining in incentivized regulation over and above the underlying as-of-right uses is immune from Koontz.
- Local appeal processes for exactions to short-stop them from going to court.¹¹
- More development agreements – again, they are pure bilateral bargaining.

So, to Prof. Echeverria we present the **Koontz Catatonia Award** with the hope that Vermont Law School will create a foundation to find a cure. Actually, the passage of time will likely see this infliction fade away as people realize that Koontz has had little or no effect on land use decision making.

The Award Ceremony

As we have in the past, we ended up turning to the Brothers Bon Vivant, our old friends Trenholm Walker and Andy Gowder of Charleston, South Carolina, to find us a proper venue to roll out the red carpet for the spectacular annual ZiPLER Awards. As you may recall, we have for many years celebrated the remarkable achievements in zoning and planning law at the Squat and Gobble Restaurant in Bluffton, South Carolina. Last year on Andy's recommendation we broke from that tradition and went to The Great Wall Buffet in Grand Forks, North Dakota, rated by TripAdvisor.com in its most recent review as the worst restaurant in town.¹² Grand Forks was a special treat because it is the very place where Cream of Wheat® was invented 120 years ago.¹³ Those of you who were fortunate enough to get invitations to attend the gala black-tie affair and did make it, over 500 of you in all, greatly enjoyed many of the tasty treats from the online cookbook provided by the North Dakota Wheat Commission, including the ever-popular dried beef spread...mmmm.¹⁴

This year we reached out to Randall Burbach, the seventh and eighth grade football coach at the middle school in the Corbett School District in rural eastern Multnomah County, Oregon for a recommendation. Coach Burbach was recently noted for hosting a dinner for his 12 to 14-year-old players and their families at Hooters. I believe this is a fine venue,” said Randall Burbach. “It's not a strip club. If you have a dirty mind, you'll find dirt.”¹⁵ We here at ZiPLER Award Central always want to surround ourselves with people like Coach Burbach who have the same good, common sense we do. Unfortunately Coach Burbach's choice was booked the night we needed it, so somewhat reluctantly, but knowing that Trenholm and Andy would exercise some really good Coach Burbach-style judgment, we turned back to them.

They have booked us into the fabulous Kuappi in Iisalmi, Finland for a truly intimate dining experience. It is a uniquely delightful venue on the water.¹⁶

It happens to be the smallest restaurant in the world with barely room for one table and a small kitchen, though we are pleased to note that it has a full bar, made possible only by stocking it with a selection you typically find in a hotel minibar.¹⁷ We do have a bit of a problem of course given our invitation list of almost 1,000 people. So, we will hold this year's awards banquet with a series of seatings, two hours apart, three people each which will give us 36 people in a day and complete the banquet in about 15 days. Bon appétit! Thank you again, Trenholm and Andy, for your always great advice.

The Awards

Fortunately, we have somehow escaped coming down with Koontz Catatonia so we can turn to our *raison d'être*, to bring you the coveted Zoning and Planning Law Report Awards.

Every year we get so many animal nominations that some time ago we set up a completely separate award category. This year we have two truly notable awards to present. The first is the **You Can't Pigeonhole These Pets As An Accessory Use Award** which goes to the Village of Mamaroneck, New York for denying David La Russo's petition for an interpretation of the Village of Mamaroneck, New York Code that a racing pigeon constituted a customary household pet and that having 40 or more fine feathered friends roosting at his single-family home was a permissible accessory use. Specifically, the Zoning Board of Appeals held that the keeping of 40 or more racing pigeons did not qualify as keeping "a reasonable number of customary household pets" within the meaning of the Code. The ZBA was swayed by the evidence that only La Russo and his father could handle the birds because they were "too sensitive and valuable" as "race birds" and that other members of the household, including La Russo's children, were not allowed to handle the birds. There was also no evidence in the record that any other residents of the Village of Mamaroneck had 40 or more pigeons on a residential lot for any purpose. As a consequence, the appellate division denied La Russo's appeal, apparently holding it to be a flight of fancy.

One of the great tragedies of the Hurricane Katrina disaster, above and beyond the loss of human life and the widespread destruction of property, was the loss of many pets and other animals. Few people

would even think to put together a disaster plan to address the needs of such animals. The U.S. Government, however, has stepped in to fill the obvious void. The U.S. Department of Agriculture adopted a new rule inspired by Hurricane Katrina effective January 30, 2009, requiring anyone who is a licensed exhibitor of animals to have a disaster plan for their critters. During the comment period on the proposed regulation 997 comments were received, only 50 of which were in favor of the rule as written.

The rules for exhibitors are already quite burdensome, now running to 14 pages just for rabbits with such requirements as the need to submit to the USDA an itinerary if an exhibited rabbit is taken out of town for an extended period. Rabbits raised for meat are exempt from the rules. Marty the Magician, whose real name is Marty Hahne and who has a registered three-pound Netherland dwarf rabbit he uses in his act, was so exasperated by all of this that he once said to an inspector: "you're telling me I can kill the rabbit right in front of you, but I can't take it across the street to the birthday party without a license?" Also he notes that because the regulations only apply to warm blooded animals he could switch from a rabbit to an iguana as an animal to pull out of his hat and be free of the regulations.

Now he has to have a disaster plan for his rabbit.¹⁸ The plan must be written and address fire, flood, tornado, air-conditioning going out of commission, ice storms, and power failures among many other potential calamities.¹⁹ So there, it is our pleasure to award to the USDA the **Regulations Run Amok Award** for its overinclusive and underinclusive efforts to protect animals. The one saving grace is that right after this story of Marty the Magician was published in The Washington Post, the USDA suspended its rule: "Effective July 31, 2013, the USDA issued a stay of the Contingency Plan regulation in order to give the agency additional time to determine the best course of action. The stay will remain in place until the best course of action is determined and will apply to all regulated entities."²⁰ Ah, the power of the press.

Special thanks to our friend David Yearout, the director of the Junction City/Dreary County Planning and Zoning Department, for bringing to our attention and nominating Delmont, Pennsylvania for a special award arising out of the enforcement of its ordinance prohibiting the keeping of "poultry" against one Jim Kistler for the heinous crime of

keeping four Blue Swedish ducks as pets.²¹ The four ducks—Larry, Moe, Curly, and Fred—are clearly pets. Kistler does not intend to eat them and he argues that the regulation against certain types of farm animals including swine, goats, sheep, and poultry, under which ducks are being placed for purposes of this enforcement proceeding, should not encompass ducks which are kept as pets as the regulation is intended to prevent farming on residential land. “I’m not going to eat my pets,” said Kistler.²² The regulation is quite extensive and includes insects, reptiles having a venomous or constrictor nature, and all manner of quadrupeds such as elephants, rhinoceros, hippopotamus, moose, and deer. None of those can be household pets. Don’t try to keep a hippopotamus at home in Delmont, Pennsylvania, even on a leash.

Jim Bonner, Executive Director of the Audubon Society of Western Pennsylvania, has come to Kistler’s defense. Bonner says that ducks won’t hurt anybody and that Blue Swedish ducks are commonly kept as pets and known to be docile and quiet. “They are a domesticated species,” says Bonner. “These guys have been bred for centuries. It’s really no different (from a dog or cat). If my neighbor had one, I wouldn’t mind.”

Kistler was facing a \$500 a day fine when his case went to a hearing before the zoning hearing board. We are pleased to announce that the board unanimously voted to allow Kistler to keep his ducks. Kistler had a pro bono lawyer for the hearing and a petition in his favor signed by 244 Delmont residents.²³ The appeal fee was \$400; he paid \$3.50 each for the ducks. To Jim Kistler we are so pleased to present the **It All Turned Out Just Ducky Award** for his fortitude and steadfast efforts to keep his anus platyrhynchos domesticus pets.

Let’s see—pigeons, rabbits, ducks—what haven’t we covered? Donkeys! From Mesquite, Texas we have the case of the City Council debating whether a property owner can breed and sell miniature donkeys in a residential area. Lonnie Craine, the donkey breeder, says that: “they’re really trying to control something that is probably a non-issue.”²⁴ He has 11 miniature donkeys on 12 acres that he is seeking to rezone from residential to agricultural use so that he can breed and sell the animals. “The money they can gain is off the sales tax for business. It would be a shame to have this place to be subdivided into something that it’s not, this property has always been ‘ag’ and our plan is to keep it that way.”

The Council by 4-3 vote ultimately denied the zoning amendment out of concern that the area would be difficult to develop if it were in an agricultural district because of potential property tax exemptions. As with many zoning disputes, a whole lot of attitude and personality appears to have come in from both sides. Said one councilmember of Craine: “Maybe it’s just your personality, but you come across as rather belligerent, and rather ‘No, it’s my way or the highway.’”²⁵ The **Don’t Be An Ass Award** goes jointly to the Council and Craine. Let’s see how they do sharing it.

Regular readers of the ZiPLER Awards will recall that two years ago we highlighted the need to address the growing problem of homeless chickens. To call attention to this plight and to honor a savior, we conferred upon Winder City, Georgia, the **What Do You Do With Evicted Chickens Award** and noted the great work done by Chicken Run Rescue.²⁶ Last year, we thanked Patricia Salkin, editor of this fine publication and the dean of the Touro College Jacob D. Fuchsberg Law Center, and Daniel Gross, a Fellow in Government Law & Policy at the Government Law Center of Albany Law School, for bringing to our attention a New York Times report on urban chicken retirement. We then were pleased to present Pete Porath of Portland, Oregon, with the **On A Wing And A Prayer Award**, which we did with three loud “clucks” at the awards dinner, for sheltering these chickens and others, some 1,000 to 2,000 birds a year, in what he describes as “rehoming”: “We have rehomed all kinds of stuff. Ducks, chickens, peacocks, turkey, quail, guineas. Birds that we rehome out of the city, we have a policy that we don’t eat them.” Unfortunately, all we had on the menu for the awards dinner last year was Caesar salad with chicken, chicken fingers, fried chicken, chicken Kiev, and chicken cacciatore. Oops.

This year, we will try to be a little more sensitive with the menu selection. We have another chicken rescue story and an award to give. The **Frequent Flyer Award** goes to Kimberly Sturla, the Executive Director of Animal Place, an animal rescue operation in Grass Valley, California, which organized a cross-country flight in a chartered cargo plane from California to Elmira, New York, with a cargo of 1,200 rescued hens.²⁷ The birds, which were just two years old at the time of the flight, were rescued from an egg farm living in so-called “battery cages” now outlawed effective 2015 in California. It’s hard to find

a home for these birds, as they have typically been debeaked, atrophied from their confinement, and suffering from osteoporosis.

Animal Place had received a flock of 3,000 birds that had reached the end of their egg laying lives and were to be killed by the farmer. They knew of East Coast animal sanctuaries that were willing to take the White Leghorns, but how could they get them there? It would not work to take them by truck given the distance, and regular airlines will not take adult chickens. So, they simply chartered a cargo plane at a cost of \$50,000 which works out to over \$40 per chicken. An anonymous benefactor paid for the flight.

The egg industry is big, producing almost 93,000,000,000 eggs last year. Animal rescue people want to see the birds treated more humanely and they are pleased with the results of this particular rescue effort. The Catskill Animal Sanctuary in Saugerties, New York took 200 birds to live inside an old wooden barn and be able to run freely outside. As the group's director said: "they have everything they lacked in their egg-laying facility. They will live very much like companion animals: able to make choices about how to spend their day, who to be friends with, and etc."

Of course, the problem is not limited to the egg producing industry. There has been a dramatic increase in the number of abandoned chickens. Tiffany Young, the founder of a Seattle-based animal rescue group, identifies the cause of the problem as "hipster urban yuppie types" trying to be locavores, raising poultry in their backyards and then ultimately giving it all up when they realize the amount of work necessary to support the chickens. "There is not a sanctuary in the Northwest that is not at capacity or beyond," explained Young.²⁸

Does the name "James Davis" ring a bell? Last year, Davis of Stevenson, Alabama, received the **Buried Under Local Regulations Award** for his unending efforts to keep his late wife in her grave in the front yard of their home. He was married to Patsy Ruth Davis for 48 years and built a log home for his wife and himself in Stevenson about 30 years ago. He buried her there at her request and then was ordered to disinter her. We wrote about another backyard burial case in 2008. This year, I co-authored a monograph for the American Planning Association, "Planning for the Deceased." Is there a disturbing pattern in my reporting?

Anyway, Davis is back again, this time in *The New York Times* for his continuing efforts to do what he could to maintain the gravesite, even though on October 11, 2013, the Alabama Supreme Court affirmed the lower court ruling that the grave had to be relocated.²⁹ And sadly, Davis eventually capitulated, removing the remains of his beloved wife on November 15, 2013, with members of the family present.³⁰ So, to James Davis and for the first time ever in 19 years of the ZiPLeR Awards, we present a second identical award, **Buried Under Local Regulations Award**.

The **Let There Be Light But Not Too Much Of It Award** goes to Canary Wharf and Land Securities, the developers of the building at 20 Fenchurch Street in London, England, which is sometimes known as the Pint or the Walkie-Talkie because of its unusual shape that rounds out at the top.³¹ It seems that the building, designed by Uruguayan architect Rafael Viñoly, melted part of a Jaguar parked beneath the building, probably because of light focused from the curved surface of the glass. Funny thing is the same thing happened with another building by the same architect, the 57-story Vdara Hotel in Las Vegas, which consists of three curved glass towers with 1,500 rooms and 3,000 "double-pane acid-etched spandrel glass panels for energy-efficient heating and cooling." Unfortunately, this type of glass focuses the high-energy Nevada sun on the sunbathers below. As a guest told ABC news: "I'm sitting there in the chair and all of the sudden my hair and the top of my head are burning. I'm rubbing my head and it felt like a chemical burn. I couldn't imagine what it could be." The same, concave, glazed form of the building as that in London channels the rays to such a degree that plastic poolside chaise lounges were melted and guest newspapers had holes burned through. A hotel staff member said to one of the guests: "Yeah we know. We call it the death ray."

The Religious Land Use and Institutionalized Persons Act continues to wreak havoc with local government planning and regulation. We follow and report on virtually every one of the cases at www.RLUIPA-Defense.com. Only one of them is a ZiPLeR Award winner this year. That is the case of *Davis v. City of Selma* in the U.S. Federal District Court for the Eastern District of California.³² It is not a planning or zoning case, but it shows you how far RLUIPA has come to reach. Davis is a fortune teller and she sued

the city alleging that the city's licensing requirements are unduly burdensome, intrusive, and restrictive; and therefore violate her right to the free exercise of her religious beliefs under the U.S. Constitution and are actionable under RLUIPA.

The Selma Municipal Code defines "fortune telling" as "the practice of astrology for compensation, palmistry, phrenology, life reading, fortune telling, cartomancy, clairvoyance, clairaudience, crystal gazing, medium shift, prophecy, augury, divination, necromancy, and graphology." If you're in the business of fortune telling, you need a license. Stephanie Davis is a 30-year-old wife and mother who was a palm-reading fortune-teller.

As the court noted:

Ms. Davis' spiritual counseling activities are founded on and motivated by her fundamental religious principles and beliefs. Ms. Davis has practiced spiritual counseling for twelve (12) years. Ms. Davis utilizes a variety of methodologies and techniques that are tailored to the client's specific spiritual needs and goals. Ms. Davis sincerely believes in a counseling method that involves palm, angel cards, spiritual readings, astrology, and clairvoyant and medium abilities. Ms. Davis' spiritual counseling involves religious beliefs, exercise of these beliefs and expressive activity that includes opinions that are sincerely held by her.

It is over for now for Davis because the court found her claim not to be ripe in that she did not yet have a concrete plan to operate a business in the city and thereby violate the law. The case was also not ripe because the city had not threatened her with enforcement proceedings. Still, we do have to commend Davis for her creativity and therefore we are pleased to present to her the **It Just Wasn't In The Cards Award**.

Our friend, Michael Berger of Manatt Phelps & Phillips LLP in Los Angeles, is always looking out for ZiPLER Award nominees and has been a great source, but this year unfortunately he does not have a winner. The problem is that his nomination of Madero L. Pouncil, a prisoner serving a life sentence in California's Mule Creek State Prison, fails for two reasons. First, the case report came to him during 2013, but the actual decision was in 2012. Second, even though this is a RLUIPA case, it is not a land-use case. Under

the circumstances we cannot award Pouncil the proposed **Keep The Faith Award**. Sorry, Mike.

The nomination papers explain in some detail how Pouncil as a state prisoner sought to have conjugal visits with his wife, which visits were denied by prison officials. Pouncil argued that his religious faith requires him to marry, consummate his marriage, and father children. Thus, claimed Pouncil, not allowing him to have conjugal visits violated his religious rights under the First Amendment and was subject to a claim under RLUIPA. The Ninth Circuit only addressed the statute of limitations problem and held that the statute did not run from Pouncil's first request in 2002, but from his later, separate, discrete request in 2008, and that his claim was not time-barred. A couple of interesting facts are that he married his first wife while he was in prison and sought the conjugal visits with her in 2002. Then he divorced and married his second wife and requested the conjugal visits with her in 2008. Kind of gets you singing the Rolling Stones' 1965 hit tune, "Satisfaction."

Mike, why are you following prisoner conjugal visit case reports? Is the California real estate market still that bad?

Just as we saw the saga of James Kessler and his front yard burial continue on over the years, we recently had occasion to go back into the Thomson Reuters West ZiPLER Awards vault located in a secret cave to recover some of the documentation of an early ZiPLER Award winner who is back in the news. In 2008 we gave the coveted **McMansion-Prestidigitiation Award** to Robert Fidler of Honeycrock Farm, Salfords, Redhill, Surrey, in the United Kingdom for his exemplary guile in covertly building a faux castle behind a 40-foot wall of hay bales.³³

Fidler didn't get planning permission to build the house and built it secretly behind hundreds of 4 foot by 8 foot bales of straw covered with blue tarps. To keep the project secret, Fidler and his wife even kept their son Harry away from playschool the day that he was supposed to be painting a picture of his home in class. "We couldn't have him drawing a big blue haystack [—] people might [have] asked questions," said Fidler's wife, the boy's mother. They had moved into the house under construction when Harry was just a year old, so he has basically grown up on the construction site with nothing more to view from his window than a pile of hay bales. Fidler figured that he had pulled a fast one because the planning laws vest

rights in structures that have been up for four years without objection. After four years had passed, Fidler applied for a certificate of lawfulness. The Reigate and Banstead Council balked, arguing that the four-year period had not run because no one could see the mock-Tudor castle behind the hay bales.

Well, it looks like it really is the beginning of the end for Fidler. He has just lost in court on his disingenuous claim—"disingenuous" is the word used by the court—that he could have continued to live with the hay bales and that the four-year statutory enforcement period had passed before he removed the hay bales. Fidler, who spent over \$80,000 building his castle complete with cannon and battlements, is defiant:

"this house will never be knocked down. This is a beautiful house that has been lovingly created. I will do whatever it takes to keep it. The castle is lawful, but they are twisting and perverting the law. Knocking this place down now would be nothing short of vandalism. They say an Englishman is entitled to have his castle. I thought that maybe I could claim this to be my castle and see if there was any mileage in that. Of course, we are going to appeal. If we don't win in the Court of Appeal we will take it to the European Court of Human Rights."³⁴

Most recently, local officials rejected his bid to have it declared legal finding it to be "an unacceptable precedent for development in the green belt." Chances are, we will be reporting on Fidler again later. For now, we take great pride in recognizing him with the first and we expect last **Fidler On The Hay Bale Award** for his thinking he could get away with his straw-for-brains scheme.

These Brits seem to have a lot more fun with design than we do here in the United States. The ZIPLeR Awards Committee has authorized a special award this year, the **Going With The Flow Award**, to Malcom Higgins of the small town of Glastonbury, population about 9,000, in Somerset County, in the South West region of England. The Environment Agency told Higgins that anything he built needed to be flood resistant. He said that he only had two choices of construction: "I was immediately put on the spot. Either I couldn't build or had to use a flood-resistant building. There's two types: wooden huts on stilts which they use on flood plains everywhere else, or my chosen favourite for this location."

Even though Higgins property is about 20 miles from the ocean, he has decided to build a lighthouse, the ultimate water resistant structure.³⁵ In July he received planning approval by a vote of 12 to 7 for the lighthouse and he commented: "Some thought it would make them a laughing stock but others thought it an iconic building and wished they lived in Glastonbury to see it built. We need architecture like this, not little boxes,"³⁶ A special thanks to Charles Janson of Robinson & Cole's Stamford office for making this nomination. Charlie knows all about good design and is an Advisor of the National Trust for Historic Preservation.

Back to Fidler and the hay bale house for a moment, we need to recognize another type of illegal construction. We get dozens of these nominations each year, but the one and only one we will award this year is **The Grinch Who Stole The Treehouse Award** to the Selinsgrove, Pennsylvania Zoning Hearing Board for denying poor little Samantha Carlson's (actually her father's) variance request to keep a tree house.³⁷ Samantha's father had started building the treehouse, just eight by six feet, on a tree stump in the front yard when the zoning enforcement official happened to drive by and then began an enforcement action based on a violation of the setback requirements. The tree house was intended to be a birthday gift for 11-year-old Samantha. The board voted unanimously that the treehouse violated the ordinance and had to be removed. Samantha's father was quoted as saying after the vote: "After serving 22 years in the military and thinking I've seen everything, tonight proved me absolutely wrong. I've never in my life seen anyone deny a child a tree house."

Carlson had legal counsel. Fourteen friends and neighbors showed up, all of them testifying under oath in support of the variance. One neighbor also submitted a petition signed by 20 neighbors saying: "let them build the treehouse." Another neighbor said: "I am thrilled at the project. It is something Mark Twain would do." Even religion was called in for support of the variance, as one neighbor offered: "they are good people, a good Christian family and it is how they are raising their daughter."

Leave it to the Board's Solicitor to add a sensitive perspective: "It's a good thing she didn't ask for a castle with a moat for her birthday. Look, we are bound by the municipality's planning code, which is state law, which is mirrored in the borough's ordinance. The law is very specific about when we can grant a variance. It's very strict. Every board mem-

ber would have loved for that little girl to have a tree house, but the law just didn't allow it. If there is a change, the change has to be with the Borough Council." Sure, there is no hardship here, but why not a variance for a term, say three years? Samantha will be 14 then and out of her treehouse years.

We have a sense that the regular readers of the ZiPLER Awards Issue have a somewhat prurient interest in certain types of zoning issues. It is often disguised in some lofty notions of the relationship of First Amendment rights to freedom of expression and strip clubs. The ZiPLER Awards Committee is always pleased to play to that interest if it sells subscriptions and therefore have sought out the most titillating nominees for recognition. This year, in what is absolutely the first ever, we commend Pat Konopelski of Berks County, Pennsylvania, the owner of a farm who runs something called Shocktoberfest, for his advancement of adult entertainment and award him the **You Won't Be Caught With Your Pants Down Award**. We also want to recognize Prof. John R. Nolon of Pace University School of Law for bringing this ZiPLER Instant Winner to our attention. Perhaps we need to ponder why it is that John knew about this particular controversy before anyone else.

This last Halloween Konopelski offered the Naked and Scared Challenge at his "scream park" in Spring Township and Sinking Spring Borough. We carefully research all nomination packages and so we have viewed, several times, the YouTube video and it appears to us that the scream park is essentially a haunted house.³⁸ The Naked and Scared Challenge provides its customers with the opportunity of going through the scream park "nude or prude," that is, naked or wearing underwear.

This turns out to be a zoning problem, because, say local officials, if Konopelski's guests go through the scream park nude that makes the scream park an adult entertainment use which is not a permitted use in that zone.³⁹ Konopelski capitulated and went with the "undergarments required" option. "Borough officials took the position that this is adult entertainment," said Konopelski. "What we are doing clearly is not adult entertainment. But, not wanting to pick fights with our neighbors or township officials, I conceded and said: 'Does anybody have a problem with the prude option?' They said 'No, that's fine.' "

Happy customers commented on the experience: "how many other people could say they went through a haunted house with friends completely naked.!! Live a little. I had a whole group ready to come and do it naked." And another said: "yet another freedom stifled by media hype. People are way too sensitive now a days. The point is to take you out of your comfort zone to make it a scarier experience."⁴⁰

Now here we have what has got to be the best ever, and we mean best ever, sexually oriented business (SOB) decision. To Judge Fred Biery, Chief United State District Judge for the Western District of Texas, we award what our ZiPLER Archivist, Ms. Indy Valt, reports is the first-ever **Senior Judges Have More Fun Award** for his unbelievably funny, must-read decision in 35 Bar and Grille, LLC. v. The City of San Antonio.⁴¹ We thank the ever-vigilant Sophia Stadnyk, formerly of the International Municipal Lawyers Association, now with the National Rifle Association, for bringing this decision to our attention.

You know you are for an exciting ride when you see the title of the case:

35 BAR AND GRILL, LLC, ET AL.,))
)
 Plaintiffs))
 V.) CIVIL ACTION NO.SA-13-CA-34-FB
 THE CITY OF SAN ANTONIO))
))
 Defendant.))

IN THE CASE OF THE ITSY-BITSY TEENY-WEENY BIKINI TOP
V. THE (MORE) ITSY-BITSY TEENY-WEENY PASTIE
ORDER CONCERNING PRELIMINARY INJUNCTION

The story goes like this. The club was operating a topless bar. The city of San Antonio had an ordinance that regulated this club and others like it as SOB's with a licensing process that included background checks, prohibition on participation in the business by people with criminal records, and a requirement that the employees wear identification wristlets (an obvious fashion faux pas).

The club came up with a clever plan to avoid the reach of the ordinance and "changed their dancer's attire to g-strings and pasties over the areolae of the female breast." The club, and others like it, were thus able to continue to operate under their dance hall licenses instead of having to subject themselves to the SOB licensing. Not a single such establishment made a request to operate under the SOB ordinance.

San Antonio amended the ordinance, as it said in its own words, "because certain businesses featuring adult dance entertainment have found a way to circumvent the restrictions as set forth in the 2005 ordinance." The new ordinance has this amended definition:

SEMI-NUDITY means a state of dress that fails to completely and opaquely cover (a) human genitals, pubic region, pubic hair or (b) crevice of buttocks or anus, or (c) *any portion of the female breast that is situated below a point immediately above the top of the areola*, or (d) any combination of (a), (b) or (c). [italics in original]

The practical effect of this amendment given the geography of the human breast was "to require dancers at Plaintiffs' businesses to wear bikini tops in order for the businesses to avoid SOB classification and the concomitant licensing, building and location requirements." Predictably, the clubs argued that the ordinance was an unconstitutional restriction on the rights of their dancers to express themselves through dance and that it was also unconstitutional because there was no evidence that changing the dancers attire from pasties to bikini tops would reduce the negative secondary effects of the adult entertainment.

Judge Biery denied the preliminary injunction concluding his opinion thusly: "Should the parties choose to string this case out to trial on the merits, the Court encourages reasonable discovery intercourse as they navigate the peaks and valleys of litigation, perhaps to reach a happy ending. It is so

ORDERED." We swear we are not making this up. Read the original.

That last quote is from the last page of the decision, page 29. What fun Judge Biery had in getting there. Let us give you just a few quotes from his decision to entice you to read it in its entirety:

An ordinance dealing with semi-nude dancers has once again fallen on the Court's lap. The City of San Antonio ("City") wants exotic dancers employed by Plaintiffs to wear larger pieces of fabric to cover more of the female breast. Thus, the age old question before the Court, now with constitutional implications, is: Does size matter?....

The Court infers Plaintiffs fear enforcement of the ordinance would strip them of their profits, adversely impacting their bottom line. ..

Plaintiffs, and by extension their customers, seek an erection of a constitutional wall separating themselves from the regulatory power of City government....

While the Court has not received amicus curiae briefs, the Court has been blessed with volunteers known in South Texas as "curious amigos" to be inspectors general to perform on sight [SIC but perhaps intentionally so] visits at the locations in question. ...

To bare, or not to bare, that is the question. While the Court finds these businesses to be nefarious magnets of mischief, the Court doubts several square inches of fabric will stanch the flow of violence and other secondary effects emanating from these businesses. Indeed, this case exposes the underbelly of America's Romanesque passion for entertainment, sex and money, sought to be covered with constitutional prophylaxis. Alcohol, drugs, testosterone, guns and knives are more likely the causative agents than the female breast, proving once again that humans are a peculiar lot. But case law does not require causation between nudity and naughtiness.

This decision and the award epitomize the nonpareil high quality of the ZiPLERs.

While we are on the First Amendment front, maybe it is appropriate to bring up the perennial issue of holiday displays with religious content. In December 2012, just a little too late for the 2012 awards, we came upon an antidote to the nativity scene controversies that just seem to keep coming. Chaz Stevens in Deerfield Beach, Florida, recipient of the **Winning At The Poles Award**, has fought for five years to have a nativity scene removed from a city firehouse lawn next to a busy intersection. To offset his failed efforts to get the nativity scene removed, he has applied for permission to set up a “Festivus Pole” which was made popular in the Seinfeld television series. Festivus is a holiday “celebrated with an airing of grievances, physical contests between family members and friends and the display of a Festivus Pole (the traditional model is simply an unadorned metal pipe).”⁴² This Festivus Pole is unique—“It’s just 23 beer cans stacked 8 feet high and conveniently located 6 feet from Baby Jesus,” said Stevens. An ACLU attorney, Barry Butin, helped put together the application: “I think the Festivus pole is perfect. It does have some religious or holiday symbolism, but it’s from a comedy.”

This award nominee helps illustrate the need for inclusionary zoning for various types of housing for all manner of households. We present, to the tune of “Here Comes the Bride,” the exclusive **Multiple Co-Owners Award** to the Apostolic United Brethren of Bluffdale, Utah for applying for a zone change for land in Bluffdale where the polygamist group is proposing to build up to eight homes for retirees.⁴³ So far as we know, this is the first polygamist retirement village and it obviously deserves our special attention. We checked out their definition of family and it certainly would permit polygamous occupancy because it does not limit the number of people related by marriage:

Family - An individual of two or more persons related by blood, marriage, or adoption, living together in a single dwelling unit and maintaining a common household. A family may include two, but not more than two, non-related persons living with the residing family. The term “family” shall not be construed to mean a group of non-related individuals, a fraternity, club, or institutional group.⁴⁴

Speaking of “Here Comes the Bride,” it now seems that there are few things beyond the reach of zoning. Farmers in Green Bluff, Washington, looking to make a little extra money, have been hosting weddings and parties on their farms. The neighbors, however, don’t like the noise and they have gone to Spokane County with their complaints.⁴⁵ The planning commission does not like the concept. Planning commission Chair Joyce McNamee believes that wedding and special event facilities are simply inappropriate in farm areas, particularly because the sound bothers the neighbors: “we as a planning commission have to think of the neighbors.”⁴⁶ The planning commissioners are also concerned about traffic, parking, lighting, fire safety, alcohol consumption, the frequency of the events, and the loss of farmland which would be rededicated to structures for the events and associated parking. This debate went on at great length for three sessions and if you ever have a similar issue, you may want to read the minutes of those meetings.⁴⁷

The planning commission rejected the request to change the zoning to allow weddings and other events on some farms, but the Spokane County Council thought otherwise and sent the matter back to the planning commission with the directive that it find a compromise: “You do the work. You do the lifting. You find the compromises,” County Commissioner Al French told the planning commissioners.

The planning commission, however, has pushed back, and recently voted to not make any changes to the zoning to allow weddings and events in the Small Tract Agricultural Zone.⁴⁸ It looks like we will have to revisit this battle royale next year.

We salute both the Spokane County Planning Commission and the County Council for their efforts to find just the right zoning for barnyard weddings and confer jointly upon them the **Pre-nuptial Pontifications For The Perfect Prescriptive Public Proviso Award**.

While we are on the subject of the limits of zoning, we need to recognize the City of Leith, North Dakota with the **You Can’t Buy Our Town Award** for fending off, with zoning no less, Craig Cobb, 62, a white supremacist who tried to turn the town into a “white enclave” by buying 20 properties and proposing to rename the town Cobbsville in his honor. He said all residents would be required to fly a “racialist banner” at their homes. Cobb wrote

last year: “Imagine strolling over to your neighbors to discuss world politics with nearly all like-minded volk. Imagine the international publicity and usefulness to our cause! For starters, we could declare a Mexican illegal invaders and Israeli Mossad/IDF spies no-go zone. If leftist journalists or antis come and try to make trouble, they just might break one of our local ordinances and would have to be arrested by our town constable.”⁴⁹

Leith’s planning and zoning board apparently put the kibosh on the plan by issuing an order that all of the inhabited houses must have running water and sewer and citing an ordinance prohibiting tents and campers from remaining on the properties more than 10 consecutive days.

In a surprising twist, it was recently discovered through DNA testing that Cobb is 14% African-American. We have provided you a link to the video of his reaction.⁵⁰

This is a story that just keeps giving. Cobb has been arrested for terrorizing residents of Leith. He has been charged, along with Kynan Dutton, 29, with seven counts of terrorizing residents; five counts have mandatory minimum sentences of two years in jail. It might not take a big effort to terrorize all of the residents of Leith, however, because there are only 24 of them in the city all of about one square mile.⁵¹

Okay, we know that there is bribery, extortion, corruption and all manner of bad things that do go on in government generally and in land development in particular, but most of us are never exposed to it because we are smart enough to avoid it or our reputations are such that no one would ask us to get involved in such a thing. When a case of really bad corruption surfaces, it is astonishing and enlightening to learn the details. We honor Darren L. Reagan, D’Angelo Lee, Donald W. Hill, and Sheila D. Farrington with the **Distinguished Educational Achievement Award** for providing all of us with an opportunity to see just how bad it can get. Unfortunately, they will not be able to attend the awards ceremony. All four of them were charged with various crimes and found guilty of some. Those crimes included bribery, conspiracy, aiding and abetting, extortion and conspiracy, extortion, honest services fraud, and conspiracy to launder money. The charges arose out of an indictment that “alleged ...[Reagan et al.] had

been involved in various capacities in illegal schemes related to attempts by two housing developers... to obtain public financing, zoning clearance, and political support for their rival housing development plans in Dallas.” Hill was an elected member of the Dallas City Council. Hill nominated Lee to a position on the city plan and zoning commission to which he was appointed. Farrington was Hill’s mistress and later his wife who purported to work as a consultant. Reagan was chairman and chief executive of a community development corporation.

We will spare you the complicated details of what they all allegedly did and let you read the Fifth Circuit Court of Appeals decision affirming the sentences imposed by the Federal District Court.⁵² Suffice it to say that it is all quite ugly.

Along similar lines, but all legal and maybe even above board, the **Doing Well By Doing Good Award** goes to the La Mirada Avenue Neighborhood Association in Los Angeles for its settlement of a case in which it opposed a development. In the end the developer paid the association \$250,000 and paid their attorney’s fees and costs of \$90,000. These types of payments are reportedly called “greenmail” by some people.⁵³ The excerpts from the settlement are worth reading. You have likely seen similar. The report of the settlement quotes Jennifer Hernandez, a partner at Holland & Knight and head of the firm’s West Coast Land Use and Environment Practice Group: “We absolutely don’t know what happens with the money. Typically in a settlement, there is no limit on how much money or what the money can be used for.” Hernandez is the author of *A Practical Guide to Implementing the California Environmental Quality Act*. The report on the settlement says that “Hernandez describes the lawyers who seek financial sums unrelated to the laws that they are suing under as ‘bounty hunters.’ CEQA provides such bounty hunters with a loophole that can be easily exploited without the knowledge of the public: ‘Unlike all other parts of CEQA, litigation is remarkably shielded from transparency. You can hide who you are suing on behalf of, and you can hide what you settled for.’” Hernandez says that the greenmail problem is largely brought on by the California Environmental Quality Act: “In other states and under NEPA [a federal law similar to CEQA], if your interests are primarily

economic, you cannot sue under an environmental statute ... California has gone in a remarkably different direction.”

Fact is, other states do have land use and environmental law statutes with generous standing provisions, so “greenmail” is by no means limited to California. But what is “greenmail” and what is nothing more than a reasonable settlement with payments that cover fees and costs and allow the advocates to mitigate their settlements with advocacy elsewhere?

Another perennial favorite among the thousands of ZiPLER nominations received every year is the old question of when is a sign not a sign. You may recall the case of the gigantic L.L. Bean hunting boot in the front yard of an L.L. Bean store in upstate New York where the local government found it to be merely a “site feature” and not a sign. Or perhaps you will recollect the award given in connection with an old Oldsmobile converted into a planter that was found to be a sign and ordered removed. This year, the question is whether a Hyatt-brand hotel in the Township of Cranbury, New Jersey has an architectural feature which constitutes a sign in that it is something intended to draw attention to the business.⁵⁴ A note of thanks to Dean Salkin and her blog, Law of the Land, for reporting on this case.⁵⁵

“Cranbury’s definition of a ‘sign’ is quite broad,” noted the appellate court in affirming the trial court’s upholding of the local board’s decision that the blade-shaped parapet was not a sign. Section 150-7 provides as follows:

SIGN: Any object, device, display or structure or part thereof, situated outdoors or indoors, which is used to advertise, identify, display, direct or attract attention to an object, person, institution, organization, business, product, service, event or location by any means, including words, letters, figures, design, symbols, fixtures, colors, illumination or projected images.

During the hearing the applicant’s architect testified that the “blade” was an aluminum-and-glass geometric feature to be installed along the roofline of the bone-white hotel building such that it would appear to be a “slope roof structure that slopes upright at the entry of the hotel.” Further testimony from

another witness was that the “blade” would be “lit from within at night so it has a soft glow, a little bit of a tint.” It was claimed that the “blade” was there to house mechanical and electrical equipment and that it also served as the hotel’s “brand hallmark,” but it was argued that it was not a logo. We are going to spend the next few months researching the difference between a “brand hallmark” and a “brand logo” and ask the assistance of all you readers who are intellectual property experts.

It was also stated that the “blade” would have no letters or words on it, and its real purpose was merely to be “something that provides interest to the building at night.” The record was devoid of any evidence that the “blade” was trademarked or uniformly incorporated in the architecture of all Hyatt-brand hotels. Of course, it might be that blade-shaped parapets are a recent invention, but that possibility was not pursued. And in the usual kind of twist of the negative proving the positive, the court noted that there was no “evidence to suggest that the blade would be required to be removed if the structure came under the control of a different hotel chain.”

The court concluded:

In light of the nature of the blade’s design as an aesthetically pleasing architectural feature, we decline to interfere in the Board’s eminently reasonable interpretation of its ordinance. Because the blade is harmoniously blended into the framework of the hotel’s superstructure, it was not arbitrary, capricious, or unreasonable to treat it as something other than a sign.

It is thus with pleasure that we present the Township of Cranbury Board of Adjustment with the first-ever **At The Cutting Edge Award** for slicing and dicing its own regulations to find that the blade-shaped parapet on the new Hyatt hotel that just happens to look like the company’s familiar blade symbol arching through its name was not a sign at all, but just an architectural feature.

Oh, by the way, the plaintiff in the case, RIYA Cranbury Hotel, LLC, a good corporate citizen obviously concerned about land use agencies making the right decisions, concerned enough in fact that it would suffer the bother and expense of opposing the

application at the local level and then appealing the decision to approve the Hyatt hotel, just happens, so it appears, to own a Staybridge Suites Hotel in Cranbury.⁵⁶ Do you think that had anything to do with how the board, the trial court and the appellate court decided the “blade” issue?

Maybe the owners of The Beach Plum take-out restaurant in North Hampton, New Hampshire need to look up the lawyers for the new Hyatt-brand hotel in Cranbury. The Board of Adjustment for the Village District of Little Boar’s Head denied a variance to The Beach Plum that would have allowed a 900-pound carved lobster statue to remain outside the restaurant in the picnic area across from the state park. The board held that the statue was a sign and that the “smiling lobster is too large.” The restaurant’s lawyer said the owners of the restaurant never thought of them (there is a second smaller one next to the takeout window which the board is allowing them to keep) as a sign: “They thought of them as interesting artwork and just put them in.”⁵⁷ We will consider someone in this mess, now in court, for an award next year.

The **Self-Help Zoning Enforcement Relief Award** goes to the truly hapless Steven J. McCann, 29, of Jamaica Plain, Massachusetts, who has pleaded not guilty to two arson charges and one charge of burning a building to defraud an insurer, with his plea made from his hospital bed after he was severely burned. He allegedly torched a house that was illegal because it did not meet local zoning and was the subject of a demolition order by the town of Brookline.⁵⁸ The issue was the use of nonhabitable attic space on the second floor as habitable space and something new to us: “infectious invalidity” – the second lot was unbuildable because of the floor area problem on the other lot. The Board of Appeals proceedings on May 19, 2011 relate the long, sad story.⁵⁹

To the Spring Grove Cemetery in Cincinnati, Ohio, we present, with some serious regrets, the **She Was Gravely Serious Award** for its refusal to allow a SpongeBob SquarePants headstone for the late Army Sgt. Kimberly Walker, who did two tours in Iraq but was apparently killed at age 28 by her boyfriend. Sgt. Walker loved SpongeBob. Someone

at the cemetery initially gave the family permission for the unique gravestone, two of them actually, at 7,000 pounds each, one in Sgt. Walker’s uniform and the other in her twin sister’s Navy uniform, which they had created at a cost of \$26,000. They placed the gravestones and the next day the cemetery removed them claiming that it didn’t fit the cemetery’s guidelines: “The family chose a design with the guidance of a Spring Grove employee who unfortunately made an error in judgment. The monument does not fit within Spring Grove Cemetery guidelines, was not approved by senior management and cannot remain here.”⁶⁰

Another Year Now Over

So ends another banner year for planning and zoning cases. With Shocktoberfest’s nude haunted house, buildings burning up cars, chicken rescue, polygamists’ retirement villages, and Judge Biery’s magnificent 35 Bar and Grill decision, how can anyone want to do anything other than planning and zoning? Keep those nominations coming. We look forward to seeing many of you at the awards party.

NOTES

Note: Long web addresses are impossible to type. You will be able to get to most of these materials by typing in the narrative descriptions of the cite into any good search engine.

1. 482 U.S. 304.
2. 133 S.Ct. 2586 (2013) http://www.supremecourt.gov/opinions/12pdf/11-1447_4e46.pdf N.B. No apostrophe in St. Johns and here is why: http://jacksonville.com/tu-online/stories/030108/nes_252187795.shtml; for a recent article on the case, see Steven J. Eagle, “Koontz in the Mansion and the Gatehouse,” November 15, 2013 Urban Lawyer, Vol. 61, No. 1, 2014 Forthcoming. George Mason Law & Economics Research Paper No. 13-64 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354617.
3. Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

4. <http://emedicine.medscape.com/article/1154851-overview>.
5. Gosling, John (2009). *Waging The War of the Worlds: A History of the 1938 Radio Broadcast and Resulting Panic*. Jefferson, NC: McFarland. You can listen to the broadcast here: <http://www.mercurytheatre.info/>.
6. "A Legal Blow to Sustainable Development," *The New York Times*, June 26, 2013, http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html?_r=0.
7. <http://gideonstrumpet.info/>.
8. *Lingle v. Chevron*, 544 U.S. 528 (2005).
9. Norman Williams, "A Narrow Escape?," *Zoning and Planning Law Report* (April-May 1993, pp. 113-20, and pp.121-28. He too was a professor at Vermont Law School at the time and he like Professor Echeverria and I graduated from Yale Law School. I taught as an adjunct professor at Vermont Law School 1994-2012.
10. Dwight Merriam, "No, Norman, The Sky IS Not Falling," *Zoning and Planning Law Report*, (July–August 1993), pp. 137-141.
11. <http://www.lexingtonky.gov/index.aspx?page=2480>.
12. http://www.tripadvisor.com/ShowUserReviews-g49816-d2271546-r118032837-Great_Wall_Buffet-Grand_Forks_North_Dakota.html last visited 11/16/13.
13. <http://www.cbsnews.com/stories/2007/06/15/entertainment/main2932767.shtml>.
14. <http://www.ndwheat.com/consumers/default.asp?ID=324>; <http://www.ndwheat.com/consumers/recipes/index.asp?ID=428§ionid=1&subsectionID=4&RecipeID=3>.

Dried Beef Spread

Ingredients

- 8 ounces fat-free cream cheese, softened
- 1 cup low-fat sour cream
- 2 tablespoons finely chopped green onions
- 1 tablespoon finely chopped green pepper
- 2 1/2 ounces dried beef, chopped

Instructions

Mix cream cheese and sour cream. Add remaining ingredients. Pour into a baking pan and bake at 350 degrees for 15 minutes. Cool completely in refrigerator before serving.

Makes 2 1/2 cups.

Nutritional Information: Each tablespoon provides 16 calories, 1.5g protein, 3.5g carbohydrates, 0.76g fat, 4mg cholesterol.

15. "Hooters party for middle-schoolers: Corbett coach defends his choice of venue," November 4, 2013, updated November 5, 2013. *The Oregonian* http://www.oregonlive.com/gresham/index.ssf/2013/11/hooters_party_for_middle-school.html#incart_river.
16. See it on YouTube. <http://www.youtube.com/watch?v=-GXbXHK4y44>.
17. "The World's Smallest Restaurants," *The Daily Meal*, January 8, 2013 <http://www.thedailymeal.com/world-s-smallest-restaurants>, <http://www.foxnews.com/leisure/2013/01/23/worlds-smallest-restaurants/>, <http://www.youtube.com/watch?v=-GXbXHK4y44>, <https://www.facebook.com/pages/The-worlds-smallest-restaurant-Kuappi/201967479941221>.
18. "Magician needs disaster plan for his rabbit, USDA says," *ABA Journal*, July 17, 2013. http://www.abajournal.com/news/article/magician_needs_disaster_plan_for_his_rabbit_usda_says_in_letter/ "Watch him pull a USDA-mandated rabbit disaster plan out of his hat," *The Washington Post*, July 16, 2013 http://articles.washingtonpost.com/2013-07-16/politics/40610671_1_rabbit-magician-u-s-department.
19. Department Of Agriculture Animal and Plant Health Inspection Service, 9 CFR Parts 2 and 3 [Docket No. APHIS–2006–0159] RIN 0579–AC69 Handling of Animals; Contingency Plans, Agency: Animal <http://www.gpo.gov/fdsys/pkg/FR-2012-12-31/pdf/2012-31422.pdf>.
20. http://www.aphis.usda.gov/animal_welfare/awa_contingency_plan.shtml.
21. "Quackdown: Pennsylvania town fines man for pet ducks," *Fox News* July 3, 2013 <http://www.foxnews.com/politics/2013/07/03/quackdown-pennsylvania-town-fines-man-for-pet-ducks/>.

22. If he changes his mind, here's a really nice recipe for shredded duck soup: <http://www.mapleleaf-farms.com/29?recipe=256&reecat=4>.
23. "Delmont man allowed to keep his ducks," TribLIVE News, July 23, 2013, <http://triblive.com/news/westmoreland/4400848-74/ducks-kistler-appeal#axzz2kqItWXzd>.
24. "Mesquite Debates Unusual Miniature Donkey Breeding Zoning Case," 5 NBCDFW.com, January 16, 2103 <http://www.nbcdfw.com/news/local/Mesquite-Debates-Unusual-Miniature-Donkey-Breeding-Zoning-Case—187213741.html>.
25. "Mesquite City Council rejects couple's rezoning request to allow miniature donkey breeding license," The Dallas Morning News, <http://www.dallasnews.com/news/community-news/mesquite/headlines/20130123-mesquite-city-council-rejects-couples-rezoning-request-to-allow-miniature-donkey-breeding-business.ece>.
26. Chicken Run Rescue, PO Box 11742, Minneapolis, MN 55411 USA
<http://www.brittonclouse.com/chickenrunrescue>.
27. "Rescued Hens Fly Cross-Country, No Flapping Required, to Find New Lives," The New York Times, September 5, 2013 http://www.nytimes.com/2013/09/06/nyregion/rescued-hens-fly-cross-country-no-flapping-required-to-find-new-lives.html?_r=0.
28. "Only in America," The Week, July 19, 2013 p. 4.
29. "Giving a Wife Her Front Yard Grade, No Matter What," The New York Times, October 22, 2013 http://www.nytimes.com/2013/10/23/us/a-front-yard-burial-in-alabama-no-matter-what.html?_r=0.
30. "Alabama man loses battle to keep wife buried in his front yard," Reuters, November 15, 2013 <http://www.reuters.com/article/2013/11/15/us-usa-alabama-burial-idUSBRE9AE17020131115>.
31. "CT-powered Pint burns London cars," the Hartford business Journal, September 4, 2013. <http://www.hartfordbusiness.com/article/20130904/NEWS01/130909984&template=MobileArt>
"The Walkie-Talkie skyscraper and the cities burning passion or glass," The Guardian.
32. No. 12-1362 http://www.gpo.gov/fdsys/granule/USCOURTS-caed-1_12-cv-01362/USCOURTS-caed-1_12-cv-01362-1/content-detail.html opinion filed July 3, 2013 http://scholar.google.com/scholar_case?case=1524742768754976609&hl=en&as_sdt=8006.
33. "Hay presto! Farmer unveils the 'illegal' mock-Tudor castle he tried to hide behind 40ft hay bales," Mail Online, 27 January 2008, <http://www.dailymail.co.uk/news/article-510161/Hay-presto-Farmer-unveils-illegal-mock-Tudor-castle-tried-hide-40ft-hay-bales.html>.
34. "Farmer who built secret castle behind straw bales loses court bid to save it from demolition," MailOnline, February 3, 201; <http://www.dailymail.co.uk/news/article-1248226/Farmers-secret-castle-demolished-court-rules.html>; "Surrey farmer suffers blow in fight to keep 'castle'," BBC News, February 21, 2013 <http://www.bbc.co.uk/news/uk-england-surrey-21522957>.
35. "Glastonbury carpenter has lighthouse home plan," BBC, April 23, 2013. <http://www.glastonburypeople.co.uk/Plans-lighthouse-edge-Glastonbury-approved/story-19473689-detail/story.html>.
36. "Plans for lighthouse on edge of Glastonbury approved," Western Daily Press, July 4, 2013. <http://www.glastonburypeople.co.uk/Plans-lighthouse-edge-Glastonbury-approved/story-19473689-detail/story.html>.
37. "Pa. Zoning Board orders removal of young girl's treehouse," Sentinel-Echo.com, June 7, 2013. <http://www.sentinel-echo.com/community-news-network/x1076949156/Pa-zoning-board-orders-destruction-of-young-girls-tree-house/print>.
38. **Warning: Adult content.** "Naked haunted house at Shocktoberfest Scream Park, Naked and Scared Challenge" <http://www.youtube.com/watch?v=qWv2A-yCbUA>.
39. "Municipal officials object to 'Naked and Scared' challenge at Shocktoberfest," TrbLIVE, September 27, 2013 <http://triblive.com/news/alleggheny/4779270-74/naked-officials-shocktoberfest#axzz2kwZQzUDG>.
40. "VIDEO: Naked haunted house debuts at Shocktoberfest Scream Park as eye-popping, nearly-nude Halloween experience," Insidemagic.net, September 30, 2013 <http://www.insidethemagic.net/2013/09/video-naked-haunted-house-debuts->

- at-shocktoberfest-scream-park-as-eye-popping-nearly-nude-halloween-experience/.
41. Aril 29, 2013, <http://www.scribd.com/doc/138711177/35-Bar-and-Grille-v-City-of-SA-Order-Re-Prelim-Injunction-Part-I>.
 42. “‘Festivus Pole’ Featuring Beer Cans Goes Up, with City’s OK, Next to Traditional Nativity Scene,” ABA Journal, December 11, 2012. http://www.abajournal.com/news/article/festivus_pole_featuring_beer_cans_goes_up_with_citys_ok_next_to_traditional/.
 43. “Polygamists asked Bluffdale to alter zoning to allow retirement community,” the Salt Lake Tribune, April 2, 2013. <http://www.sltrib.com/sltrib/news/56088421-78/bluffdale-aub-planning-group.html.csp>.
 44. Bluffdale Zoning Ordinance, Chapter 12.29 Definitions. <http://www.bluffdale.com/Planning/Zoning%20Ordinance/12.29%20Definitions.pdf>.
 45. “County to look at zoning for weddings, parties and Green Bluff,” KREM.com, March 28, 2013. <http://www.krem.com/news/County-to-look-at-zoning-for-weddings-parties-in-Green-Bluff-200419611.html>.
 46. “County open to green bluff events,” The Spokesman-Review, June 11, 2013. <http://www.spokesman.com/stories/2013/jun/11/county-open-to-green-bluff-events/>.
 47. Minutes of the Spokane County Planning Commission, April 11, 2013. <http://www.spokanecounty.org/data/BuildingAndPlanning/autodata/Meetings/Planning/2013/04/04-11-13/04-11-13.pdf>. Minutes of the Spokane County Planning Commission, April 25, 2013. <http://www.spokanecounty.org/data/BuildingAndPlanning/autodata/Meetings/Planning/2013/04/04-25-13/04-25-13.pdf>. Minutes of the Spokane County Planning Commission, May 13, 2013. <http://www.spokanecounty.org/data/BuildingAndPlanning/autodata/Meetings/Planning/2013/05/05-30-13/05-30-13.pdf>.
 48. Minutes of the Spokane County Planning Commission, October 31, 2013. <http://www.spokanecounty.org/data/BuildingAndPlanning/autodata/Meetings/Planning/2013/10/10-31-13/10-31-13.pdf>.
 49. “White supremacist’s enclave foiled by zoning regulations in ‘evil and nasty’ North Dakota town,” The Raw Story, October 28, 2013 <http://www.rawstory.com/rs/2013/10/28/craig-cobb-white-supremacist-enclave-foiled-by-zoning-regulations-in-evil-and-nasty-north-dakota-town/>.
 50. “Video Of White Supremacist Learning He Is 14 Percent Black May Be The Best Thing Ever, unquote the Huffington Post, November 12, 2013. http://www.huffingtonpost.com/2013/11/11/craig-cobb-white-supremacist-black_n_4256360.html.
 51. “North Dakota white supremacist charged with terrorizing residents,” The Guardian, <http://www.theguardian.com/world/2013/nov/20/north-dakota-white-supremacist-terrorising-residents>.
 52. U.S. v. Reagan et al., U.S.C.A., No. 10-2011, August 2, 2013. <http://www.ca5.uscourts.gov/opinions/pub/10/10-10211-CR0.wpd.pdf>.
 53. “Leaked Settlement Shows How NIMBYs ‘Greenmail’ Developers,” Curbed Los Angeles, January 3, 2013. http://la.curbed.com/archives/2013/01/leaked_settlement_shows_how_nimbys_greenmail_developers_1.php#reader_comments.
 54. Riya Cranbury Hotel, LLC v. Zoning Bd. of Adjustment of the Township of Cranbury, 2013 WL 375564 (N.J. Sup. Ct. 2/1/13) <http://www.leagle.com/decision/In%20NJCO%2020130201273>.
 55. <http://lawoftheland.wordpress.com/2013/03/28/nj-appellate-court-upholds-boards-finding-at-a-blade-was-not-a-sign-and-that-banquet-facility-was-allowed-under-code-that-permitted-restaurants-and-upholds-trial-court/>.
 56. “Staybridge Suites Hotels Opens Hotels in New Orleans and Cranbury, NJ; The \$19 million New Orleans Property is the Largest Staybridge Suites Hotel in North America,” February 12, 2004. http://hotel-online.com/News/PR2004_1st/Feb04_StaybridgeOpens.html.
 57. “North Hampton restaurant’s carved lobster spark zoning debate,” The Union Leader, January 22, 2013. <http://www.unionleader.com/article/20130123/NEWS06/130129706/0/NEWS04;BeachPlumb'sLobsterSparksCourtBattle>, “Beach Plumb’s Lobster Sparks Court Battle,” Hampton-North Hampton is Patch, January 23, 2013. <http://hampton-northhampton.patch.com/groups/politics-and-elections/p/north-hampton-beach-nh-lobster-sign-sparks-court-batt-5722b4374b>.

58. “Brookline Police charge man hospitalized with burns with arson,” Boston.com, August 1, 2013. http://www.boston.com/yourtown/news/brookline/2013/08/brookline_police_charge_man_hospitalized_with_burns_with_arson.html; 81 Spooner Road, LLC v. Zoning Board of Appeals of Brookline, <http://law.justia.com/cases/massachusetts/court-of-appeals/volumes/78/78massappct233.html>; <http://mass-cases.com/cases/sjc/461/461mass692.html>.
59. Zoning Board of Appeals Decisions/Zoning Board of Appeals Decisions 2011)
- Thursday, 19 May 2011 go to www.brooklinema.gov and search “2011-0004-81SpoonerRd.pdf.”
60. “Cemetery Won’t Let Soldier Have a Sponge-Bob Gravestone,” The Wire, October 22, 2013. <http://www.thewire.com/national/2013/10/cemetery-wont-let-soldier-have-spongebob-gravestone/70787/>; “Family feuds with cemetery over SpongeBob gravestones,” Comic Book Resources, November 1, 2013 <http://robot6.comicbookresources.com/2013/11/family-feuds-with-cemetery-over-spongebob-gravestones/>.