ZONING AND PLANNING LAW REPORT

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THE 2011 ZiPLeRs: THE SEVENTEENTH ANNUAL ZONING AND PLANNING LAW REPORT LAND USE DECISION AWARDS

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Road trip! How about taking a tour of the sites of our awards and then uploading the videos to YouTube? After you have a taste of these scrumptious ZiPLeRs, and here is just a sampling, you'll want more.

- Are meadow muffin piles an accessory use?
- Where do you find rescue shelters for displaced chickens?
- How much time should your zoning ordinance allow for a rooster to be with the chickens?
- What is the variance hardship test for a potbellied pig?
- What is New York's new "duck-in-sight" rule?
- Where is tree house law headed?

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- When, doggone it, is a mural not art?
- Feed a feral cat, get arrested?
- What's crushing about Lithuanian bike lane enforcement?
- Who will win the lactation battle on the Upper West Side?
- Evangelical Presbyterians versus golfers—is yelling "fore" enough?
- When should you arrest a Girl Scout for selling cookies?

ZiPLeRs—the short version of the long history

To give you some measure of how long these awards have been running, Justin Bieber was born March 1, 1994, and was discovered in 2008, where else, on YouTube. That would put the mop-haired wonder a few months shy of the "terrible twos" when the very first ZiPLeR Award issue hit the newsstands around the world. And that was also about a decade before Rupert Murdoch's first of three unsuccessful attempts to buy the ZiPLeR Awards. We have vowed never to sell, and we never will. These awards are so vital to the future of zoning and planning worldwide that they must be protected from those who might cheapen them with crass commercialism.

Just how valuable and valued these awards are is evidenced by the fact that for almost 20 years the ZiPLeR Awards have been at the center of the negotiations each time West, Thomson, Reuters, whatever, whoever, this week or last, merged, split, was acquired, liquidated, or restructured. All we know is someone pays the bills for the lavish awards ceremony held each year. Be on the lookout for your invitation. This year, the event will be held at the Motel 2 in Camden, New Jersey, which seems a fitting location given the state of the real estate economy and enormous cost overruns two years ago from the bash hosted by Andy Gowder and Trenholm Walker at the Squat & Gobble Restaurant in Bluffton, South Carolina, and the one last year on a disabled Carnival Cruise Line ship somewhere off the coast of California. For the most apt description of the current state of real estate development, the principal factor

sending us to the Motel 2, we recall the pronouncement of the Coroner in the Wizard of Oz upon the dropping of a certain house on the Wicked Witch of the West: "As Coroner, I must aver I thoroughly examined her. And she's not only merely dead, she's really, most sincerely dead." Wizard of Oz (1939).[1]

Back to the extraordinary longevity—here's another measure of it. The ZiPLeRs have been around 2.83 times longer than Demi Moore and Ashton Kutcher stayed married,[2] and over 200 times (not a misprint) longer that Kim Kardashian's marriage to Kris Humphries lasted.[3] That latter figure is based on a most authoritative source, Reuters, the publisher of these ZiPLeR Awards, which has a remarkable and terribly important article on how Kardashian's "quickie marriage" to Humphries is causing all kinds of problems, not the least of which is the cancellation of the former couple's Christmas cards with the two of them all cuddly right on the front of it.[4] It's hard to focus on conditional use permits, spot zoning, and even transit-oriented development when our own publisher is spot-on with reports like this.

But soldier on we must, as it is our sacred duty to pick and choose, from among those so many worthy of awards, the very few gems equal in magnificence to the Golden Jubilee Diamond (545.67 carats), for those great moments in planning and zoning that we celebrate each year. We take our inspiration from Winston Churchill, who said: "A man does what he must—in spite of personal consequences, in spite of obstacles and dangers and pressures—and that is the basis of all human morality."[5] It seems that you can find a quote for just about anything from Churchill, from "I may be drunk, Miss, but in the morning I will be sober and you will still be ugly," to this (which is surprisingly on point with many of the controversies that lead to our better ZiPLeR nominations): "If you have ten thousand regulations, you destroy all respect for the law."

What, you say? This is the first ZiPLeR Awards issue you ever saw? Here's the short story behind the story.

ZiPLeR comes from "Zoning and Planning Law Report." Get it? The first letters in each word from the title of this monthly report. I should warn you, you have to be careful with this sort of thing, with this tricky business of coming up with zippy abbreviations. As some of you know, I am a retired Navy Captain and I inadvertently absorbed a little U.S. Naval history along the way. The General Order of 6 December 1922 established the U.S Navy Fleet and created the Commander-in-Chief, U.S. Fleet (commonly referred to as "CINCUS") under the office of the Chief of Naval Operations. On December 18, 1941, President Roosevelt signed Executive Order 8984 "Prescribing the Duties of the Commander In Chief of the United States Fleet and the Co-operative Duties of the Chief of Naval Operations" replacing CINCUS with the new title Commander-in-Chief, United States Fleet, with the new abbreviation, a real mouthful, "COMINCH." Why? Because for two decades CINCUS had been commonly pronounced "sink us" and the President did not wish his commander to carry that title after the attack on Pearl Harbor.

You can be assured that "ZiPLeR" was completely and thoroughly vetted for any unintended meanings by a worldwide team of linguists.

Way back when, 1995 to be precise, we convinced the then-editors to let us do one issue, just one, on the more unusual cases of the year. They bought it, the readers read it, nobody canceled their subscription, and the editors let us slide on to second and third and fourth… editions.

The success of the ZiPLeR Awards largely depends on the nominations from you, our readers, so keep those cards and letters coming to dmerriam@rc.com and you may see your name in print next year.

One warning. The lawyers at Thomson Reuters are singularly focused on liability avoidance, call it defensive publishing, and they have directed that I remind our readers that the ZiPLeR Awards are provided to you for entertainment purposes only. In the past, we have had numerous unfortunate incidents where readers have carelessly claimed that they actually learned something from reading the ZiPLeR Awards. Neither I nor Thomson Reuters believe there is any educational or intellectual value whatsoever in these awards, and you expressly and unconditionally agree in reading beyond this point that you will not hold Thomson Reuters, editor Patricia Salkin, or yours truly liable in any way if you inadvertently learn something useful, notwithstanding the appearance of credibility presented by having the

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ZiPLeR Awards issue published under the banner of this highly-regarded periodical.

The Animal Corral

We continue to get so many animal cases that last year we established a new category of awards simply to herd them all into one place…

The first-ever **Meadow Muffin Award** goes to the Sattler family of Windsor, Colorado, being the lucky recipients of multiple nuisance violations for keeping cows on their residential lot and also for having a large manure/compost pile. That mound of animal by-product has to be an accessory use, at least for the cows. The current zoning allows horses, ponies, mules, donkeys, and llamas as accessory uses to single-family residential, but no cows. The Sattlers have four cows, 10 chickens, and a horse. They have sought an amendment to the zoning regulations and, if they lose, we should look forward to an invitation to one of Colorado's biggest backyard barbecues ever.[6]

This just in as we were finishing our final fact checking—November 16, 2011, dateline Windsor, Colorado: following a four-hour trial, the Sattlers have been found guilty on two of three charges—keeping the large animals and the brush pile. They were found not guilty as to the manure. Sentencing is scheduled for December 13. Mr. Sattler represented himself.[7]

If the Sattler family decides to create a support group, they might ask Jeramy Mello if he would like to join it. In the early fall of 2011, he decided that raising chickens would be something fun to do with his children, so he acquired 20 chickens and one visiting rooster for his nine-year-old twins and their older brother, age 11, to raise. As Mr. Mello said: "It's been a great family project."[8]

The **Let's Play Chicken Award** goes to Willard, Missouri for issuing Mr. Mello an order to remove the 20 chickens and that very happy single rooster within 30 days, because apparently the city ordinance only allows farm animals to be raised on residential property of 10 acres or larger. Mr. Mello lives on three-quarters of an acre.

Meanwhile, two aldermen in the city are rethinking prior rejected proposals that would have allowed three chickens and no roosters. Mr. Mello is holding out for six chickens and no roosters. I'm thinking that rooster needs a *guardian ad litem*. As Mr. Mello's nine-year-old son Jacob says "The neighborhood dogs are much louder than the chickens."

This ratio of 20 chickens to one rooster brings to mind the psychology of sex (don't most ZiPLeR Awards?) and the Coolidge Effect as described by *Psychology Today*:

> Scientists call the tendency to tire of a mate with whom one sexually satiates oneself, while mechanically perking up for a new one, the *Coolidge Effect*. They have observed this phenomenon widely among mammals, including females. Some female rodents, for example, flirt a lot more—arching in inviting displays—with unfamiliar partners than with those with which they've already copulated. In keeping with this phenomenon, when couples divorce because their sex lives have gone out of sync, the formerly uninterested spouse is often startled by a raging libido when a new lover enters the picture.[9]

The term was coined in 1955 by ethologist Frank A. Beach at the suggestion of a student. It comes from this wonderful old joke about President Coolidge—"Cool Calvin" as we New Englanders so fondly call him from his campaign slogan: "Keep Cool with Coolidge:"

> The President and Mrs. Coolidge were being shown [separately] around an experimental government farm. When [Mrs. Coolidge] came to the chicken yard she noticed that a rooster was mating very frequently. She asked the attendant how often that happened and was told, "Dozens of times each day." Mrs. Coolidge said, "Tell that to the President when he comes by." Upon being told, President asked, "Same hen every time?" The reply was, "Oh, no, Mr. President, a different hen every time." President: "Tell that to Mrs. Coolidge."[10]

The **What Do You Do with Evicted Chickens Award** goes to Winder City, Georgia which took on the chickens-in-residential-zones problem early in 2011. The city's initiative would allow 12 chickens per acre and has had ample public support, with 78% of respondents saying they did not object to the chick-

ens (the local KFC and Popeye's franchisees were not allowed to vote). Only three people spoke in opposition at the public hearing. Still, the planning commission recommended against changing the law. As city planner Larry Lucas explained: "Ultimately, the planning and zoning commission voted not to change the ordinance. They felt like the benefit of the few folks who saw that this was not a major disruption to their neighborhood's character were [sic] outweighed by the commitment and expense it would take to enforce the ordinance."[11] The most recent information is that the council rejected the ordinance.[12]

The much-sought-after **Micromanagement Award** goes to Hopewell Township, New Jersey, which this year adopted an ordinance dictating when chickens and roosters can hook up in henhouses. Roosters must first demonstrate that they are disease-free. They will then be allowed in the henhouse only 10 days a year because mature roosters are too noisy. The ordinance actually provides that if a rooster gets a little too noisy over his latest conquest, he can be banned from the property for up to two years.[13] The word around the Hopewell Township henhouses is keep the noise down and be discreet.

Back to the **What Do You Do with Evicted Chickens Award:** Apparently, there is an unintended consequence of banning chickens already kept on residential properties—there are virtually no chicken shelters. In Auburn, Georgia, and Barrow County, Georgia as a whole, there is no place to put the homeless chickens. We all know about animal rescue operations for dogs, cats, llamas, and rabbits—but chickens? We are pleased to report that an Internet search of the term "chicken rescue" yields Chicken Run Rescue: "Chicken Run Rescue is the only urban chicken rescue of its kind," which just goes to show you there is an organization for every cause.[14] At Chicken Run Rescue, you can even learn why chickens make great companion animals:

- Chickens are highly intelligent, gentle, vivacious individuals who form strong lifelong emotional bonds with each other as well as other species.
- They are warm and silky and lovely to hold.
- They are primarily ground-dwelling birds who are very home- and routine-centered and can thrive in a space the size of a normal urban backyard and home. They can coexist happily with compatible dogs and cats and have similar life spans.
- Adopting a chicken will increase compassion and reduce violence in the world.

PetFinder.com lists about two dozen chickens available for adoption. Farm Animal Shelter is an excellent rescue and adoption resource for all types of farm animals.[15]

The issue of raising chickens on residential properties has become of such national interest that leading academics in the field are writing on the subject, including the editor of this distingué publication. See, for example, Patricia Salkin, "Feeding the Locavores, One Chicken at a Time: Regulating Backyard Chickens." [16]

The **Porcine Practical Difficulty and Unnecessary Hardship Award** goes to Holly Hacker of Whitehall Township, Pennsylvania. This award winner was nominated by Michael Berger of Manatt, Phelps & Phillips of Los Angeles, who has been a generous supporter of the ZiPLeR Awards for many years.

Hacker's potbellied pig, Porkus Maximus, was the subject of a citation issued for violation of the township's livestock rules which do not allow pigs to be kept in a residence. Hacker was ably represented by legal counsel when she petitioned for a variance. Her lawyer argued that Porkus Maximus has a dog house with a "doggie door." (Come on now, please, it is "pig house" and "piggy door.") The Zoning Hearing Board approved a variance 4 to 1.[17] The practical difficulty and unnecessary hardship? Separating Hacker from Porkus "would create a hardship because the two have lived together for two years." Hacker's lawyer was Dan Dougherty, whose performance was described this way on a blog site: "Holly's Attorney Dan Dougherty was masterful in his opening arguments."

He should be proud of the silk purse he made out of the sow's ear in getting the hardship ruling. That's real land use advocacy.[18]

The **Now, Isn't That Just Ducky Award** goes to the Town of Clifton Park, New York for issuing 13 appearance tickets to George Sarris for "harboring the waterfowl on his property in the town of Clifton Park, Saratoga County in violation of the zoning code[.]" Sarris responded by seeking a declaratory

judgment that harboring of ducks, geese, and other waterfowl was actually permitted. The Appellate Division found that the keeping of waterfowl is not permitted on Sarris's property, which is smaller than the five-acre minimum necessary to keep even "poultry," never mind ducks. Still, Sarris managed to get out of one of the 13 tickets because, even though he admitted to harboring ducks on his property, the code enforcement officer admitted to not actually seeing any ducks on one of the days of the alleged violations, thereby creating what might be new law in the State of New York: The "duck-in-sight" rule for zoning enforcement.[19]

The **Making a Big Deal Out of a Little Dog Award** goes to the Century Village condominium association for attempting to evict Sweetie, a Chihuahua owned by Phyllis Schleifer. Ms. Schleifer is described as so "fragile and lonely" that her doctors have prescribed the dog to be her companion, to serve her as an "emotional service animal."[20] Thanks to my assistant, Diane McGrath, for this nomination.

It is a familiar story and you can probably fill in the blanks. The condominium documents prohibit pets unless they are service animals, such as a seeing-eye dog.

Schleifer moved into Century Village in 2008, three years after the death of her husband of 42 years. A few years prior to his death she had a "horrible" car accident and, according to documents, she suffers from "severe depression and post-traumatic stress disorder." The condo association refused to allow her to have the pet even though she had a doctor's note prescribing it, so she invoked state and county civil rights laws and now has the county representing her in an action against the condo association.

It has been reported that investigators believe the condo association has violated the federal Fair Housing Act and the county's Human Rights Act.

Schleifer says the doctors, four of them, told her to get a dog to help for her mental problems, so she went to a pet store and happened upon Sweetie. "I took one look at her. She took one look at me, and she literally jumped right into my arms. I said, 'Oh, my God. This is heaven.'" She claims she could not live without Sweetie.

To add insult to her injury, the condo board posted a notice that they would have to sue her to get rid of the dog, which they claimed was barking, and that all the condo owners would have to chip in to pay for the cost of booting the pooch. She described the notice as being "like a knife in my heart."

The condo association's lawyer then sent Schleifer a demand letter claiming that she owed the association $16,752 in legal fees and that the association might be required to file a lien on her condo unit if she refused to pay.

William Lourenso, who was the president of the condo association when all this started, apparently thinks it is quite simple. "We had our bylaws and it didn't allow dogs," Lourenso said. "She took it upon herself to bring the dog in. Then she came up with the doctor's note. … Anybody can get a doctor's note these days." The latest news report indicated that the association was interested in settling the case.[21]

It is a good thing our canine friends have four legs, because coming up here we have an award that has one paw in the animal corral section of this awards issue, another paw in the U.S. Constitution, a third paw in a content-neutral county sign regulation, and the last paw in the world of the visual arts. Thanks for the nomination to Dean Patricia Salkin, who highlighted the case in her blog, The Law of The Land.[22]

The **It Isn't Art, It's Just Business Award** goes to the U.S. District Court for the Eastern District in Alexandria, Virginia for its decision holding that a 960-square foot mural with a business logo overlooking a dog park that just happened to be frequented by many of the business's customers was more an advertising sign and commercial speech than First Amendment protected art, and was properly regulated by the county's content-neutral sign ordinances.[23]

The plaintiff in the case, Kim Houghton, owns Wag More Dogs, a dog grooming business and boarding facility. It is located in a light industrial district in Arlington, Virginia. After Houghton completed major improvements to her facility, she commissioned a local artist to paint a large mural on the side of the building overlooking the Shirlington Dog Park. Sort of like when Pope Julius II, the warrior pope (1503-1513), commissioned Michelangelo to paint the Sistine Chapel ceiling, Raphael to paint the Stanze di Raffaello in the Vatican, and Bramante to be the chief architect of St. Peter's Basilica. Well,

sort of. The mural depicts dogs, dog bones, and paw prints. She readily admitted that one of the purposes of painting the mural was "to create goodwill of the people who frequented the [Shirlington] Dog Park, many of whom were potential Wag More Dogs customers." The business logo on the mural: Wag More Dogs. And, probably not by happenstance, the cartoon dogs were near-clones of the ones on the Wag More Dogs website.

An enforcement proceeding began with the Arlington County Zoning Administrator refusing to let the renovated business open until the mural problem was resolved. Houghton covered up the problem in the short run by draping a tarp over the mural, and received a temporary certificate of occupancy.

Houghton lost at the local level and lost in the federal district court, even though the county tried to meet her part way by offering that she could keep the mural if she added the phrase: "Welcome to Shirlington Park's Community Canine Area." She refused, claiming that it was unconstitutionally compelled speech, a claim the federal court also rejected.

The **Don't Be Pussyfooting or Pussyfeeding Around in Henrico County** goes to—you guessed it—Henrico County, Virginia for prosecuting Susan Mills for the crime against society of feeding some wild critters. Specifically, she's charged with feeding feral cats, which the Henrico County Planning Department says is not "customarily incidental to a dwelling." Deputy County Attorney J. T. "Tom" (as in "Tomcat," I suppose) Tokarz explains it this way: "People feed their own house pets all the time, but not cats living homeless in the wild. That is the difference. … Unfortunately, in a world of competing positions, her position increases the health risks of the other county residents, diminishes the enjoyment of their property and violates the county zoning ordinance."

Mills owns two domesticated cats that live in her house, but she still chooses to put out food for the feral cats. Recently, it was reported that she blatantly opened a can of cat food and placed portions in seven bowls around her backyard deck, after which several feral cats, and one panhandling feline freeloader from a neighbor's house, came by to dine.[24]

The county has kept careful records of her heinous behavior in a thick three-ring binder which reportedly also includes many letters from neighbors in support of her.

If Mills is ultimately unsuccessful in her appeal to the Henrico Board of Zoning Appeals, she could be charged with a Class 1 misdemeanor. Can you see it now on the evening news, or better yet on "Cops," with the local constabulary saying: "Ms. Mills. Drop that can opener and step back from the cat food. Tell your feral friends to leave the area immediately or we will be forced to tase you."

The latest news is that the BZA did deny her appeal in October, but that Jack Robb and Will Shewmake of the law firm of LeclairRyan have agreed to appeal this ruling for Mills to the Henrico County Circuit Court…pro bono feline.[25] Good for them, for stepping up to the plate to help out. Robb, according to his law firm's website, has extensive pro bono experience and is a commercial litigator. Shewmake is a planning commissioner and focuses his practice on land use and zoning law. This may turn out to be the case of the feral cat that roared. Mills and Shewmake—go get 'em.

The Tree House Corner

Another area of the law where we see similar cases cropping up (branching out?), year after year after year, is driven by the insatiable need for humankind to reach back to its primate ancestors and connect with them in a strange ritual of nesting in treetops. In the past, we have had a wide variety of tree house cases, from the one where a homeowner wanted to discreetly build one without a permit but did so in his front yard, to another in which a gentleman built his tree house without any approvals—at a cost equal to that of a modest home—only to be forced to tear it down, to others where neighbors have come close to fisticuffs over the elevated abodes.

This year's award is shared by five winners, first identified by CNBC.com and all worthy of recognition. The award is simply, and so aptly, named the **Swiss Family Robinson Award** in honor of those who added such legitimacy to the primal urge.[26]

The first of the five winners is the Tree House Workshop, which built a small tree house with merely a kitchenette, bath, sitting room with a fireplace, balconies, and accommodations for four on

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the Olympic Peninsula in Washington in 2005. The second winner is the Pine Lake Garden tree house in Northumberland, England, which we believe is one of the world's largest tree houses if not the largest and the only one we know of that serves as a restaurant as well. The third winner is thought to be the world's tallest tree house at ten stories and 100 feet tall, with between 8,000 and 10,000 square feet of space. It is the minister's tree house in Crossville, Tennessee, built by R. S. Burgess, who was told by God to build the tree house: "I was praying one day and the Lord said, 'If you build me a tree house, I'll see you never run out of material.'" Sounds like a good proposition for a Home Depot or Lowe's ad.

The fourth winner is the Tree House Djuren in Germany which is really a "tree pod" resembling a vintage travel trailer—think of an Airstream stuck up in a tree—and is among the most contemporary in design.

Finally, we are pleased to recognize the Robert Louis Stevenson Legacy House of Northern California, also built by the Tree House Workshop and located on land formerly owned by Robert Louis Stevenson. It is made of reclaimed materials, including doors and windows from the writer's home.

From the internationally famous to the backyard mundane, we come full circle to the sorry story of an Army National Guardsman who promised to build his two sons a tree house on their single-family residential lot in Falls Church, Virginia when he returned from another tour in Iraq. The **Not Good When It Goes Viral Award** goes to Fairfax County, Virginia for its enforcement action. So far over 700 people have joined together on www.change.org in support of an effort to give the tree house builder, Mark W. Grapin, a break. The latest report is that the Fairfax County officials are not going to budge. The Board of Zoning Appeals denied Grapin's request for a variance that would allow him to keep the treehouse.[27] Grapin has already spent more money in the zoning fight than he did in building the tree house. Could there be some middle ground here? Say a variance for a relatively short term of years until his two sons have outgrown the tree house or Grapin has moved on, whichever comes first? How about an amendment to the zoning regulations that actually allows tree houses of a certain small size within the setbacks and side yards for a term of years?

The **Nah, You Don't Have To Obey THAT Stop Sign Award** goes to Cranston, Rhode Island, which recently discovered that about one-quarter of its 2,600 stop signs were put up illegally and that apparently anybody who ran through them should not have been subjected to any penalty. Specifically, after careful investigation it was determined that 692 signs are illegal in that they were never approved by the City Council. It is suspected that some of the signs leading to state highways were put up by the state without local permission and that other signs were illegally placed there by residents. It is speculated (and this seems so wildly off base in Rhode Island…), that some prior mayors and council members may have simply circumvented the normal approval process to take care of their constituents. One is reminded of that line by Captain Renault in *Casablanca*: "I'm shocked, shocked to find that gambling is going on in here!"[28]

The first-ever **Watching Your Sign Go Up in Smoke Award** goes to Richard and Tina Gulan of East Berlin Borough, Pennsylvania, who own a haute cuisine dining establishment specializing in barbecue and going by the name "Hog Wild." We have had more than our share of things masquerading as signs every year, just as regularly as the vernal equinox. Recidivist readers will recall last year's award for the Oldsmobile 88 turned planter, turned work of art, turned sign; and the award for the Paul Bunyan statue muffler sign, turned landscaping business sign, turned exempt from any regulation as a flag bearer. The year before, it was the two-story-tall pair of L.L. Bean hunting boots that Victor, New York declared was not a sign, because they so wanted the L.L. Bean store, but instead was a "site feature."

This year's award winners placed a smoker/cooker on the sidewalk in front of their fine eatery, which serves both chicken and barbecue. The Gulans have a freestanding sign mounted on a pole hung over the sidewalk, a temporary or A-frame sign, and the aforementioned cooker/smoker parked on the sidewalk. The smoker/cooker has no lettering or any illustrations on it, the only adornment being an attached "head with horns."[29]

For this Hog Wild hodgepodge, the Gulans received a notice of violation alleging too many signs. It appears that the crucial evidence at the hearing was this provided by one Bob Clayton, who visited the restaurant to have lunch and spoke with Mr. Gulan:

> I asked him a question because I had an interest—I had seen the cooker outside. And while my lunch was being prepared, I asked him, Are you cooking outside? The reason I asked that question is because an organization that I belong to wished to create a cooker and I needed some information about it.
>
> And he said to me, No, that's just a sign, just an advertisement for this place. I said, I saw smoke.
>
> He says, Well, we have a little thing inside with just a little bit of wood to make smoke.

Gulan testified to the contrary, claiming that he uses it almost daily to barbecue chicken: "50 to a hundred halves of chicken a day five days a week at least four days."

The definition of "Sign" in East Berlin Borough is typical:

> Any material, structure or device, or part thereof, composed of lettered of [sic] pictorial matter that is placed when used or located out of doors or outside or on the exterior of any building, including window display areas, for display of an advertisement, announcement, notice, direction, matter or name. Includes sign frames, billboard, sign boards, painted wall signs, hanging signs, illuminated signs, pennants, fluttering devices, strings of light, projecting signs or ground signs and shall also include an announcement, declaration, demonstration, display, illustration or insignia used to advertise or promote the interests of any person or business when the same is in view of the general public.
>
> (1) **Billboards, Advertising Sign or Poster Panel**—any structure or part thereof or any device attached to a structure for the painting, posting or otherwise displaying of information for the purpose of bringing to the attention of the public any produce, business, services or cause not necessarily located on or related to the premises on which the sign is situated.

The Zoning Board concluded that even without the longhorns or other decoration, the smoker/cooker was still a sign, particularly because it was located in close proximity to the freestanding sign with "BBQ" on it. The trial court upheld the Zoning Board, and the Commonwealth Court of Pennsylvania affirmed the trial court's judgment, agreeing with the court and the Board that the smoker/cooker was a "structure, and demonstration or display" under the ordinance. Said the court: "The smoker/cooker was placed conspicuously to draw attention to the business. …[T]he common pleas court determined that the Board was correct that an object without lettering may still be a sign."[30]

Municipalities get into trouble with their sign regulations when they start carving out exceptions. The City of St. Louis has an ordinance which exempts from sign regulations works of art, civil symbols, and crests. Neighborhood Enterprises., Inc., "a real estate/property management company whose mission is to provide decent, affordable rental housing in the city of St. Louis, Missouri,"[31] commissioned a sign to be painted on the side of a two-story duplex. The sign reads "End Eminent Domain Abuse" and has the international symbol for "no" or "not" over it. Rob Thomas of Hawaii and California nominated this sign for special recognition when he featured it on his widely-followed blog, inversecondemnation.com.[32]

The building inspection department issued a citation for the sign, the Board of Adjustment refused the appeal, saying it was not one of the three exempt types of displays, and the Federal District Court granted summary judgment in the city's favor.

The U.S. Court of Appeals for the Eighth Circuit, however, reversed, holding that those who commissioned the sign had standing to challenge the sign code's constitutionality and that the St. Louis' definition of sign was not content-neutral and was subject to strict scrutiny. "The message conveyed determines whether the speech is subject to restriction," said the Eighth Circuit, quoting from precedent and noting further that "a municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling." The court held that the ordinance would fail, regardless, because it was not narrowly tailored.

The lesson learned? It is always risky to have specific exceptions to what is a sign, and often unproductive for a municipality to lead with its chin by challenging any sign or display that appears to be purely political or religious speech.

You may recall the ZiPLeR Award we gave last year to David Bowden, who painted in large letters across the front of his house: "Screwed by the town of Cary." After last year's gala awards ceremony in which more choice things were said about Cary, North Carolina, he won his case in court.[33] Bowden died this year of lung cancer at age 69, shortly thereafter.[34] The town of Cary has appealed to the Fourth Circuit.

This year's award, the **First Amendment Can't Be Stretched That Far Award**, goes to Adzookie, an advertising company that offers to paint the entire outside of your house, windows, and trim for free. All you have to do is agree that you won't change the paint scheme for at least three months and that the obligation to leave it as they made it could be extended for up to a year.[35] Ernest Hutton, FAICP, AIA, a gifted planner based in New York City, nominated Adzookie and will be getting his engraved invitation to the awards ceremony. Wait by your mail box, Ernie.

Oh, one little catch—they intend to paint an advertising sign across the front of your house, turning your abode into a billboard.

Most communities have restrictions on off-premises commercial signs and painting a billboard across the front of a house is almost certainly to be just that, so you may not want to put your money on Adzookie if they are forced to litigate this scheme.

Surprisingly, we don't have a Religious Land Use and Institutionalized Persons Act (RLUIPA) case this year. Funny about that; maybe RLUIPA is not so funny anymore. But we do have an establishment clause case sent in at the eleventh hour by Amy Lavine, Staff Attorney at the Government Law Center at Albany Law School, who has been desperate to be recognized as a successful nominator of a ZiPLeR Award. The **You Want to Call Out His Name on Some of the Double Diamond Trails Award** goes to the U.S. Forest Service for being caught in the crossfire of a holy war between the Freedom from Religion Foundation—which doesn't want the Forest Service to renew a lease on land at Big Mountain (not Big Sky), Montana near Whitefish with a concrete statue of Jesus on it—and folks who like it right where it is, as a memorial to World War II, as a bit of local culture, and just because it's fun to have along the ski trail.[36] I took my first skiing lesson on the mountain at age 37, but I don't remember seeing Jesus located near the top of chair 2, probably because it is unlikely I got up that high. The Jesus statue now has a Facebook page.[37]

We are pleased to recognize another good sign with the **Who Says You Have to Have an Eye for Real Beauty Award**, presented to none other than Hugh Hefner for putting up part of the money that the Trust for Public Land needed to acquire Cahuenga Peak, adjacent to the famous "Hollywood" sign. He will be honored with an inscribed boulder on a trail linking the peak with Mt. Lee, where the Hollywood sign is located.[38] Diane McGrath also made this nomination.

The **Damned if You Do and Damned if You Don't Award** goes to Westport, Connecticut for its enforcement of its setback requirements violated by the placement of a swing set in a back yard. The real loser in the case is the seven-year-old daughter of Cary Moscowitz, who is at risk of losing her playset. In Westport, on Connecticut's Gold Coast, playsets are more often large and expensive structures, but they're still playsets. First Selectman Gordon Joseloff says: "We have lots of other things to do than go out and see who has a swingset or tool shed in a setback."[39] The case is in the courts and the latest word from reliable sources is that a settlement may be in the offing.

These disputes over backyard recreational uses can get heated. To the Wolcott, Connecticut Zoning Board of Appeals Commissioner Joseph Membrino Jr., we award the **Zoning Board of Appeals Purple Heart Award** for the injuries he sustained in the line of duty. Edward Humel built a backyard hockey rink without a permit, received a cease-and-desist order, and ended up in front of his ZBA in an enforcement proceeding. The ZBA upheld the decision of the zoning enforcement officer. Humel went postal outside the hearing room, attacking Commissioner Membrino with a metal pipe, hitting him several times, and threatening to kill him. According to the complaint filed in court, Humel said to Membrino as he attacked him: "I'm connected. I'm going to burn your house down and put a bullet in your (expletive) head." Humel is known to have several guns registered in his name, and prior to his release from custody the police were going to secure the weapons.[40]

Among the all-time favorite ZiPLeR Awards have been the ones with road names and place names, and the favorites among those favorites are Farfrompoo-

pen Road in Tennessee, the only way to get up to Constipation Ridge, and Penistone, England. That these are among the most popular awards obviously says something about our devoted readership.

This year, we have turned to the country's best slogans promoting local governments and agree with Laura Bly of USA Today that the winner should be Bushnell, South Dakota. This year's award, the **Tell It Like It Is Award,** is given to Bushnell for the slogan: "It's not the end of the earth but you can see it from here."[41]

Runners-up include Dumas, Arkansas for "Home of the Ding Dong Daddy," because of the vaudeville era hit song entitled "I Am a Ding Dong Daddy from Dumas," and Gas, Kansas for "Don't pass Gas, stop and enjoy it." Also of note are Hooker, Oklahoma for "It's a location, not a vocation," (I write to you from Hartford "Founded by a Hooker"), and Riverton, Wyoming which proudly proclaims: "We Got All the Civilization You Need."

The **Not My Little Grass Shack in Kealakekua, Hawai`i Award** goes to Steven Huff of Springfield, Missouri, who is building himself a cozy little cabin of 72,000 square feet with 13 bedrooms, 14 bathrooms, and a grand ballroom of 2,000 square feet.[42] That room alone is about the area of a typical single-family home. Actually, it is his second home. He just happens to own a concrete company and not surprisingly his house is being built of concrete. Apparently an environmentalist at heart, he's using special energy-efficient concrete. That wolf in the old story with the three pigs will have a tough time with this one, as it is designed to withstand an F-5 tornado. Huff (as in "I'll Huff and Puff and blow your house down") has named his house Pensmore, which is some kind of admixture of French and English for "think more" (Pensmore is strangely similar to the place name in England noted above).

Still, Pensmore is not the country's largest home. That honor goes to the Biltmore estate in North Carolina at 175,000 square feet.[43]

The walls of Pensmore are 12 inches thick on the exterior and 9 inches for the interior. It is heated indirectly through pipes in the concrete, with hot water supplied in the winter from 4,000 square feet of solar panels on the roof, and cooled in the summer by water drawn from geothermal wells. "Green is such a buzzword," says Huff. "We're trying to show a cost-effective way to be green by being more energy-efficient."

Meanwhile, one neighbor just down the road says: "It's really strange, and we're thinking something's up. If there was a nuclear thing they could hide a bunch of important people there."[44]

At the other extreme are the smallest apartments available on the market today. According to the National Association of Home Builders, the average single-family house in 2010 was 2,392 square feet, with the area trending down over the next few years.[45] Getting out ahead of the trend are our two award winners, Boston, Massachusetts and Reading, Ohio for having two of the smallest apartments available in this country. The absolute smallest, but not currently on the market (maybe the broker and prospective tenant can't get inside at the same time), is 90 square feet in New York City.[46] We honor them with the **Keep Your Arms To Your Side As I Need To Turn Around Award** for being places where you can find an apartment of 240 square feet, one-tenth the size of the average new single-family home in this country and less than ten times the area of an average dining room table.[47] While in Reading this means you're going to be able to get a little nest for not much money, just $345; in Boston for that same size Lilliputian pad you will have to pony up $1,175 a month. Covering every square inch of that Boston apartment floor with one dollar bills would yield not quite enough ($2,160) to cover two month's rent.

Were Goldilocks a land use planner, she might see a proposed development project as too big, too small, or just right. How about this: the **Man Bites Dog (Land Use Version) Award,** nominated and named by our old friend, Michael Berger, and going to a Hollywood neighborhood group? According to a report in the Los Angeles Business Journal, some Hollywood residents have filed an objection to a proposed 179-apartment project because they say it's simply too small. They have appealed to the Central Los Angeles Planning Commission to force the developer, Martin Group, to expand the project to 219 units.[48]

In an unholy alliance, the developer has joined hands, figuratively, with the neighbors in supporting the 219-unit project and indeed, the developer started with that number but another neighborhood group complained it was too large at that size and

the Martin Group capitulated, rather than engage in a lengthy battle.

As you know, we have given awards all over the world, given the global interest in land use issues. Your ZiPLeR Awards Team travels internationally every year seeking out nominations and impaneling groups of experts on all the continents to review the many submissions.

Here is this year's international winner: **The Heck with Notices of Violation and Common Traffic Tickets Award** goes to Mayor Arturus Zoukas of Vilnius, Lithuania for his assertive, direct action designed to head off any miscreants who might even think of parking their cars in a bike lane. As the mayor proclaimed in a video showing him driving an armored personnel carrier and crushing a Mercedes parked in the bike lane: "That's what will happen if you park your car illegally. I want to point out that if you have a car and more money it doesn't mean that you can park it everywhere. Recently there's been an increase in this type of parking violations, and it shows a lack of respect for others." While the car crushing was a staged event, it does suggest some of the international differences in the approach to enforcement of local government laws.[49]

The **Major Pythian Match Award** goes to the board of directors of the Pythian condominium on the Upper West Side of Manhattan for its attempts to shut down a first-floor tenant selling breast pumps and BPA-free bottles. The Pythian is ironically named after the all-male lodge that was originally located there on West 70th Street. The boutique, called Upper Breast Side, was started by Ms. Rakowski-Gallagher, a former police officer, who began the business originally in her apartment and moved it to the windowless space in the Pythian, which she bought for $825,000 in 2007.[50]

This new battle in the lactation wars is caused by an ambiguous provision in the New York City zoning ordinance regarding uses in the R8B zoning district, a residential district, in which retail uses are not permitted. The Upper Breast Side is a one-of-a-kind admixture of counseling center and resource for the provision of equipment and supplies used in breastfeeding. The zoning provisions for the R8B district permit a "community facility," which is defined as one promoting "educational, recreational, religious, health or other essential services for the community it serves." Is the Upper Breast Side a "community facility," or is it a "commercial/retail" store (which is not permitted) because it happens to sell a $145 silky black nursing bra or a rhinestone-encrusted one by a company called HOTmilk? "Are you going to nurse in something that looks like a stretched-out athletic sock, or do you want to wear a completely blinged-out HOTmilk or Marlies Dekkers nursing bra that looks just like what Lady Gaga wears?" said Rakowski-Gallagher. "Nursing is normal. And normal means that you can be really gorgeous."

The **No Matter How You Slice It Award** goes to the Faith Evangelical Presbyterian Church of Fairfax County for petitioning a Fairfax court to order a special grand jury to decide whether the TopGolf driving range should be prosecuted for being a public nuisance. It seems that from the 76-bay, two-level driving range some 2,637 golf balls have gone off course and landed on neighboring properties, including that of the church, which has suffered a broken window in its office, the shattering of the pastor's rear car window, and the beaning of the youth director who was knocked down while he worked with a group of children. The numbers are known with specificity because church members have collected each and every one of the 42.57-mm spheres.[51]

A special grand jury was convened and just recently reported back that there is a sufficient basis to pursue the misdemeanor charge against TopGolf. The lawyer for the church puts it this way: "They want one thing: to stop the barrage of golf balls. The church lives in fear of a fatal injury."

This has become a battle of experts to some degree. TopGolf golfers hit some 10 million balls a year, so it's not all that surprising that some of them make it all the way to the church property, but that's 350 yards away and there is nothing in between. TopGolf claims that an errant golf ball is unusual, really unusual, because by their reckoning "99.9927% of balls stay [with]in the property line." How do they know that? It seems that TopGolf has put a microchip in every golf ball to track the length of the drive and the number of balls hit. Now that's entrepreneurship, and great evidence.

I had the pleasure for many years of representing a place called the Borough of Fenwick, Connecticut,

an incorporated village within the town of Old Saybrook. There are 70 something homes in Fenwick and during the time I was the Borough Attorney, Katherine Hepburn lived there and I was completely thrilled to get to spend some time with her. It's a beautiful little community of largely summer homes with maybe about a fifth of the people living there year-round. It has a nine-hole golf course, in the middle of which is their chapel, St. Mary's by the Sea. The Borough is so small that it has no place where people can meet for hearings or other large events. On election night, they always have to look around for someone with a strong battery and good headlights to park where the voting machines are located in a garage so they can stay open until 8:00 p.m.

I recall conducting a zoning hearing on a Sunday morning—that is when they used to hold them because the weekenders would be there—in the only large assembly place in the Borough of Fenwick, St. Mary's by the Sea. In the span of an hour or so at least a half dozen golf balls bounced off the roof. It seemed most everybody there thought it was all quite charming and it gave us a good audible clue as to why so few people came to hear about some zoning amendments when they could be, and were, otherwise engaged.

As this article goes to press, the TopGolf controversy goes on, with a hearing scheduled on January 23, 2012, if the differences can't be worked out. The church describes the problem in its complaint as one caused by the "massive, intolerable, dangerous and life-threatening quantity of golf balls" driven onto its property, such an onslaught that the church has chosen not to build a playground outside.

I hope that we have reached the final chapter in what has been a rather bizarre odyssey which began almost a decade ago with a notorious Tampa, Florida case involving an outfit called Voyeur Dorm, in which the question was whether naked women prancing around a single-family house, with their activities broadcast over the Internet to subscribers, was somehow not permitted in a single-family zone. In the Voyeur Dorm case, as in the more recent Coco Dorm case, it was argued that because no customers came to the house and no business was conducted there, it was not a business. That just didn't seem right, but Voyeur Dorm won.[52]

The problem for me in reporting on Voyeur Dorm was that in trying to do some fact checking (really) I never could get to the Voyeur Dorm site without going to our IT department and expressly asking them to open up access to the pornographic site for my scholarly research. Eventually they capitulated and gave me an hour's time to do the research and learn more about how VoyeurDorm.com presented itself to the world and what the business model was.

Then along came Coco Dorm on the other side of the state, in Miami, with apparently the very same kind of operation. While I thought it would be interesting see how the courts handled it this time around. I just couldn't face going back to the IT department and talking my way back onto a pornographic site, so I deviated (if I can use that term here) from my otherwise steadfast rule of carefully fact-checking these awards and I gave Coco Dorm the **We're Just Working Girls Awards** in 2009.

Months passed and I was called on to do a presentation on the annual ZiPLeR Awards which I do with photographs, illustrations, and graphics that I find on the Internet. I was on my home computer and it took me right to the first webpage of CocoDorm.com without running into the problems of our filter. And what to my wondering eyes should appear but a website selling sexually-oriented material involving gay men of color. Equal opportunity pornography.

At least I don't think we will have to be put through this again, as finally the Federal District Court and Court of Appeals have figured out how to get to the right answer, which is that these types of operations do violate local zoning ordinances prohibiting adult entertainment establishments and most businesses within residential zones. Coco Dorm was found to be operating a business by the U.S. District Court and the Eleventh Circuit, and when the case was returned to the District Court, that court rejected all of the freedom of speech and expression claims, holding that they were mooted upon the dismissal of the violation relating to the adult entertainment establishment. To the Federal District Court and the Eleventh Circuit we give the **You Won't Find Us with Our Pants Down a Second Time Award**. Thanks to Sophia Stadnyk of the International Municipal Lawyers Association for being the first to bring the Coco Dorm decisions to our attention.[53]

Several food truck cases have been nominated for awards over the years, but one of the rare instances in which the food truck wins appears to have occurred this year in Fredericksburg, Virginia, where the owner of Virginia Beach Fries successfully defended himself against a claim that parking his truck at a business establishment needed some type of zoning approval. The owner, Richard "Eddie" Crosslin, argued that the itinerant merchant's license he had was all he needed. The judge sided with Crosslin, but apparently only because the city cited Crosslin for an occupancy violation. That leaves Crosslin a couple of fries short of being a long-term winner. In ruling on the case, the judge said that Crosslin was "not guilty, this time around." The judge also suggested that maybe Fredericksburg could amend its local ordinances to make it possible to regulate mobile food truck locations. So to Fredericksburg, Virginia, we give the **Would You Like Ketchup with That Cease-and-Desist Order Award**.[54]

Our fact-checking team suggested we make you aware that though Eddie Crosslin's food truck case appears to be one of the few little victories for food trucks, if we notch down just a little to the hot dog carts, we can find another winner. This one is Wayne Bal of Onancock, Virginia, who has a hot dog cart and on October 8, 2011, distributed free hot dogs in celebration of the decision by Onancock officials to amend the town zoning ordinance to allow mobile food carts in the business district. To Wayne Bal we present the **Tube Steak Extraordinaire Award** for his advocacy on behalf of all hot dog cart vendors around the world. He collected 609 signatures on a petition in favor of allowing them in Onancock. Remarkably, he also got support from 42 area businesses. Said Bal: "I just want to thank everyone for standing behind me—so come have a hot dog."[55]

A near-record crowd of about three dozen people attended the town council meeting and thanked the council for amending the ordinance, expressing their pleasure with thundering applause as one of the participants shouted out: "They're good hot dogs, too." Former Mayor Shirley Zamora saw it as an economic issue: "In this time of economic challenges … Onancock needs to be business friendly."

From the *New York Times*, no less, comes another food-meets-zoning case, this one in Hazelwood, Missouri where city officials have told Caroline Mills and her two daughters, Abigail, 14, and Caitlin, 16, that they can no longer sell Girl Scout cookies from their driveway because it violates the city's zoning code.[56]

The city's position is that Girl Scouts can sell cookies, but only door-to-door, or perhaps in a grocery store parking lot so long as they have permission of the store. However, selling from your front yard, like that great tradition of the lemonade stand, is simply *verboten* in Hazelwood.

As Caitlin puts it: "This is crazy. It's not like we're selling drugs on the street." Her sister explained that they have sold cookies from their driveway for several years, every day after school from 3:00 to 6:00 p.m. and Saturdays starting at noon. They live on a busy street and business has been good. While they only sell cookies for three weeks a year, the last few years they sold 1,700 to 2,000 boxes at $3.50 each.

In an interview, Kevin O'Keefe, Hazelwood's city attorney, explained the city's position: "I'm not sure how much you know about zoning, but one of the principles is that you live over there, you work over there, you shop over there. Not never the twain shall meet, but those are the general limitations. The prohibition against conducting sales in residential areas is to protect the peace and repose of residential neighborhoods." He went on: "We told them you can't run a business in your front yard. They said, 'Oh,' and stopped…. It's not as if we ran around in our jackboots stomping on them."

To Hazelwood, Missouri we award the coveted **Take a Bite Out of Crime Award** for its vigorous enforcement of its zoning laws. Maybe the Girl Scouts will make a commemorative Girl Scout cookie variety, called the "Hazelwood." When you open the box, you'll find it empty.

Speaking of good government, it gives us great pleasure to award Lyons, Illinois Mayor Christopher Getty the **Best Local Appointment of 2011 Award** for naming his father to a new seat on the town's planning and zoning board. His dad, Kenneth Getty, age 70, helped his 28-year-old son get elected. Kenneth Getty knows plenty about local government. He was mayor of Lyons, Illinois at one point before he was convicted and sent to prison for rigging construction bids during his term in office. Prosecutors

claimed that the village architect, his son, and Kenneth Getty pocketed $179,000. Kenneth Getty was released from prison in 2004.[57]

The former Mayor Getty says the town attorney issued an opinion to the village trustees that no law precludes a convicted felon from serving on the planning and zoning board and, besides, as he explained, which gives us great comfort: "I was totally innocent all the way through."

The **Waiting Game or Return to Green Acres Award** goes to Thomas Malouf for his proposal in Hernando County, Florida to rezone a previously-approved 530-unit residential subdivision to agricultural use. Malouf is a part-time developer who earns his living as a restaurant owner and claims he really does want to work the land and get some economic use out of it. The development economy in the Tampa area is virtually dead and the recovery is viewed by most as a long, very long, slow process.[58]

Robert Widmar, a member of the Hernando County Planning and Zoning Commission, speculates that Malouf is a speculator seeking spectacular success and that all he really wants to do is hold his 147 acres in reserve and get the lower preferential property tax for the agricultural use while he waits out the recovery. Regardless of how quickly the recovery comes, Hernando County has 61,048 approved, undeveloped residential lots in inventory. Commissioner Widmar argues against the rezoning, saying that the local economy is based on homebuilding and that to go back to agriculture would be "a step backwards." Ultimately, the commission voted 4 to 1 to recommend the rezoning.

Being an advocate for agriculture can be a risky business, as Julie Bass of Oak Park, Michigan found out recently. "The price of organic food is kind of through the roof. We thought it'd be really cool to [put an organic vegetable garden in my front yard] so the neighbors can see. The kids love it. The kids from the neighborhood all help."[59]

The City of Oak Park has issued a citation to Bass, and she has since been charged with a misdemeanor because the local code requires that a front yard be planted with suitable, live, plant material and apparently an organic vegetable garden is just not suitable.

Oak Park City Planner Kevin Rulkowski says it's not suitable because it's not common: "If you look at the definition of what suitable is in Webster's dictionary, it will say common. [N.B. he didn't cite the Merriam-Webster dictionary.] So, if you look around you and you look in any other community, what's common to a front yard is a nice, grass yard with beautiful trees and bushes and flowers." To City Planner Kevin Rulkowski we award the **It's Time for Some Uncommon Planning Award** with the hope that he and others on the city staff will wake up and smell the organic vegetables.

Thank you to Patrice Carson, formerly the town planner in Somers, Connecticut and now a consulting planner and assistant town administrator in Eastham, Massachusetts on Cape Cod, who sent the link to this case to a listserv of Connecticut planning professionals and offered this observation: "I hope you'll find this article at least entertaining, but probably more sad and why we [local government planners] sometimes get the bad rap."

There was a pretrial in the late spring of 2011 and another pretrial was scheduled July 26. However, United Press International reported in mid-July that the city had dropped all charges without telling Bass.[60] Bass's lawyer oh so graciously accepted the city's decision: "Charges are dropped for the time being. Based on the games the city has been playing, I would not put it past them to drop the charges just to get the media off their back."

The **Watching Your Zoning Go Up in Smoke Award** goes to Glendale, California which has decided not to allow hookah lounges in the city. At the time of this change there were two hookah lounges operating, and both will be getting notices of violation.[61]

In 2008, the city enacted an ordinance restricting smoking to 25% of a restaurant's outdoor space. Although hookah lounges are not banned by zoning per se, to smoke inside or in more than 25% of the outside space would be a violation of the no-smoking ordinance.

Has anyone ever seen a smokeless hookah lounge?

Thank you, John Boehnert, of Providence, Rhode Island—a preeminent land use lawyer—for this nomination, first posted on his website www.rhodeislandpropertylaw.com. The **Scarlet Notice Award**

goes to the town of Narragansett, Rhode Island, where many University of Rhode Island students live, for enacting and applying an ordinance which makes landlords jointly and severally liable with their tenants and others organizing events, including social gatherings, which result in a violation of law and create a "substantial disturbance." Here's how Narragansett describes a public nuisance:

> It shall be a public nuisance to conduct a gathering of five or more persons on any private property in a manner which constitutes a substantial disturbance of the quiet enjoyment of private or public property and a significant segment of the neighborhood, as result of a violation of law. Illustrative of such unlawful conduct is excessive noise or traffic, obstruction of public streets by crowds or vehicles, illegal parking, public drunkenness, public urination, the service of alcohol to minors, fights, disturbances of the peace, and litter.

That pretty much covers all of any college party night. As Boehnert says in his posting: "Picky! Picky! Picky! Can't college kids have any fun, for heaven's sake?"[62]

The town imposes fines for violations in increasing amounts, from $300 to $400 to $500, for repeat offenses, with court-ordered community service also a potential penalty.

The U. S. District Court for the District of Rhode Island and the U. S. Court of Appeals for the First Circuit have upheld the ordinance, which includes a remarkable "unorthodox solution to the problems caused by unruly gatherings," to use the words of the First Circuit:

> Once the police have abated and dispersed an unruly gathering, subsection 46-32(a) authorizes them to prominently post a notice on the premises. This notice takes the form of a bright orange ten by fourteen inch sticker, which is affixed on or near the front entrance of the building. The sticker contains an explicit message. It admonishes that, should police intervention be required in response to another violation at the same address during the same posting, various parties (e.g., the owners and residents of the premises, the sponsors of the unruly gathering, and any guests to cause a nuisance) will be held jointly and severely liable. Landlords are informed by mail of both the posting and the violation that led to it.

Both decisions are worth reading, particularly for the First Circuit's holding that in this case, where the challenge is facial, no prior notice is required prior to the posting of the sticker.

Narragansett isn't the only place with student problems. Hundreds and maybe thousands of Northwestern University students in Evanston, Illinois face eviction because of the city's enforcement of its definition of "family," which limits unrelated people to three per dwelling unit. This rule is known locally as the "brothel rule," because legend is that it was adopted initially to prevent that use.[63]

Just about every college town has a problem with students living in large groups in single-family homes close to campus, and sometimes spread out, exacerbating traffic and parking problems on campus. Some communities have addressed the problem by creating opportunities for housing specially adapted for students close to campus, as Chapel Hill, North Carolina has done. Some communities, such as Ames, Iowa, have addressed the issue by redoing their definitions of family and group homes and creating a flexible definition of functional family to avoid traditional single-family neighborhoods from being overrun with students.

To Evanston, Illinois we regrettably give the **If You Can't Find A More Artful Solution, Just Put Them Out On The Street Award** for the city's failure to find a creative middle ground.

Cynthia Baker and Dean Patricia Salkin are co-editing a book tentatively titled (they'll come up with something snappier): "Town and Gown: Effective Legal Strategies Promoting Cooperation Between Institutions of Higher Education and Their Host Municipalities," soon to be published by the American Bar Association's Section of State and Local Government Law. The book will address many issues, including housing, facing college towns.

So ends another busy year in land planning and zoning, with more than enough interesting, curious, odd, and often entertaining controversies to keep us

mindful of how much fun this practice can be. Again, please keep those nominations coming.

Just as we were going to press, we received two new winning nominations that unfortunately will have to be carried over to the 2012 awards. One is the **You Really Don't Have To Be A Dick To Visit This Museum Award** which goes to the Icelandic Philological Museum (*Hið Íslenzka Reðasafn*) which receives 12,000 visitors a year. [64] Another is **The Good Neighbor Award**, nominated by my law partner, Mike Giaimo, and going to the neighbors of 74 Bubier Road in Marblehead, Massachusetts, who have won the right to tear down the house at 74 Bubier Road built on a lot with insufficient frontage and, not incidentally, blocking their view of Marblehead Harbor.[65]

See you next year. A recent poll still puts the ZiPLeR Awards on the "fun-to-follow" scale out ahead of Herman Cain. We'll do our best to maintain that comfortable margin against all challengers.

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RECENT CASES

Supreme Court of North Dakota upholds determination that fence was a "structure" that landowner could not construct along property line.

Melvin Mertz applied to the City of Elgin for a permit to build a fence on the edge of his property. The permit was denied on the grounds that the fence would violate a city ordinance prohibiting a structure from being built within seven feet of the lot line along a side yard. The denial was affirmed on judicial review by the district court.

On appeal, the Supreme Court of North Dakota affirmed. Mertz argued that the word "structure" should be deemed to include only buildings or structures like buildings. The court, however, noted that the City's definition of a structure—"something constructed or built … or composed of parts joined together"—included the attributes of a fence. It was reasonable for the City to decide that a fence is a structure. Mertz contended that holding a fence to be a structure led to an absurd result, under which a fence could only be built seven feet from a lot line. The court did not view that result as absurd.

The court also rejected Mertz's arguments that the ordinance was not a valid exercise of the police power, and that the City's decision was not supported by substantial evidence. And although Mertz contended that other residences in Elgin had structures within seven feet of lot lines, there was nothing in the record to show that the ordinance of which he complained had been in effect when those structures were built. *Mertz v. City of Elgin, Grant County*, 2011 ND 148, 800 N.W.2d 710 (N.D. 2011).

Florida District Court of Appeal upholds ordinance prohibiting sale of sides of hotel building for signage.

Malibu Lodging Investments, LLC, owned a multi-story hotel abutting Interstate 95 in Miami-Dade County. Malibu sold space on the north, south and east sides of the hotel for outdoor advertising signage. The County determined that such signage violated County ordinances prohibiting signs within 600 feet of an expressway right-of-way, and filed suit against Malibu. After a hearing, the trial court denied the County's motion for preliminary injunctive relief and dismissed the suit, holding that the ordinances the County relied on were unconstitutional.

On appeal, the Florida District Court of Appeal reversed. The court noted that the County had broad home rule powers to regulate signs. The ordinances in question were enacted for the stated purposes of protecting public safety, avoiding distractions endangering pedestrian or traffic safety, and protecting aesthetic or visual qualities of the County. The ordinances, said the court, were clearly a proper exercise of the County's home rule and police powers.

The court below had held the ordinances unconstitutional largely because they made no provision for the granting of a variance, citing the case of *Innkeepers Motor Lodge, Inc. v. City of New Smyrna Beach*, 460 So. 2d 379 (Fla. Dist. Ct. App. 5th Dist. 1984). The Court of Appeal, however,

held *Innkeepers* to be distinguishable, because there was no evidence in the instant case that the County's ordinances had been arbitrarily adopted, and Malibu had made no showing that the application of the ordinances had caused it a unique hardship, i.e., that such application was arbitrary, oppressive, or confiscatory. The ordinances, said the court, were not unconstitutional. The court remanded the case for entry of a preliminary injunction in favor of the County. *Miami-Dade County ex rel. Walthour v. Malibu Lodging Investments, LLC*, 64 So. 3d 716 (Fla. Dist. Ct. App. 3d Dist. 2011), reh'g denied, (July 22, 2011).

