

# ZONING AND PLANNING LAW REPORT

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## THE 2009 ZiPLeRs: THE FIFTEENTH ANNUAL ZONING AND PLANNING LAW REPORT LAND USE DECISION AWARDS

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Read this special award issue and you'll be able to Tweet your friends with the answers to these questions and more...

- What Pagan ritual involves putting a "for sale" sign on your car?
- Does Bob Dylan really have a smelly porta-potty?
- Is it a home occupation to perform lewd acts in front of a webcam and sell subscriptions to viewers?
- When is a 10-foot high boot not a sign?
- When are two signs, not one, one too many?
- What zoning criteria apply to rocket launching?
- Should you worry if your college-age son takes your car to the car wash every day?



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THE 2009 ZiPLeRs: THE FIFTEENTH ANNUAL  
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USE DECISION AWARDS ..... 1

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## The ZiPLeRs—A Brief History

If you’ve never heard of the annual ZiPLeR Awards, there will be some type of investigation, but before that we’ll give you enough background so you don’t further embarrass yourself. If you’ve followed the ZiPLeR Awards during all or part of the last 14 years, you still may need a little warm up, so read along.

ZiPLeR is an unofficial, unsanctioned and spell-check-confounding abbreviation for Zoning and Planning Law Report. Way back when it was West Publishing, before Thomson West, before the current Thomson Reuters, and before Balloon Boy—I’m talking way back when Kate and Jon were swooning and smitten, not bitter and bickering—the Zoning and Planning Law Report was already the leading monthly periodical for recent developments in zoning and planning. This was before e-mail, and websites, and RSS feeds, and Twitter and the rest of the nearly instantaneous information saturation. People actually got their first knowledge of the most recent developments and thoughtful analysis of important issues through ZiPLeR. It still leads the way, but now the in-depth articles are more important than ever, because they provide thoughtful reflections on the latest developments that come to us by the minute 24/7 through the scattershot of the internet.

“24/7”—reminds me of a hearing last year in which I was representing a Chabad seeking to build a synagogue. The rabbi, in presenting his plans to the local commission, wanted to emphasize his willingness to provide whatever information they needed and to let them know he would be responsive: “Anything you need, I will get that to you. I am available to you 24/6.”

Back to the coveted ZiPLeRs—all that is just ducky, but thoughtful reflection can get a little tiresome. Indeed, after looking at month after month of routine case reports and the lead, analytical articles, it occurred to me that a little something was missing. The editors were obviously picking the cases of general interest consistent with West’s highly developed classification system which, curiously, lacked a key number for “wacko land use cases.”

I saw those oddball cases around me in my own practice and heard tales of similar cases all across the country. I reached out to West and offered to put together a special issue on the unusual cases as a way to illuminate the more generic and universal themes, and fundamental truths. How is that for self-aggran-

dizement?—the trashy ZiPLER awards as our way of finding fundamental truths.

Anyway, some editor who I expect has long since been let go and is probably running a parking lot shuttle at the Panama City, Florida airport, decided that this was really a good idea, and he or she, whoever it was, let me do the first ZiPLER awards.

They took on a life of their own. Later editors never second-guessed the first decision. They just figured that this is something that West had to do every year, and so we've got away with it for 15 years now.

Regrettably, in the push to get these ZiPLERs to the press, I must report that we ran out of time to complete the final negotiations on a new special feature. But I can tell you this much—we're going to reach out to Tiger Woods, now that he has a little time on his hands, to be a guest writer for the ZiPLER awards. Our idea is to have him write about land-use issues with which he is familiar. The lead article is tentatively entitled "Utilizing Trees in Traffic Calming," and will describe how we can reduce vehicular speeds on our local streets, particularly by large vehicles, through the strategic placement of trees and other plantings.

I'll bet you are clueless as to who Thomson and Reuters are? You should know them; they are our gracious hosts. Let's start with the latter, who actually was the former.

Paul Julius Freiherr von Reuter (Baron De Reuter)—how's that for a name? It must have cost him plenty to have his shirts monogrammed—born in 1816, died in 1899, grew up in Germany and moved to London in 1845, where he went under the name Joseph Josaphat. I guess it really should be Thomson Josaphat, but they already made up all the signs and new letterhead, so we'll have to leave it as Thomson Reuters. A month later, after his arrival in London and his name change, he changed his name again, this time to Paul Julius Reuter. He went back to Germany and then on to Paris and eventually got into the news business, where he founded the Reuters News Agency. He sent messages between Brussels and Aachen, the North Rhine-Westphalia Germany spa city in the very western part of the country. Charlemagne's favorite place to reside was Aachen. In creating this Brussels-Aachen link, Reuter apparently was the first to make a complete connection between Berlin and Paris.<sup>1</sup>

You ready for this? He sent the messages by pigeon. Wouldn't it be great to get your ZiPLER each month by pigeon? Pigeons with zip codes on their tails. Think about it. Pigeons in your in-basket.

This carrier pigeon business was actually a good idea. These flying feathered friends were faster than the mail train, and as a consequence Reuter was able to get information on stock prices from the Paris stock exchange faster than anyone else.

In 1851 the carrier pigeons of Paul Julius Freiherr von Reuter (Baron De Reuter), aka Joseph Josephat, aka Paul Julius Reuter, retired to their roosts and the telegraph took over. Reuter went back to London and founded the news agency with which he is most closely associated. He succeeded in that business, because he already had staff in place all over Europe who could gather information on businesses so that he could sell it to newspapers. For an evening of pure enjoyment, you can watch the 1940 biographical film about Reuter, "A Dispatch from Reuters," in which our hero is played by Edward G. Robinson.<sup>2</sup> In the movie, Reuter's pigeon carries a message about poison that was mistakenly sent to a hospital, and thereby prevents a catastrophe. Who needs to go see "Avatar" when a movie like that is out there? Desperate to see it myself, I went to Amazon.com and Netflix—neither had it. But just as technology put the pigeons out of the message delivery business, technology saves us today—the movie is available free on the internet.<sup>3</sup> Attention Thomson Reuters people—this is required watching.

The lead name in this new team is Roy Thomson, who was born in Toronto, Canada, on the other side of the pond from Reuter, five years before Reuter died. An interesting connection exists between the two men, in that Roy Thomson was the son of a telegraphist (who later became a barber and worked at the Grosvenor Hotel in Toronto). He tried to join the Army in World War I but couldn't get in because of poor eyesight. He had many jobs after that, including farming and selling radios. Of course, back then there were few radio stations, so he decided if he was going to sell radios he needed to demonstrate to his potential purchasers they could actually listen to something on the air. He managed to get a license for a radio station frequency and a transmitter for a total cost of \$201, and went on the air with CFCH radio in 1931. That helped radio sales, but eventually he focused on the radio station and then purchased a newspaper, the Timmins Daily Press in Timmins, Ontario, with a down payment of \$200. He expanded to 19 newspapers and branched out into television in Scotland. He also purchased the largest group of newspapers in Britain, including the Sunday Times. Eventually he had over 200 newspapers in Canada, the United States, and the United Kingdom.

Interestingly, like Reuter, he was a baron—Baron Thomson of Fleet.

All right, you've had your dose of history and as much intellectual content as you're going to get. You can now switch into "trash news" mode and enjoy the simple pleasure of knowing that your local land use follies and foibles and your own occasional failings are nothing compared to what goes on in the rest of the country and even overseas. In reading the ZiPLERs you will experience a phenomenon, which we might label "relative inferiority," but also might be called the "Governor Sanford Effect" or the "Tiger-Woods-You-Don't-Get-A-Mulligan Doctrine." Imagine the husband who forgets to pick up the laundry on the way home, or buys a kitchen appliance for his wife's birthday instead of a nice piece of jewelry—he actually looks pretty good compared with our South Carolina governor and the sports icon. By the way, have you ever wondered why women who are politicians or sports heroes seldom seem to get in the same trouble? Can you even imagine Nancy Pelosi sneaking off to South America for a rendezvous with some gigolo, even as we seem to condone similar behavior in the latest reality television show—"The Cougar?" Serena Williams, the highest-paid female athlete, is worth \$23 million, a drop in the bucket compared to Tiger's estimated \$1 billion. And, yes, she was fined a record \$82,500 for her tirade at the U.S. Open, but it is unthinkable that she would ever get caught up in any real misconduct. There's something to this, but it is beyond the scope of the annual ZiPLER Awards. Perhaps Thomson Reuters will have a new periodical, "The Self-Destructing Celebrity Reporter."

The **Take-It-Or-Leave-It Award** goes to the Town of Wappinger, New York, for ordering Donald and Patrick O'Mara and their company, Property Management Inc., to remove a newly-constructed house which had been built, apparently unknowingly, on land subject to open space restrictions. The house was built, the restrictions were discovered, and town officials refused to give the plaintiffs a certificate of occupancy and told them to pick up and move the house.

The O'Maras sued in the U. S. District Court for the Southern District of New York, and won. The U.S. Court of Appeals for the Second Circuit certified to the New York Court of Appeals the question of whether the open space restriction was enforceable. After receiving the Court of Appeals' answer, the Second Circuit overturned the District Court's judgment that held the open space restriction to be unenforceable.<sup>4</sup> The case went back to the District Court for further proceedings, and the court filed its order on January

6, 2009.<sup>5</sup> The court held that the town of Wappinger was entitled to judgment on its claims that the house should be removed, describing one of the plaintiffs' arguments ("[T]he Town cannot now change its mind and decide to enforce the open space restriction after it allowed the house to be built") as "simply silly." How would you like to be the lawyer who has to pass on that decision to his or her clients?

As if that wasn't bad enough, the court said a claim for compensation was "not worth the trouble to address[.]" The court said there was no regulatory taking of the house: "plaintiffs have only themselves to blame for the fact that they cannot keep the house on Parcel E; they could have settled this action many years ago—and kept the house where it is—by agreeing not to develop the rest of parcels B and E. I do not fault plaintiffs for pursuing their lawsuit—indeed, they had an absolute right to persist—but they ran the risk of losing, and losing has inevitable consequences."

The lot is located at 1 Wildwood Drive. I looked at it on Bing.com and Google.com, and there appears to be a house there. I wrote to the clerk of the Wappinger Zoning Board of Appeals and the Town Supervisor, Christopher Coley, replied with this update: "The house is currently in its location and the Town is pending a final word from the federal court."<sup>6</sup>

We get so many zoning enforcement and interpretation cases each year that we couldn't possibly recognize them all, but what follows are a few of the stand-outs.

The **Half-A-Loaf-May-Be-Better-Than-None Award** goes to Denise and Mark Richmond of Deerfield, Illinois, who built a fabulous seven-bedroom, 20,000-square foot home before local officials discovered its close proximity to the North Branch of the Chicago River and that it was in violation of several laws including the building code, zoning ordinance, and floodplain restrictions. The village sued the Richmonds and it appears that about half of the house is illegally in the floodplain and might have to be removed.<sup>7</sup> Robert J. Sitkowski, AICP, AIA, the form-based code guru at Sustainable Development Strategies, LLC, made this nomination. Just as we seem to have animal cases every year, someone dealing with too many animals and some of them dealing with the wrong types of animals, this is the second year in a row that we've had a case involving cutting a house in half. Last year it was an estranged and angry husband who decided that the only way to partition the real estate owned with his soon-to-be former wife was to get some friends with chainsaws and cut the house down the middle and move his half to his parents' land. For



that, the unhappy hubby received the **Breaking-Up-Is-So-Hard-To-Do Award** last year.

There is a whole lot of finger-pointing going on here. Mark Richmond says it is the architect and builder. The lawyer for the architect says that nobody did anything wrong, and he has proposed putting up an earthen berm to prevent flood damage and getting the Federal Emergency Management Agency to remove the property from the floodplain map. When he “floated” the idea to FEMA, its senior national flood insurance program specialist for the region said that building in the floodplain had to be addressed first.

The first-ever **Give-Them-The-Boot Award** goes to the Victor New York, planning board for deciding that a 10-foot high L.L. Bean hunting shoe, the iconic lace-up boot with the rubber bottom and leather top that we here in New England wear almost continuously from November through the end of mud season, was not a sign. The boot was proposed to be placed outside the L.L. Bean store at the Eastview Mall. My thanks to Patricia Salkin for passing on the message from Tom Warth at Hiscock & Barclay in Rochester, New York about the case.<sup>8</sup> If it wasn’t a sign, as the lone dissenter on the board argued it was, then what was it? “They had a site plan approval that had to be modified and we gave them the modification they asked for that site feature,” said Planning Board Chairman Bob Davis. Oh, a “site feature”—I like that; I can use that next time I have some 10-foot high thing out front that attracts people to a store and the planning board tries to call it a “sign.”

The **We-Are-Just-Working-Girls Award**, in yet another enforcement case, goes to [www.cocodorm.com](http://www.cocodorm.com), which operates a website offering pornographic video over the internet for a fee. Thank you, Lora Lucero, for this nomination. Patricia Salkin also reported on it on her blog at [www.lawoftheland.wordpress.com](http://www.lawoftheland.wordpress.com). This isn’t the first enforcement case of this type. There was one earlier involving [www.voyeurdorm.com](http://www.voyeurdorm.com), in which the court held that having attractive young women parading around a house wearing little or no clothing was not a home occupation or business use requiring any zoning approval in a residential zone, because all of it was conducted on the Internet.<sup>9</sup> You should know I do arduous fact checking for these awards, including thoroughly checking out these sites to investigate the content. The [www.voyeurdorm.com](http://www.voyeurdorm.com) site is still up. Unfortunately, my stick-in-the-mud I.T. people have blocked access so I can’t complete my research.

The city of Miami issued an enforcement order against the [www.cocodorm.com](http://www.cocodorm.com) operation. Residents

of the house are paid, with free room and board, to engage in sexual activities that are picked up by webcams and put out on the Internet. As with [www.voyeurdorm.com](http://www.voyeurdorm.com), you can subscribe to the internet feed and buy magazines and DVDs shipped by the U.S. Postal Service or other carriers. The servers and the related equipment for the recorded video feeds are not in the house, and the address of the house is not on the website. No customers or vendors visit the house, and all of the business aspects are conducted elsewhere.

Given these facts, the federal district court ordered the enforcement order to be withdrawn.<sup>10</sup> Good news for all of you readers looking to start up a home business and make a little extra cash during these tough times. Maybe we could do [www.zoningdorm.com](http://www.zoningdorm.com) (the domain name is available) with live webcam feeds showing lawyers pouring over zoning maps and preparing a variance application to allow a homeowner to bake and sell baklava from a residence, or crafting a slope easement for a turning lane on a subdivision map. Now, you’re talking excitement.

I know the readers of the ZiPLER Awards have a special interest in these cases involving sex, so here are a couple more.

We give special thanks to Prof. John R. Nolon of Pace University School of Law for this nomination. Apparently, Prof. Nolon spends a lot of time on the Internet keeping up with these types of cases. We are pleased to give two awards, the **Stop-Needling-Me Award** and the **Keep-Your-Hands-Off Award** to the several operators of acupuncture and massage parlors, respectively, in Vista, California, who somehow escaped prosecution in a recent sting operation. The effort was undertaken by the Vista City Council to put an end to prostitution and sex trafficking through these businesses. A handful of the approximate 20 such businesses in town were found to be places of illegal operation during the enforcement action. In recent years, the Sheriff’s Department had arrested 11 adults and one juvenile on suspicion of prostitution, prompting new regulations and the crackdown.<sup>11</sup> The new regulations limit the number of massage therapists at day spas to one therapist for each acupuncturist. A minor-use permit is required for new day spa operators.

The **Tempest-In-Tiverton Award** goes to—who else?—Tiverton, Rhode Island, a cute little town, which appears to have lost a longtime merchant over the question of whether she had too many—one too many, two, not one—signs on her property.<sup>12</sup>

Louise Silverman has operated Sakonnet Purls, a knit shop at 3988 Main Road in Tiverton, for 24 years in a former 18th-century farmhouse. She has now put that property up for sale and plans on moving out of town, all over the controversy as to whether she can have one sign on the property or two. She had a sign on the front of her business, and then she rented a shed in the back to Back Alley Woodworks, a furniture restoration business. In December 2008 she put a second sign out front identifying the business in the shed.

Neighbors filed a complaint and lawyers showed up on both sides. Ultimately, the Tiverton Zoning Board of Review decided that only one sign is permissible. "With this nonsense that went on, I think it is time to move out of Tiverton," said Silverman.

The first-ever **Actually-This-Is-Rocket-Science Award** goes to the Augusta County, Virginia Board of Zoning Appeals, which voted 3-1 to deny a special use permit for the Valley Aerospace Team ("VAST") which had sought approval to continue launching rockets from a 500-acre site in Swoope, Virginia.

These rockets are big, up to 15 feet in height. The Valley Aerospace Team had been launching regularly from the site for over a year and didn't know about any neighborhood objections. An agent for the group offered research that showed people are "400 times more likely to be hit by lightning than by rocket." Apparently not convinced by this comforting statistic, the neighbors showed up in large numbers, one of them bearing a petition with over 100 names on it. This is largely an agricultural community, and several speakers complained that the noise of the rockets bothered their animals. One owner said his horse "became unglued" by the sound of the rockets, a most unfortunate turn of a phrase, I should say.

A zoning board member, in voting to deny the special use permit, said he didn't disapprove of the activity but "it's just a bad site. Swoope is true agriculture and not the place for it."<sup>13</sup>

From the VAST website, we have this announcement: "All VAST Launches are: NO GO Until Further Notice. VAST Special Use Permit was denied by the County of Augusta Board of Zoning Appeals on September 3rd, 2009. VAST has hired an attorney to appeal the decision to the Circuit Court of the County of Augusta."<sup>14</sup>

We are pleased to present this next award to Dale "Dee" Hage of Barnegat Township, New Jersey, and wish her good luck in her entrepreneurial endeavors. The **Your-Bigger-Problem-May-Be-The-Name-Of-**

**Your-Business Award** is given to celebrate Ms. Hage's hard work to establish herself as a hot dog vendor working out of a \$37,000 trailer plunked down along the side of Route 9 on rented land where she dispenses such fine cuisine as her \$5 special—two hot dogs, a paper bag of fries, and a soft drink. Her business is called "Dee'z Dirty Water Dogz," thus the name for this award. She had a full-time job and had set up this business to supplement her income.<sup>15</sup>

Anyway, some local businesses complained—I doubt it was Morton's The Steakhouse—and thus commenced a zoning enforcement action. She took her case to the zoning board, seeking a use variance.

When I get these stories, I do some research and then do some follow-up, sometimes calling or e-mailing people involved and searching for later stories. The end of this story is not a happy one. Her variance was denied, and she didn't have enough money to do the engineering work necessary to get the approval she needed. "I love this town, and it sucks that I have to now take my truck and bring it somewhere else," Hage said.<sup>16</sup> She got laid off from her full-time job and is now unemployed. Sure, maybe she was foolish for setting up her hot dog stand without carefully checking to determine what approval she might need. But it is important to remember that sometimes little zoning problems can result in big impacts on the lives of people.

Follow her on Facebook.<sup>17</sup>

Perhaps the flip of that life lesson is that sometimes big people can have little zoning problems. It is for this reason that we award Sir Cliff Richard, the 68-year-old singer, the **Millennium-Prayer Award**, named after his 1999 charity single in which he sings the Lord's Prayer to the tune of "Auld Lang Syne." He'll need a lot of prayer to get past the pending order to demolish his £30,000 conservatory, which is oversized and without permits. He put up the 17-foot by 13-foot structure three years ago at his £1.3 million mansion in Virginia Water, Surrey.

His estate was built in place of the original building on the property and, without the conservatory, had already reached the 30% floor area limit permitted under local law. Michael Kusneraitus, on the Runnymede Borough Council's planning committee which ordered the enforcement, worked in ten of the singer's song titles in addressing the alleged violation. He said: "If the 'Bachelor Boy' was successful in appealing the committee's decision, they might all be singing 'Congratulations'."<sup>18</sup>

Talking about celebrities with enforcement problems, I thank my friend Michael Berger of Manatt, Phelps & Phillips, LLP in Los Angeles for sniffing out and bringing to our attention neighborhood complaints about none other than Bob Dylan and his allegedly smelly portable toilet that he has at his Malibu property. According to the newspaper report “the stench made members of one family ill and forced them to abandon their bedrooms on warm nights....”<sup>19</sup> For six months, Dylan has done nothing in response to the many complaints. One neighbor has been relegated to installing five industrial-sized fans in their front yard to blow the stink back toward Dylan. The city manager said he drove by once and couldn’t smell anything or see it. The neighbors are still complaining vehemently: “It’s worse when it’s misty outside at night. We turn on the five fans, but it still gets inside our house. We are not even using the upstairs now. We sleep downstairs.” Another neighbor: “We both have allergies and are sensitive to chemicals. I finally noticed that they had moved the porta-potty directly in front of my front door.”

Oh, you ask, what is the name of this award? Forgive me, I can’t help myself—the answer, my friend?—it is the **Blowin’-In-The-Wind Award**.

Jumping back over to the other side of the country, we note a tiff, not the tax increment kind, among the hoi polloi on Park Avenue in Manhattan. We present the Park Avenue neighbors with the **You-Can’t-Cater-To-Everyone Award**. Whether the Christian Science Church dishes out food for the soul or food for the stomach or, more likely, the poor (both literally and figuratively) church is an innocent third party. It all started in 2006 when the church, having lost many members and without enough money to take care of its 60,000 square-foot edifice at 583 Park Avenue at 63rd Street, entered into a lease with the Rose Group, a catering company.

The church is a magnificent structure, a four-story neo-Georgian corner building built in 1924. It is in a residential district, but the church got a waiver to allow it to be used for the catering tenant as an “accessory use.” Church members continue to meet there a couple days a week, but the catering activity has virtually taken over the building and dominates the use. The city revoked the accessory use waiver, but the church went to court and won, based on its claim that it had been treated differently than other buildings close by. That decision is on appeal.

The problem is that major events are now taking place in the church with increased traffic. Earlier in the year, it was the Oscar de la Renta 2009 Resort Wear

Show. Paul McCartney has appeared there on behalf of an environmental group. The neighbors want the caterer out of there. “These are strange people in my book. They crept into the neighborhood, they didn’t ask anybody if it was O.K., they didn’t come around and talk to us—we found out ourselves, and they seem to play by different rules than everyone else.”<sup>20</sup> The neighbors have lawyered up and the caterer has nine, count them, nine lawyers fighting on various fronts.

The catering operation is important to preserving the building because the church gets a minimum of \$250,000 a year with a guaranty under the contract, which requires the caterer to pay the church 10% of the catering hall’s revenue. The building needs work—the estimated cost to repair the roof and restore the slate is \$1 million. The catering business also pays the city more than \$300,000 a year in sales tax and has some 600 employees.

Meanwhile, that repair work has been suspended because money is being spent on lawyers and the neighbors continue to fight: “We didn’t really bargain for this. This isn’t running a hotel or any other kind of business; this is just having parties,” said a neighbor. And the parties do keep coming—Oscar de la Renta had his pre-fall 2010 show in the church on December 7, 2009.<sup>21</sup>

Church, state and land use also joined up in Tulsa, where the Tam-Bao Buddhist Temple on 16933 East 21st Street applied to amend its site plan to place a 49-foot tall granite statue of Buddha’s goddess Quan Am 300 feet back from the street. The zoning board of adjustment granted the amendment by a 4-1 vote, doing its best not to get caught up in a religious discrimination claim. As board member Clayda Stead said: “This board is generic when it comes to religion.”<sup>22</sup> Ms. Stead is the lucky winner of the **Fine-Choice-Of-A-Word Award** for her magical misuse of “generic” that most certainly has immunized the city from any claim of religious discrimination.

Here is a snippet about this famous goddess Quan Am (see how much you can learn by reading the Zi-PLeR Award issue?): “Quan Yin is one of the most universally beloved of deities in the Buddhist tradition. Also known as Kuan Yin, Quan’Am (Vietnam), Kannon (Japan), and Kanin (Bali), She is the embodiment of compassionate loving kindness. As the Bodhisattva of Compassion, She hears the cries of all beings. Quan Yin enjoys a strong resonance with the Christian Mary, the Mother of Jesus, and the Tibetan goddess Tara.”<sup>23</sup>



Who wouldn't want her for a neighbor? But 49 feet tall? It turns out that the temple site is in an agricultural zone which has no height limitation. This is not the end of the permitting process, however. The Harvey Young Airport is a mile and a half away, and the statue is so tall that the temple will now need to get approval from the Federal Aviation Administration. Harvey Young is a small, privately-owned, general aviation airport with two runways, one paved, each 2580 feet long. It will be quite a surprise for pilots approaching the field to glance over and see a five-story woman.

Speaking of big statues, municipal officials in Anchorage, Alaska have issued a cease-and-desist order against the people who put up another iconic figure. The article which drew my attention to this enforcement problem is dated December 23, 2008. We have a few awards given for items discovered in December, because it takes a long time to get all these materials together, have our selection committee flown in from the four corners of the globe, complete all the background checks of potential winners, and then make the arrangements for the eventual grand ceremony, which this year we have scheduled for one of my favorite fine dining venues, the Squat and Gobble Restaurant in Bluffton, South Carolina, near Hilton Head.<sup>24</sup> I wanted to give you a reference so you could see that there really is such a restaurant, but in the process I discovered that there are several pretenders around the country who go by the same name, including restaurants in San Francisco (there are five listed on their website)<sup>25</sup> and Vernon, New York. But I tell you, as far as I'm concerned, there's only one Squat and Gobble and it's in Bluffton. Ask my friends, Andy Gowder and Trenholm Walker of the Pratt-Thomas Walker law firm in Charleston, and they'll tell you.

Back to the problem in Anchorage. It seems that some local zoning miscreant—every town has at least one—built an enormous snowman, now nicknamed Snowzilla.<sup>26</sup> This monster was first created in 2005 and was 16 feet high, but from looking at the photograph of the current version, it appears that he is approaching 30 feet in height. Snowzilla has the usual accoutrements—the carrot nose and corn cob pipe, but our “going rogue” and “mavericky” friends in the far north have made his eyes out of beer bottles.

Snowzilla became a public hazard in a couple of ways. There were traffic jams in front of the home where Snowzilla was re-created last year, and it was feared he might collapse. Where do you find “snowman” in the building code? There are instructions on line on how to build a snowman and, of course, a

PowerPoint.<sup>27</sup> You can even find guidance on building an eco-friendly snowman with helpful points like this: “**The Pipe/Mouth.** Your *snowman shouldn't smoke*. It sets a bad example. Instead, find a peanut butter jar with a red lid. You can cut out the middle of the lid for a surprised ‘O’ shape. Or cut the lid in half and make the snowman's lips as thin or as thick as you'd like.”<sup>28</sup>

The **Snowzilla-Lives! Award** goes to the brave soul(s), yet unknown, who will step forward and in an act of civil disobedience defy the court's order and bring Snowzilla back to life. Thanks to Peter Olson, a lawyer in Bethel, Connecticut, for making this great nomination.

The lead builder of Snowzilla and the person on whose property Snowzilla lives is one Billy Powers, who according to the mayor's office operates a junk and salvage operation at his home. He has violated land use codes for 13 years, says the city, and he reportedly owes more than \$100,000 in fines and other assessments.<sup>29</sup> Billy Powers responded: “I have tried to jump through every goofy hoop they have sent to me. I have never been confrontational and it goes on and on and on and it is so goofy. Some of it is unfounded, some is just outrageous.”

The **I-Scream-You-Scream-We-All-Scream-For-Ice-Cream-And-Six-Chairs-Have-To-Get-Gone Award** goes to the Department of Business Affairs and Consumer Protection of the City of Chicago for enforcing the City of Chicago Municipal Code 10-28-805, regulating sidewalk cafés. Dennis and Mardi Johnson Moore have been operating Scooter's Frozen Custard at the corner of Belmont Avenue and Paulina Street for the last six years. It has become, according to the Chicago Tribune, a “neighborhood institution, beloved by parents, dog owners and locals for its custard—and also for its chairs.” The Moores set the chairs out on the sidewalk where people could sit and enjoy their custard, but guess what? You can't put chairs on the sidewalk unless you are a permanent sidewalk café, and they did not have a permit. On June 30, 2009, an inspector issued an order directing the removal of the chairs.

Social networking sites are increasingly used in cases of public controversy. The store's Facebook page was quickly filled by many people expressing support for the chairs. The owners posted this: “Scooter's Frozen Custard. Thank you to all who have supported us in the loss of our outdoor seating. We are truly humbled by the community support. Below is a link to join the cause started by a customer... ‘Save the Chairs at Scooters Frozen Custard.’ It is just one of many gestures that truly bring tears to our eyes from the



support of our Fans, Customers, Friends and Neighbors.”<sup>30</sup>

The **Devil-Is-In-The-Details Award** goes to the Village of Glendale, Ohio, which lost a case in the U.S. Court of Appeals for the Sixth Circuit brought by none other than Christopher J. Pagan, because the municipality failed to carry its burden of proof that a law prohibiting motor vehicles parked on the street with “for sale” signs “directly and materially advances its regulatory interests.”<sup>31</sup> You will want to read the prior Sixth Circuit decision in 2007, which gives more detail.<sup>32</sup>

There’s plenty of history in this case, but the simple facts are these. In July 2003, Pagan put his 1970 Mercury Cougar XR7 out on Sharon Road with a “for sale” sign in the window. He then was the lucky recipient of a notice from the Glendale Police Department that he was in violation of a traffic code provision which makes it illegal to park a car on the street “for the purpose of displaying it for sale.” Here’s the ordinance, Section 76.06:

It shall be unlawful for any person to stand or park any vehicle, motorized or towed, upon any public or private street, road, or highway within the village or upon any unimproved privately owned area within the village for the purpose of:

(A) Displaying it for sale, except that a homeowner may display a motor vehicle, motorized or towed, for sale only when owned and titled to said homeowner and/or a member of said household, and only when parked upon an improved driveway or apron upon the owner’s private property;

(B) Washing, maintaining or repairing such vehicle except repairs necessitated by an emergency;

(C) Any advertising.

To avoid being cited, Pagan removed the sign, but then sued Glendale and its chief of police claiming that the law was unconstitutional because it infringed upon his right to engage in commercial speech as protected by the First Amendment.

In the end, Glendale lost because it failed to offer any evidence of its need for the regulation or to address in any way the narrow tailoring prong. The Institute for Justice represented Pagan. You may recall that IJ represented Susette Kelo and her neighbors in *Kelo v. New London*, the notorious U.S. Supreme

Court eminent domain decision allowing the taking of private property for redevelopment by private developers. They had this to say about the Pagan case on their website: “In July 2003, the City of Glendale, Ohio, a suburb of Cincinnati, threatened Chris Pagan with a hefty fine and even jail time because he put a ‘for sale’ sign in the window of his car. Glendale bans the words ‘for sale’ from parked cars because it thinks people will walk into traffic and get run over while looking at them.”<sup>33</sup>

Might that have been a sufficient rationale if the police chief could have shown some accident history? The Sixth Circuit chided Glendale for offering no evidence on the rationale: “Glendale gambled that the court would adopt its view of the case [that the chief’s affidavit was sufficient], and lost.”

The **Your-Wife-Will-Thank-You-For-Keeping-The-Family-Car-Clean-Until-She-Finds-Out-Why Award** goes to the City of San Antonio, which is doing all it can to limit the secondary effects of car washes. The problem began in April 2008 when a local businessman, Richard Arsate, opened the Bikini Carwash along a major street on the South Side in close proximity to schools, churches and revival halls. The attendants at the facility were women and they were attired in bikinis which, according to my (what else?) Merriam-Webster dictionary is “a woman’s scanty two-piece bathing suit.” The neighbors complained, and the police were called to clear up numerous traffic jams apparently caused by drivers slowing down to observe the operation and to get into line to get their cars cleaned, perhaps for the second or third time that day.

Thank you Bryan W. Wenter, Assistant City Attorney in Walnut Creek, California, and Planetizen for this nomination.

A city councilwoman, Jennifer Ramos, proposed a new law which would require sufficient screening so that the scantily-attired workers (would they hire a guy wearing a Speedo?) would be out of public view. The city’s Development Services Director, Rod Sanchez, emphasized that “this ordinance does not prohibit a bikini carwash operation, but what it does require is that the washing, drying, polishing go on out of public view; basically, that you can’t see it from the road. Nor are we telling people how to screen. If they want to put up a fence, or screens, or trees or rearrange an operation so that the building will block the view, they are free to do that.”

There is an interesting back story. Members of the nearby Theo Avenue Baptist Church took over Bikini Car Wash just a month after it opened, got rid of the women who were wearing bikinis, and reopened the business under the name “What Would Jesus Do.”<sup>34</sup> There is no report on whether cars in the area are being kept as clean as they were previously.

For those interested in knowing more about this emerging urban phenomenon, go to “The Charity Bikini Car Wash!” on line with 45 photographs of an event in Indianapolis this last summer.<sup>35</sup> I’m pleased to report that our I.T. filter failed to stop your diligent researcher from his work. The trend does not seem to be spreading to New England, where as I write this in late December, it is 15 degrees and a winter storm warning has been posted for more than a foot of snow...

The **There-Are-Dollars-In-The-Dénouement Award** goes to Edward G. Burg of Manatt, Phelps & Phillips, LLP in Los Angeles for getting his client, Palo Alto-based developer Charles J. Keenan, an \$18 million settlement of his taking claim against the City of Half Moon Bay, California. Michael Berger, his law partner of many years, nominated him. The City of Half Moon Bay, California, received a 2007 ZiPLER prize, the **Inverse-Condemnation-Full-Monty Award** for creating wetlands on a 25-acre parcel that destroyed the potential for development of a previously-vested, 83-home residential subdivision. Half Moon Bay was ordered to pay \$36.8 million—\$3,000 for each and every resident of the city of Half Moon Bay. The term “Full Monty” is invoked not only in deference to the name of the winner, but also because of the bare facts supporting the decision.

A deal was struck by which Half Moon Bay would agree to do what it could to get relief from certain restrictions at the state level to enable development of the property and, if they couldn’t do that, they would pay \$18 million in settlement. Half Moon Bay failed to get the relief, and in July 2009 the city issued bonds totaling \$16,439,507 to go towards the \$18 million that it ultimately did pay in August 2009.

Now what? According to the San Mateo County Times, the city intends to “repackage” the property and sell it to a developer later on for maybe as much as \$15 million.<sup>36</sup> Mayor John Muller was quick to pass the blame to the state legislature: “We sold the bonds. It’s a gratifying, sad experience. It’s been a long three years of this thing. Sacramento was never going to be on our side, I don’t think. It’s just a mess up there.”

What exactly does it mean to “repackage”? For one thing, according to the newspaper “The city will drain certain areas of the property to keep new wetlands from forming...” Also, the mayor, now that he owns this land, has some new thoughts on the 100-foot buffer the city has required around wetlands since the 1990s, a large buffer which virtually prohibited development of the site. “We’re trying to find out what a wetland is and what it is not. We’re hoping to make it a 25-foot to 50-foot buffer. Otherwise it’s just outrageous. We want to ensure the guidelines are met but that it’s not exorbitant.”

Funny thing how government’s perspective changes once it becomes the owner and potential seller of property...

When we notified Ed Burg of his selection to receive a ZiPLER, and to tell him to get his reservation in for family and friends for the big gala at the Squat and Gobble, he was overcome with emotion at receiving such a prestigious accolade. Regaining his composure, he said: “the City (which has an annual budget of \$10 million) will be paying \$1.2 million per year for the next 30 years to pay off the bond. No, they can’t drain without [Coastal Commission] approval. When our client tried to drain the property 10 years ago (shortly after the “W” word was first mentioned), the City called the police and they threatened to arrest him unless he stopped. He stopped.”

Do you think the Coastal Commission will give the city a break?

This is not the first time we’ve seen this change of heart. Remember *Lucas v. South Carolina Coastal Council*,<sup>37</sup> the 1992 U.S. Supreme Court decision in which the Court found a categorical taking when David Lucas was prohibited from developing his two waterfront lots and there was no economic use remaining? The state of South Carolina ended up paying \$1.5 million for one lot and then turned around and offered the lots for sale for development at \$450,000, more than the \$425,000 paid to Lucas. Andy Guagenti, a neighbor, offered \$315,000 and promised to keep it undeveloped to protect his view, but the state rejected it, saying it needed the full \$450,000.<sup>38</sup>

The **Happy-Ending Award** goes to the lucky and thankful William Daeder of Sunrise, Florida, who back in June was threatened with a lawsuit to clean up his property, which has been described as the ugliest house in the city. At the time of the threatened lawsuit,

he had already accumulated more than \$200,000 in fines for what town officials described as an “endless junk pile” that was damaging property values in the neighborhood and had created a safety hazard.<sup>39</sup> You can take a look at the house by going to Bing.com or Google.com and plugging in the address, which is 9511 Sunset Strip, Sunrise, Florida. Special thanks to my assistant, Diane McGrath, for spotting this one.

Commissioner Larry Sofield didn’t hold back in describing the property: “This house is the worst in the city. There are others, but this is the worst. We just want to get the junk off the property.”

That junk includes a rusted 1963 flatbed truck cab loaded with junk. There is only a narrow path to the front door, because the front yard is filled with fish tanks, wires, cords, metal rods, a brass bed frame, a wicker chair, Christmas lights, and at least one refrigerator, maybe two. He says people give him junk like the refrigerators. He gets \$5 each for the metal when he takes them to the scrap yard, and it helps pay for gasoline. The first citation he got, back in December 2005, noted an overgrown tree requiring removal. Later citations reference the damaged roof, rotting wooden fence, two inoperable vehicles which have since been taken away and replaced by the flatbed truck, and all of the potpourri of junk filling the yards all around the house. How can Daeder stand living in this mess?: “I like it this way. It keeps the Mormons away.”

Things turned around for Daeder in June 2009, when Commissioner Sofield’s idea that neighbors might volunteer to help him out got traction and a group of helpful citizens came in and cleaned up the place.<sup>40</sup>

Now, if Daeder’s house is no longer the ugliest house after the cleanup, whose is? That honor went to Debra Higgins, who has more than \$600,000 in fines pending on her home for code violations. Commissioner Sofield was back on the job again with more volunteers, who came to the home and filled up a 40-yard dumpster with all of the detritus they cleaned from the yard, including a beehive where 90,000 honeybees were nesting. If you don’t know what 40 cubic yards is, a small single-rear axle dump truck carries 5 cubic yards or less, and a large dual-axle dump truck is about 9 cubic yards, so figure 4-5 really large dump trucks full of trash from Debra Higgins’ yard.

Here’s the coup de grace: among the volunteers was William Daeder, who said: “It’s always good to help people out, You help people out and good things come to you.”<sup>41</sup>

I’m thinking that if reality TV shows like “Biggest Loser” can make it, why not one on the theme “Ugliest House”?

There were many other reports of residential properties with junk in their yard. As much as we would like to, we can’t give them all awards, but we do want to give one honorable mention. For Wade Dunston, Jr., we have an honorable mention under the **Just-Trying-To-Make-A-Living** category. Dunston lives in Mount Rainier, Prince George’s County, Maryland, with his mother, Lillie M. Dunston, who is the record owner of their property.<sup>42</sup>

Wade Dunston has been cited more than 50 times since 1999 for trash on his property which by various reports has included television sets, tires, firewood, old lawn furniture, plastic toys, a large trunk, and something that appears to be a woodburning stove.

He may be getting a little more attention than others with messy yards because he lives just two blocks from the Mount Rainier Municipal Building. Dunston explains: “a lot of times people bring things to my yard and leave them there, and I take them to the scrap yard.” He says that local authorities “know I do this for a living. The economy’s really hard right now. I’m just trying to make an honest living.”

Wade Dunston, and we’ll throw in an honorable mention for his mother as well, deserves this special recognition because it is the first time in the history of Prince George’s County that the illegal dumping statute has been used on a residential property. Up until now, it has been applied only to businesses. Dunston and his mother have been indicted on misdemeanor charges of illegal dumping and face a possible five years in prison and a \$30,000 fine.

We have another group of regulars every year—treehouse builders. People love to build them in their yards, and they seldom get permits. Neighbors complain and zealous zoning enforcement officials go after them.

The **Leading-With-Your-Chin Award** goes to Brian Shackelford, a Highland, Arkansas contractor who decided to build his children a treehouse out of scrap lumber after their swingset fell apart. It’s quite an impressive treehouse, standing 15 to 20 feet tall, with

two platforms at different levels, slide and swing, rope ladder, stairs and a second-floor enclosed room with window and door. I owe Michael Berger for this nomination.

Shackelford picked the only place in his yard that was fenced, so his children and their friends would be protected. Problem is that area is in the front yard, where everybody driving by can see it, including the ten or so people who have already lodged complaints. As one neighbor explained: "It was a couple old people who don't want to look at it. I guarantee that's who it was. It does stand out."<sup>43</sup>

Actually, you do have to give credit to the Highland code enforcement officer, Ralph Sharp, who went out of his way to warn Shackelford during the time Shackelford was building the treehouse that if the city received a written complaint, code enforcement would be required to act.

Thank you to Planetizen for reporting on this case. See their website at [www.planetizen.com](http://www.planetizen.com).

Our other treehouse of note this year is even more magnificent.<sup>44</sup> It has a ton of pressure-treated lumber, 500 lag screws and nuts, over 1,000 feet of rope, and 48 feet of rebar. It is adorned at the very top with a copper squirrel weathervane some 50 feet above the ground. This four-platform treehouse, which cost \$12,000 to build, can be found in Worcester, Massachusetts. The **Look-Before-You-Leap Award** goes to the builder of this elaborate structure, Michael Chapman, who learned something from the experience: "If I had done it over again, I would have tried to be more detailed in my pre-negotiations with my neighbors. But hindsight is 20-20." The city ordered him to tear it down by November 2, 2009, or face fines of up to \$300 a day. The city has not responded to my inquiries for an update. My thanks to my assistant, Diane McGrath, for finding this great nominee.

This treehouse has caused some real acrimony. A next-door neighbor, Rudy Cepko, asked Chapman to scale back the project, but he didn't. Cepko complained to city officials and angry words were exchanged, one neighbor to another. Chapman accused Cepko of threatening to burn down the tree house and to kill him. Cepko replied: "He can say whatever he wants. If there was a death threat, the police would've been involved. It's just really goofy." That's at least the second time during this award period that the term "goofy" has been invoked; the other, you may recall,

was in the Snowzilla case. What does that tell us about the intellectual quality of zoning debates?

It would hardly be the ZiPLER Awards without some animal cases. Every year we have several of these. There are so many this year that we just can't give individual awards, so we're presenting, for the first time ever, a single **Menagerie Award** which will be shared by four lucky recipients: (1) Hollywood, Florida, for enforcing its no-chicken rule; (2) Griswold, Connecticut, which has had problems deciding whether to allow the expansion of a cat sanctuary with 70 cats in a small house; (3) York, Pennsylvania, where local authorities have said that miniature donkeys are not pets because you can't eat them, breed them (these poor critters are geldings, give 'em a break) or milk them; and (4) New London, Connecticut, where the planning and zoning commission voted 7-0 (votes were appropriately recorded as seven "nays") to deny the homeowner the right to keep two mustang horses on her city lot.<sup>45</sup>

Time and again, these animal cases are about too wild, too big, too many. In many communities the regulations don't contemplate the variety and number of critters that people claim as pets.

One of the most popular all-time ZiPLER Awards is the one we gave in 2007 for street names—the **Wait'll-This-Pops-Up-On-Your-GPS Award**—especially one of the street names, Farfrompopen Road in Tennessee. We fact-check these. They are real. Audiences have reacted like fourth graders. It has been delightful to watch grownups giggling, smirking and mouthing the street names as we have run through them.

This year, we went back overseas to see what was going on with place names in Great Britain, hoping that there might be something half as good as what we have right here in the states. It turns out that the Brits are even better at picking names.

The **Don't-Laugh-We-Live-There Award** goes to the residents of Crapstone, England. They have rivals, however, including those in Ugley, Essex; East Breast in western Scotland; North Piddle in Worcestershire; Butt Hole Road in South Yorkshire; and Spanker Lane in Derbyshire. But then again, maybe you will be lucky enough someday to live in Crotch Crescent, Oxford; Titty Ho, Northamptonshire; Wetwang, East Yorkshire; Slutshole Lane, Norfolk; Thong, Kent; or even Pratts Bottom, Kent. Try pronouncing this tidy village—Penistone, South Yorkshire. Wrong. It's PENNIS-tun. One local is even careful to spell it in



a way that eliminates the obvious—"p-e-n" and then "i-s-t-o-n-e."

We have given awards in the past for street name and place name generators, which are capable of coming up with some fun and lively names. We found a variant of that in the "Sustainability Buzzword Generator," which is a game you can play sitting around with your land-use friends. Uly Ma (apparently no one gave his parents one of those baby name books), who invented the game, is the winner of our **Nomenclature-For-Numb-Noggins Award**.<sup>46</sup> Look at the three columns below. You can play two different games. In game one, you sit quietly in meetings, appearing to take notes, but actually what you're doing is checking off each buzzword every time it is used.

The person who says the most buzzwords wins. Alternatively, a word that gets the most hits could be selected as the winner, but that seems unsatisfying as there is no way you're going to get a word to buy you drinks at the bar after the meeting.

In game two, you actively participate in these meetings with your sustainability friends, and rather than stumbling over these sometimes difficult to pronounce and awkward juxtaposition of terms, you call numbers, such as 7-3-9 for "future development strategies." Obviously, everyone else has to have the three-column buzzword checklist. It's a little like the shorthand notation for defensive baseball plays.

<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
1. sustainable	1. regenerating	1. agenda
2. green	2. management	2. initiative
3. responsible	3. development	3. concept
4. integrated	4. organizational	4. program
5. equitable	5. team	5. project
6. balanced	6. policy	6. capability
7. future	7. adaptive	7. options
8. renewable	8. change	8. plan
9. ethical	9. environmental	9. strategy
10. social	10. corporate	10. forum
11. holistic	11. long-term	11. consultation
12. stakeholder	12. responsibility	12. vision
13. radical	13. materiality	13. assurance
14. aggregate	14. engagement	14. matrix
15. closed-loop	15. cradle to grave	15. solution
16. competency	16. assessment	16. network
17. triple bottom line	17. convergence	17. method
18. intelligent	18. network	18. theory
19. inclusive	19. impact	19. aspect
20. CSR	20. observation	20. tactics
21. Non-Governmental	21. readiness	21. compact

We really had some great nominees this year, many deserving of awards but too numerous for detailed discussion. Several of the *crème de la crème* are collected in a last footnote to this article so they are not lost forever.<sup>47</sup>

Thank you all for your great contributions throughout the year. Keep those cards and letters coming to me a dmerriam@rc.com. Follow my postings on <http://imlablog.wordpress.com/category/land-use/> where occasionally a nominee is featured during the year.

Have a wonderful 2010 and stay positive—this could be your year to nominate or win a coveted ZiPLER Award.

## NOTES

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3. [http://www.ovguide.com/movies\\_tv/a\\_dispatch\\_from\\_reuters.htm](http://www.ovguide.com/movies_tv/a_dispatch_from_reuters.htm) or <http://tinyurl.com/yc9rbe8>. I will give you these long web addresses in an alternative form from [www.tinyurl.com](http://www.tinyurl.com). It takes these impossibly long addresses and converts them into something you might be able to type. What I usually do is take the title of the article and Google that, rather than type any web address.
4. *O'Mara v. Town of Wappinger*, 518 F.3d 151 (2d Cir. 2008).
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