ZONING AND PLANNING LAW REPORT

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# THE 2012 ZiPLeRs: THE EIGHTEENTH ANNUAL ZONING AND PLANNING LAW REPORT LAND USE DECISION AWARDS

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Hurricane Sandy got you down? Feeling a sense of emptiness over not being assaulted every evening with political attack ads on television? Worried for the security of our country when the head of an intelligence agency can't keep his extramarital affair a secret? Maybe you are feeling a little off because the recession has devastated your law or planning practice and you're tired of eating only the cheese and peanut butter provided by the Department of Agriculture's WIC program for starving lawyers and planners?


Then, take a break! Buck up and join us for the fabulous, glitzy, always-entertaining ZiPLeR Awards. Elbow the paparazzi out of the way

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and get up close to the red carpet to see our winners in all their glamour enter The Great Wall Buffet in Grand Forks, North Dakota, rated by TripAdvisor.com in its most recent review as the worst restaurant in town,[1] but chosen because of the unconditional recommendation made by Andy Gowder of Charleston, South Carolina. Andy has been our host for the awards gala in recent years, along with his law partner, Trenholm Walker, at the truly remarkable Squat and Gobble Restaurant in Bluffton, South Carolina. This year, we decided it was time to move to the Midwest and so we are off to scenic Grand Forks where we fully expect some culinary delights because, as doubtless comes to mind when you think of Grand Forks, it is the very place where Cream of Wheat® was invented 120 years ago.[2]

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

- In what County does a rice cooker equal a kitchen?
- What kind of zoning violation might get you 14 days in jail?
- For what type of zoning problem might someone say: "Shiver my timbers"?
- Is that "tramp stamp" tattoo protected speech?
- What is the law of drinking while pedaling a quadracycle?
- What do you do with an evicted chicken?
- When is corn treated like marijuana?
- Can you bury your wife in the front yard?

## ZiPLeRs and a New Charitable Foundation

We are here to celebrate the 18th anniversary of the ZiPleRs. I think we should splice the main brace and hoist our cups in celebration of reaching the legal drinking age in every country

in the Americas, except for Canada (19), Paraguay (20), and the United States (21).

What is perhaps most amazing in looking back at this annual survey of some of the strangest, most interesting, troubling, and humorous cases of the last year is how often the same situations repeat themselves in near ritualistic fashion. It seems that land-use law has a bit of obsessive compulsive disorder built into it, perhaps because the same problems arise again and again with new applicants and new neighbors and new commissioners, or maybe it is that the same old cast of characters cling to the mistaken belief that it is bound to be different the next time through.

You would be astounded to see how many cases come across my screen every day; pixilated reports of dust-ups from rural counties in Kansas, to distressed Florida cities, to Oregon towns with more Birkenstocks per square foot than anywhere else in the country, and back across the country to my home ground of New England. And many, if not most, of these screw ups and snafus (look that up in your Merriam-Webster where the online version drops the f-bomb) are virtually the same one place to another. How can that be?

We respectfully submit that embedded in land-use law are some Fundamental Truths about human kind. Regrettably, the Fundamental Truths are not always justice, charity, or even be kind to your fine feathered friends; they are more like: "I have a right to keep barnyard animals anywhere I want," "If I choose to express myself by having needles inject ink under my skin, I have a right to do that just about anywhere," and "Frat boys are on a mission from God." These are not Lofty Truths or Sacred Truths, but they are Zoning Truths, and to that we devote these coveted ZiPLeR Awards.

Just to clear the air on one issue that has been the subject of some horrible rumors. None of our award recipients, and certainly not our select Selection Committee, has ever used any performance-enhancing drug. We don't consider partaking of a little ganja in the interest of research related to the land-use planning and regulatory issues surrounding the cultivation, dispensing, possession, and consumption of medical marijuana to be "performance enhancing," at least according to the trainers and physicians who have advised Lance Armstrong. Regrettably, the recent revelations may have slightly, and temporarily, collaterally damaged the Livestrong Foundation which seems to have moved on to a good place independent of its founder. We sense that there may be a void to fill and to that end Thomson Reuters and the International Advisory Board of the ZiPLeR Awards is pleased to announce the creation of the new "Practicaldifficultyandunnecessaryhardship Foundation" devoted to the promotion of zoning variances worldwide for the betterment of mankind. The Practicaldifficultyandunnecessaryhardship Foundation believes that there cannot be too many variances, and that variances are important to all of us and our families in many critical ways in helping us achieve the Ultimate Good.

The Practicaldifficultyandunnecessaryhardship Foundation had intended to produce a line of purple rubber wristbands that could be conspicuously worn with all manner of dress, including black-tie and evening gowns, so that the wearers could flaunt their commitment to the Practicaldifficultyandunnecessaryhardship Foundation and the worldwide goal of more variances. It became apparent, however, that "Practicaldifficultyandunnecessaryhardship" was a little too much to fit on a single wristband, unless it was worn by the recently-upsized Lady Gaga. So, instead, there is a really tasteful line of collars. You might choose to call them necklaces or even dog collars if you're into something a little weird. They too

are available in the same alluring aubergine we have in the wristbands. Order yours today at www.Practicaldifficultyandunnecessaryhardship.com, $10 for a 10-pack, or order a 100-pack for $100 and we'll throw in a six pack of that new craft brew "Backyard Setback," plus a bumper sticker that reads "My Kid Is an Honor Student Who Knows Zoning Estoppel".

This is getting way too serious for the ZiPLeRs. BTW, TTTT, and 2G2B4G, ZiPLeR is short for Zoning and Planning Law Report. [Editor's note: The author, BHOF that he is, still has two teenage children and occasionally slips into text messaging talk. Go to http://www.netlingo.com/acronyms.php for translation.] We started giving these awards 18 years ago in an attempt to silence all the whiners and chronic complainers who constantly lamented how they had to handle all the weird and wacky cases, and they were the ones with planning and zoning matters never seen before anywhere, and they were burdened beyond all recompense. Baloney. Now there's a word. According to our ever-at-the-ready Merriam-Webster, the first use of the word can be traced to 1922 as a mispronunciation of the sausage known as bologna, which itself probably comes from the Italian city of the same name, which in turn supports the speculation of at least one commentator that to refer to something as "baloney" was to make a disparaging reference to the University at Bologna and its education of lawyers.[3] Why does it so often all come back to beating up on the lawyers? The corruption of the pronouncement is laid at the feet of the French, of course.

Then there is the camp that says the "baloney" comes from the corruption of another word, "blarney" as in the Blarney Stone. The difference between "baloney" and "blarney," interestingly, was explained in a radio address by Bishop Fulton J. Sheen in 1954: "Baloney is the unvarnished lie laid on so thick you hate it; blarney is flattery laid on so thin you love it." Be that as it may, all this self-pity over what is patently routine is baloney…no matter how you slice it.

Let's get to the awards and you'll see what we mean.

The first-ever **Crimes Against Society Punishable By Death Award** goes to the County of Kauai, Hawaii, for the obviously overzealous enforcement of its zoning laws. We thank Rob Thomas, blogger extraordinaire www.inversecondemnation.com, for first reporting this case on his site. If you have ever been to Hawaii you know that the three most ubiquitous things are rice cookers, flip-flops, and Spam®, which is most certainly not baloney, but a savory pork product that is consumed by Hawaiians on a per capita basis several times greater than the average of the other 49 states.[4] Hawaiians eat five million pounds of the stuff a year, an average of about six cans by every man, woman and child.

Our attention in this case, however, is directed at rice cookers. It seems that a Kauai County planning official conducted a warrantless search of a councilmember's home in response to a complaint about an alleged zoning violation. The official found, as has been alleged in the federal complaint brought by the councilmember, that she "allegedly observed a rice cooker and a refrigerator in the addition/family room in the family home."[5]

Zoning violations don't get much worse than this—this otherwise permitted structure, the addition/family room, with the simple placement of one rice cooker and a refrigerator had obviously mutated into a kitchen in which presumably Rachael Ray could whip up a feast for 10. But, how would you cook the Spam?

The councilmember further alleges in the complaint that the Zoning Notice Violation was dismissed by a State Deputy Attorney General assigned to prosecute the case after the

circuit court removed the Kauai Prosecutor. Already this case smells worse than the five-foot-tall Hawaiian flower, *Amorphophallus titanium*, perhaps more descriptively known by its common name, the "corpse flower." Not surprisingly, the complaint alleges that the zoning enforcement action was nothing more than political retaliation. Film at 11.

While we are on food, how about some shrimp to go with that rice? Don't expect to buy any from Landon Wilder and his business partner Guy Morrison, who sell shrimp under the banner of "The Shrimp Connection," most recently at the intersection of US 220 and NC 150 in Summerfield, North Carolina. They received a cease-and-desist order from the town of Summerfield telling them that they can no longer sell shrimp from a stand alongside the road as they have for years. As Morrison says: "This is how seafood has traditionally been sold, in open-air markets."

The Summerfield town manager, Scott Whitaker, deadpans that "their roadside tent model does not neatly fit into" the development ordinance. Wilder and Morrison have been selling shrimp for 12 years, most of it caught off the coast of North Carolina, from ice chests. When they set up at this intersection in December 2011 they were granted a special extended permit, because no one could quite figure out how their business might fit within the zoning ordinance. So, to the hapless owners of The Shrimp Connection we present the **Devein In Vain Award**, because our guess is that in the end the town will zone them out.[6]

There is one place you really don't want to violate the zoning ordinance. That is Lockport New York. This year, a Niagara County judge sentenced a local businessman to 15 days in jail for an illegal electronic display.[7] Thank you, Matt Dolan, a compatriot of ours here at Robinson & Cole, for spotting this important case and making the nomination. The local law on electronic signs says that you cannot change message on the sign more than once every 10 minutes. David Mongielo violated that law a year ago, paid a fine of $700, and was told that if he violated the law again he would be sent off to jail for 15 days. Just a few days before his year was up, Mongielo's sign was illuminated to promote a fundraiser for Allen Gerhardt, a Niagara County Sheriff's Department deputy, who lost both legs in a motor vehicle accident.

Mongielo attempted to defend himself, claiming that the message was protected speech: "Displaying a fundraising event, happy birthday message, anything non-commercial, it's my constitutional right; they can't regulate it."

In checking to see if there were any latest developments, we have found that execution of the sentence was stayed pending appeal.[8] And just now, in doing our last minute fact checking, we have learned that another judge has found errors in the earlier proceeding and ordered a new trial.[9] Also, in this case we have another example of the use of the Internet to develop support for a position. Mongielo has a website reporting on his case and providing links to numerous articles and video clips.[10]

To the Town of Lockport, New York, we bestow the much-sought-after **Send 'Em To The Guillotine For Jaywalking Award** in recognition of the town's exemplary zealousness in enforcing its local laws.

Mongielo's threatened 15 days in the slammer is child's play compared to what is going on with the Phoenix, Arizona, man who recently served a 60-day sentence in Maricopa County's notorious "tent city" jail for holding religious services in his home in violation of zoning and building codes. There is a whole lot more to this story than that, including the fact that Michael Salman violated the terms of his probation arising out of a former enforcement proceeding regarding the structure which does not meet construction and

fire code requirements. Salman is a reformed former gang member who was previously arrested in a drive-by shooting and has been charged with impersonating a police officer. While he was in jail on the zoning rap, the Arizona attorney general got an eight-count indictment against Salman and his wife Suzanne in connection with statements they made to get benefits under a state program. Salman's brother himself has had a nine-count indictment handed up against him with basically the same allegations.[11]

Talk about zoning enforcement gone wild, we had an instant winner this year, the **Jamaican Me Crazy Award**, which goes to the Red Bank, New Jersey Zoning Board for its complaints about the Caribbean color scheme, including green tables, at the Yo Mon Yogurt store. Ironically, Karen Waldman, a board member who first raised the complaint, was wearing a lime green shirt as she derided the green tables. By the time the board had expressed its color preferences, Yo Mon Yogurt had purchased the furniture. The board still insisted on a change to a different color. The board's chair, Lauren Nicosia, said: "I like red."[12]

The first-ever **Tabula Rasa Award,** in recognition of this year's most draconian zoning enforcement decision, goes to Wayne Johnson of Marblehead, Massachusetts, who had the most unpleasant task of tearing down his own house. Special thanks to my law partner, Mike Giaimo, for this nomination. Dr. John and Dr. Ruth Schey, the next door neighbors of Wayne Johnson, had opposed the construction of the house since 1994 and commenced an action in court in 1996, claiming that Johnson's million-dollar home blocked their view of the water and was not in conformance with the zoning.

Johnson created the lot in 1994 from a larger lot improved with a house and garage by dividing that lot into two parts, one with the house and the other with the garage. Johnson sold the lot with the house on it and kept the garage lot for himself. He then demolished the garage and replaced it with his new home which became the subject matter of the case.

Ultimately, the court found that the lot failed the "lot width" test which requires that no part of the lot be less than 75% of the lot's required frontage. As the court stated in its conclusion: "Sixteen years after filing, eleven years after entry of judgment, five years after that judgment was affirmed, and after all other possibilities to change the demolition and removal order have been attempted and rejected, this case has reached an end point. …[T]he house at 74 Bubier Road must be demolished and removed, immediately."[13]

Johnson ultimately gave up, not only because of the threat of the court's order, but because he put pencil to paper and figured out that his legal fees had exceeded the cost of his very expensive home.[14] Demolition occurred in February 2012 following the removal of all salvageable material.[15]

In a similar case, but based on a restrictive covenant, James and Theresa Price in La Maza Villa, Arizona, have been ordered by the court to remove the second story they constructed in the new home they built up on their lot after tearing down the old house. It seems there is a covenant for all of the lots in the neighborhood restricting them to a height of one story. We extend our thanks to Dean Patricia Salkin for having posted this case on her blog, www.lawoftheland.wordpress.com.[16]

If a too-big house is not a good neighbor, how about a 100-year-old, 72-foot-long, ketch-style wooden ship "Shawnee" in a neighborhood of million-dollar homes? Thank you, Tim Thomas, former managing editor of Zoning and Planning Law Report at Thomson Reuters, for making this nomination [Note to senior management at Thomson Reuters: Tim Thomas obviously has too much time on his hands;

give him another treatise to edit.] John Casey, a lawyer at Robinson & Cole and former officer in the U.S. Navy Judge Advocate General's Corps, also spotted this case a day later—thank you, John. In Newport Beach, California, Dennis Holland, age 66, who says "I just like old things," faced this question of what it means to be a good neighbor when folks nearby took their concerns about his boat parked in the side yard of his home to the city and ultimately to court where Holland ended up receiving a court order requiring him to remove the vessel or pay fines of $1,000 a day or go cool his seagoing heels in jail. The Newport Beach deputy city attorney Kyle Rowen wished for an easy resolution: "We hope Mr. Holland will comply with the court's orders and move the boat to a suitable location."[17]

But wait. There's more to this story. Dennis Holland put up a fabulous website about his efforts to save Shawnee. He posted this message: "To all my supporters I say THANK YOU. Please help me to convince the City of Newport Beach to let me finish restoring the Shawnee as they originally agreed to. Please e-mail your opinions and suggestions to me and I will forward them to the city. Thank you for your continued support. Dennis"[18]

The Internet is a powerful tool in land-use disputes. We have seen many instances where public opinion was marshaled and amplified, and used ultimately by one side to win. That may be the case with Shawnee, as reported by the Huffington Post. The matter was settled when Holland agreed to take the boat apart and reassemble it in his backyard out of the sight of his neighbors.[19] The pièce de résistance was offered up by Holland's historic ship lovers from across the country when they showed up in pirate costumes at a City Council meeting in support of the shipbuilder.[20] Reflecting on the settlement, Holland offered this: "You know, we weren't getting anywhere. I decided this has been going on too long. I decided they're right. … I feel relieved and happy and everything, so it's really nice. I just wish I could have talked to the city attorneys years ago."

So, to Shawnee we bestow the **Shiver My Timbers Award**, which is so completely appropriate here because the expression "shiver my timbers" is synonymous with "let my boat break into pieces," as Holland agreed to do. "Shiver" originated at least as early as the 14th century in old English texts to mean "to break into pieces," for example, as in James Froude's *Caesar; a sketch*, 1879: "As he crossed the hall, his statue fell, and shivered on the stones."[21] Oh, the things you learn in partaking of the annual ZiPLeR Awards.

Related to our enforcement cases is a possible new category for the ZiPLeR Awards, **Commissioners Behaving Badly**, but because they did behave badly they're not going to get any awards; instead, we'll just cite them here as examples of what we may have in that category in future ZiPLeR Awards:

The chairman of the Bandera (Texas) Planning and Zoning Commission, Jim Hannah, is alleged to have used the so-called "B. Alerts" to anonymously endorse two candidates for a runoff election. In the end, Hannah resigned from his position on the planning and zoning commission. The acrimony continued to run strong, as illustrated in Hannah's message to a media outlet in which he claimed he was "falsely charged."[22]

In New Port Richie, Florida, a council member, Judy De Bella Thomas, is in a bit of a jam because she works for a clinical drug trial company that decided to open up a new facility without proper zoning approvals, leading to a written warning for violation of the city code. The deputy mayor said that it "certainly doesn't look good" and "it sets a bad precedent, particularly with a council member as their employee. It creates a perception, real or not, that they are getting some kind of special treatment." What

did council member Thomas have to say in response? "I just work for them. I have no control over any day-to-day operations."[23]

And we have one last, all-too-common story about a land-use board member. Richard Kane, on the Zoning Board of Appeals in Northborough, Massachusetts was noted by some people to apparently be sleeping during meetings in January and February of 2012. Kane responded: "To my knowledge, I've never fallen asleep."[24]

One of the longest-running, really ugly eminent domain battles was over the development of Atlantic Yards in Brooklyn. Daniel Goldstein was the holdout. They even made a movie about the fight—"Battle for Brooklyn." In the end, he capitulated as the inevitable became apparent, but caving in had its own rewards. In the end in 2010 they paid him $3 million for the home he purchased for $590,000 in 2003.[25] He took that pot of gold and bought a house in South Park Slope for $812,000. It just wasn't big enough for Goldstein, his wife, and daughter so he decided to enlarge it by adding a deck, a hot tub, and an addition in the back of the house. The neighbors on one side complained, saying that the addition would block their light. But those neighbors now have moved on after listing their house for $1.425 million and selling it in September 2012.

There's a certain "Circle of Life" ring to all this; you can practically hear the theme song from The Lion King: "Some say eat or be eaten, Some say live and let live, But all are agreed as they join the stampede, You should never take more than you give." To Daniel Goldstein, who characterized his neighbor's concerns as "garden-variety lunacy," we are pleased to award, in recognition of his becoming a developer of sorts facing neighborhood opposition, the **Now That the Shoe Is On The Other Foot Award.**

Here's a question to ponder: if you get a tattoo on your foot, is it a footnote? This could become a question of some importance given the Arizona Supreme Court decision in *Coleman v. City of Mesa*, in which that court became the first state supreme court to find that tattooing was protected free expression.[26] The only other state supreme court ruling on tattoos and the First Amendment was South Carolina in 2002.[27] There, in *State v. White,* the court ruled that "the process of injecting dye to create the tattoo is not sufficiently communicative to warrant protections and outweigh the risks to public safety."

In 2010 the United States Court of Appeals for the Ninth Circuit in Anderson v. City of Hermosa Beach came to essentially the same conclusions as the Arizona court with the same reasoning: "We hold that tattooing is purely expressive activity fully protected by the First Amendment, and that a total ban on such activity is not a reasonable 'time, place, or manner' restriction." [28]

So, to get your tattoo with no sniveling zoning enforcement officers on your tail head to Hermosa Beach, California, and see Johnny Anderson at his shop, "Yer Cheat'n Heart Tattoo and Body Piercing" in Gardena. Soon, you may be able to do the same in Mesa and just about everywhere else in Arizona.

Exercise your First Amendment right to have a little ink shot under your skin. It's your expression and the tattooist's art. Here's how Johnny described his expressive activity:

> The tattoo designs that are applied by me are individual and unique creative works of visual art, designed by me in collaboration with the person who is to receive the tattoo. The precise design to be used is decided upon after discussion with the client and review of a draft of the design. The choices made by both me and by the recipient involve consideration of

> color, light, shape, size, placement on the body, literal meaning, symbolic meaning, historical allusion, religious import, and emotional content. I believe my designs are enormously varied and complex, and include realistic depictions of people, animals and objects, stylized depictions of the same things, religious images, fictional images, and geometric shapes and patterns. . . . Sometimes, several kinds of images are combined into a single tattoo or series of tattoos. . . . I have studied the history of tattooing, and I draw significantly on traditional Americana tattoo designs and on Japanese tattoo motifs in creating my images, while all the while trying to add my own creative input to make the designs my own.

The Ninth Circuit analyzed it in this way:

> Tattooing is a process like writing words down or drawing a picture except that it is performed on a person's skin. As with putting a pen to paper, the process of tattooing is not intended to "symbolize" anything. Rather, the entire purpose of tattooing is to produce the tattoo, and the tattoo cannot be created without the tattooing process any more than the Declaration of Independence could have been created without a goose quill, foolscap, and ink. Thus, as with writing or painting, the tattooing process is inextricably intertwined with the purely expressive product (the tattoo), and is itself entitled to full First Amendment protection.

The court concluded:

> In sum, we hold that the tattoo itself, the process of tattooing, and the business of tattooing are forms of pure expression fully protected by the First Amendment. We further hold that the City's total ban on tattoo parlors in Hermosa Beach is not a reasonable "time, place, or manner" restriction because it is substantially broader than necessary to achieve the City's significant health and safety interests and because it entirely forecloses a unique and important method of expression. Moreover, no genuine issue of material fact exists with respect to the constitutionality of the regulation. Thus, we hold that Hermosa Beach Municipal Code § 17.06.070 is facially unconstitutional to the extent that it excludes tattoo parlors, and we reverse the district court's order granting summary judgment in favor of the City and remand with instructions to grant Anderson's motion for summary judgment and enjoin the City to include tattoo parlors in its zoning regulations.

The Arizona court cited and quoted from the Hermosa Beach decision extensively and added its own additional guidance, putting to rest any concerns you might have that someone would be protected in turning you into a walking signboard against your will:

> A tattoo involves expressive elements beyond those present in "a pen-and-ink" drawing, inasmuch as a tattoo reflects not only the work of the tattoo artist but also the self-expression of the person displaying the tattoo's relatively permanent image. Of course, there is no First Amendment right to tattoo another person against his or her will…and indeed the First Amendment (and other constitutional provisions) would prevent the government from requiring a person to be tattooed. *Cf. Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that First Amendment barred state from requiring citizens to display "Live Free or Die" motto on vehicle license plates).

So, it is with great pleasure that we confer upon the Arizona Supreme Court a most coveted ZiPLeR accolade, the **Tramp Stamps**

**Forever Award**, for recognizing and reinforcing the obvious original intent of the drafters of the Bill of Rights. Can't you just hear James Madison's June 8, 1789, speech to the First Congress, and his words, obviously contemplating tattoo shops in Mesa: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, one of the great bulwarks of liberty, shall be inviolable."[29] Gives you goose bumps, doesn't it?

A source of some pride in the worldwide ZiPLeR Awards community is the commitment to following up on stories from years past. Last year we presented the **It Isn't Art, It's Just Business Award** 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 Wag More Dogs business logo overlooking a dog park that just happened to be frequented by many of the Wag More Dogs' 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.[30]

The plaintiff in the case, Kim Houghton, owns Wag More Dogs, a dog grooming businesses 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. 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 that the federal court also rejected.

We assume that U.S. Court of Appeals for the Fourth Circuit Judges Duncan, Keenan, and Diaz were so envious of the District Court's award that they took up the case themselves and have now affirmed the District Court. We really have no choice but to award them the **Tail Wagging the Dog Award** because they have largely reiterated in their decision all of what the District Court had to offer, just as we did in copying last year's text to bring our new readers up to speed [note to Thomson Reuters awards department: sorry about the extra expense of the three-way award, but we don't want to get crossways with these three judges by picking one over the other].[31] One thing that should give all of us some comfort is that our Court of Appeals judges have declared themselves not to be prone to idle reverie: "We are mindful that our task is not to dream scenarios in which a regulation might be subject to a successful vagueness challenge."

The **Safe Driving Award** was an easy one to select this year and goes to the City Council of Savannah, Georgia, for its consideration of an ordinance to prohibit alcoholic beverages on commercial quadracycles, those 15-passenger-plus one driver, pedal-it-yourself, touristy vehicles you may have seen. It seems like a pretty

good idea to not allow drinking on such vehicles. Here is the proposal at the First Reading:

> Alcoholic Beverages on Commercial Quadracycles. An ordinance to amend the Alcoholic Beverages Ordinance to prohibit alcoholic beverages on commercial quadracycles, establish an effective date, and repeal all ordinances in conflict.

Curiously, on the same day that the City Council had its first reading of the quadracycle proposal, it also had a first reading of its "Beer Growler Ordinance" defining a beer growler as a 64-ounce glass or ceramic container "which allows someone in a convenience store to pour beer into the container and then seal it." The Council was quick to note: "There are no issues regarding the increased amount of alcohol in City streets." Sure there aren't...[32]

In the end the ban on drinking while quadracycling (think "Arrested for QUI" or "Don't Drink and Pedal") was not adopted, the only concession to safety being a requirement for seatbelts and the installation of turn signals and brake lights.[33] At least the steering and braking is done by an independent operator who, we hope, is not allowed to drink.

One Savannah tourist website offers useful information for quadracycle riders: "If you are taking a drink along in a plastic cup, drink it about half-way down or share with a friend, when the ride gets going a little bit of spilling happens if you're not careful!"[34]

The **Stick It To The Samaritan Award** is a special joint award presented to the Philadelphia Redevelopment Authority and the City of Philadelphia for bringing an action against Ori Feibush for cleaning up a vacant lot.[35] Feibush had visited the Philadelphia Redevelopment Authority four times, written seven requests, and made 24 phone calls asking them to please clean up an empty lot next to his coffee shop. The Redevelopment Authority did nothing. And, worse than that, they told Feibush to leave well enough alone.

Feibush, the miscreant with evil intent, went ahead on his own and cleaned up 40 tons of trash spending more than $20,000 of his own funds to grade the area, plant cherry trees, install fencing and park benches, and repave the sidewalk. You have to feel some pity for the poor director of communications for the Department of Housing and Community Development for being put in the awful position of having to make this public statement: "Like any property owner, [the authority] does not permit unauthorized access to or alteration of its property. This is both on principle (no property owner knowingly allows trespassing) and to limit taxpayer liability."

The controversy over this little lot may be a manifestation of a much bigger issue. The Associated Press reports: "The changes have pitted longtime residents fearing gentrification and higher property taxes against new neighbors whose pricey houses are raising home values. Neighborhood zoning hearings have grown so heated, with allegations of vote tampering, racism and governmental wrongdoing, that police were called."[36]

## The Critter Corner

Last year, we found ourselves with such an enormous pile of animal cases that we decided to corral all those critters into a new section known as the **Critter Corner**. There were just as many nominations this year, so many in fact, that for several days we spent so much time on them that we lost track of what the Kardashians were doing. That can't happen again, so we've pared them down to just a few.

No **Critter Corner** would be complete without some poor potbellied pig being discriminated against. Thanks to my administrative assistant, Diane McGrath, for picking up on

this important piece of news from Palm Beach County, Florida—the Palm Beach County Commissioners have lifted the prohibition on having potbellied pigs as pets, thereby enabling Jennifer San Filippo to keep Yoda, her beloved porcine companion. Said Ms. San Filippo: "One giant step for pigkind. I am ecstatic."[37]

To the kindhearted Commissioners of Palm Beach County, we are pleased to present this **Be Kind To Your Big-Bellied Friends Award** for their compassion. Now, if we could just get people to stop using that expression "a silk purse from a sow's ear." Which is not only disgusting to visualize, but disparaging of both silk and sows.

Thanks again to the sharp eyes of my assistant we were pleased to learn that the town of Manchester, Connecticut has granted a reprieve to potbellied pig "Oliver" allowing him to continue on living with Eddie Clayton and his family at their single-family home as he has for the last four years. Oliver is quite comfortable there, reportedly splashing in his kiddie pool during the summer and munching on watermelon, when he is not resting in the gazebo. As Clayton described his relationship with Oliver: "We've bonded to where he thinks I'm his mother and father."

It did not start off well, when the town's zoning enforcement officer sent a letter to Clayton: "It has been called to my attention that you may be keeping a pig(s) at your residence. I am required to notify you that violations of the Town of Manchester zoning regulations may result in the imposition of criminal or civil fines."[38] However, in a unanimous decision the Zoning Board of Appeals ultimately concluded: "There is no definition in the Town zoning regulations regarding the types of animals considered to be livestock or the types of animals considered to be domestic pets." The ZBA also noted that the Claytons' "yard is well kept and orderly, there is no noise or smell, and there is no negative impact to the Neighborhood." We are pleased to present to the Manchester ZBA the **This Little Piggy Stayed Home Award** for ruling with reason.

We are especially pleased to recognize the Planning & Zoning Commission of Griswold, Connecticut, with this truly unique **Be Kind To Your No Legged Friends Award** for granting a business license to Randy LaPorte. LaPorte is a herpetological hobbyist who supported his hobby financially by breeding snakes and mice (you know what the mice are for...) in his single-family home. Someone anonymously complained about odor coming from the house and a cease-and-desist order followed because LaPorte did not have a permit to operate a business out of his home. He then applied to the Commission. This is another nomination by Diane McGrath, who has a special affinity for critters.

The commission was favorably impressed and granted the permit. As commissioner Erik Kudlis put it: "I had envisioned something out of 'Indiana Jones,' with 250 snakes waiting to pounce on you, but I didn't see that at all. I don't see where it's a nuisance. There are no complaining neighbors, no odors, no threats to the neighborhood. I'd be more concerned if he had two pit bulls for pets."

You may recall, those of you who are ZiPLeR Award recidivists, that last year we pointed out the need to address the growing problem of homeless chickens. To call attention to this plight and to honor a savior we conferred upon Winder City, Georgia, the **What Do You Do With Evicted Chickens Award** and noted the great work done by Chicken Run Rescue.[39] This year, we thank Patricia Salkin, the newly-minted dean of the Touro College Jacob D. Fuchsberg Law Center, and Daniel Gross, a Fellow in Government Law & Policy at the Government Law Center of Albany Law School, for bringing to our at-

tention a New York Times report on urban chicken retirement. Really, this is impressive beyond words—a Fellow of a research center, a Dean of a law school and editor of this fine publication, and The New York Times all focusing on providing retirement homes for urban chickens when they outlive their egg-laying years and have nowhere to go as their owners would never think of stewing them.[40]

To Pete Porath of Portland, Oregon, we present with three loud "clucks" the **On A Wing And A Prayer Award** for sheltering these chickens and others, some 1,000 to 2,000 birds a year, in what he describes as "rehoming": "We have rehomed all kinds of stuff. Ducks, chickens, peacocks, turkey, quail, guineas. Birds that we rehome out of the city, we have a policy that we don't eat them."

Since we now have the **Critter Corner**, it may be time to add a new **Locavore Locale** to house all our chickens-in-the-backyard, veggies-in-the-front-yard cases. One would think that simply growing vegetables on a patch of land wouldn't require any type of zoning approval, and you couldn't get in trouble for doing that, but we keep seeing enforcement actions against these small agricultural operations. A couple of years ago DeKalb County, Georgia, brought an enforcement action against a man who grew more vegetables on his vacant suburban lot than could be sold there.[41]

This year's locavore case comes from Delaware Water Gap in the Poconos of Pennsylvania, where the local Zoning Hearing Board has ruled that Jeanie Gong, the owner of the old Glenwood Hotel, is in violation of the zoning for growing several acres of corn.[42] The Glenwood was an operating hotel and golf course, but is now used as a Christian retreat. The zoning approval for the 57-acre property limits its use to a hotel or resort and does not expressly permit a farm with the growing of crops. Gong said that growing corn on three acres was an experiment, because she wanted to see if the soil was fertile enough to be converted to cropland. The Zoning Hearing Board didn't buy it, or her corn. One of the members saw an ad on craigslist by Gong's associate advertising sweet corn for sale. Gong denied even knowing that corn was being sold at her property.

The zoning enforcement officer issued an order directing that the corn be cut down. It reminds one of those Drug Enforcement Agency raids on cannabis fields. Dateline Yuma, Arizona: "The Drug Enforcement Administration (DEA) along with the Arizona Department of Public Safety (DPS) eradicated and destroyed more than 4500 marijuana plants found growing along the Centennial Wash, near Wenden, Arizona in La Paz County. The plants ranged from 3 to 6 feet high and were located in four separate grows throughout the one acre site."[43]

Now, hold onto your socks... the zoning enforcement officer's name? Larry Freshcorn. Gong capitulated, donating the corn to charity. Her associate said: "The point is, we were trying to make this neighborhood nicer. We were trying to grow fresh corn, so local people could feed their families. We were turning land that had been filled with weeds and do something fertile."

No fresh corn for Larry Freshcorn in Delaware Water Gap, but we will give him the conciliation prize of the **Lend Me An Ear Award** and, for hapless Jeanie Gong, the **Convicted For Stalking Award.**

While we are on the subject of illegally grown crops, let us give the prestigious **A Good Smell Is In The Nose Of The Sniffer Award** to the neighbors of Michael Engle in Ypsilanti Township, Michigan, who complained about an "intense" odor coming from his home which made them sick and caused them to keep their windows closed. The zoning provision in play is the vague "creation of offensive

odors shall be prohibited" in any zone. The Township said, and the judge agreed, that the odor was offensive.

Engle is growing medical marijuana. Under state law, a person who is a patient authorized to use medical marijuana may grow up to 12 plants for personal use. The Township ordinance permits residents to grow their personal plants in residential areas. Under state law, if you are a registered caregiver you can grow up to 72 plants for up to five patients, but the Township regulations do not allow these larger, caregiver grow operations in residential zones.[44]

When Engle finally allowed an inspector to come into the house, the inspector was led down a "small, dark hallway" with the doors along each side covered over with black plastic. The inspector was then taken down in the basement where he was shown 10 medical marijuana plants.

Massachusetts and Connecticut enacted laws in 2012 authorizing medical marijuana bringing the total to 18 states plus the District of Columbia. Marijuana remains a Schedule I drug under federal law (The Controlled Substances Act, Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970) and the Department of Justice has been enforcing the law with the numerous prosecutions. This last year a landlord in Montana, where medical marijuana is legal, received a 13-month sentence in federal prison for renting to a medical marijuana grower.[45]

To Nathan Benjamin Myers, we hereby confer the coveted **May God Bless You For Your Piety Award** for his extraordinary, but unsuccessful, efforts in the United States District Court of the Northern District of Illinois Eastern Division to prove that the Loyola University Sigma Pi fraternity occupancy of a house rented from him would not be in the nature of a frat house, but would be a monastery.[46] Thank you, Stuart Meck of Rutgers, who came across this case just as we did and reinforced our decision to make this high award. Myers purchased a house in Chicago to rent to the fraternity.[47] Because the zoning regulations classify fraternities and sororities as special uses, Myers tried to circumvent the special use discretionary review by claiming that the fraternity's use was in essence a monastery, not a frat house. To support this argument, Myers relied on Sigma Pi's mission statement: "In the Service of God and Man."

After local zoning officials rejected Myers' assertion (no doubt a shock to Myers), he sued, alleging an equal protection violation. Myers claimed that the City had treated him differently than other similarly-situated fraternities, namely Alpha Delta Gamma which has its fraternity house just up the street from Myers' house, without a special use permit.

The first thing that might come to your mind in reading of this claim is what lawyer, who cared anything of his or her reputation, would file such a pleading? The answer is, apparently no lawyer, because Myers appeared pro se. It turns out, however, that Myers is represented by a lawyer—himself. The court took judicial notice of the fact that he was admitted to the bar in 1985, is currently an active member authorized to practice, and is also a member of the federal court's general and trial bar in the Northern District of Illinois.

The complaint is reminiscent of some prisoner-drafted habeas corpus petitions, reflecting the fact that pro se prisoners have plenty of time on their hands. Meyer's complaint, which runs 34 pages with over 101 paragraphs that aren't numbered consecutively, "relies on purported evidence that lacks any foundation and much of which is irrelevant, hearsay, or both. It cites to entire exhibits (only some of which exist) and not to specific pages or paragraphs. There is simply no way for the defendants to respond as required or for the Court to sift

out any truly material facts that are properly supported, even if it were inclined to do so."

The city moved for summary judgment, and Myers filed an 11-page brief in objection in which he didn't cite a single case or any other legal authority.

The Court found that "Myers' attempt to compare himself with ADG [Alpha Delta Gamma] fails. The admitted facts show that the ADG house began as a permitted use in 1969 and remained a valid use by operation of the grandfather clause after the later amendment of the zoning ordinance. By contrast, Myers purchased his property long after fraternities and sororities were required to have a special use permit to operate in an RT4 district."

The Court stated: "Myers cannot show that the defendants acted irrationally in interpreting and enforcing the zoning ordinance in a way that differentiates between a college frat house and a monastery. No matter how closely Sigma Pi hews to the letter of its motto, Myers has fallen far short of proving that the Sigma Pi fraternity brothers are actual Religious Brothers, that is, in the words of the ordinance, 'persons (such as nuns or monks) under religious vows.' The defendants' interpretation of this language to exclude fraternity houses therefore passes the rational basis test."

The Court concluded by stating: "Therefore, Myers can do no more than show that his venture was thwarted by an ordinance that applies equally to all similarly situated property owners. And 'thwarted' is a strong word since he didn't seek a special use permit before suing and so did not know whether the use might have been allowed. His equal protection claim therefore fails."

This isn't the first time that a group of college men has tried to circumvent zoning regulations by claiming that it is a religious organization. In 2006, nine students at Georgetown University moved into a house and filed to incorporate as a nonprofit religious organization, which they called the "Apostles of Peace and Unity," in an effort to obtain an exemption from the city's limit of six unrelated people per home. City officials instead deemed the Apostles of Peace and Unity a fraternity and ordered them to comply with the regulations.[48]

To James Davis we present the **Buried Under Local Regulations Award** for his unending efforts to keep his late wife in her grave in the front yard of their home in Stevenson, Alabama.[49] He was married to Patsy Ruth Davis for 48 years and built a log home for his wife and himself in Stevenson about 30 years ago. They had planned on being cremated, but Patsy decided she was uncomfortable with the concept and wanted to be buried in a casket. She said she wanted to be right out by the front porch and that's exactly what James did in 2009 with the approval of the state Department of Health and the assistance of a mortuary. James requested a cemetery permit from the city, but was denied. He went ahead anyway, had a mortuary install a vault in the front yard, and then interred his late wife in her steel casket in the vault.

The city began an enforcement action and ultimately a county judge ordered James to disinter his wife. The case is presently on hold as James appeals the order. James, 73, said: "Good Lord, they've raised pigs in their yard, there's horses out the road here in a corral in the city limits, they've got other grave sites here all over the place, and shouldn't have been a problem." The city has tried to settle the case by offering several compromises, including two plots in the municipal graveyard, but James rejected them all, saying: "So if they order her to be moved, it's a death sentence to me. I'll meet mama sooner than I had planned on it."[50]

If this case sounds like déjà vu all over again, to use a turn of words from Yogi Berra commenting on Mickey Mantle and Roger

Maris hitting home runs one after the other,[51] it should because we presented an award for essentially the same thing, the only difference being that the burial was in the backyard, not the front yard, and the spouse buried was the husband, not the wife.

In 2008 the **Only The Zoning Enforcement Officer Can Keep You Apart Award** went to the zoning enforcement officer of Chester, Connecticut. As we related to you back then, Elise Piquet and her husband, in an act of extraordinary mutual love and devotion from a lifetime together, pledged to each other that they would be side-by-side for eternity (a concept that guarantees one of you will never, ever get your fair share of the covers). They sought burial plots in Chester, but found none available. They did the next best thing, and agreed that they should be buried together in their backyard. When Elise Piquet's husband died, she buried him in the backyard of their home at 28 South Wig Hill Road with the supervision of a licensed funeral director. On December 3, 2008, I asked the town's attorney, my friend John S. Bennet, of Gould, Larson, Bennet, Wells and McDonnell in Essex, Connecticut, about the status of the case. He replied: "It turns out the case is not dead yet. An appeal has been timely taken. I have the paperwork buried here someplace. Let me know if you need any of it and I will try to exhume it from the file for you and send it along."

In 2012, the Connecticut Supreme Court finally dug into the case and ended up with a bare-bones remand to the trial court that promises to resurrect the issue of who regulates here—local zoning or state public health authorities or both? Because Piquet abandoned her administrative appeal, the statute of limitations for the appeal has run and she is precluded from challenging the zoning decision. It looks like the unresolved problems will fall to the state under its public health responsibilities, but the issues remain somewhat shrouded by the jurisdictional ambiguities..[52]

The first-ever **Doing God's Work Award** goes to the City Council of Macon, Georgia, for having denied zoning approval in December of 2011 to the Assembly at Riverside church, which was planted by the Assembly at Warner Robins.[53] Divine intervention, however, guided the Assembly along another path—to a former car dealership located next to a Cracker Barrel restaurant and close to the location it had previously sought.

Down but not out following the zoning denial, Marc Merrill, regional presbyter for more than 50 Assembly of God churches in the Macon, Warner Robbins, Griffin, and Dublin areas always preached: "Be patient, God will work it out." That patience paid off when the Assembly obtained approval to place its new congregation at a 20,000 square-foot facility with more than 200 parking spaces, and close to the interstate exit, not far from the original site. The facility has an information kiosk and a coffee and refreshment area, similar to a convenience store. More than the 160 people attended the first church services when doors opened in September.

Merrill said of the initial zoning denial: "But it was a blessing in disguise. The facility is everything we wanted and better suited to what we're doing. Physically, it's rare you can lease a place with such a huge space for children, office space, space for fellowship and of course an auditorium."

In yet another instance of how the ZiPLeR Awards just keep on giving, we find ourselves ankle-deep in news reports that cause us to tiptoe back and drop to our knees in wonder over the case of the big leg in Sag Harbor, New York, first brought to the world's attention in the 16th Annual 2010 ZiPLeRs. "Hip, Hip, Hooray," we say. At that time we gave the "**Not A Leg To Stand On" Award** going to

Sag Harbor Zoning Board of Appeals which decided that two people need four variances for two legs on one sculpture. Ruth Vered and her partner Janet Lehr bought a replica of "Legs," a sculpture created by Larry Rivers in 1969 for a suburban shopping mall on Long Island - 16 feet high, 10 feet long with two feet on the bottom – it's a humongous pair of good-looking legs in a long stride. Both of the articles cited have a photograph.[54]

Those legs were back before the Zoning Board of Appeals again this year.[55] The ZBA denied any relief for the owners of the legs, saying:

> A sculpture can be both "art" and a structure subject to zoning. There is nothing in the Sag Harbor Village Zoning Code that exempts "art" from the definition of a structure. Further, the concept of a local government determining what does and does not constitute "art" would present a constitutional conundrum that government must avoid. "Art," like "beauty," is in the eye of the beholder and is not something to be legislated.[56]

Vered and Lehr have appealed to court.[57] Their complaint includes a claim that the ZBA chair was biased because she failed to disclose a conflict of interest in the case. Allegedly, several years ago and before she was chair of the ZBA she had sought to have her own artwork in Vered's gallery and Vered had rejected the artwork. The chair denies the claim as set out on appeal: "The fact that the Chair was responsible for the conduct of these hearings and led discussions and deliberations by the board with respect to this application and a previous related application in 2010 and cast a positive vote for the board's decision herein, the entire proceeding was tainted and the decision should be thrown out."

The 2012 **Shin Splints Award** (also known as the **Tibial Stress Syndrome Award**) goes to Ruth Vered for straining herself with this highly attenuated claim.

What better way to end this year's ZiPLeR Awards than with the latest nomination to come to us through the ether of the Internet—thank you, Al Gore, for inventing the Internet. This one was so good that it joins the handful of prior awards as an "instant winner," one that is so obviously of the high quality of ZiPLeRs that it bypasses committee review. To the entire Zoning and Planning Commission of Baldwin County, Alabama, we give the first time ever, and we hope the last ever, **Throwing In The Towel Award**, for resigning en masse, all nine members of the Commission, on November 16, 2012.[58] Apparently, they were miffed because the Baldwin County Commission essentially stripped the Zoning and Planning Commission of most of its authority when it scrapped the Horizon 2025 Development Plan. Former Zoning and Planning Commission member commission Doug Holton, who seems to have led the exodus, said: "I'm pretty sure they're not concerned about planning for the future, but they'd rather return to the wild, Wild West."

So, keep in touch, until next year, when the 19th AnnualZiPLeR Awards makes its way to you. Please continue to send us your nominations. We look forward to seeing you all at the awards ceremony at The Great Wall Buffet in Grand Forks, North Dakota.

**NOTES**

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