

# ZONING AND PLANNING LAW REPORT

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## THE 2010 ZiPLeRs: THE SIXTEENTH ANNUAL ZONING AND PLANNING LAW REPORT LAND USE DECISION AWARDS

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You'll want to post a few of these tidbits on your Facebook page and impress your long list of friends with these questions and the answers...

- What zoning applies to 16-foot high legs?
- When is a 26-foot tall Paul Bunyan a flagpole?
- How do you serve a cease and desist order on a bee?
- Which President of the United States is the first person to receive a ZiPLeR posthumously?
- Is an Oldsmobile 88 a junk car, cactus planter, or First Amendment-protected expression?
- What happens when you spray paint "Screwed by the town of Cary" across the second floor front of your house...in Cary?



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- Okay, got that last one, then try this—what happens when you put signs in your yard that say “\$10,000 to take a crap”?
- Is it a home business to cavort naked around a house 24/7 on the internet for a fee?
- Is pole dancing a performing art exempt from sales tax?
- Is your beloved potbellied pig a pet?
- What can we learn from *Family Guy* about zoning?

## The ZiPLeRs—A Brief History

The annual ZiPLeR Awards have now been around so long that if you Google “ZiPLeR Awards” you will get two hits. Too busy to Google? Off-line reading this august publication? Then, here’s the sound-bite background.

ZiPLeR is the diminutive for “Zoning and Planning Law Report,” kind of like “Peg” for “Margaret.” Back in the day it was West Publishing, before Thomson West, before the current Thomson Reuters, and the Zoning and Planning Law Report was the established primary source of the most recent information on all things planning and zoning.

That position of being the first has been eclipsed by technology, but the Zoning and Planning Law Report has remained the preeminent source of thoughtful, as contrasted with instantaneous, analysis (despite the annual blight of the ZiPLeR Awards). In short, your Tweets, daily RSS feeds, and instantaneous reports are all good, but join us here each month (except this issue) for information of substance.

I convinced the editors back then, Bernie Madoff-style, to let me do one issue, just one, on the more unusual cases of the year. They bought it, Matt Cholewa and I wrote up the first ZiPLeR Awards, and apparently no one cancelled their subscription in protest. That’s a victory of sorts, I guess, in the publishing business.

The next year, I simply told them I was continuing the series and got away with it. This works. Just pretend like you’re entitled, and most people will believe you are. A couple of years ago I was at a meeting in Nashville, came out of the hotel, saw a nice new Escalade, and just for fun (you who know me will get this) barked at the young valet “Where the

@#+"^%# are the keys to my Escalade?" which he promptly plopped into my palm. Only then did I tell him of my ruse. Just pretend like you're entitled. It's hard to believe it has now been more than a decade and a half, but here we are again, thanks in large measure to you, our readers, who keep us amply supplied with local land use foibles to feed the ZiPLeR beast. Keep those cards and letters coming to dmerriam@rc.com and you may see your name in print next year.

We have added a brand new category in this year's already bombastic ZiPLeRs—the "Legacy Medal"—for a history-making zoning and planning event or initiative that pre-dates our annual award qualification period. This year's first-time-ever winner—nominated by my own 15-year-old son, Alexander, who literally has grown up with the ZiPLeR Awards as a family franchise and is a devoted ZiPLer follower—goes to that inspiring phenom of the arts, *Family Guy*. For those of you who have been with us from the get-go, it must seem so obvious that a show like *Family Guy* would be the recipient of such a coveted award. For you newcomers, you now have a better sense of the sophistication and nuanced approach the ZiPLer Awards Committee takes in making its choices. (The Legacy Medal is awarded at the end of this issue.)

Last year, you may recall, we held the awards ceremony at the Squat and Gobble Restaurant in Bluffton, South Carolina, and what a night it was. Governor Sanford came by and presented a slide show of his hiking along the Appalachian Trail. My goodness, I've hiked the trail in the White Mountains of New Hampshire and it was nothing like part of the trail the Guv covered.

And being in South Carolina before the elections, we had Alvin Greene, the previously-unknown Democratic candidate for the U.S. Senate, whose fundraising never met the \$5,000 threshold required for reporting to the Federal Election Commission. He graduated from the University of South Carolina and in an interview had much good advice for the students. How about this nugget about choosing a major: "They have to choose something they're interested in knowing and something in line with the profession they want to be in."<sup>1</sup> The ZiPLeR Awards gave him our unconditional endorsement and that helped catapult him to garnering fully 28% of the vote.

Thanks again to our friends in Charleston, Andy Gowder and Trenholm Walker, for hosting us during our stay for the awards ceremony. We would like to include them on our awards selection committee, but we can't just now because they have had to re-engineer their practices during this development recession like so many of us. They are now largely doing dog bite defense and slip and fall cases, so they are too far outside the realm of planning and zoning to qualify to be on the committee. Maybe when things turn around...

Actually, to tell you the truth (doesn't it make you wonder when someone, right in the middle of a long explanation, says "to tell you the truth"?—what were they doing before that?), there is no committee. The Thomson Reuters lawyers said I had to 'fess up about the supposed committee after all these years. Sarbanes-Oxley Title VIII "*Corporate and Criminal Fraud Accountability Act of 2002*" or something like that. I alone am the committee.

I had something like this happen—now this is the truth—when an environmental expert for the opposition got up at a coastal wetlands hearing, dropped his jacked-up, three-pound Curriculum Vitae (experts don't seem to have résumés) into the record and pontificated on the impending end of the world as we knew it if our client's project got approved. The expert was the President of some seemingly big-time consulting outfit; let's call it "World Environmental Consulting LLC." It had at least as impressive a name. I knew otherwise, so I asked: "Your C.V. [always talk their lingo] says that you're the President of World Environmental Consulting LLC, right?" "Yes" he answered. "How long have you been President?" "15 years." "Do you have offices internationally?" "No," he answered, "Just in this country." I asked, "Just here, as it says, in Bakersville?" "Yes" "And your world corporate headquarters are at 123 Elm Street?" "Yes," he answered, starting to study his shoelaces, rather than look at me. So, I went on: "How many employees do you have at World Environmental Consulting LLC – please break it down into professional and support staff?" "One," he said. And to bring an end to this painful process, I asked, "One? Just you? And your company's headquarters at 123 Elm Street, what is that?" "It's my home." Finally: "And the offices of World Environmental Consulting LLC are located where in your home?" "In a room in the basement."

We once found that a town planner opposing a client had been hired by the town in part on the basis of a master's degree in planning and professional certification, but that he did not have the master's degree and had lied on the application to take the certification exam. The town didn't fire him. And, it is a good idea to look just as hard at the credentials of your own consultants and to ask them point-blank if all of it will stand up to close scrutiny.

Careerbuilder.com reports: "Although just five percent of workers admitted to fibbing on their résumé, 57 percent of hiring managers say they have caught a lie on a candidate's application. Ninety-three percent of those who spotted the lie did not hire the candidate because of it." Some estimates are that 30% of resumes are untruthful and 80% have puffery. Here's an example I used to illustrate for my younger children how people can overstate their successes. I have a trophy for Second Place in the World Championship Regatta for the Nonsuch 26 class of sailboats held some years ago in New York Harbor. Pretty impressive, except only three boats competed in that class.

And speaking of winners, this year's awards will be presented aboard the fabulous Carnival Cruise Lines ship *SPLENDOR* presently in San Diego. Some kind of mechanical thing, they said. I logged onto one of the travel sites and the cost of passage was so low I decided to save Thomson Reuters a few bucks. Interesting suggestions from Carnival for passengers though—bring a cooler with ice, some canned SpaghettiO<sup>®</sup>s, and a really long oar.

Carnival promoted the trip by explaining that during the last cruise they ended up having an open bar for all passengers. That's unusual. Lindsey Lohan has booked the trip as well. We are pleased to announce that Charlie Sheen will be onboard giving a series of lectures on "Healthy Lifestyle Habits for Successful People," and telling us all how to make our hotel rooms more comfy when traveling. For the shore trips, Carnival has booked Nicole Polizzi, aka Snooki, to offer tips on good manners at the beach. Should be fun. Watch this publication for details.

Now, the curtain rises, and a hush comes over the audience in anticipation of the announcement of this year's lucky winners, selected from thousands of voluminous nominations, with the results tabulated by the Florida Registrar of Voters from the Bush-Gore contest...

The "Not-A-Leg-To-Stand-On" Award goes to the Zoning Board of Appeals of tony Sag Harbor, Long Island, which has 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. Sixteen feet high, ten 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.<sup>2</sup>

Vered and Lehr thought they had a leg up on the local zoning authorities when they permanently parked the sculpture alongside their house in concrete foundations. Their home is the former Bethel Baptist Church, which I only mention because those graceful gams look surprisingly in scale up against the high windows and at the same time are in such incongruous juxtaposition. The Bible hardly refers to legs, and the one passage most talked about has been the focus of debate about the apparent scientific inaccuracy:

All flying insects that walk on all fours are to be detestable to you. There are, however, some winged creatures that walk on all fours that you may eat: those that have jointed legs for hopping on the ground. Of these you may eat any kind of locust, katydid, cricket or grasshopper. Leviticus 11:20-22.

No insects have four legs. The ZiPLeR Awards continue to strive to be eclectically educational.

I can find only a couple of other references to legs in the Bible. One is:

So take a new grip with your tired hands, stand firm on your shaky legs, and mark out a straight, smooth path for your feet so that those that follow you, though weak and lame, will not fall and hurt themselves, but become strong. Hebrews 12:12.

There's not much here for sermons, so it's just as well the church is now a home.

The building department says the legs are a structure and as such would need to be 34 feet from the property line and 13 inches shorter. Great—a partial amputation in the name of setbacks. Sag Harbor Village Attorney Anthony Tohill has opined that two more variances, lot coverage and use, may be

required because, wonder of wonders, 16-foot long legs are not listed as an accessory structure to a former Baptist church turned residence.

Vered and Lehr's lawyer has a way around this—declare that the legs could take a walk, that they are temporary. He argues:

This sculpture was erected utilizing a concrete footing, but we can modify the installation by setting the base into a bed of deep sand with a tether wire attached to the building for stability. Utilizing sand would clearly make the installation temporary and it would be as safe as the existing installation.

Another suggested solution is to bolt the legs to the church-become-house, which would make them (it) part of the house, a house with legs if you will, and therefore not accessory.

The weakest, make-weight-light-weight argument they offer is this: "I must stress once again that this sculpture is not permanent and it serves no utilitarian purpose as might a shed or a garage."

Apparently, no one has yet played the First Amendment, art-as-protected-speech-exempt-from-zoning card. I would slap that baby on the table in a heartbeat, or more appropriately, a New York minute. However, there has been some discussion of the artistic merit of this sculpture.

Not all see it as art, anyway. The next door neighbor, Charles McCarron, had this assessment: "I heard this guy [the artist, Larry Rivers] is a whack job. This is not Greenwich Village." An art historian who knows the work of Larry Rivers says: "It is indisputably a work of art—whether you like it or not. It is not his greatest work of art. They are not a masterpiece—but they were created by a master." Hmm. "They." Is a single sculpture of two legs singular or plural? Send in those high-powered Thomson Reuters editors.

I'll bet Paul Bunyan could chop these legs down to size, and we have just the Paul Bunyan to do the trick, a 26-foot tall Paul Bunyan standing outside the House of Doors in Cheshire, Connecticut.<sup>3</sup> The nomination was made by my law partner, Ed Hill, who lives in Cheshire, and apparently is an admirer of the Paul Bunyan statue. We are pleased to give the highly prestigious "**Sculpture-Art-Appreciation**" Award to the town of Cheshire, Connecticut and to

its planning director, Bill Voelker, for letting Mr. Bunyan continue to stand tall on West Johnson Avenue.

The statue is one of many built in the 1960s by International Fiberglass in California and more commonly known as "muffler men," because the figures were used to advertise service stations and muffler shops. Mr. Bunyan has been in town since 1979 and frequently has a flag hanging from the pipe he is holding. This reminds me of last year's "**Give-Them-The-Boot**" Award for the 10-foot high L.L. Bean boot up in Victor, New York, where the town simply declared the iconic hunting shoe to be a "site feature" and not a sign.

The founder of House of Doors originally used Mr. Bunyan to advertise his prior business, a tree service company. At that time Mr. Bunyan had an ax in his hands. Someone reportedly claimed that Mr. Bunyan, ax in hands, was a sign advertising the tree service business and as such violated the sign height restrictions. Consequently, Mr. Bunyan's owner decided to hang a flag from the pipe, or ax handle, or whatever it is that Mr. Bunyan is holding, which—presto—turned him into a flagpole. A flagpole is exempt from the height restrictions.

Sometimes, someone's yard ornamentation is neither art nor expression, but just decoration, just as sometimes a cigar is just a cigar.

We are pleased to award Prince Mongo, a perennial candidate for Mayor of Memphis where he is usually domiciled, with our "**Oh-So-Tastefully-Done**" Award for his yard decorations at his beachside home in Volusia County, Florida, south of Daytona Beach.<sup>4</sup> I thank my administrative assistant, Diane McGrath, for this nomination, and for the Belfast chickens and Sprague animal farm nominations discussed later on. County officials had issued a code violation order against Prince Mongo for some decking in a setback, and the Prince countered by painting the house in a bizarre scheme and littering his yard with diverse items including crisscrossing clotheslines with extra-large boxer shorts and bras. What remains after settlement of the enforcement action is the most unusual multicolored paint scheme, large sand dunes with plastic Santas, a toilet, a bicycle, and some hockey sticks. Prince Mongo, who says he is a 333-year-old alien from the planet Zambodia, proclaims that even though public officials have said this was all a big misunderstanding, it is unfair for him to have to pay the \$475 fine that was levied.

Another enforcement action has been lodged against him, this time for five paintings of nude women in the front yard. The county's position is that the paintings are not art, but have been put up to retaliate against the fine.

Speaking of artistic expression versus zoning repression, we have the "sad case of the cactus planter" from San Marcos, Texas. We first heard of this case in 2008.<sup>5</sup> This "**Art-Is-In-The-Eye-Of-The-Beholder-If-The-Beholder-Is-Wearing-A-Long-Black-Robe**" Award goes to U.S. District Judge Sam Sparks for his 2007 decision, upheld in part in the Fifth Circuit this year. Thanks to the International Municipal Lawyers Association for first picking up on the decision and Patricia Salkin of [www.lawoftheland.wordpress.com](http://www.lawoftheland.wordpress.com), and editor of ZPLR, for covering the story, which I quote from below without further attribution.

"Ralph the Cactus Planter" is the name of this fine work of art which you can see by going to the citation in endnote 5. Ralph is a much-modified, old Oldsmobile 88 in front of the Planet K store on I-35 in San Marcos.

In 2007, the city of San Marcos ordered the vehicle removed under the junked-car ordinance. The Planet K owner, Michael Kleinman, said it was art and protected speech—a commentary on the car and oil culture of America. Planet K is a store that sold "funky" goods. The store had a tradition of celebrating new store openings with a "car bash," a charity event at which the public paid for the privilege of sledge hammering a car to "a smashed wreck." These wrecks were then filled with dirt, planted with vegetation, painted, and placed outside each store as a unique advertising device. In the case of the Oldsmobile, it had been painted by two local artists, with Kleinman asking that "make love not war" be included in the design. Kleinman contested the violation orders and, when the citations were upheld, he sued, claiming that the ordinance violated his First Amendment rights.

Two local artists also sued under the Visual Artists Right Act (VARA), which provides that artists have the right to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation; further, that any intentional distortion, mutilation, or modification of that work is a violation of that right, and any intentional or grossly negligent

destruction of that work is a violation of that right. 17 U.S.C.A. § 106A(a)(3). The City stipulated that "the vehicle/planter is an object which contains and projects some level of artistic expression after it was painted by Plaintiffs [artists] and altered to allow it to grow plant-life."

Kleinman lost at trial. U.S. District Judge Sam Sparks held that the former vehicle was art but that it was also a planter and a "distinctive symbol of the Planet K business." Planet K had two choices, said the judge: Move it or screen it. As "an attractive nuisance" and to protect children from playing on it or imitating play on old cars elsewhere, it had to be out of sight.

Kleinman appealed to the Fifth Circuit, which characterized the case thusly: "This appeal concerns whether a junked-vehicle ordinance designed to eliminate eyesores and promote public order ... can be applied to a wrecked Oldsmobile 88 that has been put to use as a cactus planter, colorfully painted, and adorned with the words 'make love not war.' "

The Fifth Circuit affirmed in part. While artworks were communicative and entitled to First Amendment protection, the court remained skeptical that "the heavy machinery of the First Amendment [was] to be deployed in every case involving visual non-speech expression." In this case, "[i]rrespective of the intentions of its creators or [its] owner, the car-planter [was] a utilitarian device, an advertisement, and ultimately a 'junked vehicle.' These qualities objectively dominate[d] any expressive component of its exterior painting." Because the City conceded that the car-planter had some protected expressive content, however, the court applied the intermediate scrutiny test in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), finding that the ordinance survived review under this test. Junked vehicles were a nuisance that contributed to blight and "the depressing effect of junked vehicles on property values." Further, the ordinance was not intended to regulate "speech" at all, but was a content-neutral health and safety regulation, one that was reasonably and narrowly tailored.

Dealing with the VARA issue, the court differed from the court below in beginning its analysis with a preliminary statutory issue: whether the car-planter qualified as a "work of visual art" under VARA. The statute excluded "any merchandising item or advertising, promotional, descriptive, covering, pack-

aging material or container” from protection. The car-planters were “promotional” material and, thus, outside of VARA’s protection. In any event, the ordinance did not require the destruction of a junked vehicle, “merely its screening from general public view.” However, the judgment was vacated to the extent that the district court improperly ordered the plaintiffs to comply with the municipal court order, as the City never requested any affirmative relief, and the two artists were not parties to the municipal court’s order and could not be ordered to comply. The result? “Make law, not car.”

Kleinman petitioned the U.S. Supreme Court for review by writ of certiorari, but that has been denied. “Ralph the Cactus Planter” has been relocated to the Planet K in Austin, where Kleinman has another art-car installation.<sup>6</sup> He has recently petitioned San Marcos for a zoning amendment “that would allow for junked vehicles to be used as advertisements or artistic works.”<sup>7</sup>

This may be the year of the free speech claims, because they just keep popping up. Down in the Tar Heel state, we step up to give David Bowden of Cary, North Carolina, the first-ever **“Don’t-Hold-Back-In-Speaking-Your-Mind” Award** for spray painting the second floor front of his white split-level ranch, with the protest message “Screwed by the town of Cary.”<sup>8</sup>

Cary officials directed Bowden to paint over the sign because it is larger than the maximum of five square feet allowed by zoning. The American Civil Liberties Union has sued on Bowden’s behalf.

The Christian Science Monitor reported that Gene Policinski, executive director of the First Amendment Center at Vanderbilt University, in Nashville, Tennessee, opines: “It is possible that a court will say that the city ordinance does not discriminate on the basis of viewpoint or content, but I think there’s a better argument that this is political speech, and then there’s a very high standard for when courts will allow [a town] to stop speech.”

If David Bowden thinks he can just throw a sandwich board over his shoulders and march around, he better not try it in Richmond, Indiana, where local officials are proposing a ban on people carrying signs to advertise businesses. Our special **“Don’t-You-Have-More-Important-Things-To-Worry-About” Award** goes to the City of Richmond for helping to save the world.<sup>9</sup> The loser is Little Caesar’s Pizza

owner, Bob Flores, who pays people to carry such signs. The City of Richmond says the law won’t apply to political or religious signs.

If you think “Screwed by the town of Cary” is a little rough and fully warrants our making the **“Don’t-Hold-Back-In-Speaking-Your-Mind” Award**, how about David Kliss of East Hanover Township, Dauphin County, Pennsylvania, who put up signs in his yard that say “\$10,000 to take a crap” in protest over the cost of a proposed sewer project?<sup>10</sup> The Township ordered him to not use the word “crap” because it was “vulgar, indecent or obscene.” He painted over the word “crap” and filed suit. His lawyer argues that a 1993 episode of “Seinfeld” used the word “crap” four times in 15 seconds so the word is not vulgar, indecent or obscene.

The **“Honey-Of-A-Zoning-Law” Award** goes to Howard County, Maryland, which, in a stinging rebuke to local beekeepers, has outlawed the winged honey producers from illegally congregating.<sup>11</sup> The county has a law requiring beehives be at least 200 feet away from a neighboring house or farm animal shelter.

Woody Medina, president of the Don’t Squeeze the Bees, a beekeepers’ group in Howard County, has been pushing to amend this zoning regulation because he says most of the 83 beekeepers in the county, the majority of them hobbyists, don’t have that much room and will have to give up their beekeeping. The 83 beekeepers with a total of 235 bee colonies have hives at 94 locations.

“They’re the pollination force that takes care of pollinating everything from the fruit trees to the flowers that people have in their yards to the crops that are in the field,” said Howie Feaga, president of the Howard County Farm Bureau. “They do a job that is irreplaceable.”

The proposed amendment would reduce the setback from 200 feet to 25 feet, and to just 10 feet if the hive has some type of enclosure around it forcing the bees to fly up.

Urban beekeeping is a growing avocation and business these days.<sup>12</sup> There is even a New York City Beekeeping Association—“A hive for the urban beekeepers of Gotham City,” as they describe themselves.<sup>13</sup>

Louisiana State University has a useful model beekeeping ordinance, and like most regulations in effect, they use 25 feet as a setback.<sup>14</sup>

From our correspondent on the Left Coast, Bryan Wenter, who managed to escape the jaws of private practice for the reasonably-balanced life of an assistant city attorney in Walnut Creek, California, where he is fortunate enough to have a spare moment or two to make ZiPLER nominations, we have the “**Same-Game-Name-Blame**” Award, awarded posthumously—the first time we have ever given an award posthumously—to President Ronald Reagan.<sup>15</sup>

Arthur Mijares has proposed renaming Mount Diablo, Contra Costa County’s 3,849-foot high mountain because he finds the name “Diablo,” which is Spanish for “devil,” to be “derogatory and profane.” “When I look at that mountain, I see beauty, an entity that was not created by the devil. The devil does nothing but rob, cheat, steal and kill. That is his nature. I’ve known about this for years, but I’ve now decided it is time to act.”

He has struck out with four possible names and has now decided to confer the honor on the late President Reagan, who died in 2004. Mount Diablo got its name from an incident involving Spanish troops in 1805 who were tracking down Native American runaways when they arrived at the village of Chupcans. When the Chupcans escaped with no trace as to how they got away, the Spanish named the area “Monte del Diablo”—“thicket of the devil.”

President Reagan already has dozens of places and organizations named in his honor.<sup>16</sup> Being a ZiPLER Award recipient will be top of the list, we imagine.

Chances are not looking good for the name change.<sup>17</sup> On Facebook, 81,000 people registered their opposition to any name change, and 2,000 said they wanted it changed to “President Diablo.”

And now, from *Don Quixote* by Miguel de Cervantes:

Just then they came in sight of thirty or forty windmills that rise from that plain. And no sooner did Don Quixote see them that he said to his squire, “Fortune is guiding our affairs better than we ourselves could have wished. Do you see over yonder, friend Sancho, thirty or forty hulking giants? I intend to do battle with them and slay them. With their spoils we shall

begin to be rich for this is a righteous war and the removal of so foul a brood from off the face of the earth is a service God will bless.”

“What giants?” asked Sancho Panza.

“Those you see over there,” replied his master, “with their long arms. Some of them have arms well nigh two leagues in length.”

“Take care, sir,” cried Sancho. “Those over there are not giants but windmills. Those things that seem to be their arms are sails which, when they are whirled around by the wind, turn the millstone.”

—Part 1, Chapter VIII. *Of the valorous Don Quixote’s success in the dreadful and never before imagined Adventure of the Windmills, with other events worthy of happy record.*

This premier—as in the first in time and rank—recognition with the “**Don Quixote**” Award goes to Patricia A. Muscarello of Ogle County, Illinois, for her valiant, overblown, and futile-from-the-outset attempt to strike down a wind farm proposal.<sup>18</sup>

Thanks, again, first to Robert Thomas for covering it in his blog and also to Patricia Salkin for having reported on it later. We quote and paraphrase from her blog without further attribution.

In 2003, Ogle County amended its zoning ordinance to allow for special use permits for wind turbines used to generate power. In 2005, the County granted Baileyville Wind Farms a special use permit for 40 wind turbines. Muscarello, an abutting property owner, opposed the special use permit, and after she lost at the county level, she sued in federal court.

She made the typical claims against the wind turbines, and then added a most extraordinary grab bag of far-out reasons why the permit should have been denied:

- she will be deprived of the full extent of the kinetic energy of the wind and air as it enters her property
- her property will be subject to “shadow flicker” and reduction of light
- she will have to endure severe noise
- ice may be physically thrown onto her property by the rotating blades



- there is risk of “blade throw,” meaning that the rotor blades may come loose and be thrown onto her property
- the wind turbines will cause radar interference on her property
- the wind turbines will interfere with the reception on her cell phone network
- the wind turbines will disturb her GPS service
- her property will be subject to wireless communication interference
- the system will interfere with her television signals
- the existence of the wind turbines will enhance her risk of sustaining damage from lightening
- she will be exposed to higher levels of electromagnetic radiation
- she will suffer injury from stray voltage
- the wind turbines will prevent her from conducting crop-dusting operations on her fields

She claimed a taking and asked for revocation of the permit. The district court dismissed the action. The Seventh Circuit affirmed. The takings claim wasn't ripe because Muscarello didn't seek compensation in state court, and the Equal Protection and Due Process claims were without merit.

But Muscarello's fight had an effect. In April, the County Board unanimously voted a moratorium on all special permits for wind farms, not affecting the previously-approved Baileyville project, so they could consider changes to its zoning ordinance to make the standards more stringent.<sup>19</sup>

The “**Home-Business-Of-The-Year**” Award goes to Coco Dorm in Miami, Florida, which unfortunately had to close up shop at the residence at 503 Northeast 27th Street when the Eleventh Circuit Court of Appeals determined that they were a business operating in a residential zone.<sup>20</sup> Robert H. Thomas of Damon Key Leong Kupchak Hastert in Honolulu, and the author of the informative blog *inversecondemnation.com*, made this nomination. He gets special credit for blatantly pandering to the ZiPLER Awards Committee on his website. Here's a direct quote from his June 28, 2010 posting:

We're Going To Nominate The 11th Circuit's “Porn Dorm” Case For A 2010 ZiPLER Award

Rather than revoke the previously-awarded ZiPLER because the 11th Circuit *reversed the district court's decision* and concluded that *cocodorm* was operating a “business” in a residential district, we're going to nominate the 11th Circuit's opinion for one of this year's awards. Maybe the “TMI” or “Too Much Flava” Award for telling us more than we ever wanted to know about the inner workings of porn dorms. [Emphasis in original.]

Nice try at attempting to usurp the ZiPLER Awards Committee's naming rights. Also, ZiPLERs are never TMI; ZiPLERs are founded on TMI, and you're all about to get TMI.

Last year, we gave this very same business an award.<sup>21</sup> The “**We-Are-Just-Working-Girls**” Award went to [www.cocodorm.com](http://www.cocodorm.com) operating a website offering pornographic video over the Internet for a fee. This wasn'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 with little or no clothing in the house 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>22</sup> Our IT people screen us from looking at anything interesting, but I checked on my personal computer and [www.voyeurdorm.com](http://www.voyeurdorm.com) is still up and operating, as is [www.cocodorm.com](http://www.cocodorm.com).

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. Like [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.

And here is where we left it off last year with the trial court decision consistent with the *Voyeur Dorm* case:

Given these facts, the federal district court ordered the enforcement order to be withdrawn.<sup>23</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 poring 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.

Two observations. First, I do fact-check as many of these stories as I can, but with our stodgy IT people and no ready access in my office to my personal email account as I finished up editing last year's awards, I just assumed Coco Dorm was like Voyeur Dorm and for that reason I chose to name this special honor the **"We-Are-Just-Working-Girls" Award**. Big mistake. I learned months later that Coco Dorm employs gay men of color. The more I thought about it, however, the more comfortable I got with the award name. So be it. The award stands.

Second, I always thought *Voyeur Dorm* was wrongly decided. In narrow technical turns, it made some sense—no business really transacted there, no customers coming and going, no office, and so on. But, think about it, it is psychological blight and not what anyone has in mind as a home business.

The Eleventh Circuit should probably get—heck, why not, they do get—a special **"Dirty Dancing" Award** for hot-footing around their own *Voyeur Dorm* decision and finding that the business was illegal. It is worth reading.

While we're at the intersection of sex businesses and zoning, let's make some additional awards.

The **"Expressive-Dance-Is-Not-Art" Award** goes to the New York Tax Appeals Tribunal for rejecting a requested exemption from state sales tax for pole dancing at the Nite Moves club near Albany.<sup>24</sup> The owners claimed a "dramatic arts" exception to the tax law and put on testimony before the administrative law judge from an expert witness on dance, Judith Lynne Hanna of the University of Maryland.

The Tribunal said:

We question how much planning goes into attempting a dance seen on YouTube. ... The re-

cord also shows that some of the moves on the pole are very difficult, and one had best plan how to approach turning upside down on the pole to avoid injury. However, the degree of difficulty is as relevant to a ranking in gymnastics as it is dance ... Dr. Hanna's view of choreographed performance is so broad as to include almost any planned movements done while playing canned music ... To accept Dr. Hanna's stunningly sweeping interpretation of what constitutes choreographed performance, all one needs to do is move in an aesthetically pleasing way to music, using unity, variety, repetition, contrast, transition.

Think the Bada-Bing from the *The Sopranos* series. Art or not art?

This year's **"It's-All-About-What-You-Call-It" Award** goes to the clever folks at Love Craft, in a retail strip center, so to speak, in Howard County, Maryland, who were slapped with a zoning violation for selling too much adult materials—more than the 20% allowed.<sup>25</sup> They juggled the stock some to get below the cut-off and presto, faster than Jesse James' new girlfriend can get ready for work, the complaint was withdrawn: "During the inspection March 2, [County inspector Steven Rolls] counted 1,601 DVDs, 354 videotapes and 3,278 paperbacks that were not deemed adult fare, which put Love Craft under the 20 percent limit."

Some of these stores have been known to buy used VHS tapes and children's books in bulk from wholesalers and flea markets to stock their shelves to get over the limits. How many people do you think who wander into Love Craft are looking for the classic "Bambi" (1942) with Hardie Albright (Actor), Stan Alexander (Actor), David Hand (Director)? They are probably looking for Bambi Woods in "Debbie Does Dallas" (1978).

If you're going to watch the 1942 Bambi classic, you may wish to crawl into some flannel snugglies and curl up with a hot cup of cocoa, maybe with a dollop of Marshmallow Fluff™ melting away on top. Doesn't that sound good?

So, where to get the sleepwear? You might try the Sweet Dreams shop in Indianapolis. No, that won't work, their permit was denied, but we'll give them the consolation prize of the **"Think-Of-Flannel-Instead" Award**.<sup>26</sup> Secret Dreams applied for an adult

entertainment license at its location zoned for automotive uses in September 2009, but opened for business in December 2009 without permits. That's hardly ever a good idea.

Sweet Dreams (sounds so idyllic) offers live lingerie modeling, but also sells adult videos and sex toys—that's called one-stop shopping. In Indianapolis, you can't operate an adult business within 500 feet of a residence district. There are also landscaping and signage requirements. Sweet Dreams apparently didn't meet the requirements.

A representative of a local business association said: "What we disapproved of was the live entertainment, period. If you look at what's happened in other situations with live entertainment, things go bad." A coalition of owners noted: "One of the things we're fighting in that area is the prostitution and the issues that we have on Washington Street. We feel that bringing in this type of business will only hinder us and the progress we've made."

Okay, forget about the pole dancing, adult entertainment sales, and the lingerie—how about getting together with a few friends for some fun? This year's "**Party-Pooper**" Award, so much sought-after but hardly ever given, goes to the Borough of Emmaus Zoning Board, in Lehigh County, Pennsylvania, for nixing the Vault Social Club's attempt to open.<sup>27</sup> The Club is for swingers and the Board characterized it as an adult business. Said one online report:

The Vault's website said it's a private social club catering to mature, open-minded adults. Members are couples and single women who can access VIP rooms upstairs for a more intimate setting. While the web site doesn't say the club is for swingers, there is a link to swing lifestyle, a web site for swingers to hook up. The Vault website said the club will keep it hot, sexy and discreet.

Emmaus is proud of its small-town reputation and touts it on its website, as did speakers at the hearing. From the website:

In 2009 Money Magazine ranked Emmaus as the 88th best place to live in the country. Using objective criteria, Money Magazine accounted for the Borough's reasonable housing prices and low crime rate, among other factors, to honor the Borough with its ranking. The Borough thanks all of its residents, businesses and

volunteers for making Emmaus one of the finest communities in the country.<sup>28</sup>

In the interest of making sure you have the latest developments in this case, I went to The Vault Club's site via <http://swingingclub.net> when, what to my wondering eyes should appear, but the website—so much for our filter.<sup>29</sup> I discovered that The Vault Club website is "frozen," whatever that means, but it does appear that if you want to swing in Emmaus, you'll have to find another spot.

Well, then, how about all you folks who want to socialize in your own sort-of-private way, maybe just go off and create a camp where you can sit around a campfire, sing camp songs like "If You're Happy and You Know It" and "Kookaburra," and maybe a ghost story or two—how about the ever-popular "Where is My Golden Arm?" You must read the Mark Twain version of the latter, in which he suggests this ending:

Den de voice say, right at his year—"W-h-o g-o-t m-y g-o-l-d-e-n arm?" (You must wail it out very plaintively and accusingly; then you stare steadily and impressively into the face of the farthest-gone auditor—a girl, preferably—and let that awe-inspiring pause begin to build itself in the deep hush. When it has reached exactly the right length, jump suddenly at that girl and yell, "You've got it!")

If you've got the pause right, she'll fetch a dear little yelp and spring right out of her shoes. But you must get the pause right; and you will find it the most troublesome and aggravating and uncertain thing you ever undertook.<sup>30</sup>

A camp is exactly what Sandy Partlow proposed to do in Martinsville, Indiana, when she "filed a petition for a special exception with the Morgan County Board of Zoning Appeals to operate a private, 40-site campground for 'active adults' on Peavine Road." We present to her the "**Clothes-Are-Optional-But-The-Site-Rental-Fee-Isn't**" Award. "The camp will be tailored toward 'lifestylers' and those with an open attitude toward sexuality."<sup>31</sup> She and her boyfriend, Kim Maynard, swingers and nonmonogamous according to the news reports, would run the camp. Maynard describes the campers: "Lifestylers are active older adults who, say out of 100 people, 99 are great friends, and there is one couple who you might share a bed with. That's the biggest misconception

out there—people assume it’s a bunch of people getting together and having an orgy, but it’s really 99 percent social atmosphere.”

Membership would be \$600 a year with a mandatory \$2,400 site fee where campers—the vehicles, not the people as such—are enclaved.

The campers may be nude and may be gay, lesbian, bisexual or transgender. That seems to bother the neighbors. Said one: “I just know it’s not going to be good for this community; I know it’s not going to be good for this county or this neighborhood. I’ve lived here for 42 years, and it’s a wonderful place to live. But I will never be comfortable with it there. Never, ever. It just goes against everything I believe in.”

And from another neighbor, this classic: “The gay thing is a problem for everybody, not that those people themselves are a threat. The gays, they have a problem, they need to know how to deal with it and what’s happened is one group of people say, ‘Oh, that’s fine, do whatever you like’ and another group is bad mouthing them.”

In Indiana, it’s not against the law to cavort au naturale in camp. The public indecency and public nudity laws only apply where people can be viewed by the public.

So, how does this story end? As you probably imagined, more than 100 people showed up for the hearing, and as one speaker said, much the same as the others: “Doesn’t matter where it’s at. It’s in this county and we don’t want it.” According to Channel 13 Eyewitness News (and it doesn’t get any more authoritative than that), “The Morgan County Board of Zoning Appeals denied the campground claim for two reasons. One, they said there’s nothing like it in Morgan County and also, they said it would lower property taxes.”

Finally, it turns out that you shouldn’t even try this at home, at least not in Montgomery County, Maryland, where its Department of Permitting Services receives the “**BDSM-Busting**” Award for shutting down the private house parties in a single-family detached home at 6304 Tone Drive in Merrimack Park, where Paul Pickthorne has been holding kink parties and charging admission (big mistake) to cover costs (what costs?).<sup>32</sup> He is mostly charged with operating an illegal business in holding the monthly BDSM (bondage and discipline, dominance and submission, sadism) parties at the home he rents.

The Examiner (washingtonexaminer.com) reported on the enforcement action:

Calls made by The Examiner to “British ‘Lucky’ Paul,” the self-described “pervert from the other side of the pond” who rents the house and runs the parties, were returned by the Baltimore-based National Coalition for Sexual Freedom.

Susan Wright, a spokeswoman for the coalition, said Paul is “kicking himself” for making the events appear as though they were commercial enterprises, when they were intended to be parties among friends. She said each of the parties—which began last summer—have not drawn more than 50 people, and participants can volunteer to donate to help cover costs. Any cash left over is donated to nonprofits. These parties are happening all over the country, in every neighborhood,” Wright said. “Why are they bothering us? We’re consenting adults.”

The house is in the R-60 zoning district. Zoning Code Section 59-C-1.31 prohibits businesses therein, and “Lucky” Paul has been charging “\$20 for a basic ticket, \$50 for VIP treatment,” from up to 50 people at a time. Same result, and justifiably so, as in Coco Dorm—not-so-lucky “Lucky” Paul is running a business out of a rented house.

Just as each year we have many cases about the conflicts between sex businesses and zoning, we have many cases about animals. In this new section, **The Animal Corral**, we feature five big winners.

Receiving the “**Hop-To-It**” Award is the Cobb County, Georgia Commission which has granted a Marietta rabbit rescue operation a temporary zoning permit for 12 months so that it can continue to operate out of a single-family home on Shallowford Road.<sup>33</sup> Characterizing rabbit rescue as a business use, the county’s planning board first recommended denying a 24-month request. The local East Cobb Civic Association opposed the temporary permit on the ground that the rabbit rescue operation was seeking a permanent home and the request for a temporary reprieve, for the organization and the rabbits, was inconsistent.

The County Commissioners, however, ultimately voted unanimously to allow the House Rabbit Society North Georgia Chapter to continue operating for a year so long as they had a residential bunny

caretaker on site and no more than 20 pens at any one time. They are also restricted in not being able to have any signage and are limited to two large truck deliveries a month.

The **“Ritz-Carlton-Woof-Woof” Award** goes to Fenway Bark (too cute), which received approval from the Boston Board of Zoning Appeals to establish a “fancy dog hotel” in South Boston over the opposition of local residents and city officials.<sup>34</sup> This upscale boarding facility will provide “one-stop shopping for grooming, supplies, and training for about 100 dogs,” and will be open on weekends for “daycare” for pets. The dog hotel will also provide massages, acupuncture and hydrotherapy.

If you think acupuncture for dogs seems over the top, let me tell you that our previous dog, Bailey, a 50-plus-pound English Shepherd mix we got from rescue, lived almost 16 years and had arthritis the last five. Conventional treatments helped, but he got relief from acupuncture, and it couldn’t have been the placebo effect.<sup>35</sup>

Raising chickens in urban places has been the subject of much discussion in the last few years. In prior ZiPLER Award issues we have described numerous initiatives and provided references to organizations supporting such endeavors. This year, we give the **“Chickens-By-The-Half-Dozen” Award** to the city of Belfast Maine.<sup>36</sup> The city’s proposed ordinance, prepared by city planner Wayne Marshall, allows up to six chickens in most residential areas, subject to a one-time registration fee of \$25. It was suggested that applications be reviewed by the planning office with possible pre-construction site visits to make sure the chicken coops would be appropriate on individual lots. It was decided that ten-foot setbacks would be sufficient for the 800 or so properties which might qualify. The keeping of chickens is limited to single-family homes out of concern that apartment renters moving on would leave their coops behind, adding new meaning to “they flew the coop.”

Total up the registration fee, the cost of inspections (to be borne by the city), purchasing chicks, providing feed, labor in caring for them, the cost or labor in slaughtering or collecting eggs or both (preferably in reverse order)—and any reasonable calculation is going to demonstrate that it may be fun, but uneconomic, to have chickens. Why, for the one-time \$25 registration fee you have to pay to keep six chickens, you could buy six chickens already slaughtered from

the local grocer on sale and have enough money left over for a six-pack of beer.

The **“Agricultural-Heritage-Of-Miniature-Pigs-And-Hedgehogs” Award** goes to the “Party Barn,” an operation in Sprague, Connecticut, conducted by James and Noreen Foley, on a former farm site.<sup>37</sup> They received approval of the Sprague Planning and Zoning Commission to conduct birthday parties and other events on their property, including paddleboat rides and a small petting zoo.

It started out small but then grew. Noreen Foley says: “we had a couple of people ask if it was OK to use our property for a birthday party, and we let them use it. It went from there.”

The chairman of the Planning and Zoning Commission said that the approval was given because the site had been used previously as a working farm: “it’s not something that was built brand-new, where somebody brought in animals and a barn.” Noreen Foley explains that part of her effort with the animals is to promote Sprague’s agricultural heritage. Apparently, that agricultural heritage is represented by her petting zoo consisting of a miniature pig, two hedgehogs, a goat, a miniature pony, and a goldfish pond.

The next honor, **“This-Little-Piggy-Stayed-Home-And-This-Little-Piggy-Got-Evicted” Award** is presented to Pat Brown, in memory of her beloved Gwendolyn, the pet potbellied pig who was treated so shabbily by Prince George’s County officials when they determined that she was not a customary household pet and had to be evicted from her home in Berwyn Heights where she had so happily resided most of the 20 years of life.<sup>38</sup> Pat Brown is a criminal profiler of some national repute seen on cable news. She contacted the National Enquirer and started a Facebook page to try to stop the “pigsecution” of poor Gwendolyn. Her Facebook page is titled “Save Criminal Profiler Pat Brown’s Pet Pig, Gwendolyn!” Gwendolyn quickly got over 2,000 fans. Brown says: “she’s a geriatric pig. I think the law is ludicrous ... My neighbors love Gwendolyn ... It’s not an issue with anyone except a bureaucrat sitting behind the desk.”

Just a month after the initial report of the enforcement action, The Washington Post had an article, a kind of pig obituary, announcing the Gwendolyn had died. By the time of her death, she had more

than 3,000 fans on Facebook. There seems to be not much doubt that her spirit was crushed by the zoning enforcement action. As Pat Brown said: “I could tell she was in some sort of discomfort. I rubbed her tummy and spoke softly to her and this went on for about 30 minutes. Then she became quiet and she just let me hug and kiss her for another half hour or so and then she was gone.”

The first-ever “**Big-Brother-Joins-Zoning-Enforcement**” Award goes to Pierce County, Washington, which has instituted an “eye in sky” program using aerial photos to find illegal buildings, mostly garages and sheds.<sup>39</sup> They have an amnesty program under which property owners can avoid some of the more serious penalties by getting permits after the fact. I thank Sophia Stadnyk, Senior Assistant Counsel for the International Municipal Lawyers Association, for this nomination.

The county has thus far identified more than 3,200 illegal garages and other structures. Clamping down on these miscreants has generated over \$100,000 in revenue from property owners seeking building permits. Their target is \$310,000 for this year. The chairman of the County Council’s Community Development Committee is concerned about the “eye in sky” program: “this has been a troubling program to a number of council members.”

One last and very special award, the first-ever “**Legacy Medal**” goes to the animated television show, *Family Guy*, for Episode 18 in Season 2, “E. Peterbus Unum,” which first aired July 12, 2000.<sup>40</sup> It illustrates the frustration just about everyone has with zoning, and as a popular show for a large segment of the population it suggests that zoning is of common concern. Here’s the synopsis of the ZiPLeR Award-winning show which will be shown in full at the annual award ceremony somewhere far at sea on the Carnival Cruises Lines’ SPLENDOR:

The town zoning laws won’t allow Peter to build a pool in his yard. When he tries to get a permit, he discovers that his property is actually not part of Quahog, and therefore not part of the United States. Armed with this new information, Peter makes his land his own country, calling it Petoria. When Peter gets no respect in the United Nation, he decides to invade Joe’s pool, which brings the U.S. Army to his border. The Griffins can only survive so long without

water, electricity, heat, or access to the United States, and finally, Lois and the kids leave President Peter, along with Brian, to his third-world country. Peter finally repatriates only a week after seceding.

That’s it for this year. There are signs of spring in the world of real estate development, so hopefully by this time next year we’ll have even more awards. Send your nominations to [dmerriam@rc.com](mailto:dmerriam@rc.com).

## NOTES

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