THE 2014 ZIPLERS: THE TWENTIETH ANNUAL ZONING AND PLANNING LAW REPORT LAND USE DECISION AWARDS

Dwight H. Merriam, FAICP, CRE*

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:

- What Bill Cosby, Gangnam Style, the Russian ruble in rubble, and fracking have in common
- Learn why Los Angeles is the place to be for zoning
- Remember there are video cameras everywhere
- Get ready to celebrate the holidays with Satan
- Observe the effects of overly zealous land use regulation
- Get guidance on getting married in a barn
- Become as smart as a carpenter: survey twice and build once
- Experience the most thoughtful primer ever on caboose law
- Tell your friends why dogs have a legal right to fair housing
- Know when 10 pets are not six-too-many under a four-pet limit
- Become attuned on how to keep yourself out of jail
- Learn the zoning law of feral cats
- Be able to answer the question: “Is a 12-foot skateboard a sign?”
Know what to do with a garage five times bigger than the home

Consider how you would regulate baristas in bikinis

Be ready when a Sriracha hot sauce factory comes to town

See for yourself the most ridiculous commissioner of the year, if not the decade

The 20th Anniversary Edition

China is the traditional gift for a 20th anniversary, at least in a marriage, and having done the ZiPLeR awards for 20 years one begins to feel more or less married to, or at least in a common law marriage with, Thomson Reuters. Maybe we should have some commemorative porcelain plates made with our fabulous ZiPLeR logo.

The Year in Brief Review

Culturally, the biggest event of the year has to be Psy’s “Gangnam Style” becoming the first video to reach 2 billion views on YouTube. As this is written, we can report that PSY - Gangnam Style M/V has had 2,163,163,889 views. That surpassed the magic number of 2,147,483,647 and supposedly “broke” Google’s counter. How come? Google had assumed that the views for any single video would never exceed a 32-bit integer which of course as we all know is 2,147,483,647. Contrary to the urban myth that Gangnam Style somehow “broke” Google’s counter (there is no counter), Google had already adopted a 64-bit integer some months before Gangnam Style hit the 16-bit limit, bringing the maximum to 9,223,372,036,854,775,808 which most everyone agrees that neither Gangnam Style, nor any other video, will ever reach.¹ No one considered, however, the YouTube video of the ZiPLeR 2014 Awards.

It was a year of disillusionment and recognition of the shrinking globe. Bill Cosby fell from grace, with no end in sight. What’s next—Charlie Brown turns out to be The Joker from Batman in disguise, Lucy has a shoe fetish, and Snoopy is claustrophobic and thus relegated to sleeping on the doghouse roof? And the shrinking globe. Ebola would have taken years, maybe decades, if at all, to reach U.S. soil, but instead arrived here in just hours because of air travel.

It was a year of having to recognize that we are in a global economy still fundamentally grounded in natural resource extraction, and forever messed with by politicians, such that we are connected, whether we like it or not, with those half-way around the world. U.S./Russian relations and views of one another continue to decline into what some are calling the “New Cold War.” It is the Ukraine of course that is the burr under the saddle leaving both countries riding rough. Now toss in the global disruption in natural resource extraction and pricing. The Organization of the Petroleum Exporting Countries (OPEC) has brought oil prices to such a low level that...
Russia, dependent on its economy of gas and oil production, has suffered a nearly unprecedented weakening of its currency and runaway inflation. Market sanctions by western countries have exacerbated their economic problems. Not surprisingly, Putin’s ban of U.S. chicken and other American imports has not helped relations between the two countries. While some argue that low oil prices are a good thing in the U.S. by increasing spending on consumer goods, one interesting and unanticipated downside (which might actually be a good thing in some respects in the very high growth areas) is that the seemingly unstoppable hydraulic fracturing for oil and gas production has slowed, at least at the planning stage, because some sites may not be economically feasible given the current market price.

Who would have thought that in a year’s time we would find ourselves in a near-Cold War stand-off, that there would be such a precipitous drop in oil prices, that we would experience such economic havoc, that the seemingly irresistible force of fracking could fade (even a little), and that Kim Jong-un would be able to keep us from watching second-rate movies about third-rate dictators?

Really. We have bigger fish to fry than dealing with warring superpowers, comedians who are no longer funny, the demise of big oil, clownish despots, and counter-busting YouTube phenoms. OPEC schmo-pec. We need to acknowledge and deal with the fact that there are people out there, lawless people, people who care nothing of our zoning regulations, who are willful violators of the Rule of Law by harboring more chickens in their yards than allowed² and by wrongfully cohabitating³ and thereby egregiously flaunting our definition of family provisions meant to perpetuate what we hold so dear—the preservation of the Ozzie and Harriett family that never was. The world changed. Example: you probably watched “IT’S A WONDERFUL LIFE” (1946) recently. Come on, what would happen today? Half of those people would be indicted; the Securities and Exchange Commission would be all over them like a cheap suit. The ZiPLeR Awards recognize those realities of today.

The Awards

Most of you are recidivist readers, coming back to the awards year after year for yet another dose, so you know how the system works. We accept nominations from all over the world and our select international committee of planning and zoning experts analyzes them all, meets in resort locations at Thomson Reuters’ expense several times throughout the year, and from the tailings of these worked over matters involving local land use, pick just a few top examples of the best of the best. The objective, ostensibly, is to learn from the controversies. Any reader with a degree of self-awareness recognizes, however, that the ZiPLeR Awards might actually help us understand how absurd some of these planning and zoning contretemps can be. A further benefit is that in considering the ZiPLeRs we are often left with an undeserved sense of superiority knowing that people, other people, have been involved in dumber escapades than we have.

Our first award this year, the first time in the long history of the ZiPLeR Awards that we have ever given such an award, is the Life-time Achievement (If-You-Dare-Call-It-That) Award which goes to the City of Los Angeles for having some of the most detailed zoning regulations in the country. The city’s regulations, for example, dealing with medical marijuana, have no equal elsewhere in terms of the length or detail. But for this award we look back to the zoning code generally and marvel at what it contains given its origination in the year of my birth, 1946. That is a long time ago. Here are the 14 “Weirdest Land Uses in Los Angeles Is Zoning Code” as identified by Curbed Los Angeles⁴:

- Reducing salons
Most people like to see their name in print. You would be astounded at the solicitations we get from all over the world by people wanting to nominate a potential ZiPLeR Award winner and hoping that their nominee will win so they can see their name in print right here, right up front before all the world by no less than Thomson Reuters, the global leader in publishing. An example of such a nomination comes from a lawyer I was pleased to work with years ago and who has had, despite that experience, a wonderful career since. He made this nomination with the unabashed plea “if this is not ZiPLeR worthy, I don’t know what is...” For this nomination I want to thank Bryan W. Wenter, AICP.

The next ZiPLeR Award is the Politicians Behaving Badly Award (aka the Worse Than Mud Slinging Award or the Rob Ford Distinguished Public Servant Award) and goes to the former mayor of San Marino, California, a wealthy suburb of Los Angeles, who resigned his position as mayor after being caught on video throwing a bag of dog waste onto the front walk of a political opponent. While it is more than a little bit of a stretch to say that this type of bad behavior fits within the four corners of planning and zoning except to the extent that it involves land and a part of the pedestrian circulation system, there are lessons to be learned here. First, it is probably not a good idea to do what in the first instance may seem to be something you might really like to do in a perverse Walter Mitty-ish way. Second, it now appears that just about everything that we say, and do, and write is somehow recorded and preserved for posterity and may eventually lead to our undoing.

How about something more cheerful? The holiday season is just behind us as we wrap up 2014 and move on to 2015, and in the spirit of the season the Selection Committee by spontaneous acclamation picked a winner from a nomination late in the year in a matter implicating First Amendment freedom of expression rights. We extend a special thanks to Evan Seeman and Karla Chaffee, the coauthors with yours truly of the blog www.RLUIPA-Defens e.com which reports on all of the land use-related Religious Land Use and Institutionalized Persons Act cases and controversies, and constitutional claims under the First Amendment’s freedom of religion and establishment clauses. They picked up on this report of the satanist group from Detroit creating its own “holiday display” at the statehouse in Lansing, Michigan. We are pleased, well “pleased” in our own kind of ZiPLeR Awards way, to present the Detroit Chapter of the Satanic Temple with the first-ever I’m Dreaming Of A Satanic Christmas Award for their display which includes a snake wrapped around the satanic cross presenting a book (a little hard to do without any arms or hands) as some type of gift for the holiday. On the satanic cross is the inscription “the greatest gift is knowledge.” The display was featured on the Northeast lawn at the Capitol for a couple days right before Christmas. A member of the Michigan
State Capitol Commission which is responsible for approving such displays said that the commission felt compelled to approve it because it was “constrained by the Constitution” and had an obligation to “recognize everybody’s First Amendment rights.” That same commission member, John Truscott, went on to say: “Personally, I think this is absolutely repulsive and I’m very frustrated by it. I don’t appreciate a group trying to hijack a Christian holiday.” There was also a Christian nativity scene display approved for the Capitol grounds but the out-of-state person who received the approval couldn’t find anyone locally to put it up and take it down after the holiday.

The Satanic Temple has been active elsewhere. This national group of somewhat informal organization has worked to further the efforts of atheists to oppose religious displays on public lands and has been noted for its ongoing efforts to get approval of a satanic display at the Oklahoma statehouse where there is a Ten Commandments display. The satanic display, which is under construction from a mold created by a classically trained sculptor, is a statue of Baphomet, or Sabbatic Goat, which for hundreds of years has represented Satan. The figure, with smiling children on both knees, will be cast in bronze from the clay mold. It appears somewhat unlikely, however, that the display will actually ever be placed on the Oklahoma Capitol grounds, at least based on this statement from the spokesman for Governor Mary Fallin: “There will never be a satanic monument on the grounds of the Oklahoma State Capitol and the suggestion that there might be is absurd.” The Satanic Temple does, however, seem to suggest otherwise. Donate $1,000 or more and you can have your name appear on a plaque that will be mounted on the back of the Baphomet statue that the Temple intends to donate to Oklahoma City. Or purchase your very own, 7” x 4” x 3” replica.

Even Stephen Colbert has got into the act, “interviewing” Baphomet for The Colbert Report.

In October 2014 it was reported that the Satanic Temple has attempted to distribute satanist coloring books to schools in Orange County, Florida, to counter the distribution of Bibles to school children. Snopes.com has a rather complete report on the whole matter. If you don’t know Snopes.com, you should. All those time-wasting emails you get about unbelievable things—they’re mostly myths, but how do you know? Go to Snopes.com; they do a great job in most cases in separating fact from fiction, as they have done with the Orange County matter. In this case, they say it is true that “The Satanic Temple has submitted a coloring book for distribution in Florida public schools” but it is false that “The Orange County school board has decided to include the Satanic Coloring Book with other religious materials distributed in schools.” You may want to take a look at the coloring book. On the very first page, for example, you’ll find an activity which asks the reader to find six differences between two sketches of a classroom scene, posing the challenge in this way: “Annabel is spreading knowledge and helping to dispel fear and ignorance by demonstrating her Satanic ritual for her class. Find six differences to help her.” The school district’s legal counsel has said that “We definitely, definitely will not be distributing those materials until we have a work session on that issue.”

It all started back in January 2013 when the school district allowed World Changers of Florida, Inc. to distribute Bibles to students. An atheist organization, the Freedom From Religion Foundation, began handing out atheist materials and when the school district stopped them from distributing the material to the students, the Foundation brought an action, which suit was ultimately dismissed after the district capitulated to some extent and allowed some atheist materials to be distributed.
to the school children. That settlement apparently put the Satanic Temple in a position to claim a right to distribute the coloring books.¹³

An interesting and as yet unresolved question is whether atheism is a form of religion protected under the Religious Land Use and Institutionalized Persons Act.¹⁴

Do you know the children’s book, THE LITTLE HOUSE (1942) by Virginia Lee Burton, which tells the story of a little house built alone on the top of a small hill and which is with the passage of time surrounded by large buildings? Burton denied it was a story about sprawl, but that it was meant to convey the passage of time to young readers. Regardless, it speaks to the issues of uncontrolled growth. Our next award winner is a little bit like that but with a weird twist; weird twists, of course, are often central to the ZiPLeR Awards. For the first time ever, we make an award to a parcel of real estate, 2810 E. 1st Street in Long Beach, California’s Bluff Park neighborhood. The Regulation Run Amok Award is given to the house which stands stripped of everything but its frame as a consequence of some very tough regulation which has succeeded in preserving the Bluff Park neighborhood of Craftsman bungalows and Spanish Colonial Revivals in the historic district created in 1982. Perhaps, if anything, the historic district regulations worked too well in preventing inappropriate rehabilitation of the home. The story is a long and tortured one that goes back many years leading to the current situation which has existed since December 2005 when the then-owner stripped the house of everything but its frame. The title of the article in a local newspaper probably describes it best: “Bungled Bungalow Proved a Blueprint for Historic Zoning Issues.”¹⁵ The former owner, Mohammed Movahedi, who purchased the property in 2004 for $725,000 and ended up selling it at a loss of $319,000 eight years later without ever spending a night in the house, described what happened: “It was a terrible experience. I am trying to move on with my life and want nothing to do with it anymore.”

Reportedly, he undertook some construction that exceeded the authorization he received to upgrade the plumbing and electrical systems, install a new roof, make certain interior improvements, and construct a 523-square-foot addition. During the construction, Movahedi discovered termite and water damage and other serious problems that he felt created health and safety issues. The city ordered the work stopped in January 2006 at a time when the roof had been removed from the house along with the walls and flooring—everything but the framing and a few of the windows.

Movahedi sued the city in federal court, lost the case, and sold the house, claiming that he had spent more than $1 million on the project and was facing a $65,000 environmental impact review ordered by the city. “We didn’t have the resources and we were psychologically drained. We had small children and we needed a home for them, and all the while we are paying all the costs for that house.” Fortunately, it looks like the new owner is moving forward with the restoration, having poured a new foundation and agreeing to a $70,000 environmental impact review.

Getting married in a barn is not all that bad.¹⁶ We have reported in the past on controversies over zoning in rural areas where farmers are trying to make some extra money by providing wedding venues. The latest controversy has arisen in Grant, Minnesota.¹⁷ Scott Jordan has a 50-acre spread in Grant, a quiet little village outside of St. Paul, and has spent over $300,000 restoring the barn on his property so that he could rent it out for weddings at the big city rate of $4,800. Neighbors don’t like the barn weddings one bit: “They blare music all night long, they have college students out there screaming, and everyone’s drinking,” said one neighbor with regard to another wed-
A familiar maxim for both the professional and the do-it-yourselfer is: “measure twice and cut once.” This year, for the first time ever, we are going to confer the **Survey Twice And Build Once Award** to Four Twenty Corporation which built a single-family residence in Narragansett, Rhode Island, based on survey that failed to accurately show the actual boundary lines, resulting in the $1.8 million new home encroaching 13,000 square feet into the abutting lot. We are not talking about 100 square feet or 1,000 square feet; this was 13,000 square feet, almost one-third of an acre into the abutting 4.5 acre park owned by the Rose Nulman Park Foundation, described as “a diamond on the necklace that is Rhode Island’s beautiful coastline.” The entire house was on the park land and it was only discovered after the builder had entered into a contract to sell it for $1.9 million and the buyer was smart enough to have a real survey done.

In the event that, at any time after the date of this Agreement, the Trustees permit the Park to be used in any manner other than [as a park open to the public] then those of the Nulmans who are then serving as trustees of the Rose Nulman Park Foundation, jointly and severally, agree to pay the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00) to New York Presbyterian Hospital provided, however, that no such payment will be required if a court determines that the Park can be put to uses other than the Designated Use under the doctrine of cy pres or otherwise.

The developer’s only defense was that it would be inordinately expensive, between $300,000 and $400,000, to pick up the house and move it off the Foundation’s lot.

The Rhode Island Supreme Court upheld the trial court’s decision that in the case of a continuing trespass an injunction is a proper remedy but that the court did have some discretion to consider the equities when the circumstances were exceptional.

The court found that there were no exceptional circumstances in this case that would allow the court to give any special consideration to the developer, that a 13,000-square-foot encroachment was anything but de minimus, and that the developer’s reliance on the
engineer’s site development plan, innocent though it was, did not outweigh the injustice the Foundation would suffer in having to transfer title to the developer or having to accept damages in lieu of removing the trespass. The Court concluded: “[T]his Court declines to punish the innocent plaintiff by forcing it to lose any portion of its property. To do so would be to effect a judicial taking of property for private benefit. ‘[T]he duty of the courts is to protect rights, and innocent complainants cannot be required to suffer the loss of their rights because of the expense to the wrongdoer.’ [citation omitted].”

Sometimes the ZiPLeR Award nominations come a little too close to the lives of our International Selection Committee and this reporter. Such is the case from Vermilion, Ohio, involving the determination by Vermilion’s Board of Zoning Appeals as to whether to allow a local preservation group, Friends of HarbourTown, to place an historic Nickel Plate caboose next to the town’s old railroad depot. The first time around, the ZBA denied the proposal 3 to 2. At first, it looked like the Friends would have no problem with the proposal when the Planning Commission voted 4-0 to approve the plan. The problem was the required 150-foot setback from the residential area—the proposed site had only a 22-foot setback. The group needed a variance, which the Zoning Board of Appeals denied the first time the application was made.

I had a similar problem some years ago when I purchased a 1916 New York Central caboose with the idea of relocating it to my home in Vermont and setting it on a single 39-foot section of track to be laid down on the property. The local builder who built my house in 1988 asked me if I had checked the setback regulations for the town. As a first year law student and summer associate in 1976, I had occasion to thoroughly research the definition of “structure.” It turns out some courts have held that “rolling stock,” such as railcars, are not structures for purposes of some aspects of zoning, lot coverage for example. At least, that was my vague recollection. So, I told the builder maybe we didn’t need to check the setback. These small-town, native Vermont builders are a lot smarter than at least one so-called “flatlander” land use lawyer from out-of-state. He suggested, and I agreed, that he should check with the zoning enforcement officer to determine if the section of track, which by then had been installed on the property, was sufficiently set back from the property line. Fortunately, it was, and we were saved from finding out, for better or for worse, whether a privately-owned caboose on a single-family lot in Ludlow, Vermont, is “rolling stock” exempt from zoning.

The problem in Vermilion with the first vote was not so much with the usual practical difficulty or unnecessary hardship test that trips up so many (but not enough) variances, but the poor condition of the old depot and the belief that the caboose wouldn’t help.

The second application proposed to locate the caboose elsewhere at the depot, in the back of property. The second time it came before the board of zoning appeals, it was tabled, sending it off to the City Council’s legislative committee which reportedly was considering an ordinance governing the Friends of HarbourTown’s stewardship of the property. To the Friends of HarbourTown we present the Vagaries Of Variances Award.

Unlike Rolling Stone, the ZiPLeR Team is committed to fact checking. The Vermilion Director of Public Service/Building Official, Robert Kurtz, upon inquiry by our staff of dedicated journalists, filled us in on the end of the story:

Pertaining to our “caboose” issue - the real problem stemmed from an old two-story brick school house on the property that has not been maintained and is in very poor condition and an ordinance from the 1980’s that granted a
non-profit organization (the property owners) very generous freedom with this property, and without having to go through approval processes that everyone else is subject to.

Council has rescinded the 1980 ordinance and the school house building has been condemned. Their deadline to repair or remove the building has expired and now the City is exploring funding sources to cause the demolition.

As for the caboose, the City Law Director gave Council an opinion that the caboose is actually personal property, not a building, and therefore not subject to setback and other zoning regulations. The caboose was delivered to the property about a month ago and is being stored inside another building on the property that is not condemned.

And there you go, another milestone for the ZiPLeRs: new precedent. The heck with “rolling stock,” a caboose is “personal property” and therefore not subject to zoning at all. You heard it here for the first time.

You should have heard my insurance company, USAA, when I called and said I wanted to insure my caboose. First, a little laugh (I learned a new slang word that day), then “can you please hold?,” then after several minutes: “your caboose is treated as a shed and requires no additional coverage under your homeowners policy.”

Every year we have animal cases, enough that some time ago we created a “Critters Corner” to address them. Welcome to the 2014 Critters Corner. Our first award winner is the United States Department of Housing and Urban Development who receives, the Advocating For A Person’s Best Friend Award for charging “Kent State University, in Kent, OH, and four of its employees with housing discrimination for refusing to allow a student with disabilities to keep an emotional support animal in her campus apartment.”

The action arose out of a student in university housing who was being treated by a university psychologist for a disability. The psychologist wrote a letter, presumably to the university (the HUD press release does not say to whom it was sent), “stating that the best way for the student to cope with her disabilities was having a support animal.” The student got a dog and submitted a request for a “reasonable accommodation” to get a waiver of the “no pets” rule, which request was denied. The student and her husband were then forced to move to an apartment to keep the dog. Brian Connolly and I recently co-authored a book for the American Bar Association, GROUP HOMES: STRATEGIES FOR EFFECTIVE AND DEFENSIBLE PLANNING AND REGULATION (2014) and though we note the issue of service animals, we have only one cite to a case. If there had been enough space, it could easily have been a full chapter. The Department of Housing and Urban Development has extensive guidance on the issue which is important for landlords, tenants, and the disabled, who are unquestionably assisted in many important ways by service animals.

An assistance animal is not a pet. It is an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person’s disability. Assistance animals perform many disability-related functions, including but not limited to, guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to sounds, providing protection or rescue assistance, pulling a wheelchair, fetching items, alerting persons to impending seizures, or providing emotional support to name a few.
persons with disabilities who have a disability-related need for such support.  

As HUD concludes:

The definition of “service animal” contained in ADA regulations does not limit housing providers’ obligations to grant reasonable accommodation requests for assistance animals in housing under either the FHA Act or Section 504. Under these laws, rules, policies, or practices must be modified to permit the use of an assistance animal as a reasonable accommodation in housing when its use may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling and/or the common areas of a dwelling, or may be necessary to allow a qualified individual with a disability to participate in, or benefit from, any housing program or activity receiving financial assistance from HUD.

The next Critters Corner award, the Give The Poor Kid a Break Award, goes to the City of Lawrence Massachusetts, for reportedly enforcing its four-pets-only rule against seven-year-old Jaxon Torres, who suffers from Generalized Anxiety Disorder and whose dogs apparently have been helpful to him. His therapist says that losing the animals would be devastating to the boy and would be a setback in the progress he has made in overcoming his disability. The therapist, Abigail Eaves of Andover, Massachusetts, in a letter to the city opined: “It is my belief that the loss of his animals would cause a significant disruption not only to his ability to self soothe and fall asleep, but to his feelings of security in general. Given his pre-existing anxiety, the trauma of losing pets would be a setback for him that would ultimately impact his ability to perform well socially, emotionally and academically.”

This is a troubled household as a newspaper report detailed: “Jaxon’s mother said the seven dogs do more than help him fall asleep, including helping him feel he’d be protected if her former boyfriend returns, as he did last year after he finished a six-year prison sentence for beating Diaz [the mother]. His return ended after a few minutes when police arrived, guns drawn. The former boyfriend was convicted on several charges related to the home invasion and returned to prison.”

City Inspector Raymond Hillman in his written report stated that: “In regards to dog nuisance, i.e.: odor, condition of property, noise (I found) Ms. Diaz’s property to be without those concerns and to be in impeccable condition.” The family’s veterinarian wrote to the city to say that the vaccines and medications for all pets were up to date and they “are all well-loved and pampered pets.” Reportedly, the property owner was keeping seven dogs, three cats and a bird in violation of the four-pet rule. The Police Chief cited a three-pet rule.

Reading the annual ZiPLeR Awards issue could keep you out of jail. The take away from this award, the I Promise I’ll Never Mess Again With Zoning Enforcement Award presented to James Barth, who was imprisoned in the Hennepin Adult Corrections Facility for five days, is that we all need to keep our backyards neat and clean. Barth’s crime against society was that he violated Orono, Minnesota’s City Ordinance 78-1577 regarding exterior storage in residential zones by keeping, according to a city inspection report, “lumber, scrap metals, ladders, tires, rims, metal shelving, garbage bags, 5-gallon buckets, tarps, furniture, utility trailers, miscellaneous construction debris, junk and a Ford L800 Diesel vehicle with expired registration” outside on his half-acre property. A later inspection revealed he had added “a wooden gate, an appliance, a battery and a carpet remnant.” He ultimately cleaned it up and satisfied the local inspector, but the judge sent him to the slammer anyway as Barth had missed a court date, not responded to bench warrant, and at one point had not cleaned up the property.

But sometimes enforcement can go a little
too far, at least in the eyes of some. That may be the case in the Village of Providence, Alabama, where a Christmas tree lot was shut down for violating zoning.31 The zoning enforcement coordinator (we’ll call him Mr. Scrooge to protect his identity) is a no-nonsense guy: “We’re not out to hurt the small business guy, but we’ve got a set of rules and have to enforce them. There are no winners here.” As the tree seller, Greg Shell, described the enforcement process: “They said, ‘You need to shut it down right now, or we’re calling the police and will fine you.’ ” Tree sellers in nearby jurisdictions have received variances, but in Providence you can’t get a variance under its mixed-use code; you must amend the ordinance. Shell ended up giving away his remaining trees and taking a $20,000 loss. To the Village of Providence, we give the Zoning For Zealots Award. At least those who picked up a free tree, some of them 12-feet tall and valued at $200, had a happy Christmas. One woman whose unemployed daughter, with an eight-year old daughter, couldn’t afford a tree picked one up: “This is going to be a blessing.”

You know the general rule that if a mistake is made by the local government in issuing a permit, the government is almost always not liable and all of the responsibility is on the property owner and developer. So was the case in San Antonio, Texas, where the owner of Commonwealth Coffee House & Bakery, Jorge Herrero, received all the required approvals for his new restaurant: “We got all nine final approvals from each of the inspectors, mechanical permit, plumbing, electrical, fire department, occupancy, parking and also health department.” Then, just weeks before opening the shop he discovered that the property was zoned residential and not commercial as everyone had assumed for over 30 years.32 The City Council considered and denied, because it would set bad precedent, a change in zoning to allow the coffee shop as a kind of buffer use between the commercial and residential districts.

We put the ZiPLeR Awards Fact Checking Team on a private jet to San Antonio to double/triple check what had happened and discovered that just as 2014 was drawing to a close, the City Council reconsidered its position and approved the zone change.33 To San Antonio We Present The Having Your Cake And Eating It Too Award.

Some animal lovers win in the end, as did Chris Conklin of Oslo Township in Elkhart County, Indiana, who has a caring relationship with nine feral cats that she and her husband have been feeding and sometimes providing outdoor shelter for near their home at Ideal Beach. To Chris Conklin we present the I Won’t Pussyfoot Around When It Comes To Zoning Award for succeeding in her appeal of a County zoning ruling that would have required her to get a special permit to provide care for the feral cats.34 The problem arose because the zoning ordinance defines a “kennel” as existing where “more than five dogs, cats or other household domestic animals over six months of age are kept on a property; if there are more than two such animals kept for breeding, boarding or training for compensation; if more than two such animals are kept and offered for sale.” The county zoning administrator, Brian Mabry, wrote to the Conklins and told them that their situation in caring for the feral cats constituted a kennel under the zoning ordinance because they were feeding them and they exercise a certain degree of control over them, and that by the dictionary definition feral cats are considered domestic because they were the same species as household cats.

An enforcement action ensued, the Conklins appealed to the zoning board of appeals, and the board voted unanimously that feeding feral cats is not the equivalent of a kennel. One of the board members was articulate and definitive at the highest level of sophistication in expressing the factual, legal, and public policy basis for granting the appeal and setting aside
the enforcement action: upholding the enforce-
ment action, she said, would have “opened up
a can of worms.”

Your ZiPLeR Team goes to no end in getting
the story behind the story and in this case has
for you the actual appeal papers that will be of
great help to you in your next feral-cat-feeding-
is-it-a-kennel case. You simply can’t get such
high quality information critical to your zon-
ing practice any other place other than right
here with the ZiPLeR Awards.

Our inveterate readers will recall the case of
the Jewett City, Connecticut, snake breeder
and his zoning problems in the 2012 issue of
the ZiPLeR Awards. The local zoning comis-
sion received that year’s coveted Be Kind To
Your No Legged Friends Award. As most
of our readers have doubtless experienced,
many zoning disputes take on a life of their
own and continue on for years. The snake
breeder, Randy LaPorte, has been selected to
receive the Snakebite Award for having
lodged a zoning complaint against his neighbor
who was one of the more zealous opponents of
LaPorte’s ultimately successful pursuit of
permission to breed snakes in his home.

LaPorte complained about his neighbor’s
operation of a bed and breakfast and the
construction of a back deck and roof allegedly
without proper permits. Making some kind of
fashion statement, LaPorte showed up at the
zoning meeting nattily attired in a T-shirt
upon which was printed “If Provoked, I Will
Strike.” I thank my assistant, Diane McGrath,
for keeping track of this story as it continued
to develop.

Late breaking news. On December 17th, just
as this issue was going into production, it was
reported to the ZiPLeR Fact Checking Team
that the skateboard had been removed and the
shop owners are pursuing approval as a sign.
The shop owners’ structural engineer, as their
agent, has been working with Roger Water-
street, a sta/c141 member at the County’s depart-
ment of permitting services. There is one
problem, however, and it may be an insur-
mountable one. No, it is not as most of us
would imagine one of size; it is a matter of
shape. The county’s code provides that be “sign
must be a geometric shape; a sign shaped to
resemble any human or animal form is
prohibited.” Now, if we could get one of Kim
Jong-un’s minions to hack into the minds of
our readers and download their reaction to this
regulation, I’ll bet most are asking themselves:
“Where did this come from—a sign can’t be
shaped like an animal?”

Almost every year we have one or more cases
of when is a sign not a sign and when is a
sculpture or object d’art a sign. We have had
cases of a giant L.L. Bean boot, a man-sized
lobster, and the Hyatt hotel chain’s “blade”
incorporated into architecture. This year, we
confer upon the Bethesda (Maryland) Scooters
and Boards skateboard shop the much-sought-
after You Might Not Skate By Award for its
12-foot long skateboard hanging outside its
store over the display windows. Said the
owner: “It’s become like a landmark.” He
explained his strategy in putting it up: “If you
want to do something like this [putting up a
12-foot long skateboard], the county blatantly
told me, look, we’d never let you do it. So I
didn’t even ask them.” You’re smiling as you
read this, aren’t you? . . . because you’ve had
a client just like this at some point. The
skateboard shop owners faced fines of up to
$500 a day if they didn’t’ remove it.

The unresolved question is: “Is a skateboard
a geometric shape?” One of the shop’s co-
owners says it is: “What is a skateboard if it’s

Almost every year we have one or more cases
of when is a sign not a sign and when is a
sculpture or object d’art a sign. We have had
cases of a giant L.L. Bean boot, a man-sized
lobster, and the Hyatt hotel chain’s “blade”
incorporated into architecture. This year, we
confer upon the Bethesda (Maryland) Scooters
and Boards skateboard shop the much-sought-
after You Might Not Skate By Award for its
12-foot long skateboard hanging outside its
store over the display windows. Said the
owner: “It’s become like a landmark.” He
explained his strategy in putting it up: “If you
want to do something like this [putting up a
12-foot long skateboard], the county blatantly
told me, look, we’d never let you do it. So I
didn’t even ask them.” You’re smiling as you
read this, aren’t you? . . . because you’ve had
a client just like this at some point. The
skateboard shop owners faced fines of up to
$500 a day if they didn’t’ remove it.

Almost every year we have one or more cases
of when is a sign not a sign and when is a
sculpture or object d’art a sign. We have had
cases of a giant L.L. Bean boot, a man-sized
lobster, and the Hyatt hotel chain’s “blade”
incorporated into architecture. This year, we
confer upon the Bethesda (Maryland) Scooters
and Boards skateboard shop the much-sought-
after You Might Not Skate By Award for its
12-foot long skateboard hanging outside its
store over the display windows. Said the
owner: “It’s become like a landmark.” He
explained his strategy in putting it up: “If you
want to do something like this [putting up a
12-foot long skateboard], the county blatantly
told me, look, we’d never let you do it. So I
didn’t even ask them.” You’re smiling as you
read this, aren’t you? . . . because you’ve had
a client just like this at some point. The
skateboard shop owners faced fines of up to
$500 a day if they didn’t’ remove it.

Almost every year we have one or more cases
of when is a sign not a sign and when is a
sculpture or object d’art a sign. We have had
cases of a giant L.L. Bean boot, a man-sized
lobster, and the Hyatt hotel chain’s “blade”
incorporated into architecture. This year, we
confer upon the Bethesda (Maryland) Scooters
and Boards skateboard shop the much-sought-
after You Might Not Skate By Award for its
12-foot long skateboard hanging outside its
store over the display windows. Said the
owner: “It’s become like a landmark.” He
explained his strategy in putting it up: “If you
want to do something like this [putting up a
12-foot long skateboard], the county bluntly
told me, look, we’d never let you do it. So I
didn’t even ask them.” You’re smiling as you
read this, aren’t you? . . . because you’ve had
a client just like this at some point. The
skateboard shop owners faced fines of up to
$500 a day if they didn’t’ remove it.
not geometric shapes? It’s lines, it’s circles.” The big skateboard apparently was quite effective in bringing in business, because as one of the co-owners laments: “We’re sitting here just trying to keep our head afloat without a sign. Our business is struggling because no one knows we’re here.”

Over the years we’ve given out several awards that might fall under the heading of **Land Use Commissioners Behaving Badly.** This year, there are two worthy of special recognition. Sharing the **Keep On Trucking Award** or **How About A Garage With A House Attached Award** are the Hawaii County Council Planning Committee and the Hawaii County Council who have approved a rezoning to correct a zoning violation by a limited liability company owned by the County Automotive Division Chief and a business partner, who also just happen to own a pumping company that has a $1 million-plus contract with the county.39

The pumping company applied for and received approval for a single-family home in a residential zone. Using the permit, they built a 7,324-square-foot, steel-framed, metal building with five 20-foot high bays capable of garaging something big — how about something the size of a large pumping truck? — with 5,996 square feet of the structure devoted to the garage and the vestigial remainder, 1,218 square feet, available for residential use should anyone actually want to live there.

The County’s Public Works Director said that it wasn’t his job to check on how the structure would be used; he only takes a look at compliance with the electrical, plumbing, and fire codes. He said that maybe “it’s a residential structure with a five car garage.” He also said he didn’t know that the applicant was owned by the County’s Automotive Division Chief and his business partner who also own the pumping company, but he said it wouldn’t matter anyway because everyone gets treated the same. The Planning Program Manager said: “We do see on a frequent basis construction activities which give us pause,” but that it wasn’t the County’s job to dictate residential design.

One councilmember did step forward to say: “How shameful this is. We want people to be able to trust us. . . . If it looks like a tiger and they say it’s a donkey, then OK. . . we look like fools.”

ZiPLeR Award issue readers always demand a little something to meet their prurient interests, so we will give them what they want with this one award, the **Bare Baristas Bemoaned Award,** presented to the six municipalities of Everett, Kent, Federal Way, Sumner, Bonney Lake, and Spokane Valley, Washington, all of which are addressing in one way or the other the problem of so-called “bikini” or “lingerie” coffee stands which by the latest count number about 130 in the states of Washington, Oregon, and Idaho.40 The Spokane Valley City Council has banned wearing “pasties” (the spelling is correct, it is not “pastries”) in coffee stands after the XXX-tremeEspresso coffee stand held “topless” days. In Everett, local officials have been talking about regulating these businesses as adult entertainment venues.

The Irwindale City Council finally cooled down and cleared the air in April 2014 by declaring that the Sriracha hot sauce factory was not, I repeat *not,* a public nuisance and could continue to operate its 650,000-square-foot factory.41 This hotly contested issue had gone on for some time with the city ultimately suing the manufacturer, Huy Fong Foods, for nuisance following many complaints by the neighbors. The city and the manufacturer ultimately settled with the Council motivated by the need to be more business-friendly and with the manufacturer taking some steps to abate the powerful odor emanating especially during the chili grinding season.
filters that were installed at the factory were tested using pepper spray. To the City Council we present What’s Sauce For The Goose Is Sauce For The Gander Award.

We end this year’s review of the strangest planning and zoning cases with one of those incidents that renders all of us in this business dumbfounded. We’ve all seen our share of applicants, neighbors, experts, commissioners, local gadflies, and the like do truly stupid things, but this one takes the cake. Put down your copy of this year’s award issue, turn on your computer, go to the link in the endnote or type in this URL http://tinyurl.com/k3eedgm and watch the 1:05 minute video of the Village of Wellington, Florida Planning, Zoning and Adjustment Board’s meeting, then return.

You’re back?

Dr. Marcia Radosovich, a multi-millionaire with a doctorate in sociology, receives the Most Ridiculous Public Display Ever By A Land Use Commissioner Award, a lifetime achievement award which will be retired and hopefully forgotten with this one recognition, for having given the “Heil Hitler” salute to a village employee during a public meeting. We are pleased to report that at least she apologized and resigned from the Board 20 days later. The tragedy of it all is that Radosovich knows too well what the gesture means. In her letter of resignation she said she recognized “the horror of Nazi Germany” and has herself “been the subject of anti-Semitism and would never intentionally subject another person to that experience.” Her grandfather was interned in a concentration camp and her father had post-traumatic stress disorder from combat against the Nazis. Even in the relatively simple, straightforward world of planning and zoning, some things are unfathomable.

And so ends another interesting year in planning and zoning, and the 20th year for the Zoning And Planning Law Report Awards. We thank you for your continuing support and for your nominations throughout the year.

ENDNOTES:

1. Dwight H. Merriam is a lawyer with the law firm of Robinson & Cole, LLP, in Hartford, Connecticut, where he practices land use and real estate law. He is Past Chair of the American Bar Association’s Section of State and Local Government Law, a member of Owners’ Counsel of America, Past President and a Fellow of the American Institute of Certified Planners, a Fellow of the American College of Real Estate Lawyers, a member of the Anglo-American Real Property Institute, a Counselor of Real Estate, and a Fellow of the Royal Institution of Chartered Surveyors. He has written over 200 articles and is the author of THE COMPLETE GUIDE TO ZONING (2005), and the author, co-author, editor, or co-editor of nine other books including the casebook, PLANNING AND CONTROL OF LAND DEVELOPMENT, and the leading treatise in the field, RATHKOPF’S THE LAW OF ZONING AND PLANNING, 4TH. The award illustration is by Ray Andrews, a former partner at Robinson & Cole, LLP.

2. “Suffield’s ‘Chicken Chick’ Won’t Give Up Her Chickens, Despite Cease-And-Desist Order,” Journal-Inquirer (August 22, 2014) (40 chickens on less than the required one acre).

3. City of Baron Rouge v. Myers, (La., 2014) (more than two, count them, two unrelated people living in a single-family unit; talk about a crime against society).


8. Satanic Group Says Oklahoma Must Give the Devil His Due, FoxNews (5/5/14) http://www
to plan the joint military campaign that led to the victory at Yorktown in the end of the American Revolution.” http://webb-deane-stevens.org/historic-houses-barns/webb-house/.


8The expression is even in at least two Dilbert cartoons. http://search.dilbert.com/comic/Measure%20Once%20Cut%20Twice.


12A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA, Rolling Stone (11/19/14)(This was the report of the University of Virginia alleged rape. Rolling Stone had to backpedal when it did some fact checking: “In the face of new information reported by the Washington Post and other news outlets, there now appear to be discrepancies in Jackie’s account.”) www.rollingstone.com/culture/feature/a-rape-on-campus-20141119.

13I called and left a message and then sent an email to which he responded on 12/19/14; the term “staff” can be one person, I think.


15“Finally, the West Virginia Supreme Court found that the FHAA does not prohibit a landlord from directing tenants to provide medical documentation that they need to have a service animal to ameliorate the effects of their disabilities and to make reasonable efforts to show that the animal is properly trained.” In its guidance, HUD states that: “For purposes of reasonable accommodation requests, neither the FHAct nor Section 504 requires an assistance animal to be individually trained or certified.” The footnote to this statement says: “For a more detailed discussion on assistance animals and the issue of


Lucien Graves, a spokesman for the Satanic Temple argues that no religious material should be distributed in schools, period, but if it is allowed, all “religions” should have equal rights to distribute so that all students have access to all opinions: “We would never seek to establish a precedent of disseminating our religious materials in public schools because we believe our constitutional values are better served by respecting a strong separation of Church and State. However, if a public school board is going to allow religious pamphlets and full Bibles to be distributed to students, as is the case in Orange County, Florida, we think the responsible thing to do is to ensure that these students are given access to a variety of differing religious opinions, as opposed to standing idly by while one religious voice dominates the discourse and delivers propaganda to youth.” http://www.snopes.com/politics/religion/satanicschools.asp#JvjEuMACcJjOpZtjy.99.


This writer was married in an historic barn at the Webb-Deane-Stevens Museum in Wethersfield, Connecticut. http://webb-deane-stevens.org/historic-houses-barns/the-webb-barn/ “The [Webb] house served as George Washington’s headquarters in May 1781 and is where the Continental General met with French commander the Comte de Rochambeau
training, see the preamble to HUD's final rule, Pet Ownership for the Elderly and Persons With Disabilities, 73 Fed. Reg. 63834,63835 (October 27, 2008)."


27Note to professors and students: this subject of the FHAA and service animals would a great subject for research and writing.


23Bah, Humbug: Huntsville Christmas Tree Lot Shut Down For Zoning Violation, AL.com (12/18/23) http://blog.al.com/breaking/2013/12/bah__humbug__huntsville__christmas.html (too late for the 2013 ZiPLeR Awards so it was carried over by the Selection Committee).


