
ZONING AND PLANNING LAW REPORT



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THE 2016 ZIPLERS: THE TWENTY-SECOND ANNUAL ZONING AND PLANNING LAW REPORT LAND USE DECISION AWARDS

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If you see anything in this list of highlights below that is of interest, please read on. WARNING: This report of the annual ZiPLeR Awards contains material intended for mature audiences.

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- Bad Boys, Bad Boys / Whatcha Gonna Do, Whatcha Gonna Do / When They Come For You?
- Treehouse Trauma . . . Again
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After the extraordinary 2016 presidential campaign, most Americans, including those who do planning and zoning for a living, are ready for a recharge. If you are worn out, wrung out, and otherwise suffering a certain intellectual numbness, you need to read and revel in this issue of the ZiPLeR Awards. Our nominees, selected from the thousands suggested to us for the prestigious awards, come solely from the first-hand accounts of the many on-the-scene observers we have around the world. None are based on recently-discovered, previously-missing e-mails or taken from inadvertent hot-mic audio recordings of conversations with Billy Bush. No, all of our sources are totally validated beyond reproach. And just to be clear, there will be no recounts. We are here to make the ZiPLeRs great again and

anyone who thinks otherwise, we will quickly count among the deplorables. The ZiPLeRs are huge. It is all about winning. As one orator of some repute stated recently during his campaign: “Believe me. You’ll never get bored with winning. You’ll never get bored!”¹

In the past, we have promoted the ZiPLeR Awards as being truly out of the ordinary, nonpareil, and so far beyond the pale that they make the ordinary work of planning and zoning with its unanticipated challenges and frustrations seem like child’s play. Now, in the wake of the presidential election the ZiPLeR Awards themselves risk appearing tame. At the very least, we can promise you that you are certain to find some respite in reading this award issue and in finding once again that what might seem extraordinary in your own experience, is actually all too common.

Never have we had a president with such extensive dealings in real estate and land use as Donald Trump. It is important to recognize, however, that our presidents, especially the first ones, had extensive land holdings. What is different is that they seem to have dealt with them in ways quite different than our new president. George Washington was among the first real land readjustment entrepreneurs in America when he assembled 17 large farm tracts to create our nation’s capital. Washington negotiated an agreement on March 30, 1791, whereby land owners, without compensation, conveyed portions of their land needed for streets, parks, and similar public uses and sold additional land at \$57 an acre for government buildings. In exchange they received building lots laid out by the government and apportioned between the private land owners and the Federal government. No eminent domain.²

Donald Trump may have a style different than that of George Washington. His experience with zoning suggests that. In February 2016, during the campaign Trump explained

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that his successes in zoning were more difficult to achieve than it would be to get something through Congress.³ He said that “Trump Tower was supposed to be a 30 story building. It was zoned for 30 stories next to Tiffany. It’s 68 stories.” He also cited the Trump World Tower, across from the United Nations, as another example of success in his zoning battles, that victory getting him 72 stories.

In his book, *The Art of the Deal*, Trump wrote about how he was able to get variances and other approvals.⁴ Importantly, Trump’s approach to development is not one of free-market, but instead depends on working with government, as he did in not only getting his various zoning approvals for projects, but also in having his real property taxes abated, buying and selling property, and obtaining the latest Atlantic City casino license, when Hilton hotels could not.

In the middle of the campaign there was the threat of a zoning enforcement action against Trump for his use of the Trump Tower atrium for campaign events, when the agreement with the city was that this area would be kept open to the public. The first reports indicated an investigation was underway. Joe Soldevere, a New York City Department of Buildings spokesman, said that the “Department of Building’s enforcement unit is investigating whether the atrium was improperly closed to the public.”⁵ It was also reported that Soldevere said the issue was whether the atrium had been closed contrary to the building owner’s agreement with the city,⁶ Under the terms of the deal that Trump made with the city to allow additional floors of Trump Tower, Trump agreed to create a 6,000 square foot public atrium and have it open to the public every day between 10 AM and 8 PM. Public access to the space is noted over the entrance. Like other public spaces similarly created in New York City, the atrium can be closed up to four times a year for private events if approved

by city officials. The problem is that Trump had at least “several” events since his campaign began. He probably could afford and pay the fine if one were ever levied, as it is \$4,000. Trump had problems before with this very same space when he replaced a bench with a booth selling Trump merchandise. This was held to be a violation. Trump removed the booth and paid the \$4,000 fine.

Trump has had more than his own fair share of zoning problems. Which is not to say Hillary Clinton has not had her own problems. In October 2016, it was reported that the Clintons had no permits for the renovation of a 3,600 square foot house on 1.51 acres they purchased last summer for \$1.16 million, next to their home in Chappaqua, New York. The renovations included remodeling the kitchen, replacing the heating and air conditioning system, relocating interior walls, and filling in a swimming pool with sand and gravel.⁷ In his report, the building inspector noted that “several building and zoning code violations now exist.”

Back in 1980, Donald Trump purchased Mar-A-Largo, Marjorie Meriwether Post’s Palm Beach, Florida estate for \$10 million. He erected an 80-foot pole with an outsized American flag, where the regulations limit flag poles to 42 feet and flags to 4’ x 6’. The flag in different reports was described variously as 15’ x 25’ or 20’ x 30’. Apparently it was the same flag, just described differently at different times. Trump never applied for a permit or variance or any other approval before raising his flagpole.

The town council fined Trump either \$1,250 or \$250, per various reports as documented by Snopes.com, a site that we find valuable in fact checking.⁸ Trump sued Palm Beach for \$25 million, claiming his rights under the First Amendment to display the flag and that he had been treated unfairly compared with other people who allegedly had flags flying in violation of town ordinances. Palm Beach and

Trump eventually settled with the town waiving all fines and agreeing to review its ordinances as to flagpole height and flag size, and Trump in turn reducing the flagpole from 80 feet to 70 feet, getting a permit, relocating it inland, and donating \$200,000 to certain charities. Some may speculate as to why Trump would go to such lengths to fight over how big his flagpole might be, but we here at ZiPLeR Awards Central will just paraphrase a quote probably misattributed to Freud: “sometimes a flagpole is just a flagpole.”⁹

We noted above that George Washington avoided the use of eminent domain by undertaking a very clever voluntary land assembly process to create the Capital. Trump likes eminent domain and has used it to his advantage.¹⁰ He convinced the Casino Reinvestment Development Authority (CRDA) to use its power of eminent domain to take the home of the elderly widow, Vera Coking, so he could build a limousine parking lot next to his 22-story Trump Plaza.

He also convinced the CRDA to take a building from Peter Banin, a Russian immigrant who paid \$500,000 for the building a few months earlier and was now offered \$174,000. Banin said: “I knew they could do this in Russia, but not here. I would understand if they needed it for an airport runway, but for a casino?” Ultimately, Banin represented by the Institute for Justice beat Trump and CRDA in court.

Trump was a defender of the notorious decision in the 2005 *Kelo* case: “I happen to agree with it 100%. If you have a person living in an area that’s not even necessarily a good area, and . . . government wants to build a tremendous economic development, where a lot of people are going to be put to work and . . . create thousands upon thousands of jobs and beautification and lots of other things, I think it happens to be good.”

Recently, Catherine Rampbell of the Wash-

ington Post offered a commentary taking a satirical poke at Trump, with her advocating the use of eminent domain to solve the problem of the security at Trump Tower in New York City suddenly costing the taxpayers big money and damaging business in the area:

Fortunately, I’ve come up with a solution [to the expense of the security and adverse impacts on commerce in the area] that should warm the cockles of the president-elect’s heart: New York should use eminent domain to seize Trump Tower. . . . Trump loves eminent domain, especially this ruling. He thinks it’s wonderful. And there’s no question why: Throughout his career, Trump has lobbied governments to seize properties from those who refuse to sell when he wants to build amusement parks, golf courses, office buildings and parking lots on their land. He believes expansive use of eminent domain is necessary to promote economic growth and “beautification” and that it’s even a good deal for property owners who don’t want to sell. “When eminent domain is used on somebody’s property, that person gets a fortune,” he has declared. . . . The city doesn’t need to prove that Trump Tower is derelict to declare it “blighted”; the mere fact that it’s hindering traffic, impeding commerce and draining the public fisc could be sufficient.¹¹

The 22nd Anniversary Edition

Every year, it gets harder and harder to believe that the ZiPLeR Awards not only remain a thought leader in planning and zoning after more than two decades, but are expanding in influence. Nominations continue to flow in from all over the world, so many in fact that we had to replace the computers at our international headquarters in Agency, Missouri, which could not keep up with our volume. The ZiPLeR Awards have generated huge new revenues for Thomson West from the plaques sold to lucky winners who display them prominently in their offices, and the sale of T-shirts and water bottles available in our many outlet stores, all proudly bearing our logo and the motto: “No Matter What We Do,

the ZiPLeRs Can't Be Greater Than They Are Already" (and by special request at a modest additional cost, you can also get inscribed: "obscurum per obscuri"). The ZiPLeR Awards Foundation has supported important research on critical land use planning and zoning issues, such as the difference in the coefficient of runoff between Astroturf and natural grass, parking ratios for hover boards, and regulating tailgating by special permit. The ZiPLeR Awards have truly made the world a better place.

The Awards Banquet

Those new to the ZiPLeR Awards need to know that one of the highlights of the year is the awards banquet. So many venues worldwide have been privileged to host the awards. Our banquet planning team, led by the incomparable Sir Phabulus Spred, is constantly courted by those who would love to host the awards banquet. One writer recently told the planning team: "Our resort has hosted events for so many world figures, from Princess Diana to the 14th Dalai Lama to Pee-wee Herman, but the one that we would most treasure is the ZiPLeR Awards."

Trenholm Walker and Andy Gowder of Charleston, South Carolina, graciously agreed to continue to help plan this event. Andy and an old friend have recently set up a new smallish law firm, one that promises to continue the truly sophisticated practice in real estate and land use. The freshly-painted sign hanging outside their offices suggests the breadth of their service to the community: "attorneys at law, live bait, keys made, notary public."

Our favorite and most memorable venue will always be the beloved Squat 'n Gobble restaurant in Bluffton, South Carolina. We have been to the world's smallest restaurant (a few people at a time; it went on for days), and The Great Wall Buffet in Grand Forks, North Dakota. Last year it was O.NOIR in

Toronto, Canada,¹² a restaurant first opened in 2006 in Montréal and then in a second location in Toronto in 2009. At O.NOIR your food is truly appreciated because you will not be distracted by having to see it since you dine in the complete dark. Flashlights, watches, cell phones, and anything else that can illuminate are strictly prohibited in the restaurant. Orders are placed in a lighted area and then diners are escorted by servers to the darkened dining room.

What we didn't know when we booked ourselves into the venue last year and described it in the awards issue was the waiters are visually-impaired. Really.¹³ Here's the first question and answer from the website's FAQ:

1. Are the waiters really blind?

The visually-impaired are the best people capable of doing the job in such a context. You will become blind for 1-2 hours and you really must be able to trust your waiter. It is a true "transfer of trust" and an amazing approach to raise awareness about vision impairment and disability in general. A group of professional, talented, and very kind waiters are always ready to serve you at O.Noir Toronto.

You see, the ZiPLeR Awards does astonishing things even when it doesn't intend to.

One of the more significant problems we have had has been so many people crashing the annual awards dinner. So, we must truly commend Andy and Trenholm for their diligence in researching and eventually selecting the Safe House in Milwaukee.¹⁴ As Reader's Digest describes it:

This Midwestern U.S. restaurant has a rather nondescript exterior, but that seems to be the precisely the point. Everything related to the spy-themed restaurant is based on the CIA definition of a safe house, which is meant to be a seemingly innocent premise where an intelligence organization would conduct its covert operations in relative security. Nowhere will you find a sign advertising "Safe House," and you even need to know the password to enter

the establishment. If you ever find yourself in Milwaukee, this top-secret restaurant is worth seeking out; though remember, you didn't hear it from us.¹⁵

The restaurant was sold in 2015, but remains essentially the same.¹⁶ We will see you there. There will not be any intelligence briefings in advance. We at the ZiPLeR Awards are smart enough to know we don't need any briefings.

The Year in Brief Review

The soundbite version of the year in review was that things continue to improve and that there will be more zoning and land use regulatory activity of consequence. As Fortune magazine characterized it at midyear 2016: "the housing market has done a lot of healing, but also has a long way to go."¹⁷ Interest in home buying has returned almost to the 2006 levels, but homebuilders have not been responding to the demand and most of the housing that is being built is for the higher end of the market. Part of the reason for that is that middle income homebuyers are finding it difficult to get financing given the post-recession restrictions imposed on lenders. The rental market continues to be tight, with vacancy rates are at the lowest level in several decades. Commercial real estate markets continue to be positive.¹⁸ Our prognosis for 2017 is there will be many great opportunities for new ZiPLeR Awards nominations, so keep them coming. . .

The Awards

As our recidivist readers know, it is not easy to get a ZiPLeR Award. A nominee is about as likely to be selected as Ann Hodges was to be hit by a meteorite in November 1954 while napping on her couch. The fact is, she is the only person to have been hit by a meteorite.¹⁹ And, as these things always seem to go, lawyers ultimately got involved over who owned the meteorite—Ann and her husband, Eugene Hodges; or their landlady. The landlady gave

up her claim for \$500 and the Hodges hoped to make big money on it. They didn't. They ultimately gave it to The Smithsonian. Their lives were ruined by the whole thing. Ann Hodges had a nervous breakdown, they separated, and she died of kidney disease at age 52.

Okay then, how about Roy Sullivan, the park ranger who was struck by lightning seven times? The probability of that happening may be greater than a nominee being selected for a ZiPLeR Award.²⁰ The odds of someone getting struck by lightning seven times are 4.15 in 100,000,000,000,000,000,000,000,000,000, according to a George Washington University statistics professor.

And one last instance, a California couple, in 2002, won the Lottery twice in the same day. A Stanford mathematics professor calculated the odds of that at 1 in 24 trillion.²¹

Our first award this year, which we begin with so that you will see immediately the ultra-high quality of our picks, is the **There's Always Room for Jell-O Award**. It goes to Brunswick, New York, a community of about 12,000 people just northeast of Albany for finally recognizing after 58 years that people in town engage in adult uses. The name of the award will be familiar to older readers. Jell-O, the gelatin dessert, had an ad campaign begun in 1994 based on the slogan that "there is always room for Jell-O." By the way, according to the website for the JELL-O Gallery in Le Roy, New York, on "March 17, 1993, technicians at St. Jerome hospital in Batavia test[ed] a bowl of lime Jell-O with an EEG machine and confirm[ed] the earlier testing by Dr. Adrian Upton that a bowl of wiggly Jell-O has brain waves identical to those of adult men and women."²²

So, what's the zoning—Jell-O connection? Brunswick's new regulations now include adult uses with 14 different definitions, among them

the business that offers “wrestling or tumbling between persons of the opposite sex” or between “persons of the same sex with one or more of the persons in a state of nudity or semi-nudity” which is meant to include such “wrestling or tumbling” in pools of Jell-O.²³ If you are planning a Jell-O wrestling event, there are companies who can provide the necessary mix and instructions. One vendor sells 5.25 pound bags of mix sufficient to make 100 gallons of Jell-O for \$95. You will have to provide your own pool and wrestlers. The website includes photographs of this wholesome, athletic form of entertainment.²⁴ All good sports require rules and one website lays them out for you.²⁵ Here are some of those rules:

- No Kicking, punching, biting, hair pulling, gouging, head butting, choking etc.
- All participants must remain on their knees - No standing (this prevents injuries from slips and minimizes the impact of the ground when being tackled).
- Always have one nominated referee who ensures that the participants abide by the rules—The refs decision is final. They also have the power to eject participants for overly rough play or misconduct (for official jello wrestling referee t-shirts and merchandise click here).
- No Shoes (shoes can accidentally tear the base of a pool).
- If your opponent yells “stop,” passes out, or is injured in any way then the round ends immediately.

The city of Houston, Texas, takes home the **No Zoning Can Be Hazardous to Your Health Award**. A recent study by researchers from the University of Washington and the University of Pittsburgh found that 65% of Houston is a mile or less from a facility that the federal Environmental Protection Agency includes in its toxic release inventory. The 65%

figure is 20% higher than in the other Texas cities of San Antonio, Austin, and Dallas.²⁶ But why is that? Two factors may be in play. First, Houston has a little zoning, if you can call it that, but what it lacks is a comprehensive plan to limit certain uses to certain geographic areas. Second, even though 20 years ago Houston passed an ordinance which would keep hazardous materials locations away from housing, many of the facilities were already in place and had a vested right to stay there. Exacerbating the potential problem and of even greater concern is the fact that many sites with dangerous chemicals were not part of the study because they were not identified as such by the EPA given the homeland security needs to protect them from terrorist attack.

Where the Rubber Meets the Road Award goes to San Juan Capistrano, California, for skidding into the *Reed v. Gilbert* problem of content-based sign regulation. *Reed v. Gilbert* is the U.S. Supreme Court’s decision from 2014 making it quite difficult to regulate signs by basically providing that regulation of the content of the sign in any form will trigger strict scrutiny.²⁷ In the San Juan Capistrano case, the city adopted an ordinance forbidding advertising a car for sale by displaying a sign on it when it is parked on a public street. Michael Cefali has a Volkswagen he wants to unload (maybe a diesel?) so he parked it out front of his house on a residential street and put “for sale” signs on the back windows. This didn’t yield a buyer but it did produce an Orange County sheriff’s deputy who ticketed Cefali for violating the city’s ban on displaying “for sale” signs on vehicles parked on public streets. Cefali paid the \$50 fine but then sued. He is represented by the Pacific Legal Foundation, the nonprofit pro-property rights law firm. Cefali is a recent graduate of the Fowler School of Law at Chapman and he has the help of law students enrolled in the constitutional jurisprudence clinic at the law school.²⁸ Said Cefali, “I’m suing for my rights and, hopefully,

to strengthen the First Amendment for everybody. As someone who loves the Constitution and the Bill of Rights—and who studied them carefully in law school—I could not ignore the city’s violations when I became aware of them in a personal way, right in the pocketbook.”

Newsflash. Our fact checking department just returned with this late breaking news from San Juan Capistrano, dateline October 10, 2016: The San Juan Capistrano city council voted on October 4th 5-0 to introduce an ordinance to eliminate the ban on “for sale” signs on parked cars.²⁹ The ban was lifted.³⁰ One smart move.

PLF, as you might expect, had plenty to say about the result. PLF Principal Attorney Larry Salzman said:

The city is making the right move in repealing this law, because the ordinance collides head-on with the Constitution.

The First Amendment forbids government from banning signs or penalizing speech simply because it doesn’t like the content. The government can’t ban a “For Sale” sign while allowing other messages, such as political signs. Some people may not like “For Sale” signs in parked cars, but individuals have a right to communicate truthfully with the public—even when that communication is an advertisement.

We hope this case will send a message to other cities that continue to enforce unconstitutional sign bans: Repeal them now or risk being served with an embarrassing and expensive lawsuit.

While we’re on the subject of signs, may I call your attention to a listing on craigslist, of all places? Let me assure you that with the over 150 researchers we have at the ZiPLER Awards Research Center we leave no stone unturned, that includes craigslist. Here’s the title of one listing: “zoning codes hurting your advertising?—\$250 (Jeffersonville).” The photograph with the listing is of a 1940s era flatbed truck with tandem wheels, rusted,

dented, and obviously not drivable. What could be the link to zoning: Here’s the listing (typographic errors and all, more carefully preserved than the truck):

Zoning codes telling you can’t put up the advertising sign you want for your business? This old truck may help. Use it as it is or paint to your liking and mount your sign /billboard on the back. Park it in the location you want it and your zoning issues should be gone. The sign being mounted on wheels make it a whole different issue check the requirements in your area. Not only will your sign stand out the old truck will be an icon and talk of the area. You will not see these too often so get it while you can.

Easy to move come by with your local towing company with a roll off truck and take it away.

It looks much better now that it is out of the weeds.

First \$250 takes it

Call Jim Mon-Fri 7-4 Sat 7-11

To “Jim” whoever and wherever he might be, we are pleased to confer the coveted **First Amendment Commercial Free Speech Award**. Nice work, Jim, in terms of analyzing the First Amendment issues and the limitations on local sign regulation, as well as finding an innovative solution to those who need more signage in support of their business. You have a great future ahead of you.

The Answer, My Friend, Is Blowin’ in the Wind Award goes to the Clinton County planning and zoning commission in Missouri for amending its regulations to ban all “commercial wind energy conversion systems” in the county with the exception of small systems less than 100 kW and no taller than 120 feet.³¹ And, of course, the County has been sued by the companies attempting to build wind power projects.³² One of the plaintiffs has a 97-turbine wind farm under construction, close to completion. The complaint alleges:

Against the repeated recommendation of plaintiffs, the Planning and Zoning Commission

failed to hire legal counsel or experts in fields being examined, even after plaintiffs offered to pay for such experts. While the Planning and Zoning Commission did provide an opportunity for these wind opposition parties to provide testimony in opposition to the wind project, it did not provide this opportunity to Clinton County residents that favored the wind project or that would have property rights harmed by the proposed amendments.

If there was a due process violation, the court will never get to the merits and there will be another hearing, vote, and maybe an appeal. That is the beauty of land use battles, isn't it? They enable a sustainable law practice.

Before we announce our next award winner, we need to do another generational check as with Jell-O. Does the name "Cooter" ring a bell? Specifically, "Cooter Davenport" of the *Dukes of Hazzard*, a television action-comedy series that aired 147 episodes from 1979 through 1985? That role was played by Ben Lewis Jones, now age 75, who later served in the United States House of Representatives for two terms, 1989-1993, from Georgia's Fourth District.³³

The *Dukes of Hazzard* are a fine illustration of American culture, for better and worse, as we note below. Apparently, that was not enough for Ben Jones, neither were two terms in Congress, so he returned to opening a series of museums and stores devoted to Cooter, in Nashville, Tennessee, Gatlinburg, Tennessee, and Luray, Virginia.³⁴ He opened another in Sperryville, Virginia, but shut down within a year or so because of zoning problems, apparently parking at the rear of the building. Said Jones of the shutdown: "in the last few months, it's been nothing but a big problem for us. So, we made the decision, my wife and I., that we can't continue to be somewhere where we're not wanted. It's just time for us to pull the plug here and move on."

To Rappahannock County, we present the **Jefferson Davis "Boss" Hogg Award**, a

name that will be lost on those readers under 45, unless they have watched the reruns or done some esoteric research. Reruns are apparently not available as ABC took the program off its schedule in 2015.³⁵ The issue is the Confederate flag painted on the roof of the car known as "The General." While the use of the flag, typical of the time when the show was first on television in 1970, was maybe less objectionable then, and there may have been no political intent on the part of those who permitted the use of the flag of the car, the fact remains that a lot of has changed in 40 years. John Schneider, who played Bo Duke in the series, said that "It amazes me that anyone could take offense to the General Lee, the 1969 Dodge Charger. If there was ever a non-racist family, it was the Dukes of Hazzard."³⁶ Schneider told a reporter in 2015: "The *Dukes of Hazzard* was and is no more a show seated in racism than *Breaking Bad* was a show seated in reality."

Schneider says his residuals from the show "have never been much to write home about," but he would like the show to persist because of the old-fashioned values it promotes, such as honesty, courage, chivalry, rebelliousness and the like. Those who seek to malign the show because the famous car it featured had a Confederate flag painted on the roof are missing the point, he says.

"I am saddened that one angry and misguided individual can cause one of the most beloved television shows in the history of the medium to suddenly be seen in this light," Schneider said. "Are people who grew up watching the show now suddenly racists? Will they have to go through a detox and a 12-step program to kick their *Dukes* habit? 'Hi. . . My name is John. I'm a *Dukesoholic*.'"

In 2015, NASCAR urged all its racers and fans not to display the flag. That may be the best indication of where we now are on this issue.

As members of the NASCAR industry, we join NASCAR in the desire to make our events among the most fan-friendly, welcoming environments in all of sports and entertainment.

To do that, we are asking our fans and partners to join us in a renewed effort to create an all-inclusive, even more welcoming atmosphere for all who attend our events. This will include the request to refrain from displaying the Confederate Flag at our facilities and NASCAR events.

We are committed to providing a welcoming atmosphere free of offensive symbols. This is an opportunity for NASCAR Nation to demonstrate its sense of mutual respect and acceptance for all who attend our events while collectively sharing the tremendous experience of NASCAR racing.³⁷

Golfer Bubba Watson simply eliminated the flag from his copy of *The General Lee*. As he explained: “All men ARE created equal, I believe that so I will be painting the American flag over the roof of the General Lee.”³⁸

Don’t you imagine advanced video editing of our times could simply eliminate the flag from the roof of *The General Lee*?

The **Doggedly Opposing It Award** goes to the kennel owners and shepherds in Shenandoah County, Virginia, who are opposing a new zoning regulation that limits to just five the number of dogs allowed on any property, including land designated for agriculture.³⁹ This type of controversy seems to be in the news all across the country in various forms, most recently in the equivalent of Airbnb for dogs; namely, people taking in dogs on a short-term basis to take care of them at their homes.⁴⁰ But the Shenandoah County regulation, of course, goes much further. What about the shepherd who needs dogs to manage the herd? By the way, what is the correct name for group of sheep? It is a drove, flock, or herd, and a very large group of sheep is a band or mob.

With that out of the way, let us turn to the

most relevant question at hand as to the impact of the five-dog rule: how many dogs does it take to manage a herd of sheep? For that answer, the ZiPLeR Awards Research Center went overseas to the Natural Environment Research Council, the “leading funder of independent research, training and innovation in environmental science in the UK.”⁴¹ The NERC researchers found that sheepdogs use two simple rules—they collect the animals that are dispersed first and then drive them forward once they are aggregated. By following that model, a single shepherd with a well-trained dog can manage a herd of more than 100 individuals. However, if the dog doesn’t follow these rules of making the herd cohesive at first before driving them forward, it takes multiple shepherds and multiple sheepdogs once you get above 50 individuals. So, the short answer to this difficult zoning problem in Shenandoah County, Virginia, is that if they want to support shepherds and large herds of sheep over 250 individuals, or 500 individuals with the best of sheepdog management, they will have to ease the rules and allow more dogs.

Now think about it; nowhere else do you get such important, useful information like this than your annual dose of ZiPLeR Awards?

To former Snohomish County sheriff’s department Sgt. Darrell O’Neill we award the **Check the Accessory Use Regulations First Award**. We are not sure that we will be able to give it to him personally at the annual award ceremony. He is being sent off to jail for a year, the maximum sentence permitted for his offenses, since he was found guilty of helping a woman turn her otherwise authorized roadside espresso stands into drive-through strip clubs and brothels.⁴² Sgt. O’Neill served in the sheriff’s office for 31 years before his illegal activities caused him to plead guilty to felony conspiracy to launder money and two counts of misdemeanor official misconduct. The drive-through strip club and sex business apparently was quite profitable, reportedly bring-

ing in millions of dollars a year. One can only imagine what it was like at the drive up window: “I’ll have a latte today with a shot of caramel and a . . .”

The local constabulary might have figured that something besides coffee was being served up given the names of the two chains: Java Juggs and Twin Peaks, but perhaps the double entendre signals were too subtle for law enforcement. The owner of the business was a former exotic dancer who had run strip clubs in Washington including one that was shut down by federal authorities as a front for prostitution.

The owner had installed stripper poles and hired former nude dancers. We will leave to your further reading a description of this cop’s bad behavior that resulted in the judge refusing to even consider not having him serve jail time.

In a related matter, we have an additional award, this one to the city of Everett, Washington, which video recorded the illegal sex acts of the baristas and their customers as described above and which now probably has to turn the videos over under the Public Records Act. This unusual recognition is the **Police Proliferating Porno Photography Award**. A man with a reputation for frequently requesting public records is apparently going to get the videos along with some compensation because the local trial court judge decided the city’s limited “inspect-but-don’t copy” restriction on viewing the videos violated the Public Records Act. The city had argued that these videos were “nonconsensual photography” and as such could not and should not be released.⁴³

There are bad boys everywhere, and land use issues sometimes bring out the worst of them. The **Public Official Supplemental Income Benefit Plan Award** goes to the city treasurer of Norfolk, Virginia, who was charged with using his positions as city coun-

cilman, vice mayor, and treasurer to get contracts and development approvals for a developer, for which he solicited at least \$475,000.⁴⁴ In early December 2016, the Treasurer, Anthony L. Burfoot, was convicted by a federal jury of four counts of public corruption and two counts of perjury. He will be sentenced on April 17, 2017.⁴⁵ Burfoot solicited a \$25,000 gift for the mother of his children so she could buy a condominium. For that, he helped get a “gentlemen’s club” approved. The developer missed a deadline and Burfoot fixed it. Yet another time, Burfoot helped the developer get a contract to build housing in a redevelopment project even though the developer was not qualified.

The National Conference of Bar Examiners will likely be pleased when they learn that they will receive the **Thanks for Thinking of Us Award** in recognizing zoning with new questions on the Multistate Bar Examination and the Multistate Essay Examination.⁴⁶ The NCBE has dropped questions regarding what it considers to be somewhat obscure topics about fixtures and abatement that they decided new lawyers really didn’t need to know about, though some might disagree. But what is important is the recognition of zoning by NCBE. Here is a statement from them:

Effective with the February 2017 administration, there will be changes to the Real Property scope of coverage for the MBE and the MEE. The Real Property topics will be slightly reordered and revised.

New topics will include conflicts of law; property owners’ associations and common interest ownership communities; drafting, review, and negotiation of closing documents; and persons authorized to execute real estate documents.

Minor modifications will include providing specific examples of rules affecting future interests; including security deposits in termination of tenancies; providing more detailed zoning topics; and including as separate topics transfers of restrictive covenants, transfers of easements, profits, and licenses, and acceleration of loans before foreclosure.

Note that the Real Property topics will no longer include (1) application of Article 9 of the Uniform Commercial Code to fixtures or (2) abatement of devises.

The **Names Matter Award** goes to all of Great Britain which has a long history of colorful names for places, with the unfortunate effect that in some instances buyers are so put off by what some places are called that they choose not to live there. For example, homes at Crotch Crescent, a semicircular street about 50 miles northwest of London, sell at about 15% less than similar properties nearby, all because of the name.⁴⁷

In a recent survey reported in USA Today, respondents identified the 15 top names for the most bizarre locations:

1. **Bell End near Lickey End**, two villages in Worcestershire County, England
2. **Brown Willy**, a 1,378-foot hill in Cornwall County, England
3. **Boggy Bottom**, an area that used to be a swamp in the village of Abbots Langley in Hertfordshire County, England
4. **Twatt**, a village on Mainland Island of Scotland's Orkney Islands
5. **Nob End**, site of a former dump in Lancashire County, England
6. **Fanny Barks**, a small forest in County Durham, England
7. **Scratchy Bottom**, a valley between Durdle Door and Swyre Head in Dorset County, England
8. **Minge Lane**, a street in Upton upon Severn in Worcestershire County, England
9. **Dicks Mount**, a street in Beccles in Suffolk County, England
10. **Crotch Crescent**, a street in the village of Marston in Oxfordshire County,

England

11. **Sandy Balls**, a park in Hampshire, England

12. **Cock Play**, the remains of a 19th-century lime kiln in the village of Matfen in Northumberland County, England

13. **The Bastard**, a 617-foot rounded hill in the Argyll region of Scotland

14. **Fanny Hands Lane**, in the village of Ludford in Lincolnshire County, England

15. **Titty Hill**, a hamlet in West Sussex County, England

On September 21, 2016, the Massachusetts State Police, along with troops from the Massachusetts National Guard, supported by a helicopter and several vehicles, swooped down onto a property in Amherst, Massachusetts, to destroy an illegal crop of marijuana.⁴⁸ To Margaret Holcombe, an 81-year-old woman who suffers from glaucoma, arthritis, and sleeplessness, we confer the **Granny Got Busted Award** for being the object of this raid which netted the coordinated federal and state team a single marijuana plant. Holcomb had grown the plant to use for her self-treatment. She found that getting a doctor's approval for legally authorized medical cannabis and traveling to the nearest dispensary in another town, and the cost of buying medical cannabis, was more than she could handle.

We are in a new age when it comes to both medical cannabis and recreational marijuana. The Commonwealth of Massachusetts just enacted a ballot initiative to allow recreational marijuana so presumably people like Holcombe will no longer be the object of federal and state raids.

Thank you, Bryan Wenter of Miller Starr Regalia in Walnut Creek for making this great nomination. Beverly Hills, California, should be proud to receive **The Best Zoning Money**

Can Buy Award for approving a Chinese developer's megaproject at the corner of Wilshire and Santa Monica Boulevards in return for \$820 million in revenue over the next 30 years, \$560 million more than the deal first proposed.⁴⁹ This pay-to-play by the developer is 180° out from the usual situation in which governments are begging and cajoling and tax abating and infrastructure giving and impact fee waiving to get any development. Here, because of the unusual desirability of the community and the location, the developer, the Dalian Wanda Group, backed by Wang Jianlin, reputed to be the richest man in China, was quite willing to step up and pay generously.

The city fully approved the \$1.2 billion project in late November.⁵⁰ While the negotiations on the payments and approval of the zoning were going on, Wanda was fighting with the Beverly Hilton, which opposed the project, especially because of its concern over a loading dock directly across the street from the main entrance of the Hilton. The Hilton lost when Wanda got his approval. The project, approved by a 4 to 1 vote by the City Council, will be two towers, one of 13 stories and the other 15 stories, with 134 hotel rooms and 193 condominiums. "I think we feel we made a great deal on behalf of the city," Mayor John Mirisch told *Variety*. "I hope it sets a model for other cities as well." Still, Beverly Hills is *sui generis*; Camden, New Jersey, the most distressed U. S. city with a "Distress Score" of 100% and 99.8% of its population living in a distressed zone, is not likely to see Wanda or anyone else like that on their doorstep.⁵¹

Thanks to my law partner, Michael Giaimo, we have a nominee selected for an award this year, **The Good Neighbor Award**, which will go to Tom and Kit Dennis, homeowners in Truro, Massachusetts, and their neighbor, Anton Schiffenhaus, who owns the cottage next door.⁵² This is an award with a condition,

however. It is given to the neighbors jointly so long as they can agree on their joint custody of the award and how they will share it. We wish them luck in working this out between them.

Regrettably, the ZiPLeR Awards Committee is not particularly hopeful that these neighbors will be able to come to an accommodation because they have been fighting for years. The Dennises purchased an 8,300 square foot house in 2015 for an amount still undisclosed, but somewhere north of the \$4.7 million tax assessment of the property. Said Tom Dennis: "I appreciated the aesthetic of the house and thought the house should be saved. I looked at this logically. I was naive. I really underestimated the depth of the opposition." The house is in a fabulous setting. In fact, the American master painter Edward Hopper was inspired by that very same landscape that the Dennises now enjoy when he looked out the window of his summer cottage next door. Hopper's cottage is now owned by Schiffenhaus.

The house that the Dennises bought came with some unhappy baggage. The prior owner had obtained building permits to eliminate the kitchen in the small Cape Cod-style house on the property, turning the house into a habitable studio space, and then building a big new house as an alteration. The result was the new 8,300 square foot house. Think of it as the tail wagging the dog.

The neighbors, however, sued the prior owner, alleging that it was not an alteration and that it had damaged the "Hopper landscape." In the face of this opposition, the prior owner still went ahead and built. And the case continues on. While the town initially was a co-defendant and thus had an identity of interest with the prior owner; after losing in court, the town became an adversary. Schiffenhaus says: "Kline [the prior owner] kept losing, but he refused to give up. The only people who have made out are the attorneys." His view, one could say both literally and figura-

tively, is that “the house is not ugly. It’s just an 8,000-square-foot house that’s illegal.”

So where is all this mess now? Under the terms of the court rulings, the new house is supposed to be demolished, though reportedly there are mediation efforts underway. The Truro Town Manager did not respond to our request for an update as we were going to press. Tom Dennis has realized and come to appreciate that the controversy over his house is not about his house alone: “It’s become an issue of development pressures, sense of place, affordability. This house became a symbol of all those things.”

We almost always end up giving out at least one **Commissioners Behaving Badly Award**. This year, not only were there the usual several nominations, but we had a ZiPLeR “Instant Winner.” The Awards Committee has decided to give the award to the body politic of the town of Ramseur, North Carolina, population 1,692, even though the bad behavior started with the planning and zoning board. The end result was the board (apparently, as explained below) called for the chairman of the board to be fired. What started it was a meeting at which the chairman allegedly “tabled the board’s business and opened the meeting to a public forum of shouting, arguing, finger-pointing, name-calling and even his mention of a gun. Mayor Danny Shaw, who was observing the meeting called for law enforcement before the board walked out.”⁵³ Lovely. The 23-minute YouTube video is truly astounding and will leave you shaking your head at the goings on.⁵⁴

At a special meeting eight days later town commissioners read a resolution demanding that the board chairman refute the charges of the alleged conduct. When one of the commissioners challenged the authenticity of a letter ostensibly from the planning and zoning board to the town commissioners asking for them to fire the chairman of the planning and zoning

board, it was revealed that the town clerk had written the letter and “notified the planning and zoning board members to go to town hall and sign it.”

We have a new award this year, **The Best Commissioners Money Can Buy Award**, which goes to the Township Commissioners of Muhlenberg Township, Pennsylvania, who voted four to one to begin paying members of the town’s township’s planning commission and zoning hearing board.⁵⁵ Consider all of the time that those members must spend reading applications before meetings, the meetings and hearings themselves, the lengthy deliberations. . . it all adds up. The Township was having difficulty recruiting volunteers and it was the feeling of the Township commissioners that paying these volunteers would help them attract more people to the job.

We’re not sure of how much top quality talent is going to be drawn in by the new compensation plan. The members of the planning commission and zoning hearing board will be getting \$25 per meeting. Those experienced in planning and zoning work will recognize that this probably works out to about a \$1.94 per hour when you include the preparation time.

Zoning enforcement is a sad business. Sometimes in the name of applying the letter of the law, innocent bystanders are victimized. To Elise Trunchan, an eighth-grader at Quaker Valley Middle School in Sewickley, Pennsylvania, we give this award, unfortunately really nothing more than a consolation prize for what she has already lost, and hope that she has better days ahead.⁵⁶ Elise, we look forward to seeing you at the awards ceremony and our personally presenting the **Maybe I Should be a ZEO When I Grow Up and Save the World Award**.

Elise and her father built a treehouse as a school project. The story went viral, but a neighbor didn’t like it and lodged a complaint.

The Leet Township Council ordered it demolished because it was constructed in the front yard setback where structures are prohibited. Elise said: “A lot of good times have been sleepovers with friends and family. . . . I’m sad and mad about it, but it has to come down.”

It only took one day to take down a treehouse that took Elise and her father three months to build. We have seen similar situations before. We wonder why a variance for a term, say no more than a few years, perhaps coupled with a performance bond to cover the cost of removing the structure at the end of that time, might not be a solution that preserves the integrity of the law but avoids unnecessarily hurting a child who was not at fault?

Another treehouse case emerged on Capitol Hill in Washington, DC, this year and the controversy is over the 20 inch encroachment of the treehouse into an alley.⁵⁷ The parents, the mother who counsels high school children in college admissions and the father who is a lawyer at the Department of Homeland Security, built the 70 square foot treehouse for their daughters, ages three and five, after consulting with city officials and being told there were no regulations as to tree houses. They even sent fliers out to the neighborhood, receiving the responses, before they built. They consulted with an arborist to make sure that no damage would come to the tree.

Once it was up, there were complaints, and the city decided that they did not have the necessary permits after all. They have their supporters including one person who said: “people who oppose treehouses never had, nor will they ever have, any quality of life.” And another said the obvious: “it’s a treehouse. Relax people.” But one of the opponents argues that the treehouse “overwhelms” the public space. There are photographs accompanying the article and looking at them does not bring to mind the word “overwhelms.”.. It appears from

the media reports that the matter was resolved by the family moving it back so it complies.

We should try to end on an upbeat; after all, we have another long year ahead of us. In the past, we have reported on emotional support animals and their impact on transportation. Last year we had a look at miniature horses. This year we are pleased to give Delta Airlines the coveted **Come Fly with Us No Matter What Kind of Critter You May Be Award** for its gracious and understanding accommodation of a passenger who brought along their “therapy pet,” a live turkey.⁵⁸ “Emotional support animals” under federal law travel free of charge so long as a passenger can provide documentation from a mental health professional that the animal is necessary “as an accommodation for air travel and/or activity at the passenger’s destination.” As the Washington Post reported: “no word on whether other passengers found the turkey better or worse company than a crying baby.”

One of the earlier reports we have on out-of-the-ordinary emotional support animals is that of a 70 to 80 pound pig aboard a US Airways plane.⁵⁹ The passenger was allowed to bring the pig on board as a support animal, but was ultimately removed from the plane before take-off because she and her porcine traveling companion were being disruptive. One of the passengers reported that the pig began “dropping things” in the aisle. The pig’s owner tied him to the armrest to try to clean up the mess and he began to howl. Ah, adventures in air travel.

Next Year

We expect to be back, bigger and better we hope, with the 2017 ZiPLeR Awards, but it is only possible if you keep sending those great nominations our way. Please do.

ENDNOTES:

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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.

Note to readers: Rather than typing out the long web addresses, you might try just entering the title of the article or a few key in any search engine. You are likely to get to the source easily that way.

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