
ZONING AND PLANNING LAW REPORT



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THE 2018 ZiPLeR: THE 24TH ANNUAL ZONING AND PLANNING LAW REPORT LAND USE DECISION AWARDS

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Please join us now in celebrating the 24th Annual Zoning and Planning Law Report Awards, just one year shy of our silver anniversary. For our faithful readers going back decades, you know what the ZiPLeR Awards are and for those just joining us, we want to give you a hint of what you will discover in these awards. The objective has always been to pick and choose among the many outliers in this practice area so that we can gain a better perspective of what we do and cast aside our misguided views that somehow our practice is exceptional. These awards highlight the best and worst in land-use decision-making, giving us an opportunity to better understand how our individual efforts are more normal than we ever imagined.

You'll laugh, you'll cry, you will be informed, and you may doze off. . . So please, in reading this awards issue do not operate heavy farm machinery or a motor vehicle on public highways (this warning is brought to you by the legal staff at Thomson Reuters)

Just skim down the snippets of what these awards involve this year and hopefully you'll be enticed to read on.

- Duck duck goose—the law of feathered friends
- Send those Canada geese back to Canada
- When people in transition need a home
- How to attract millennials to your listing
- From NIMBYs to YIMBYs
- Zoning for try-before-you-buy sex toys
- Expletives on a barn



- Man with a bat at a public hearing
- When a zoning amendment is twice as long as the current regulations
- The law of catteries
- Inviting homeless people to a slumber party

In the 22nd annual issue of the ZiPLer Awards we reflected on the then recent election of President Donald J. Trump, contemplating how a real estate magnate would advance the law of zoning and planning and provide new challenges for us all. In the 23rd annual issue of the ZiPLer Awards last year, we had to reset our expectations given the events of Trump's first year in office. We thought that would be the end of having to refocus, but it wasn't.

The events of the last year reshaped so many areas of public policy that even land-use wasn't left untouched. So, for this year's edition, we have decided the best way to cope with all this turbulence would be to create a Board of Editorial Advisors, and we are pleased to announce today that for this 24th annual issue of the ZiPLer Awards our editorial advisors are: Michael Cohen, for his expertise on legal issues; James Comey, for his ability to deftly navigate problems of political intrigue; Rudy

Giuliani, for his careful preparation and articulateness; Paul Manafort, for his skill in managing international relations; Michael Flynn, for the credibility and trustworthiness that only a senior military official can bring; and Stormy Daniels, for her social networking skills. This special advisory board has reviewed and approved all of these awards, along with the International ZiPLer Awards Committee.

Recidivist readers will recall the highlight of the year is the presentation of the awards. In the past, and we're pleased to say again this year, we've had the outside counsel of Trenholm Walker and Andy Gowder of Charleston, South Carolina, to select a venue and make all the arrangements for this spectacular ceremony. Regrettably, one or more members of our special advisory committee will be unable to attend because of their incarceration, but we will provide a live video feed for them.

In careful consideration of international and national events, political and economic, and our expectations for the coming year, Trenholm and Andy quickly settled on a theme that they felt was especially appropriate. Off they went to Lloret de Mar, Spain, in the Catalonia region on the Costa Brava, an area known for its Mediterranean beaches. Of interest to those in zoning and planning, this town of about 37,000 people has much fine architecture, including the Iglesia de Sant Romà church of both Catalan Gothic and modernist architecture and the nearby Santa Clotilde Gardens, designed in the Italian Renaissance tradition.

Trenholm and Andy chose the Disaster Café, not only for its fine food, but for the ambience. As you arrive at the restaurant, you will note its wait staff wearing construction helmets and equipped with other safety gear. The dishes are heavier than what you normally have in a fine restaurant. There is a reason for that, because, without announcement, the entire Disaster Café suffers a simulated 7.8 on the Richter scale earthquake, leaving many the diners screaming in fear and covered with spilled drinks. What better way to celebrate our ZiPLer Awards during this time of great unrest than at the Disaster Café.¹ Brilliant.

Latebreaking news. As this 24th Edition of the ZiPLer Awards goes to press, we are informed that

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the Disaster Café has been permanently closed, and consequently we decided to hold the awards ceremony at our second choice, the Eternity Restaurant in Truskavets, in the Ukraine. It seems so fitting to go from a disaster to eternity, especially where the Eternity Restaurant is in the shape of a giant coffin and coffins are lined up along the wall inside the restaurant.

But as luck would have it, in all things that seem to characterize our current situation of uncertainty, the Eternity Restaurant is also permanently closed.

Finally, after much hard work, Trenholm and Andy were able to come forward with a properly-themed restaurant that somehow has remained open. Their thinking was that with the current loss of civility and the “dog-eat-dog” approach to nearly every type of conflict, they would go with the concept of “Nyotaimori,” a Japanese banquet of cannibalism where the restaurant serves sushi and sashimi from a life-sized “body” made from food and placed on an operating table or (are you ready for this?) off of the body of a living person laying prostrate on a table before the diners.² Apparently, you can have this experience in Las Vegas, Los Angeles, Miami, New York, San Diego, and San Francisco.³ Here is how the promoters describe it:

Nyotaimori commonly called naked sushi or body sushi is perfect for just about any event where you want to draw attention or add a special twist. We have done movie premier parties, wrap parties, cast parties, red carpet events, corporate events, hospitality suites, bachelorette parties, bachelor parties, birthdays, anniversaries, real estate functions, music award parties, and just about everything else you can think of. We excel at coming up with creative ideas for your nyotaimori experience.⁴

If you want to take a break from your daily grind of land-use law and have a smile and shake your head a little over why anyone would even care to dine in such a place, you should go to the website referenced above. Nevertheless, we will see you there, location to be announced in the formal invitation, at the awards ceremony.

Now, for the awards. . .

Duck Duck Goose⁵

The **Getting Your Ducks In A Row Award** goes

to Georgetown Township, Michigan, for finally reversing course from its original action in issuing a nuisance order to remove the ducks kept as emotional support animals by Dylan Dyke, a 12-year-old Western Michigan boy, with autism. The neighbors complained that the ducks were smelly and that they adversely affected their property values. Really? The boy’s parents, Mark and Jennifer Dyke, requested a variance to keep the ducks. Dozens of people showed up at the hearing before the zoning board of appeals, which ultimately did the right thing in concluding that they would find a way that young Dylan could keep his ducks. Why neighbors in these situations cannot be more accommodating is a mystery to many people in the land-use business, particularly since the federal law is clear that local governments must make a “reasonable accommodation” for people with disabilities. Thank you to our editor, Patricia Salkin, for making this nomination.⁶

Just as we have had special categories for tree-houses and service/emotional support animals in the past, we may need to consider the ZiPLer Awards Committee proposal that we have a category dealing solely with ducks. As a preface to announcing this award, the Committee wanted our readers to know that the activities of a condominium association regarding governance, since they are a form of private government, are within the four corners of what we consider to be governmental action and therefore eligible for ZiPLer Awards. To the Fairlington Glen Condominium Association, goes the **Oh, Please Award** for the association’s threatening Trista Nealon and some of her neighbors with criminal charges for rescuing seven ducklings that had found their way into the neighborhood’s community pool and couldn’t get out. Nealon and her neighbors had tried, without luck, to contact the Wildlife Rescue League to come and save the little feathered friends. Fearing for the lives of the seven darling ducklings, Nealon and her group went back to the pool, unlocked the gate by reaching through a mail slot, and pulled the ducklings of the pool.⁷ Phew.

For their efforts to save the ducklings, Nealon, and a few others who assisted in the rescue mission, received a letter from the homeowners’ association informing them that the Board of Directors, “is

currently considering whether to press charges, or take other enforcement action.” Nealon responded: “I am a [27-year] Glen resident owner, and it is ridiculous that I am being threatened with criminal charges for being a Good Samaritan and saving the baby ducks.” The board’s lawyer claims that the rescuers damaged a lock, something that Nealon and the others deny, and that Nealon and the others should each come up with \$100 to cover the repair.

In a recent condominium association newsletter, the board said that there had been a “break in” at the pool:

On the evening of Thursday, May 10, 2018, about a half dozen people, some of whom are Glen residents, allegedly broke into the Glen maintenance office and swimming pool in order to save a mother duck and her ducklings from drowning. The Arlington County Police were called, but by the time the officer responded the ducks had been saved and the crowd had exited the facility. However, a police report was filed, and the Board consulted with legal counsel about the recovery of damage from the break-in.⁸

You know you are in trouble when Above the Law picks up your story. If you read ATL, you recognize that its headlines tend to be sensational, and such was the case here: “Lawyer Brought into Stupid Ducklings Massacre Effort: Condo Board Brings in Lawyer to Bully Residents. It just makes them look bad.”⁹ This is not the type of publicity a lawyer or condominium association needs:

Undeterred, the residents summoned their outer Tony Soprano and broke into the pool to rescue the stranded creatures and complete the story arc for a coming-soon-to-you Pixar blockbuster.

And that’s when lawyers got involved and tried to ruin everything. Rees Broome associate Kristen Buck wrote the residents who saved the ducks seeking \$100—EACH—to replace a lock (retail value of a padlock is about \$10) that the condo board claims got damaged during the rescue. According to Buck’s letter: “Such a good faith payment may influence whether the Board decides to press charges or take other action.”

Really? Give us money and we might not ask for more? This is just petty bullying. Charge them the price of a lock—assuming the lock was even damaged, which is in dispute—and move on. Part of lawyering is counseling unreasonable clients, like Kim Jong Fairlington here, that they can’t abuse the law to bully people.

The Research Department at ZiPLer Awards Central in Peoria has calculated that the cost of having a lawyer send a letter and the various other communications following the demand is enough to buy approximately 142 new locks.

The ZiPLer Awards Committee extends its thanks to Diane McGrath, the former legal administrative assistant of this reporter, for her nomination of the town of Waterford, Connecticut, which will now receive the **Ruffling Feathers Award** for telling a local resident that she cannot keep her pet geese, Luna and Emma, at the home where she relocated following her divorce.¹⁰ Kristine Wilcox, the owner of the pet geese said: “They kind of grow on you. (They) talk to me, they follow me. They’re my pets. They kill ticks, they kill bugs, they’re good for the environment. I never thought they would be considered poultry.” That’s how the problem arose. The town of Waterford does not have any zoning provision regarding the keeping of birds in residential neighborhoods, but they do prohibit farming on lots of less than 120,000 square feet (a little less than three acres). The local zoning official decided that geese are farm animals. Wilcox argues otherwise.

The enforcement began after a neighbor complained that the feed for the geese was attracting pests. However, the local health district staff visited the site and determined that the feed was not attracting rats.

Off to the zoning board of appeals where Wilcox presented 34 documents in support of her position that geese were pets, including a bill from a veterinarian indicating that Wilcox had registered the beloved and cuddly Luna and Emma as emotional support animals. The board decided that the geese did violate zoning and had to go.¹¹ As a result of the decision, there was talk about amending the zoning regulations to allow geese as pets in residential districts.

And lo and behold, miracle of miracles, compassion and peace broke out in the town of Waterford, Connecticut, and Kristine and her son and Luna and Emma lived happily ever after, when the town amended its zoning regulations to allow the geese to be kept on residentially-zoned land as pets, as an

accessory use by right. Good for Waterford.¹² We in the land-use business always like happy endings.

Here are the zoning regulations, in relevant part, as amended.

3.42 KEEPING OF POULTRY AND RABBITS (Effective Date 7/2/18)

Purpose: This regulation is intended to permit the keeping of poultry and small animals by Zoning Compliance and in a manner that preserves neighborhood character. This regulation is not intended to limit agricultural uses where they are permitted.

3.42.1 Hens, geese, ducks, other poultry, and rabbits may be kept on any single family residential property as an accessory use by right provided that all of the following conditions are met:

- a. No more than two (2) hens, geese, ducks and rabbits shall be allowed per 7,500 square feet of property area, with a maximum total of ten (10) per property.
- b. Roosters are prohibited. . . .¹³

The ZiPLer Awards Committee has suggested in its commentary on this award that the land-use bar look to undertake a pro bono case on behalf of the roosters, who are clearly being discriminated against by the town of Waterford, Connecticut.

Again, thanks to Diane McGrath for this nomination, the last of this year's ducks and geese category (why did 2018 become the year of ducks and geese law?). The ZiPLer Awards Committee is pleased to give billionaire Tom Golisano, as if he probably doesn't have everything already, the highly regarded **Dealing with Pooping Geese Is Very Taxing Award** for his efforts to drive off the Canada geese from his lawn and then refusing to pay a \$90,000 school tax bill until local officials did something about his unwanted guests.¹⁴

Golisano has done all he can to keep the geese away, including putting up a wolf decoy, spraying smelly repellent all around, and running fishing line across his yard, all of which ultimately did nothing to keep the Canada geese from creating what the news report described as a "minefield of poop" on his lawn at his home on Canadaigua Lake in South Bristol, New York. As Golisano described it:

This summer. It was horrible. We'd the drive in and find 100 to 200 geese parked on our lawn. You can't walk barefoot, can't play Frisbee, can't have your

grandchildren run around. . . . Here I am paying all his money in taxes and I can't use my property because of the geese droppings.

Golisano, whose net worth is estimated at \$3.4 billion by Forbes, and who happens to be married tennis star Monica Seles, has been quick to sue over the tax issues. Almost a decade ago, he spent \$200,000 in legal fees to get his taxes on another home near Rochester reduced from \$200,000 to \$60,000. Consider the economics of that, factoring in the deductibility of real property taxes and the time between revaluations/reassessments.

It's not likely he'll get far in convincing South Bristol to join the battle against the geese. The town supervisor says: "It's a resident's problem to take care of, not the town's. It's a lake, after all." The town supervisor said that he has received no other complaints from shoreline residents. Golisano says he just might appeal the taxes on his lake house because he believes the value has been reduced by the geese invasion.

Housing

Following along the same line of dealing with neighbors, the ZiPLer Awards Committee is pleased to confirm that the **Meeting You More Than Halfway Award** will go to former Atlanta Mayor and Ambassador to the United Nations, Andrew Young, who has come forward to defend the rights of the residents of the Mary Hall Freedom House to continue living in the 33 condominium units at The Reserve of Dunwoody.¹⁵ More than 100 women and children live there as they seek to move from homelessness, drug addiction, and poverty to a new life.

Unfortunately, Sandy Springs city officials have challenged the right of these people to live there, claiming that "if they had done the homework, they would've discovered the units purchased are not located in the area zoned for drug rehabilitation or commercial operations." Believe it or not, the city has apparently issued 34 new citations which are now pending before the court, following a judge's dismissal of the city's initial complaints of "incorrect zoning licenses, paperwork, and other permits." Andrew Young's participation arises out of his service on a committee of business leaders and other

operators of similar facilities, which was responsible for reviewing the legality of operations at this location for these residents. Here are the questions that the committee asked, all of which were fully answered with the committee ultimately reporting that it “found nothing out of order.”

Do you have a zoning certificate to operate in the existing locations as required by state law to obtain a state license for such operations?

Are you in compliance with local zoning ordinances for operating in the current locations?

Are you properly licensed by the appropriate state and local governmental entities?

Why do they have so many unrelated persons in the same location/residential unit contrary to best practices in such settings?

Again, one has to ask how do these issues end up in court and what are the real motivations of those in opposition? All of this, of course, arises out of the so-called Not In My Backyard (NIMBY) attitude of some. In the past annual ZiPLeR Awards we have recognized the efforts of YIMBY's—Yes, in My Backyard. National Public Radio had a show on the subject on July 27, 2018, as part of their Planet Money series. It details the efforts of a group in West Oakland, California, to promote housing. As one of those interviewed said:

The politics of no has plagued our city for far too long - not on my block, not in my backyard. We have made mistakes in the past by not moving housing production forward all over this city. And I plan to change the politics of no to the politics of yes. Yes, we will build more housing.¹⁶

Let's hope this movement gets some traction.

At least in Minneapolis, the YIMBY spirit is at work in an effort to eliminate traditional single-family zoning and allow three units as of right on any lot.¹⁷ A witness at the hearing on the Minneapolis 2040 comprehensive plan described the proposal as a “social experiment of epic proportions.” In early December 2018, the City Council voted 12 to 1 to approve the 2040 plan enabling duplexes and triplexes in every neighborhood. The next step is that the regional planning agency will review the plan amendments, with the zoning changes expected to be implemented sometime in 2019.

The ZiPLeR awards committee is especially

pleased and proud to award Minneapolis and all its right-minded YIMBY citizens the **Won't You Be My Neighbor Award**. This could be the start of something big. As Mayor Jacob Frey said recently: “Minneapolis is not alone in being a city with a history of intentional segregation. I'm hopeful that we're not alone in undoing it.”¹⁸

As has been freely acknowledged in many past editions of the ZiPLeR Awards, we recognize the sometimes prurient interests of our readers. We have reported frequently on sex businesses and some of our readers have related their experiences in making detailed investigations of such facilities in furthering their understanding about the impact of the First Amendment right to free speech. This year, we come at the sleaze from a little different angle with the **Marketing Marvels Stripped to Their Bare Essentials Award**, which goes to Kristin Gyldenege, a real estate agent who was struggling to sell a \$230,000 home in Conroe, Texas. This house was a little tough to sell because it happened to be in an area flooded by Hurricane Harvey in 2017. Gyldenege knew what she had to do: “I wanted people to see the listing. I wanted traffic.” But she also had a certain real estate broker level of decorum in mind: “I didn't want anything slutty. I wanted to represent a young couple who was on top of their game all the way around and who had just moved into this great house.”

What to do to get some action on this listing? She retained a very buff gentleman, sans shirt, and with the typical tattoos as we might expect, to take on the role of the new resident of the home, to give some appearance of what it might be like to live there. To accompany him she included a particularly fit woman who came attired in a T-shirt and black lace panties. They posed as a couple. Photographs are taken of the gentlemen cooking breakfast for his putative girlfriend in an especially tidy kitchen. Our gentleman, still with nothing on above the waist, is then seen climbing a ladder to do what men like to do around the house, undertaking some repair work. In another photo, he gives the woman a massage.

There was woman's work to be demonstrated, and in a misogynistic trope the “girlfriend” is shown, back to the camera with her T-shirt open in the back

and still apparently having no clean clothes to wear other than the previously mentioned unmentionables, folding towels coming out of the dryer. Altogether, we have here what the broker felt was a stereotypical millennial couple enjoying the good life together in the “you-can-buy-it-now” \$230,000 home, where you too might enjoy such a life of domestic bliss.¹⁹

Did this work? The broker received about 100 complaints which to her indicated she had achieved her hoped-for result: “Sweet, that’s like 10,000 people that have seen it.”

The ZiPLeR Awards Committee warns others who may seek a similar award in the future:

We will not be responsible for the health and welfare of those people pretending to live in such domestic bliss without adequate protection from the weather, especially in northern areas of the United States during the winter.

As a footnote, in some follow-on reporting from The Washington Post, the ZiPLeR Awards Investigation Team learned that Kristin Gyldenege goes by “pottymouthagent” on her Instagram account where she has reposted some of the photos.²⁰ The Investigation Team also noted this comment by an area Realtor®: “We really want to be a little more professional.”

Other techniques used in the Houston market to promote listings have included offering purchasers \$250 in tacos if they buy, listing some houses that appear to be expensive for just \$1, and having someone pose in every room in the house in a panda suit (we can’t imagine what that promotes . . .). The later Washington Post report indicates that in the first 40 days of the listing, fewer than 1,000 people had viewed it online, but within 24 hours after the images of our domesticated millennial couple had been posted, 20,000 people had clicked through.²¹

Fifteen years ago we were caught up in the “megahouse” controversies with McMansions and houses on steroids popping up on lots where modest homes once stood but were scraped off to make way for the grand manses. We don’t see so many of these today in part because the frenzy of that time was largely quelled by a combination of the Great Recession and changing demographics. It is fun, however,

to have one of these controversies emerge. And that’s exactly what we found this year at San Roy Road in Walton County, Florida, where Peter Russell sought to build a 12,000 square foot home requiring variances to build on the 2.13 acre lot at the end of a dead-end road.

The ZiPLeR Awards Committee is pleased to announce that Russell has earned the coveted **One Person’s Cottage Is Another Person’s Castle Award** for his efforts to build this house, which one neighbor claimed through his lawyer would be “30 percent larger than anything else in the area” and “could sleep somewhere in the vicinity of 28 to 30 people, which seems a little excessive if that’s a single-family residence.”²² Russell needed variances to ignore the 20-foot setback and build right to the edge of the 33-foot County right-of-way and to park his cars on the right-of-way easement. By a 4-2 vote the board of adjustment approved the variances over the protestations of the County planning director: “They asked the zoning board of adjustment to do what I as the director could not and would not do.”

The report of the controversy is a good read, because of a couple of back stories. Russell is from Dallas, in fact, the same gated community where former President George W. Bush lives, and the complaining next-door neighbor to the lot to be developed also has a Dallas connection with an ownership interest in an energy company based there. According to the neighbor, Russell may have netted in the order of \$4.1 million on the sale of a portion of the original parcel he bought and the implication is that Russell doesn’t have much hardship.

The second back story is that there apparently was some discussion about the County buying the lot for beach access before the variances were granted, but the negotiations didn’t go forward. A County commissioner, before the board of adjustment vote, requested that the subject of the acquisition of the lot be placed on the Board of County Commissioners’ agenda:

It has come to my attention that there are plans to develop property located at Eastern Lake Outfall. I am asking the Board to consider purchasing this property so that it can be used for public beach ac-

cess, and to ensure that it can be kept in its current pristine condition.

One does not need to be a Member of the Appraisal Institute to imagine that the value of the lot went up with the variances. In the words of one of the two board members who voted against the variances: “This thing really bothers me. That was not only a ridiculous variance to grant, but now I’m hearing he’s offering to sell it to the county and the county’s offering to buy it. I just don’t like the sound of this.”

Our Friend, the First Amendment

This broker marketing gimmick brings us to the next two awards that complete what some might see as the seamy part of the ZiPLER Awards report, though others would view the controversies as matters of the First Amendment and civil rights.

After 60 years of drag shows being banned in most districts in Pittsburgh under the zoning, this year saw a concerted effort, led by 331 petitioners, to amend the zoning code to eliminate the prohibition against “male and female impersonators” in districts other than the “Urban Industrial” zone.²³

The drag performances have been treated as adult cabaret uses and restricted in the same way as strip clubs. That seemed unfair and unnecessary to many people, largely those from the LGBT community. Gary Van Horn, president of the Delta Foundation that has been leading the efforts seeking the revision, said: “As it relates to LGBT equality, we’ve been winning, and hearts and minds have changed, but while we been winning our detractors and folks that hate and don’t like the LGBT community have tried to find ways to win again.”

To the Pittsburgh City Council the ZiPLER Awards Committee presents its **Cross Dress for Success Award** for amending its zoning to take “male and female impersonators” out of the classification of “adult entertainment” thereby lifting the restriction limiting them to industrial areas. Van Horn reflected on the decision: “I think it’s another step forward for Pittsburgh as we continue to make Pittsburgh the most livable city for all, including the LGBT community.”²⁴

This next award has to be the most bizarre of

any this year. You ought to consider it in the context of how on earth can or should this be planned for and regulated. It certainly suggests that there are just some things we couldn’t imagine, and, consequently, we are unlikely to get out ahead of in our planning and regulation. The city of Houston, Texas, is famous for not having zoning, but they do control some activities affecting land-use through other municipal regulation. The city has ordered KinkySdolls to stop the demolition and construction for which it did not have required permits. The company had leased a former hair salon of 2,500 square feet for its new business venture. It has the same operation in Toronto; Houston would be the second location, the first ever in the United States.²⁵

KinkySdolls describes what it provides in Toronto: “KinkySdolls is the first Adult Love Dolls Rent before you buy Service in North America. We offer a unique service to those who are looking for a companion.” In short, this is store where someone can visit, have certain intimate relations with a life-size doll, and then decide whether to buy that particular doll. There are male and female models and prices range from \$2.199 to \$3,500 US. The male dolls are at the lower end of the price range. Go figure.

To the city of Houston the ZiPLER Awards Committee presents the **You Can Look but Don’t Touch Award** for amending its 20-year-old commercial sex ordinance to include technological objects, such as these dolls that are warm and can talk. The change in the law will still allow the dolls to be sold. They mayor described the amendment: “You can sell, but not use. You can not engage in sexual activity with a lifeless object in a store.”²⁶ That seems like a pretty good policy, even generally.

The ZiPLER Awards Committee was quick to vote approval of a nomination, again from Diane McGrath, of Arthur Lynch, a resident of Billerica, Massachusetts, for the **Champion of the First Amendment, Even If It Makes Me Look Stupid Award**.²⁷ Lynch lives next door to Sal’s Pizza and became upset over the pizza shop’s construction of a fence between their properties. There probably was some agreement about the fence before it was built, but when the workers came to install it, eight feet high, Lynch forced them off his property. The pizza

restaurant owners came back with a six-foot fence, also conforming to zoning. It seems that Lynch liked that fence even less because he didn't want the restaurant patrons looking into his yard. How could Lynch get back at Sal's Pizza for something like this?

Lynch's barn faces the restaurant, so he decided to express his displeasure with the fence by spray painting the word "douchebag" across the back of the barn. Lynch offered: "If they raise the fence, I'll take douchebag off the house, but otherwise, I'm probably gonna add more."

It appears that because of the neighborly outreach of Sal Lupoli, the owner of the pizza restaurant, the matter has been resolved. Lupoli was away when the brouhaha started. When he returned, he went to see Lynch and said: "I'm here to understand your concerns." Lynch asked Lupoli why he came and not the contractors. Lupoli answered: "Because I own the real estate, and owners should talk to each other." They walked the site together, Lupoli promised to figure out a solution in the spring when the ground was no longer frozen, and Lynch, on his own initiative, covered over the offending word.²⁸

Bad Behavior, All Around

Almost every year, the ZiPLeR Awards Committee recognizes a special category of "public officials behaving badly." This year's winners are a group of five California coastal commissioners who have been fined for violating rules regarding ex parte communications and meetings with individuals and entities doing business with the Commission. Together, all five commissioners have been ordered to pay a total of just under \$60,000. But here's the kicker. . . . The action was brought by a nonprofit organization called Spotlight on Coastal Corruption.²⁹ That organization claimed, and the court granted, legal fees in the amount of \$959,000.³⁰ Apparently, there remains some controversy over who pays and there may be a potential claim by the Attorney General of California for its fees in the amount of \$650,000, which it expects Spotlight on Coastal Corruption to pay.³¹ What is remarkable, but also typical, is that the attorney's fees are more than 10 times greater than the fines themselves. Where attorney's fees are recoverable, the impacts

on decision-making are substantial, as with the Religious Land Use and Institutionalized Persons Act, the Fair Housing Amendments Act, and the Civil Rights Act of 1871 (Section 1983).

We may have to dig further into what is going on in California, because we have a second award in this category, this one going to Samuel Leung, the developer of a controversial \$72 million, 350+ unit Los Angeles apartment project. He reportedly used intermediaries to give eight local politicians nearly \$200,000 to help smooth the way to a zone change. The mayor and council members from the industrial district where he proposed to build the new residential project all received campaign contributions from Leung's acquaintances, who were then reimbursed by Leung.

The district attorney issued a statement:

Leung and David are accused of recruiting family members, employees and others to act as straw donors to funnel money to local politicians in hopes of having Leung's five-acre parcel rezoned from industrial to residential use.³²

Leung has pleaded not guilty.³³ He does get, however, a most wonderful ZiPLeR Award, **I Just Considered It Kind of Like a Tip Award**.

In the bad behavior department, we also have public citizens caught up in three different incidents this year, and the ZiPLeR Awards Committee has decided to grant all of them the **Public Participation Run Amok Award**. One goes to a Stroudsburg, Pennsylvania man who has been cited for harassment after making threats at a zoning hearing, which included saying that he would return with a baseball bat (he didn't). The identity has not yet been revealed, but as soon as we get it, we will invite him to the awards ceremony, asking him to leave his baseball bat at home.³⁴

Over in Rhode Island, we have another winner. Poor Rhode Island is the brunt of so many jokes about corruption. It is said that "things got so bad in their state during the recent recession that the Mafia had to lay off two of its judges."³⁵ Peter McGreavey of Tiverton is our winner. He was arrested by the local police just outside the town hall before he could enter to attend a Town Council meeting, where a zoning matter of interest to him

was to be voted on.³⁶ While this sounds a little like prior restraint, what preceded the arrest was McGreavy going to the gas station owned by a zoning board member, before the hearing, and telling him: “You should not be on this board. I know who you are where you live. You shouldn’t be voting on that. I’m f—ing telling you, you can’t talk about Raymond Johnson like that.”

Who is Raymond Johnson? He has a motocross operation in town that was the subject of the zoning meeting. The board member who owns the gas station reported earlier that Raymond Johnson had “showed up at the gas station and gave me \$100, and then I got a note from the zoning board clerk a week later that he was on the agenda. The following month he dropped off another \$100” at the gas station. Johnson apparently claimed the money was in settlement of a debt dating back six or seven years, but the board member said: “As far as I was concerned, I never expected to get paid.” The board member reported all of that on the record.

Our final winner of this award that no one should get is actually several demonstrators who were arrested this past summer in the Inwood neighborhood at the northern tip of Manhattan Island while protesting a rezoning plan that advocates say will bring \$500 million of investment to the area.³⁷ It was all for naught, however, as the council subcommittee overwhelmingly approved the plan.

Latebreaking news: Fifteen plaintiffs with the support of Representative Adriano Espaillat have appealed the new zoning.³⁸ Gentrification appears to be an issue of great concern, with the residents and business owners saying that the city ignored their requests to study the displacement of 12,000 preferential rent households, as well as the potential for increased rents for business owners and real estate speculation.

Neighbors

The first-ever **Don’t Look Now Award** goes to Dr. Stephane Duckett and Norinne Betjemann (yes, they are real names) of Norman’s Bay, East Sussex, England, who were successful in convincing the Rother District Council to issue a “community protection warning” to their neighbors, defining an “exclusion zone” around their home.³⁹ This warning

prohibits the neighbors, Nigel and Sheila Jacklin, from looking at their neighbors’ house.⁴⁰ Duckett and Betjemann, neighbors of the Jacklin’s for five years, complained of “noisy builders, verbal abuse, and light pollution as Duckett and Benjamin turned their former workshop into a weekend retreat.”

There is plenty of useful advice available online about how to be a good neighbor,⁴¹ but if you want to go the other way and force your neighbors out, you can also find that online (just as you can find almost anything online. . .), including this guidance:

How to Make Your Neighbors Move

If you’re really looking to take it to the next level, you can try your hand at doing something that will make your neighbors consider moving. Again, keep in mind these suggestions are all in good fun.

- Start putting out lots of food in your backyard to attract wild animals. Then cut a hole in your fence, so the animals go in your neighbor’s backyard.
- While they are away, sneak over and drain their pool.
- Start dumping your food scraps in their yard. Not only will this be hard to clean up but it will attract more wild animals to your neighbor’s yard.
- Get your child a drum set and have them practice at odd times throughout the day. Keep your window open or have them practice outside. The noise will drive your neighbors crazy.
- Hang a bunch of wind chimes on the outside of your house. That way when it gets windy, your neighbors won’t be able to get a quiet moment.
- Give your neighbors a pair of Bluetooth speakers as a gift. Then use your device to blast music into the speakers at random times during the day. You can easily sync your device to the speakers so long as you are not too far out of range. You can also blast creepy sounds to make your neighbors think their house is haunted.⁴²

Mashpee Mashup, Planning Pedant, and More Duany Dreaming

Mashpee is a delightful little Cape Cod town of 14,000 residents on 23 square miles of land. Back in the 1960s, the New Seabury Shopping Center was developed with 62,000 square feet on what is now 140 acres, and renamed Mashpee Commons in 1986. There were numerous expansions over time and it metamorphosed from its strip center beginnings into a mixed-use, pedestrian-oriented town center with over 100 shops and such public uses as a library, church, post office, and senior center—all

that resembling, mimicking, or perhaps even actually being a traditional New England town center. Mashpee really didn't have one before Mashpee Commons. It evolved to where it is today with the help of Andres Duane and Elizabeth Plater-Zyberk of DPZ Partners and has rightly received many awards.⁴³

Now, Mashpee Commons wants to go to yet another level.⁴⁴ Unhappily though, Mashpee Commons representatives did not get off to a good start at the planning board meeting on June 20, 2018, just two weeks before the October town meeting deadline, when it offered up a 266-page zoning amendment for a form-based code to enable more development flexibility. Those changes would also enable expansion of the development. For those of you not from New England, you may wish to know that zoning amendments in many towns are made only at a town meeting at which all of the voters are allowed to vote. The town meeting is the earliest form of "direct democracy," which can be traced back to before Athens and today includes ballot measures, initiatives, and referenda. As to zoning amendments, it is often something to behold.⁴⁵

The ZiPLER Awards Committee wrestled with this nomination a bit, not knowing who the most worthy recipient might be. Ultimately, the Committee decided to give it to Mashpee Commons, which will receive the **Most Weighty Zoning Amendment Award**, previously given as the **Bury Them with Words Award**, for its submission. The Committee was unable to compute how the 266 pages of proposed changes might translate into pages in the existing ordinance, but we can report that the current zoning bylaw is 149 pages.

The proposal at the eleventh hour before the scheduled town meeting caused internal tension and consternation as well, with the town manager saying: "I think the planning board needs to chill out." Mashpee Commons then withdrew the zoning amendment and proposed to resubmit it for the May 2019 town meeting.⁴⁶

Following up on the initial report, the latest word that the Committee has received is that the proposed changes may be scheduled for the May town meeting and efforts are underway to coordinate the work of all of the local boards and committees with

responsibility over the development that the changes would enable. As stated in the most recent news report:

On Monday, November 19, the Mashpee Board of Selectmen tasked the administration to talk with the respective chairmen of a number of boards and committees—including the zoning board of appeals, planning board, conservation commission, and board of health—and to put together a schedule for a number of meetings in January and February.

Selectman Andrew R. Gottlieb suggested the idea saying that the town has yet to formulate an opinion on the proposed expansion of the mixed-use development and therefore has had a difficult time taking a stance on the issue. Mr. Gottlieb said that he barely knew what the rest of the board thought about the expansion because they had not had the discussion, at least at an open meeting.

"Nobody has an ability to speak for the town because we haven't come up with that position," Mr. Gottlieb said.⁴⁷

In the Swiss Family Robinson Tradition

No ZiPLER Awards issue would be complete without at least one treehouse case. Often the ZiPLER Awards Committee has multiple awards in this category. The Town of Sullivan's Island, South Carolina, is the recipient of the **Potlatch Award** this year for having wasted its staff's time and the taxpayers' money fighting a treehouse when the real problem appears to be a lack of clear definitions in the regulations. For those unfamiliar with the term "potlatch," the Awards Committee directs your attention to the ultimate source of all good definitions, the Merriam-Webster dictionary (available at Amazon.com and bookstores everywhere):

1: a ceremonial feast of the American Indians of the northwest coast marked by the host's lavish distribution of gifts or sometimes destruction of property to demonstrate wealth and generosity with the expectation of eventual reciprocation.⁴⁸

Hal Coste built a 96-square foot treehouse for his grandchildren. The treehouse has an electrical outlet, windows, furnishings, and wall decorations. It is perched atop a 200-square foot platform and rises 30 feet above ground. The town has attempted to stop the completion of the treehouse. Coste recently paid a fine of \$600 for the egregious offense of painting the treehouse. He says: "There's a tremendous amount of (taxpayer) money being

wasted in this frivolous lawsuit.”⁴⁹ This battle goes back more than four years now.⁵⁰ Coste tried to resolve the controversy a couple of years ago by proposing an amendment to the zoning regulations that would raise the height limitation for accessory buildings from 15 feet to 30 feet. The proposal was rejected.⁵¹

Treehouses are not expressly regulated under the ordinance and this treehouse has been treated as an accessory structure. The zoning ordinance at section 21-138 defines accessory structures:

For the purpose of applying the zoning standards provided in (A) above, only the following structures are considered an Accessory Structure: Cabana, garage, gazebo, greenhouse of personal use, personal storage building, shed, tool room or workshop, and any other structure having a roof. (11-20-07).⁵²

As with most of the other treehouse cases that the ZiPLER Awards Committee has seen nominated over the last 24 years, the trouble could have been avoided if the homeowner and builder of the treehouse had simply stopped by the building official's office to discuss the plans. The controversies can be inordinately expensive for all sides and hard on families and children.

A particularly difficult one this year was fought in Norwalk, Connecticut, with the treehouse eventually coming down.⁵³ In that case, the treehouse builders claimed they were told they did not need a building permit, but it apparently was not in compliance with height limitations. They can apply and rebuild, at a lower elevation, if the plans are approved. The lesson learned is that definitive plans should be provided local officials and a follow up writing sent to the officials confirming that no approval is required.

Remember, however, the law is that if the building official makes a mistake, the responsibility for conformance with the law almost always remains with the property owner/builder. Perhaps the most notorious case of this type was the matter of *Parkview Associates v. City of New York*, where New York's highest court 30 years ago upheld an order requiring the developer to remove 12 stories of its high-rise building within 150 feet of Park Avenue. The New York City Department of buildings made a mistake when it approved the building application

and the court found that the city was not estopped to enforce its own regulations.⁵⁴ It is a decision worth reading and sharing with others, as is The New York Times article reporting on it.

Just to illustrate how often this happens, having a building official tell you that you don't need a permit and finding out later you do and then having to remove the illegal improvements, you might have a look at the case of Linh Tran and Richard Hazen.⁵⁵ Thanks again to Diane McGrath, who apparently doesn't have enough to keep her busy at work, for bringing this case to the attention of the ZiPLER Awards Committee. Tran and Hazen now share the **Maybe You Should've Asked a Lawyer to Do an Hour's Worth of Due Diligence Award**, previously called the **Always Have Someone with A Deep Pocket to Sue When Things Go South Award**.

Tran and Hazen spent about \$30,000 building a treehouse and are estimated to have spent five times that in legal fees fighting to keep it. They were told by the city that they didn't need a permit to build the treehouse, but following an anonymous complaint, the city reviewed the situation and determined that the treehouse violated a setback requirement. Tran and Hazen have been accumulating fines of a \$50 a day for not removing the treehouse and those fines now total tens of thousands of dollars.

Having lost their appeal at the local level, they did what every treehouse builder, thinking they are in the right, should do and filed a petition for certiorari with the U.S. Supreme Court. How we would have loved to see the Court go out on a limb to take this case, just to read the briefs and hear the oral arguments, but the Court denied the cert petition.⁵⁶

The latest report is that the City of Holmes Beach has moved for a default judgment against Tran and Hazen. The accumulated fines are now more than \$50,000. Tran and Hazen have spent more than \$180,000 in defending their position and the city has spent \$139,462.67 through May 9, 2018.⁵⁷ Unbelievable. Can anyone spell “m e d i a t i o n”?

Pussyfooting Around Costs Plenty

Talk about wasting money, The Borough of

Waynesboro, Pennsylvania, was criticized by its own mayor because it spent \$13,000 on the question of whether a decades-old “cattery,” a boarding or breeding establishment for cats, was a nonconforming use.⁵⁸ The ZiPLer Awards Committee has granted the Borough the **At Least the Lawyers Thought It Was the Cat’s Meow Award**. The dispute was between the borough council and the zoning hearing board. The council sued the board because it thought the board was acting beyond the scope of its authority in finding that the cattery, even though it was technically within the definition of a kennel, was still a nonconforming use allowed to continue. The court upheld that zoning board decision. The mayor said: “My concern would be spending that much money on it, and whatever the resolution was, was not good . . . It’s hard in my estimation to justify a large amount of attorneys’ fees for something of this nature.”

Zoning Tricks

The **Long Arm of Zoning Award** goes to Santa Cruz, California, for being the leader in using landside zoning to stop or limit offshore drilling platforms.⁵⁹ A total of 26 coastal cities and counties in California have adopted similar policies which control land use in support of offshore drilling. It has been dubbed by its proponents as a “coastal wall of resistance” because although the Interior Department will take local concerns into account, local governments have no veto power over the offshore drilling. Local zoning regulates the location of pipelines, helicopter pads and the like, all part of the infrastructure supporting the oil rigs. Today, however, zoning to stop or limit offshore drilling, which involved in the 1980s, may be less effective because of changes in technology. There are now floating oil rigs; very large ships that fill up with oil and then go to some distant port or refinery. The use of these floating oil rigs is expensive, so the idea of a “coastal wall of resistance” still has some use.

A Feel Good Story?

The ZiPLer Awards Committee asked us to save this award for the last with the hope that it will comfort us in 2019 as we continue to face so many challenges—chief among them, oppressive regimes,

poverty, hunger, genocide, immigration, climate change, politics, and economics (rumor has it that China may slap an import tariff on the ZiPLer Awards Issue in response to Trump’s tariffs). To Greg Schiller, the ZiPLer Awards Committee is especially proud and pleased to award **These People Are My Friends Award**, the very words used by the award winner, for his providing emergency shelter for homeless people in his basement, and fighting with the city of Elgin, Illinois, to do the right thing and provide shelter.⁶⁰ Schiller called them “slumber parties”; the city called it illegal occupancy. Schiller related: “I would stay up all night with them and give them coffee and stuff and feed them.” The city did shut him down, but it also committed to provide sufficient shelter for the homeless.⁶¹

But, sigh, the ZiPLer Awards Research Department, ever vigilant and diligent, dug behind this feel-good story to discover that our award winner owes about \$33,000 in child support payments since his divorce in 2008.⁶² The mayor of Elgin couldn’t resist taking a swipe: “As admirable as it sounds, he has been putting the homeless before his own children. Why would I trust him to do anything if can’t address the personal obligations he has?”

The Year Ahead

Good luck to you all in the year ahead. The politics look turbulent; the economy is troubling; an aging population is having impacts, including softening the market for large single-family detached homes in suburban areas; homeownership has been going down; there may be a glut of apartments in some markets; affordability looms large in some cities; sea level is rising and flooding getting worse; gentrification continues to worry people; driverless cars are coming; and short-term rentals are disrupting some neighborhoods . . . another year in land-use paradise. Enjoy. And keep those nominations coming.

* * **Note: Nearly all of the endnote references may be found on Google.com by entering the name of the article title or the reference in the text.*

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The award illustration is by Ray Andrews.

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