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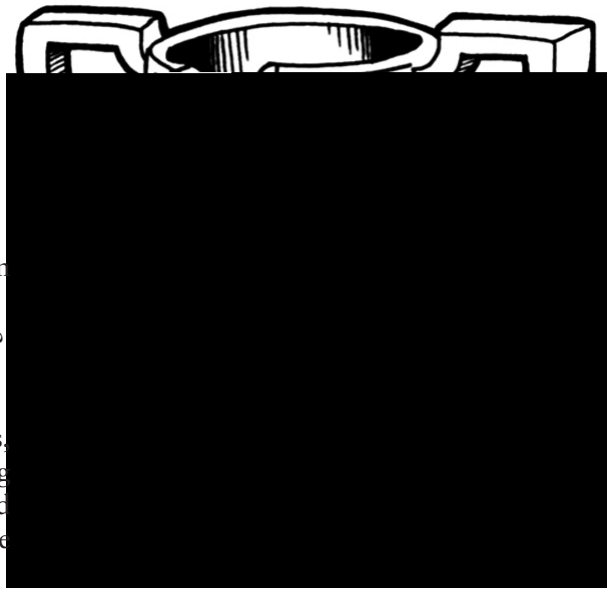
THE 2008 ZiPLeRs: THE FOURTEENTH ANNUAL ZONING AND PLANNING LAW REPORT LAND USE DECISION AWARDS

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Get the answers to these questions and more …

- Can you bury your husband in the backyard?
- Is sex an accessory use to a restaurant?
- Are miniature goats "farm animals"?
- Where is it illegal in Santa Monica to do sit-ups?
- Is Titmouse Park correctly named?
- Did the Sierra Club reject LEED Certification for its own offices?
- Is that tattooed rose on your backside protected speech?



A Primer on the ZiPLeRs

If you are a first-time reader of the annual ZiPLeR Awards, you deserve a little background. If you count yourself among ZiPLeR Awards recidivists 13 times over, you are now old enough to suffer from memory loss and you can use the same help in understanding what this is all about.

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ZiPLeR, of course, is an acronym for Zoning and Planning Law Report. Back in the day when it was West Publishing alone, before Thomson West, and before the current Thomson Reuters (no business affiliation with Roto-Rooter™), Zoning and Planning Law Report, much as it still does so well today, served up a monthly menu consisting of a main course article and a number of side dishes in the form of case reports and occasional news.

Eager readers stood by their mailboxes on that day each month when they expected their issue to arrive to tear open the envelope and get right into the excitement that comes only from reading zoning cases and thinking about adventures in planning. Sir Ernest Henry Shackleton's (1874-1922) adventures were a mere stroll in the park compared with what we do every day—three-lot subdivisions, carport variances, construction easements for sewer lines—such danger, such extreme challenges of the mind and body, such public adoration. Why only yesterday, I forced a floating zone to the ground without bending a single setback. For all of us, just reading the monthly issue of Zoning and Planning Report brought several hours of unmitigated excitement. It reminded me of my boyhood days in the early 1950s when my best friend, Bobby Bloom, received a monthly mailing of comic books, an annual Christmas gift from his most generous and completely tuned in grandmother. Imagine it, receiving comic books directly in the mail every month.

Anyway, what struck some of our regular readers of Zoning and Planning Law Report back then was that occasionally cases of some import did not make their way into the publication. An in-depth content evaluation was conducted by a panel of experts (actually, a couple of us in the office looked at a few dog-eared issues and compared them to the case reports and news stories we were seeing).

Eureka! What happened, we found, was that the editors were prioritizing the reports in a way that excluded an entire genre of interesting cases. While it is true that these extraordinarily interesting cases had little or no precedential value, and whatever they stood for you wouldn't want to repeat anyway, they did seem more typical of the daily bump and grind that we experience in the mosh pit of our profession.

I convinced West to let me select from the flotsam and jetsam in the sea of land-use law those cases and stories that wouldn't make it into the other 11

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issues of the year and elevate them to the ZiPLeR Awards. My then law partner, Ray Andrews, who is a cartoonist of some serious repute, drew the ZiPLeR Award trophy pictured above, which trophies unfortunately we won't be able to give to each winner this year unless we get some bailout money.

So here we are 14 years later. When we started these awards, Barak Obama was a second year associate at Davis, Miner, Barnhill & Galland, a 12-attorney law firm in Chicago, doing civil rights law. ER and Friends premièred on television. But all that's yesterday's news … here is the new news, the latest, the greatest, the most unusual land use cases and recent developments from our reporting staffs in every major city across the United Sates and overseas.

The **I'll-Have-Spaghetti-And-Meat-Balls-And-A-Lap-Dance-Please Award** goes to the cuisine and sex business innovator, MAJ Entertainment, Inc. of Philadelphia, for providing the adult equivalent of Chuck E Cheese™. MAJ opened an establishment called Club Kama Sutra—that should give you some hint as to what is in store—which "offered buffet dining on the first floor, DJ music and dancing on the third floor, and open cubicles with futon mattresses where patrons could engage in sexual activity, as well as watch other patrons so engaged, on the second floor."[1]

The principal legal issue ending up before the court was whether that sexual activity on the second floor was merely an accessory use to the restaurant. The restaurant had been permitted previously under a different name with a use permit allowing it to operate as a restaurant with accessory "live entertainment and dancing by patrons ...."

To fit within that permit, MAJ claimed that the patrons engaging in sexual activity with one another and the viewing of this activity by the patrons is "live entertainment." The decision MAJ relied on was one in which the Supreme Court of Pennsylvania interpreted substantially similar language in another town to allow gambling in the form of off-track betting as an accessory use to a restaurant.

The Commonwealth Court of Pennsylvania in analyzing the restaurant/off-track betting case found that 75% of the building space was devoted to the restaurant use and 25% to off-track betting. In the case of Club Kama Sutra (for a scholarly diversion, the Kama Sutra is available on line[1.10]), the court found that patrons seem to pay primarily for access to the party rather than the buffet. The president of MAJ probably did himself in when he responded to a question before the Board of Adjustment as to whether the club sold any sexual devices: "No. The only thing we charge money for is the dinner and dessert buffet, which is included in the price of admission to attend the parties." By my reckoning, that earnest slip makes the food accessory to the sex.

He also testified about the admission charge which had nothing to do with the quality or quantity of the fine dining. The charge for a couple to attend on Saturday night, he said, is $100, on Friday night it is $75 a couple, while the "cost for a single lady to attend is $25, and a single gentleman, and they can only attend on Friday night, is $100 charge." The court found that the "live entertainment" on the second floor was not an accessory use to the restaurant use below.

Professor John Nolon of Pace Law School, in reading the decision, observed: "The court had to be a bit careful in penning the phrase 'a felicitous gender balance for the operation of a swingers' club,' don't you think?"

There was one dissenter, Judge Rochelle S. Friedman, who lamented the court's crushing of MAJ's innovative entertainment venture:

> Indeed, savvy entrepreneurs always hope to discover unique restaurant concepts that are not in the mainstream, but would attract a particular clientele. Thus, in our society, adults who enjoy the theater might be able to find a dinner theater in their area showing a Las Vegas-style Revue involving some audience participation. People who enjoy mysteries might be able to find a live murder mystery dinner show that involves audience participation. People who fantasize about being professional singers might be able to find a restaurant with karaoke that allows patrons to lip-sync and gyrate to recorded music. People who enjoy gambling might be able to find a restaurant that features off-track betting by patrons. Yet, no one would expect most restaurants to offer such entertainment for patrons.

Judge Friedman cites Chuck E Cheese™ in a footnote at this point for the notion that most restaurants do not necessarily include entertainment as an accessory use, but that doesn't preclude such uses from being accessory. Finally, it occurred to me that one argument that apparently wasn't made but could have been is that food and sex have often been

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analogized, as in that old expression that someone "is quite a dish." I checked my Merriam-Webster's Collegiate Dictionary 11th Edition (emphasis on the Merriam part) and the noun "dish" includes this meaning: "4b: an attractive or sexy person." Rachael Ray offers "Sexy Surf and Turf."[2] There's room for more debate on this significant issue.

Speaking of accessory uses, one of our 2008 ZiPLeR Instant Winners® is an accessory use case from just down the road. A ZiPLeR Instant Winner® is a recent development in land use law that is so remarkable that it does not need to be submitted to our selection board for the normal review process.

The **Only-The-Zoning-Enforcement-Officer-Can-Keep-You-Apart Award** goes to the zoning enforcement officer of Chester, Connecticut. Elsie Piquet and her husband, in an act of extraordinary mutual love and devotion from a lifetime together, pledged to each other that they would be side-by-side for eternity (a concept that guarantees one of you will never, ever get your fair share of the covers).

They sought burial plots in Chester, but found none available. They did the next best thing, and agreed that they should be buried together in their backyard. When Elsie Piquet's husband died, she buried him in the backyard of their home at 28 South Wig Hill Road with the supervision of a licensed funeral director. Chester is a rural community and I went online at http://www.maps.live.com and took a look at the house and their backyard where there is a casket-sized landscaped area in the rear.

The landscape looks a lot like the Northeast Kingdom in Vermont where my family is from and where private burial grounds are maintained. You have to love the libertarian leanings of Vermonters. Here's a quote from the state's Department of Health website:[2.10] "Families in Vermont may care for their own dead [1973 Assistant Attorney General opinion] and this includes transporting the deceased, burial on private property, and/or cremation. Vermont law does not require embalming, but you should consider weather and reasonable planning so that disposition is carried out in a timely manner."Note the mention of weather. Vermonters are the most weather-conscious people I know. Mark Breen and Steve Maleski's "Eye on the Sky" weather reports on Vermont Public Radio are not to be missed.[3] But times have changed, and Chester, Connecticut, is not the rural Northeast Kingdom, and zoning enforcement officers have a job to do, so the inevitable cease-and-desist order was issued. Off they went to court. I have posted the unreported decision on my personal website if you want a copy.[4]

On December 3, 2008, I asked the town's attorney, my friend John S. Bennet, of Gould, Larson, Bennet, Wells and McDonnell in Essex, Connecticut, about the status of the case. He replied: "It turns out the case is not dead yet. An appeal has been timely taken. I have the paperwork buried here someplace. Let me know if you need any of it and I will try to exhume it from the file for you and send it along."

Zoning lawyers like to strut their stuff in Latin terms and this case is one of those *expressio unius est exclusio alterius* cases, although the court never uses the term which means "the expression of one thing is the exclusion of another." The court found that the Chester zoning regulations are permissive in nature and those matters not specifically permitted are prohibited. This type of regulation is to be compared with regulation characterized as prohibitive zoning "where all uses are allowed except those expressly prohibited." Permissive zoning regulations are the predominant type in Connecticut.

The court granted the town's motion for summary judgment in part on the interpretation of the regulations and in part because the plaintiff did not submit any evidence in support of her claim that the burial should be considered an accessory use.

There is, by the way, a movement in the direction of "natural burial" consistent with the greening of all things land-use, which according to the Centre for Natural Burial began in the United Kingdom in 1993.[5]

Our next award, also a ZiPLeR Instant Winner®, was nominated and named by Gus Bauman of Beveridge & Diamond PC in Washington, DC, and reminds us of the advice given all of us by our parents. The first-ever **Do-As-I Say-Not-As-I-Do Award** goes to the Sierra Club which is under contract to buy three floors totaling 28,000 square feet in an office condominium project in the neighborhood north of Massachusetts Avenue in the District of Columbia.

According to the developer, the 11-story, 90,000 square foot building is going to have a landscaped roof and state-of-the-art storm water management plan, along with systems which are highly energy-efficient, and a building program which uses recycled construction materials. Now that's what I call a green building.

So how does the Sierra Club win this much-sought-after ZiPLeR Award which they will doubtless ref-

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erence prominently in their promotional materials? The organization has decided that it will not seek a U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) certification for its three floors. The July 25, 2008 report on the decision states that there has been no comment from the Sierra Club on why it made its decision.[6] At the same time, Sierra Club chapters around the country are promoting LEED certification.[7]

Notice that I started this year's awards issue with a case involving sex. This is what you readers demand and this is what we give you. The International ZiPLeR Awards Committee provided us with a nomination this year that was selected to receive the seldom presented **Talk-About-Getting-Screwed-By-Your-Town-Planner Award** which goes to the Wollongong Town Planner—that's Wollongong, New South Wales, Australia—Beth Morgan, 32, "who confessed she had affairs with three prominent property developers and received gifts and cash from two of them." She was involved in the assessment or approval of four major developments in the town totaling more than $135 million. One of the developers with whom she had an affair while working on his $31 million development application told the Independent Commission against Corruption that the planner "wanted to be surrounded by successful people" which he claimed explained why she would have affairs with land developers (send that to the "go figure" department), and that "it is possible she was on a mission for sex."[8] Our thanks to Planetizen for calling our attention to this story from Down Under, so to speak. They have a great website.[9]

There was a bit of an upside, if you can call it that, as a result of the media's extensive coverage of the town planner sex scandal according to an article in The Age:

> The only good news for the Labor government is that the Wollongong scandal is overshadowing news coverage of former Labor Minister Milton Orkopoulos's trial in a Newcastle court on 34 child sex and drugs charges.[10]

The last few years we seem to be getting an increasing number of animal cases, some of them dealing with how many dogs make a kennel or whether exotic animals are household pets. This year, we have two awards. The first is **The-Neighbors-Will-Be-Brooding-Over-This-Zoning-Amendment Award** which goes to Falmouth, Maine, for amending its zoning to allow property owners to raise chickens in all residential areas of the town. At the hearing in September, no one spoke against the ordinance change. Those who spoke in favor, such as Geoff Dyhrberg, who teaches at Freeport High School, talked about the need for self-sufficiency: "As a society, we are distancing ourselves further from our food supply area and I'd like to reverse that, at least for my family. Producing eggs seemed like a simple step to take."[11] I called the Town Clerk on December 2, 2008, and she told me it passed. The zoning proposal is also reported on the BackYardChickens Forum[12]—there is a website for everything—where you can also click on "Local Chicken Laws & Ordinances (and how to change them)" to get guidance on how to undertake your own local campaign.

Our second ZiPLeR Award in the animal category goes to Maureen Kenney of Meriden, Connecticut, for committing the egregious offense of "keeping farm animals in the Residential Zoning District in violation of the Zoning Code of the City of Meriden." The **Miniature-Animals-Make-For-Gargantuan-Legal-Problems Award** comes with a smaller-than-usual ZiPLeR trophy, actually a miniature trophy, because of what happened in Meriden.

It all started out in the nose of one of the neighbors "upon the complaint of farm animals and the odor associated with them ...."[13] The zoning enforcement officer went sniffing about and discovered three horses, a miniature goat and a miniature pig at the Kenney home on 707 Hanover Road. Maureen Kenney had already lost a couple of times before on the issue of whether she could keep as many as six horses, a miniature goat and other animals on her property as a "petting zoo." She applied for and was denied a variance. She still kept the animals and ended up in court where the judge issued a temporary injunction:

> … to command and enjoin you ... from maintaining the property at 707 Hanover Road and/or 739 Hanover Road in a condition in defiance to the Cease & Desist orders issued by the City of Meriden ... and contrary to the Zoning Regulations of the City of Meriden, and contrary to the denial of the variance request by the Board of Appeals, specifically, by keeping farm animals in a Residential Zoning District, to remove from the subject property all farm animals, inter alia, therapeutic horses and petting zoo animals, to wholly and absolutely desist and refrain from operating the subject premises in violation of

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> the Zoning Regulation[s] of the City of Meriden Code until further order of the court.

The court directed that all farm animals be removed from the property within 72 hours of the order or no later than August 30, 2007.

All that seems quite clear, yet a year later Maureen Kenney had a herd, gaggle, covey, brace, colony, pod, pack, flock, prickle, cackle, troop, barrel, team, span, barren, romp, gang, drove, gam, brood, clutch, whatever, of critters on her property in contravention of the court order. I give up—there are dozens of names for congregations of animals—see "Animal Congregations, or What Do You Call a Group of.....?"[14]

In the end, in this last go around, the court found contempt for only one night for having three horses on the property, and held that the presence of one horse was not a violation of the Code. As to the miniature animals, the court couldn't figure out whether they fell within the definition of prohibited "farm animals" for purposes of the Code. Maureen Kenney was ordered to pay $250 for one day of willful violation. How does your local code define miniature animals? I know, in the small print.

The **House-Of-A-Different-Color-Or-Down-With-Earth-Tones-And-White Award** goes to Beth Parker and her husband Chris, owners of the Pet Pantry at 177 Main Street in Freeport, Maine, who painted their residential building turned business location bright purple last summer.[15] I thank my sharp-eyed Legal Administrative Assistant (formally known as Secretary) Diane McGrath for this one. She also deserves credit for finding the Falmouth, Maine, story on chickens. The town's Project Review Board reacted swiftly by voting unanimously to recommend that building color be regulated in the town's design review district, and that the colors conform to the historical colors offered by paint manufacturers. To paint a building another color would require special approval of the board.

The current Design Review Ordinance, amended as of July 15, 2008, defines "material change" to include "the colors of a building ...."[16] Beth Parker said: "it's a very select group of people that doesn't like certain colors and want (sic) color restrictions."

The City of Freeport in its Guidelines and Procedures for the 2008 Facade Improvement Program, budgeted at $10,000 for all of 2008, makes money available for grants up to 50% of the total cost of façade rehabilitation, repair or restoration. Not surprisingly, given the Pet Pantry controversy, the program requires applicants to submit color samples and conform with guidelines which require that the colors be "compatible with its original architectural style and character and ... preserve and enhance the architectural style or character of the structure and the historic district."[17]

The **McMansion-Prestidigitation Award**, for covertly building a castle behind a 40-foot wall of hay bales, goes to Robert Fidler of Honeycrock Farm, Salfords, Redhill, Surrey, in the United Kingdom.[18] Peter Olson of our law firm found this great case during a brief period of available time when he wasn't going to Red Sox games. Thank you.

Fidler didn't get planning permission to build the house and built it secretly behind hundreds of 8 foot by 4 foot bales of straw covered with blue tarps. To keep the project secret, Fidler and his wife even kept their son Harry away from playschool the day that he was supposed to be painting a picture of his home in class. "We couldn't have him drawing a big blue haystack [—] people might [have] asked questions," said Mr. Fidler's wife, the boy's mother. They had moved into the house under construction when Harry was just a year old, so he has basically grown up on the construction site with nothing more to view from his window than a pile of hay bales.

Mr. Fidler figured that he had pulled a fast one because the planning laws vest rights in structures that have been up for four years without objection. After four years had passed, Mr. Fidler applied for a certificate of lawfulness. The Reigate and Banstead Council balked, arguing that the four-year-period had not run because no one could see the mock-Tudor castle behind the hay bales.

We have received so many nominations for, and given so many awards over the years to, governments and people in California, that we have decided to open a full time ZiPLeR Award Bureau in the state. I'm pleased to announce that we will be attempting to negotiate a sublease from Bill's Hamburgers at 14742 Oxnard Street, in Van Nuys. I don't think you can find a better burger place in California and I like the sign he has prominently displayed across the front of the cash drawer of his register: "YOU CAN'T HAVE IT YOUR WAY THIS IS NOT BURGER KING!!"[19] All ZiPLeR readers should expect to receive an engraved invitation to the ribbon-cutting for the opening of the California Bureau sometime in June 2009.

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Here are some quick winners just to give you an idea of how many and diverse the award nominations are from California.

The **Stand-Up-For-America Award** goes to none other than the comb-over king, Donald Trump, for erecting a 70-foot flagpole and flying a 400 square foot flag at his Rancho Palos Verdes golf club, claiming it is an accessory use. "Since when do you have to pay to put up the American flag?" said Trump. There was also a controversy about some plantings, causing Trump to ask: "Do we need permission to plant bushes?" He lost on that one when the Council ordered him to remove the trees, some of them 12 feet tall. The city has a 16-foot limit on "accessory structures," so Trump's flagpole is some 54 feet over the limit.[20] My friend, Gideon Kanner, gets the credit for this winning nomination. You should see his blog.[21]

It seems like the ZiPLeR Awards Selection Committee has been inundated with accessory structure cases this year. My guess is that it was the total solar eclipse of August 1, 2008 in Siberia crossing the Altai Mountains, the last total solar eclipse until 2017.[22] The flag is 25' x 15'. He did get a permit after the fact and the city then told him he had to pay a $10,000 filing fee for the California Coastal Commission's review of the flagpole and its visual impact on the coast. Of course, Trump refused to pay.

This is not the first time that Trump has had a thing with flagpoles and local zoning. He has installed similar oversized flagpoles and flags at his other golf courses in New York, New Jersey and Florida. In Palm Beach, Florida, his flag was 15 times larger than what the code permitted. Trump brought a $25 million lawsuit against Palm Beach which then started fining him $1,250 a day. The case finally settled when Trump whacked the height of the pole by 10 feet, moved it away from the ocean and gave $100,000 to charity.

It would be easy to make some cheap flagpole jokes here, but in a sudden seizure of uncharacteristic restraint, we'll let it pass. "Sometimes a cigar is just a cigar" is attributed to Sigmund Freud, but apparently he never said it.[23] How about we adapt the line, however, for this award: "sometimes a flagpole is just a flagpole?"

Another California award, the **Life-Ain't-No-Picnic-On-A-California-Beach Awa**rd goes to George and Sharlee McNamee of Newport Beach, who have been ordered by the California Coastal Commission to remove their picnic equipment from the beach at their house.[24] The improvements are quite extensive and include a barbeque, restroom, shower, canopy, cabinets and concrete picnic tables on the beach adjacent to the public beach area at Corona Del Mar State Beach. The basis for the removal order is that having the private improvements in that location allegedly discourages public use of the state beach. "I'm disappointed and disgusted at the (commission's hearing) process," Sharlee McNamee, 68, said. "It was so indicative of bureaucracy in action. It doesn't use principled discretion, only the idea that rules must be enforced."

The Pacific Legal Foundation, the pro-property rights legal organization ("Rescuing Liberty from Coast to Coast") will take the appeal. PLF describes the McNamees' use of the area: "No one has complained about these facilities, and the McNamees have graciously allowed neighbors, Boy Scouts and Girl Scouts, local junior high students, and members of the general public to use them at no charge."

Interestingly, another California award was actually transmitted to us through our overseas bureau which picked up the story on BBC News, no doubt because of its international significance in promoting sustainable development, renewable resources and "green" methods of vegetation control. The second-ever **Doesn't-That-Just-Get-Your-Goat Award** goes to the city of Los Angeles which has "hired" (as BBC News describes it) a herd of goats to clear land proposed for development.[25] Thank you, Robert I. McMurry of Paul, Hastings, Janofsky & Walker LLP, who is past chair of the Los Angeles office of the ZiPLer Selection Board, for making this nomination.

The city determined that the goats were "a cheaper and greener alternative to human workers." We have not been able to determine, despite diligent research, whether these are LEED-certified goats. We did, however, check with the International Goat Association; yes, just as there is a website for everything, there is an association for everything.[26] The site even has a section on sustainability and goats, including a scholarly white paper on the subject with lots of footnotes.[27] With statements like this in the report: "Bearing in mind these sustainability characteristics, sustainable goat production could be defined as the ability to produce goats and goat products to meet the needs of mankind now and in the future," it's hard not to get excited about sustainable goats. Go to the BBC website given above and you can watch video of the goats at work, which you will want to do because all of us in the land use business have

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nothing more useful to do during this recession, except perhaps to watch some bloke watching goats eat grass.

Yes, there are more California awards. To the City of Santa Monica we present **Working-Out-The-Outdoor-Workout Award** for clamping down on the locals who had the audacity to do sit-ups and push-ups in public areas including the grassy medians along 4th Street near Adelaide Drive.[28] James Birch has been fined $158 for his illegal sit-ups and push-ups, apprehended in the act by park rangers stationed in the area by the Santa Monica Police Department. Apparently, jogging and walking in the medians is permitted under the local ordinance, but getting down on the ground for sit-ups and push-ups is not.

In the "California Corner" of the 14th Annual ZiPLeR Awards Sharon Adams, a Berkeley California activist who authored an initiative restricting military recruiting offices in the same way adult-oriented businesses are, receives our **Support-The-Troops Award**. The idea behind the initiative is to require a special use permit with a full-blown public hearing for any military recruiting office. It would prohibit those offices from being opened within 600 feet of residential districts, public parks, public health clinics, public libraries, schools or churches.[29] My thanks to John Casey, a lawyer in our office, for bringing this proposal to our attention.[30]

The proponents have numerous complaints about the military. "In the same way that many communities limit the location of pornographic stores, that's the same way we feel about the military recruiting stations," said one of the leaders who is also a member of the city's Peace and Justice Commission. I asked the City of Berkeley about the status and received this reply on December 3, 2008: "The petition was circulated, but never filed with the Clerk. The deadline to file signatures has passed. That initiative is dead. If the proponents wish to pursue the initiative, they would have to start the process anew."

The **It's-All-In-The-Name Award** goes to—yes, another California winner—Roy van de Hoek, who is lobbying park officials in Los Angeles to change the name of the small (100 x 125 feet) city-owned park created 20 years ago from a parcel in Playa del Rey once proposed to become a parking lot.[31] A big thanks to Gideon Kanner for sending me the clipping, on which he wrote: "only in America."

Mr. van de Hoek, an environmentalist, thinks the park is improperly named because it incorrectly refers to a species not native to the area. The man who painted the sign for the park explains where he got the name: "When they started digging up the ice plant over there, thousands of these little mice all ran out." He thought they were a particular species of mouse. The sign painter's expertise on mouse identification apparently consisted solely of having seen a bumper sticker on a car behind the bar at the Prince O'Whales Pub down the street. The bumper sticker said "Save the Titmouse" so the sign painter created a sign "Titmouse Park." Unfortunately, a titmouse is a bird, not a mouse; thus, Mr. van de Hoek's complaint.

There is another side to this story, perhaps involving biology as well. According to Mr. van de Hoek "Titmouse Park" received its name in another way. He said a local businessman told him "the name came about because he and his buddies were playing a joke on the women. It was a reference to a woman's body part. He was chuckling and laughing."

There are people lined up on both sides of this controversy. One suggestion for a new name is Ballona Park after the local wetlands. Out in the blogosphere there are way too many other suggestions: Baloney Park, Rat Square, Jetview Park, Hooters Park, You-Make-Me-Wet Lands Park, Silicone Implant Park and Native Cougar Habitat, and I have to stop there or Thomson Reuters will fire me … see http://la.curbed.com/archives/2008/03/suggestions_nee.php for a couple of great ones I can't print.[32]

That's enough of California, at least for now. Let's take a look at a case from Florida. Sometimes our land use cases are remarkable because they have an element of Greek tragedy, often hubris. The **Harder-They-Come-The-Harder-They-Fall Award** goes to William R. Boose III, who as a 26-year-old wunderkind wrote Palm Beach County's comprehensive plan. Now at age 63 his law and real estate licenses have been suspended and he has pleaded guilty to helping a former Palm Beach County Commission chairman conceal the chairman's interest in land sold to the South Florida Water Management District. Thanks to Frank Schnidman, Senior Fellow of the Anthony James Catanese Center for Urban and Environmental Solutions at Florida Atlantic University-Florida International University, for this nomination.

In the scheme Boose set up a land trust fund to conceal the chairman's ownership in the land. The chairman then facilitated the sale of the land to the District. The District did not know that the chairman owned the land. The chairman, who made $1.3

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million in the transaction, is now serving a five-year prison sentence. Boose reportedly received favorable consideration for his clients' zoning applications in return for engineering the secret landownership.[33]

First Amendment issues in land use never fail to entertain. Signs, religious institutions, and adult entertainment all implicate First Amendment protections. Our thanks to Dean Patricia Salkin of the Government Law Center at Albany Law School for her outstanding daily land-use blog.[34] and for bringing to our attention this First Amendment in land use award winner: The **Rose-On-Your-Butt-Doesn't-Get-The-Same-Protection-As-The-Gutenberg-Bible Award** goes to Hold Fast Tattoo, LLC of North Chicago for its ingenious claim that the right to draw tattoos is protected speech.[35] The Federal District Court for the Northern District of Illinois held that the act of tattooing cannot be protected speech because it is not intended to convey a particularized message.

I don't know. The tattoos I see seem to have the objective of conveying real messages, otherwise why would people have ink injected under their skin with innumerable needle pricks. What is perhaps more interesting is the unintended messages, especially those where tattoo artists have used Chinese symbols. Marquis Daniels of the Indiana Pacers' basketball team had his arm tattooed with three Chinese characters meant to be his initials "MAD, Marquis Antoine Daniels" only to discover later that they translated as "healthy woman roof."[36]

We have a couple of other First Amendment-related awards. The first was picked up from the wire services by my assistant, Diane McGrath. In the **Pure-Sex-God's-Way Award**, which was actually named by the recipient and is based on the series of sermons by the same name, goes to New Life Fellowship in Orange Park, Florida, for sexually-themed billboards that have shocked some drivers. One passerby said: "at first, I thought it was a porn site thing."[37] The billboard shows a couple with their feet intertwined hanging out from underneath bedcovers with the text "Pure Sex God's Way at New Life Fellowship." The intent is to promote the series of sermons. Attendance has so increased at New Life Fellowship that they may buy additional land to build a larger church.

I thank David W. Owens, Gladys H. Coates Professor of Public Law and Government, School of Government, University of North Carolina at Chapel Hill, and my planning school classmate back in the early 1970s, for his nomination which has been selected for an award. The **Equal-Access-To-Sex-Award** goes to Rex Hudson, who argued that a distancing requirement for sexually-oriented businesses that prevents him from living within 1,320 feet of his strip club, Misty's, violated the Equal Protection clauses of the United States and North Carolina Constitutions. The Court of Appeals of North Carolina rejected the theory:[38]

> … Hudson is not treated differently than other similarly situated individuals. Every business in noncompliance with the Amended Ordinance is required to come into compliance before being granted a license. Correspondingly, every citizen who, like defendant Hudson, resides within 1,320 feet of such a business will be deprived of the opportunity to continue living in such close proximity in their current residence. Accordingly, we conclude that the Amended Ordinance does not violate defendant Hudson's right to Equal Protection.

We acknowledge this was a 2007 decision, but David has been desperate to have one of his nominations selected and he didn't send it to us until March 17, 2008, so we have waived the normal requirements.

Hold the presses. This is just in from our overseas bureau. The **Breaking-Up-Is-So-Hard-To-Do Award** goes to an estranged husband from Prey Veg Province, 50 miles outside the capital of Phnom Penh in Cambodia, who separated from his wife after 40 years of marriage. The marriage broke up because the husband was angry over what he claimed was his wife's failure to take care of him when he was ill.[39]

The husband moved his belongings to one side of the house, separated it from the other side with a saw and chisels, and then moved his half of the house to his parents' land. You can see a photograph of the house on CNN's website. Does this need some type of subdivision approval?

Robert H. Thomas of Honolulu, who writes an excellent blog,[40] not only made this next nomination but named the award as well: the **Best-Plaintiff-Group-Name Award**. This award goes to the Association of Irritated Residents which sued San Joaquin Valley Pollution Unified Air Control District over an air quality issue.[41] Oh, I get it—Association of Irritated Residents … AIR …

Speaking of names, we have as a special award this year, a particularly useful website. Of course, there isn't any development going on now and won't

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be for a while in most places across the country, but when it picks up, we will all be struggling once again to pick out good names for those new subdivisions. The running joke, sometimes cruelly inaccurate, is that developments are named after the resource they destroy, such as Pheasant Run or Valley View or Red Oak Acres. Cyburbia.org wins this **You-May-Not-Be-Able-To-Finance-Or-Sell-It-But-You-Could-Name-It Award** for calling our attention to 11 subdivision name generator sites.[42] I went to the first site listed[43] and dutifully clicked on the icon of the house and got this dandy name "Stark Quail Gardens." Not bad. I hit it again. "Stoned Ditch Shoals." As a retired Navy Captain and inveterate martini drinker, this one makes me uncomfortable. I then tried the Random Town Name Generator[44] and after a few clicks came up with the regal name of Mount Gantrickwater. Now, there's a town I'd like to call home.

There was quite a bit of competition this year for the annual alternative dispute resolution award, but in the end the winner is the mediator who will settle the case between Allenhurst, New Jersey Mayor Robert Wolf and his neighbors, Mark Finley and Bill Rizzo.[45] We take the name for the award directly from a quote by Mark Finley—the **Every-Dog-Urinates Award**. Thank you Andrew R. Davis, Esq., Vice President of Paulus, Sokolowski and Sartor, LLC in Warren, New Jersey, for the nomination.

It is a little uncertain where all this started but the mayor filed a complaint saying that Mark Finley had allowed his dog, Emmitt, to urinate on the lawn between the sidewalk and curb causing bald spots on the Mayor's lawn. Before appearing in court, the Mayor asked Finley to sign a letter of apology and promise to never let his dog relieve himself on the Mayor's lawn. Finley refused to sign the letter and restrict the dog. Finley also said that his dog didn't do any damage and that "every dog urinates." To which I say: Vel caeco appareat. See also my wife's website,[46] about cleaning up after your dog.

It might all be grounded in a zoning enforcement case. Rumor has it that the Mayor's complaint was in retaliation after a resident complained about a possible code violation—the Mayor's wife operating an internet business at their residence.

My thanks to Michael M. Berger of Manatt, Phelps & Phillips, LLP in Los Angeles for his several nominations this year, including this winner, yet another California extreme enforcement case.[47] The **Water-Conservation-Be-Damned Award** goes to the Code Enforcement Department of the City of Sacramento for fining Anne Hartridge and Matt George $746 for their green living style that resulted in their lawn dying. Their home was declared a public nuisance because their front yard was not "irrigated, landscaped and maintained" as required by city code.

The couple has attempted to live with the smallest carbon footprint. They didn't own a car until four years ago when they bought a Prius hybrid so they could take their young son with allergies for treatments. They bike to work or take the bus. They have installed solar panels and highly efficient appliances in their home and dry their clothes outside on a clothesline (someone will probably begin an enforcement action on that next).

Last summer, Gov. Arnold Schwarzenegger declared a statewide drought emergency. "The whole water conservation ethic is very important to me," said Hartirdge. "In order to make the lawn go (sic), I would have had to keep watering it intensely, and since the drought was declared, I decided that wasn't a good idea. Honestly, I think there's a disconnect within the city about priorities."

The **Out-On-A-Limb Award** goes to Pete Nelson of King County, Washington, who built a 256 square foot "luxury" tree house without a permit.[48] The Department of Development and Environmental Services has told Nelson to take it down. Nelson argues that it should be allowed to remain because it is low impact development and environmentally friendly. One irony of the situation is that the permit the tree house lacks is required because it is in a flood prone area ... and of course the tree house is up in a tree.

This year's **Rush-Limbaugh-Is–A-God Award** goes to The Antiplanner, a website dedicated, as it says on its home page, "to the sunset of government planning."[49] The title of a posting in May of this year, by way of example, is "Long-Range Planning Is Irrational." There are 27 postings under the category "Why Planning Fails."

Speaking of the First Amendment, we have a new recognition this year, the **Speech-Writ-Large Award**, which goes to Jim Roos of St. Louis who hired an artist to paint a two-story mural on the end of a duplex with the message "End Eminent Domain Abuse."[50] Thank you, Michael Berger, for sending this one along, also. Local codes restrict sign area to 30 square feet. This one is 24 feet across and almost 600 square feet in total area. The city is seeking an order from a federal judge to have the painting removed.

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The associate city attorney on the case, Matthew Moak, may have been a little too free with his comments to the press: "I don't care what it says ... if it had been dogs playing pokeron [sic] the side of the building, it'd still be a problem. You cannot erect what amounts to a two-story piece of graffiti." I wonder if he's going to hear that comment repeated in court amidst some colloquy on the difference between political speech and commercial speech.

A complicating factor is that Roos did not apply for a permit before painting the sign and when he did apply for an after-the-fact permit, it was denied.

The **Best-Practical-Difficulty-And-Unnecessary-Hardship-Argument Award** goes to our friend, Attorney Bill Merrill, of Sarasota, Florida, for his argument on behalf of his client that the beachfront homeowner's allergy to fish necessitated getting permission to build a swimming pool in the setback area.[51] Thank you, Ted Taub of Shumaker, Loop & Kendrick, LLP in Tampa, for bringing this one to our attention.Merrill even had a letter from his client's doctor attesting to the severe allergy—she can't even be touched by a fish. As Merrill explained to the commissioners the fish allergy is "potentially lethal" to his client.

The location of the proposed swimming pool was in between the house and the surf, which are just 93 feet apart. The pool would not otherwise be able to be built in that location, in an area designated as "critically eroding." The commissioners voted 5-0 to deny the application.

Thanks to Frank Schnidman, we have a nomination of this year's **Follow-the-Money Award** which goes jointly to Kealle Iangelic Batista and Steve Allred, leaders of a neighborhood coalition.[52]

The short version is that some billionaire developers of a luxury condominium in West Palm Beach, Florida, offered a quarter million dollars in goodwill money to the neighbors. They made an initial $50,000 installment on that promise, but nothing more was paid. The question is: where did that money go?

The money was intended for the Northend Coalition of Neighborhoods, a grassroots organization that was never able to raise more than the $7,500 its founder initially ponied up to further its efforts to preserve the neighborhood and reduce crime.

Shortly after the developers pledged the $250,000, Batista and Allred created a for-profit company with the same name as the Coalition and took control of the initial payment. The money was apparently diverted in several questionable ways and authorities are now trying to sort it all out.

Developers often make community relations payments to neighborhood groups, but do they follow the money?

So ends another interesting year. I thank all the contributors of the stories that made it into this year's awards issue and the many other people who reported to us on developments around the country and overseas that we simply couldn't cover. Keep those cards and letters coming to me at dmerriam@rc.com. And, if you have one of those Chinese tattoos somewhere on your body, please remember it is not protected by the First Amendment and you might want to have a knowledgeable translator tell you what it actually says.

NOTES

* Author's advice on ridiculously long web addresses: You can save yourself some difficult typing for most of these notes if you go to Google and search the title of the article. Most of the time, you will be linked right to it.

1. MAJ Entertainment, Inc. v. Zoning Bd. of Adjustment of City of Philadelphia, 947 A.2d 841 (Pa. Commw. Ct. 2008), http://www.aopc.org/OpPosting/CWealth/out/1949CD06_5-2-08.pdf.

1.10 http://www.bibliomania.com/2/1/76/123/frameset.html

2. http://www.foodnetwork.com/recipes/rachael-ray/sexy-surf-and-turfseared-scallops-and-tenderloin-steaks-with-manhattan-sauce-recipe/index.html.

2.10 http://healthvermont.gov/vadr/burial/home.aspx.

3. http://www.vpr.net/program/57/, http://www.vermontguides.com/2002/11-nov/eyeonthesky.htm.

4. http://www.dwightmerriam.com.

5. See, http://www.naturalburial.coop/.

6. "Sierra Club forgoes LEED in new space," Washington Business Journal, http://www.bizjournals.com/washington/stories/2008/07/28/story7.html.

7. See, e.g., "Conservation Issues of the Ventana Chapter, Santa Cruz County, LEED-certified means a green building," http://ventana.sierraclub.org/conservation/local/leed-cert.shtml.

8. "Planner sex scandal hits NSW government," February 22, 2008, http://www.theage.com.au/news/national/planner-scandal-hits-nsw-government/2008/02/22/1203467322598.html.

9. http://www.Planetizen.com.

10. "Planner sex scandal hits NSW government," February 22, 2008, http://www.theage.com.au/news/national/planner-scandal-hits-nsw-government/2008/02/22/1203467322598.html.

11. "New zoning would allow a chicken and in every yard," Portland Press Herald, September 23, 2008, http://pressherald.mainetoday.com/story.php?id=211779&ac.

12. http://www.backyardchickens.com/forum/viewtopic.php?id=91236

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13. City of Meriden v. Kenney, 2008 WL 3916386 (Conn. Super. Ct. 2008), unpublished decision, available at http://www.dwightmerriam.com.
14. http://www.npwrc.usgs.gov/about/faqs/animals/names.htm.
15. "Color code proposed for Freeport buildings," Portland Press Herald, March 14, 2008, http://pressherald.mainetoday.com.
16. http://www.freeportmaine.com/page.php?page_id=103&title=Ordinances%20&%20Codes (click on "Number 22 Design Review").
17. http://www.ci.freeport.il.us/Ordinances%20&%20Resolutions/Facade%20Improvement%20Program%20Guidelines%202008.pdf.
18. "Hay presto! Farmer unveils the 'illegal' mock-Tudor castle he tried to hide behind 40ft hay bales," Mail Online, 27 January 2008, http://www.dailymail.co.uk/news/article-510161/Hay-presto-Farmer-unveils-illegal-mock-Tudor-castle-tried-hide-40ft-hay-bales.html.
19. http://aht.seriouseats.com/archives/2008/10/bills-hamburgers-cheeseburgers-van-nuys-los-angeles-california.html.
20. "Stern agency meets unflappable mogul," Los Angeles Times, February 7, 2008, http://articles.latimes.com/2008/feb/07/local/me-trump7.
21. http://gideonstrumpet.info/.
22. http://www.total-eclipse-2008.com/.
23. http://www.phrases.org.uk/bulletin_board/40/messages/388.html.
24. "PLF Appeals Coastal Commission Ruling Against Picnic Facilities on Private Beach Property," Pacific Legal Foundation press release, November 19, 2008, http://community.pacificlegal.org/NETCOMMUNITY/Page.aspx?pid=743&srcid=264; see also "Dealing with the California Coastal Commission Is No Day at the Beach for the McNamees," CalCoast News, May 14, 2004, http://www.calcoast.org/news/beach0040514a.html.
25. "LA city officials hire goats," BBC, 11 September 2008, http://news.bbc.co.uk/2/hi/americas/7609704.stm.
26. http://www.iga-goatworld.org.
27. "Sustainable Goat Production—Some Global Perspectives" at http://www.iga-goatworld.org/The-goats-a-challenge-for-the-sustainable-development-of-rural-areas_a65.html.
28. "New Santa Monica NIMBY battle: Stop exercising in my neighborhood!," Los Angeles Times, October 30, 2008, http://latimesblogs.latimes.com/lanow/2008/10/new-westside-ni.html.
29. "Initiative targets military recruitment," The Daily Californian, January 24, 2008.
30. You can see the petition at http://www.codepinkalert.org//article.php?id=3923 (click on the link in the second question).
31. "To some, this park's name is for the birds," Los Angeles Times, April 29, 2008, page B1, http://articles.latimes.com/2008/apr/29/local/me-titmouse29.
32. You can see photographs of the park at http://www.yelp.com/biz_photos/1FqESR9Dtf1Yky7wDSqVmg?select=t98j6EohsBuXYfIfJIJIbQ.
33. "Prominent attorney, William R. Boose III, loses everything over a $6000 fee," Daily Business Review, February 7, 2008, http://www.zoominfo.com/people/Boose_William_52546671.aspx.
34. http://lawoftheland.wordpress.com.
35. http://www.abisoft.org/opinions/2008/1_07-cv-04479_20080307.pdf, Hold Fast Tattoo, LLC v. City of North Chicago, 2008 WL 656077 (N.D. Ill. 2008).
36. "Body art with botched messages," International Herald Tribune, May 31, 2006, http://www.iht.com/articles/2006/04/04/features/tatoo.php.
37. "Church's Sexual Billboard Shocks Passerbys," WKMG Orlando local6.com, January 22, 2008; "Steamy Billboard," BuffaloAtHome.com, January 23, 2008.
38. Pitt County v. Dejavue, Inc., 185 N.C. App. 545, 650 S.E.2d 12 (2007). http://www.aoc.state.nc.us/www/public/coa/opinions/2007/060838-1.htm.
39. "A house divided: Estranged couple's home cut in half," CNN, October 20, 2008, http://www.cnn.com/2008/WORLD/asiapcf/10/09/house.divided/.
40. http://www.inversecondemnation.com.
41. The decision is at http://www.courtinfo.ca.gov/opinions/documents/F053956.PDF.
42. http://www.cyburbia.org/node/541.
43. http://www.generatorland.com/generators/subdivision_ad_gl.php.
44. http://www.geocities.com/terrorsmartyr/boe/citynames.html.
45. "Mediator to settle dispute between Mayor, neighbor," the Associated Press, October 3, 2008.
46. http://www.seniordogcentral.com.
47. "Sacramento couple who let lawn die to save water face $746 fine," The Sacramento Bee, July 2, 2008, http://www.sacbee.com/101/story/1054905.html.
48. "News and Departments," Planning, July 2008, page 42.
49. http://ti.org/antiplanner/.
50. "Political protest hits a brick wall," Los Angeles Times, July 12, 2008, http://articles.latimes.com/2008/jul/13/nation/na-mural13.
51. "Maybe she ought to go swimming east of I-75," HeraldTribune.com, July 16, 2008, http://www.heraldtribune.com/article/20080717/COLUMNIST/807170335/2256/NEWS01&title=Maybe_she_ought_to_go_swimming_east_of_I_75.
52. "Police untangling oddities in neighborhood fraud case," PalmBeachPost.com, November 15, 2008, http://www.palmbeachpost.com/localnews/content/local_news/epaper/2008/11/15/a1a_northend_1116.html.

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