constitutionally protected property right in the zoning status of their land or a constitutional right to receive actual notice of the proposed change in the zoning status." The court expressly rejected the plaintiffs' additional argument – that the un-exercised right to develop land conferred a due-process right in its existing zoning status – stating "[i]f that were so, our court would effectively be transformed into a zoning board of appeals – a role we have expressly declined to assume." *Alzamora v. Village of Chester*, No. 07-2944-cv, 2009 WL 578630 (2d Cir. Mar. 06, 2009).

Practice and Procedure
Trial Questions – Prior Disciplinary Actions

Two District of Columbia Metropolitan Police Department (MPD) officers, Merritt and Hackley, were patrolling in a marked car. They stopped, and a confrontation between the officers and two men occurred, after which the men escaped into Mrs. Hudson's nearby home. The police followed, and in the scuffle, one of the men, Clayton, was struck by the officers, and Hudson (Clayton's grandmother) was knocked to the floor. Clayton and Hudson sued the District of Columbia and the officers, alleging causes of action for excessive force, assault and battery, false arrest, malicious prosecution and negligent or intentional infliction of emotional distress based on the officers' conduct. During Clayton's counsel's cross-examination of Merritt at trial, Merritt was asked about false reports, prior disciplinary actions, the improper use of force, and "conduct unbecoming" incidents. Counsel pointed out to the jury that Merritt had been suspended for a year for lying on a report and using inappropriate force on a woman, and added, "Let me tell you something. You're not a bad cop on Monday and a good cop on Tuesday. It don't work like that. If you were a bad cop on Monday, you're a bad cop on Tuesday ... And you know from Officer Merritt himself that he was a bad cop." Defense counsel had objected and asked for a curative instruction, which the court denied because it had "sustained" the defendants' objection to the "bad cop" argument. After the jury returned verdicts in favor of the plaintiffs, the defendants moved for a new trial, which was denied, and subsequently appealed the jury verdicts finding them liable, arguing that the district court abused its discretion when it denied the motion for a new trial on all of the claims, notwithstanding the plaintiff counsel's improper "prior bad acts" cross-examination and closing argument.

The U.S. Court of Appeals for the District of Columbia Circuit agreed that the trial court committed a reversible error, and remanded the matter for a new trial. It was a violation of Federal Rules of Evidence, Rule 404(b), for the trial judge to permit Clayton's counsel to elicit testimony about Merritt's purported history of anger, the use of "improper use of force," and filing "false reports." "Such testimony is evidence of prior bad acts introduced 'to show action in conformity therewith' and is therefore prohibited under Fed. R.Evid. 404(b)." The court further compounded its error when it permitted Clayton's counsel to exploit the Rule 404(b) questioning during closing to indict Merritt as a "bad cop" and when it declined to provide a curative instruction. "The cumulative effect of the inadmissible evidence and the inflammatory argument based on it is precisely what Rule 404(b) prohibits: exhorting a jury to find against a defendant because he acted 'in conformity' with his bad acts" – here, the purported history of physical violence, the improper use of force, and filing false reports. The jury "may well have been persuaded" by such testimony, and the error was not a harmless one because "the trial was hotly contested and turned largely on credibility." *Hudson v. Dist. of Columbia*, 558 F.3d 526 (D.C. Cir. 2009).

Search and Seizure
Vehicle Search and Non-Verbal Conduct

A police officer, Tran, saw Neely driving without his headlights on and stopped him. His check of Neely's documents revealed no problems and he gave Neely a verbal warning. Before he let him go, he asked if Neely had any "guns, weapons, grenades, bazookas" in the vehicle. Neely answered no, and asked Tran if he would like to check the trunk. Because it took Neely more than 30 seconds to open the trunk – a period Tran thought was excessive– he asked Neely to get out of the vehicle. Neely gave Tran the car keys, and after Tran did a pat-down search, he began to search the car's interior (but not the trunk). He found a firearm in the magazine pouch of the passenger side front seat. Neely was charged with being a felon in possession of a firearm and filed a motion to suppress, alleging that Tran's search of the passenger compartment of his vehicle violated his Fourth Amendment rights. The district court found that when Neely handed over the keys, left the door to his vehicle open, failed to object to the search of the interior of his vehicle, and carried on a "relatively friendly" conversation with another police officer while the search was being carried out, he broadened the scope of his original consent, which had been expressly limited to the trunk, to include his entire vehicle.

On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded. By asking whether Tran would like to "check" the trunk, Neely consented to a search of his trunk. While non-verbal conduct could be sufficient to establish consent, such conduct was assessed in light of an objective reasonableness standard. Neely did not offer his keys in response to an officer's request to search his car, "an action which might reasonably be viewed as non-verbal consent," or offer his keys while asking Tran whether he would like to search his vehicle. Neely surrendered his keys on being ordered out of the vehicle, and had already placed a verbal limit on the scope of his consent. His decision to give Tran his keys and leave his car door open "were the product of cooperation with a law enforcement officer, not an intentional indication of consent." Neely's actions and his failure to object did not overcome his prior verbal limitation on the scope of his consent. Further, because Tran could not have reasonably believed that Neely was dangerous, the search of the car could not be justified as a protective search *U.S. v. Neely*, No. 08-4257, 2009 WL 1142571 (4th Cir. April 29, 2009). **ML**