Lessons from Luminaries of Land Law: Latest and Greatest Decisions

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1. **Sign regulation is not automatically content-based, so that strict scrutiny for a violation of First Amendment free speech rights would be applicable, merely because to apply the regulation, a reader must ask who is speaking and what the speaker is saying. *City of Austin, Texas v. Reagan National Advertising of Austin, LLC,* 596 U.S. 61 (2022).**

FACTS:

In April and June of 2017, Reagan National Advertising ("Reagan")—an outdoor advertising company that owns billboards in Austin, Texas ("the City")—sought permits from the City to digitize some of its off-premises billboard signs. The City denied Reagan's applications. The City's sign code distinguishes between on-premises and off-premises signs, with special attention paid to the regulation of off-premises signs in order to "protect the aesthetic value of the city and to protect public safety." 596 U.S. 61 at 66. The City's sign code defines the term "off-premises sign" as "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." Austin, Tex., City Code § 25-10-3(11) (2016). The code prohibits the construction of any new off-premises signs, but allows existing off-premises signs to remain as grandfathered "non-conforming signs." *Id.* at §§ 25-102(1), -10-3(10). An owner of a grandfathered off-premises sign was allowed to "continue or maintain [its sign] at its existing location" and could change the "face of the sign," but could not "increase the degree of the existing nonconformity," "change the method or technology used to convey a message," or "increase the illumination of the sign." *Id.* at §§ 25-10-152(A)–(B). Furthermore, the code permits the digitization of on-premises signs, but not off-premises signs. *See id.* at § 25-10-102(6).

PROCEDURAL HISTORY:

Reagan filed suit against the City in state court alleging that the City's sign code prohibition against digitizing off-premises, but not on-premises signs, violated the Free Speech Clause of the First Amendment. The City removed the case to federal court. The W.D. Tex. district court held a bench trial and entered judgment in favor of the City. *City of Austin v. Reagan Nat'l Advert. of Austin*, 377 F. Supp. 3d 670, 673, 683 (W.D. Tex. 2019).

The district court found that the challenged sign code provisions were content-neutral under the Supreme Court's holding in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). The district court stated that "the on/off premises distinction [did] not impose greater restrictions for political messages, religious messages, or any other subject matter," and "d[id] not require a viewer to evaluate the topic, idea, or viewpoint on the sign." *City of Austin*, 377 F. Supp. 3d at 681. Rather, it required the viewer only "to determine whether the subject matter is located on the same property as the sign." *Id.* Thus, the district court held that the distinction was a facially content-neutral "regulation based on location," and found "no evidence in the record" that the City had applied the sign code provisions "differently for different messages or speakers" or that its stated concern

for aesthetics and safety was "pretext for any other purpose." *See id.* Finally, the district court found the City's on-/off-premises distinction adequate under the standard of intermediate scrutiny, which is applicable to content-neutral regulations of speech. *Id.* at 682.

The Fifth Circuit Court of Appeals reversed the decision of the district court. *City of Austin v. Reagan Nat'l Advertising of Austin*, 927 F.3d 696, 699 (5th Cir. 2020). The court argued that because the City's on-/off-premises distinction required a reader of the sign to inquire "who is the speaker and what is the speaker saying," "both hallmarks of a content-based inquiry," the distinction was content-based. *Id.* at 706. The court reasoned that "[t]he fact that a government official ha[s] to read a sign's message to determine the sign's purpose [i]s enough to" render a regulation content-based and "subject [it] to strict scrutiny." *Id.* (citing *Thomas v. Bright*, 937 F.3d 721, 730–31 (6th Cir. 2019). Reviewing the sign code under the strict scrutiny standard, the court held that the City's justifications for the distinction between on-/off-premises signs could not meet strict scrutiny, thus rendering it unconstitutional. *City of Austin*, 927 F.3d at 709–10.

SUPREME COURT'S ANALYSIS:

The Court noted that a regulation of speech is facially content-based under the First Amendment if it "target[s] speech based on its communicative content," meaning that it "applies to particular speech because of the topic discussed or the idea or message expressed. *Reed*, 576 U.S. at 163. However, the Court found the Court of Appeals' interpretation of *Reed*—that if applying a regulation requires "[a] reader [to] ask: who is the speaker and what is the speaker saying" then the regulation is automatically content based—to be too extreme of an interpretation. *See City of Austin*, 972 F.3d at 706. The Court felt this too extreme because unlike the regulations in *Reed*, the City's off-premises distinction required an examination of speech only in service of "drawing neutral, location-based lines . . . [and] is agnostic as to content." 596 U.S. at 69. The Court concluded that "[t]hus, absent a content-based purpose or justification, the City's distinction is content-neutral and does not warrant the application of strict scrutiny." *Id.* The Court further differentiated the regulations at issue in *Reed* from the City's sign regulations because the regulations in *Reed* "single[d] out specific subject matter for differential treatment. *Reed*, 576 U.S. at 169. The *Reed* Court determined that this singling out of specific subject matter for differential treatment was not content-neutral, even though it did not discriminate on the basis of viewpoint because "it [was] well established that '[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" *Id.* at 169.

Unlike the regulations in *Reed*, the City's enforcement of its sign code only required reading the billboard to determine whether it directed readers to the property on which it stands or to some other, offsite location, which does not single out any topic or subject matter for differential treatment. 596 U.S. at 71. Furthermore, unlike *Reed*, the City's sign code contained "no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events . . . ." *Id.* Rather, the City's sign code distinguished solely based on location—a given sign is treated differently based on whether it is located on the same premises as the item or service being advertised. *See id.* Thus, the Court concluded that the on-/off-premises distinction is similar to "ordinary time, place, or manner restrictions," of which *Reed*

does not mandate the application of strict scrutiny. *See id.* (citing *Frisby v. Schultz*, 487 U.S. 474, 482 (1988)).

The Court noted that its First Amendment precedents and doctrines have long recognized that restrictions on speech may "require some evaluation of the speech and nonetheless remain content neutral." *Id.* at 72. As examples, the Court noted its precedent which allows for the regulation of solicitation. *Id.*; s*ee Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 643–44, 649 (1981); *Cantwell v. Connecticut*, 310 U.S. 296, 306–07 (1940). The Court further noted its precedent finding that distinctions between on-/off-premises signs are content-neutral. 596 U.S. at 73; *see Suffolk Outdoor Advert. Co. v. Hulse*, 439 U.S. 808 (1978); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981). According to the Court, the ideas "[u]nderlying these cases and others is a rejection of the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern. Rather, it is regulations that discriminate based on 'the topic discussed or the idea or message expressed' that are content based." 596 U.S. at 73–74 (quoting *Reed*, 576 U.S. at 171). The Court concluded that the sign code provisions here did not discriminate on the aforementioned bases.

Reagan, relying on a sentence in the *Reed* opinion, contended that the City's sign code "defines off-premises signs based on their 'function or purpose,'" and asked the Court to "reaffirm that, where a regulation 'define[s] regulated speech by its function or purpose' it is content-based on its face and thus subject to strict scrutiny." 596 U.S. at 74 (Brief for Respondent 34 (quoting *Reed*, 576 U.S. at 163)). The Court disagreed, arguing that this stretches *Reed's* "function or purpose" language too far because the principle quoted is more straightforward than Reagan argues. The Court argued that although some regulations of speech attempt to escape classification as facially content-based "simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result," this does not mean that any classification that considers function or purpose is always content-based. U.S. 596 at 74. Such a reading of *Reed's* "function or purpose" language would "contravene numerous precedents . . . . *Reed* did not purport to cast doubt on these cases." *Id.* at 74–75.

The Court concluded that the City's ordinance is facially content-neutral, however, the Court noted that this did not end the First Amendment inquiry. *Id.* at 76. Rather, "if there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction . . . that restriction may be content based." *Id.* Moreover, to survive intermediate scrutiny "a restriction on speech or expression must be 'narrowly tailored to serve a significant governmental interest.'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The Court, however, did not reach this inquiry because the issue was not addressed in the courts below and the Court is not a court of "first view" and does not "[o]rdinarily . . . decide in the first instance issues not decided below." 596 U.S. at 76–77 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)). The Court thus reversed the decision of the Fifth Circuit and remanded for further proceedings regarding the impermissible purpose issue. 596 U.S. at 77.

[Breyer, J., concurring]: Justice Breyer would conclude that the City's regulation of off-premises signs works no such disproportionate harm but nonetheless, *Reed's* strict formalism can sometimes disserve the very First Amendment interests it was designed to protect.

The Court's reasoning in *Reed* was wrong because it jumped to presumptive conclusions without first considering "whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives." 596 U.S. at 77–78 (quoting *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. __, ____).

[Alito, J., concurring in the judgment in part and dissenting in part]: Justice Alito would hold that the provisions at issue are not facially unconstitutional and would refrain from "making any broader pronouncements." 596 U.S. at 86.

The Court of Appeals did not apply the tests that must be met before a law is held to be facially unconstitutional: "Normally, a plaintiff bringing a facial challenge must 'establish that no set of circumstances exists under which the [law] would be valid,' or show that the law lacks 'a plainly legitimate sweep.'" 596 U.S. at 83 (quoting *Ams. for Prosperity Found. v. Bonta*, 594 U.S. ___, ___. A somewhat less demanding test applies when a law affects freedom of speech. Under the "overbreadth" doctrine, a law restricting speech is unconstitutional "if a substantial number of applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." 596 U.S. at 83 (quoting *U.S. v. Stevens*, 559 U.S. 460, 473). In this case, the Court of Appeals did not apply either of those tests, and it is doubtful that they can be met. 596 U.S. at 83. The majority's categorical statement that "[t]he sign code provisions challenged here do not discriminate" on the basis of "'the topic discussed or the idea or message expressed,'" are incorrect—the provisions defining on-/off-premises signs clearly discriminate on those grounds, and in some situations, strict scrutiny should be required. *See* 596 U.S. at 85 (quoting 596 U.S. at 73).

[Thomas, J., with whom Gorsuch, J., and Barret, J., join, dissenting]:

Under *Reed*, the City's off-premises restriction is content-based because it discriminates against certain signs based on the message they convey which is whether they promote an on-/off-site event, activity, or service. *See id.* The Court incorrectly holds that the off-premises restriction is content-neutral because it proscribes a sufficiently broad category of communicative content and, thus, does not target a specific "topic or subject matter" which misinterprets *Reed's* clear rule for content-based restrictions and "replaces it with an incoherent and malleable standard." *See id.* (quoting 596 U.S. 70).

PRACTICE SIGNIFICANCE:

In *City of Austin*, the Court attempted to provide clarity for First Amendment law by revisiting the question (addressed in *Reed*): How should laws / ordinances that single out specific subject matter for different treatment under the First Amendment be addressed? A divided Court declared that intermediate scrutiny is the appropriate standard of review for municipality ordinances that make location-based distinctions—specifically, providing differentiated treatment for on-/off-premises signs. Yet, for many, this area of First Amendment jurisprudence remains disarrayed.

2. Intermediate scrutiny applied to owner's challenge to the municipality's ban on digitizing existing off-premises signs; and the municipality's ban was narrowly tailored to serve city's significant interests in traffic safety and aesthetics. *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 64 F.4th 287 (5th Cir. 2023).

FACTS:

Plaintiffs-Appellants, Reagan National Advertising of Austin and Lamar Advantage Outdoor Company, separately own billboards in Austin, Texas. *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 64 F.4th 287, 289-90 (5th Cir. 2023). The City of Austin (the "City") governs outdoor signs through its City Code, specifically Chapter 25-10 (the "Sign Code"). *Id*. at 290. An "off-premises sign" is defined as "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." AUSTIN, TEX., CITY CODE § 25-10-3(11) (2016). The Sign Code contained a grandfather clause for existing off-premises signs and banned the construction of new signs, but the pre-existing off-premises signs had restrictions on modifications, such as digitizing them. *Reagan Nat'l Advert.*, 64 F.4th at 290. Both Plaintiffs-Appellants applied to digitize their pre-existing off-premises signs and the City rejected the applications. *Id*.

PROCEDURAL HISTORY:

The Plaintiffs-Appellants filed suit, claiming that the Sign Code made distinctions between on-premises and off-premises signs that violated First Amendment free speech rights. *Id.* After a bench trial in the district court entered judgement in favor of the City. The Fifth Circuit Court of Appeals reversed finding that the relevant Sign Code provisions were content-based and failed strict scrutiny. *Id*. The Supreme Court reversed and remanded, finding the Sign Code to be content-neutral and, thus, deserving the intermediate scrutiny standard. *Id*.

FIFTH CIRCUIT'S ANALYSIS:

On remand from the United States Supreme Court, the Fifth Circuit Court of Appeals held that the Sign Code was a content-neutral, time, place, and manner restriction. *Id.* at 296. Therefore, to survive a First Amendment challenge, the Sign Code provisions at issue had to (1) not have an improper purpose, and (2) must be narrowly tailored to serve a significant governmental interest (the intermediate scrutiny test). *Id*. at 293.

The parties did not assert that there was an improper purpose; therefore, the only issue before the court was whether the Sign Code's ban on digitizing existing off-premises signs was narrowly tailored to serve a significant government interest. *Id*. The court stated that the government's interest in advancing traffic safety and aesthetics had already been deemed as an appropriate government interest to advance. *Id*. at 294. Also, the City reasoned that the entire purpose of allowing some off-premises signs to be grandfathered-in as permissible yet still have restrictions on modifications to those signs, like banning digitization, was to slowly phase off-premises signs out over time, and this is within the City's discretion to regulate. *Id*. at 295. Ultimately, the court found that municipalities are entitled to discretion when it comes to the legislation of sign regulations and found in favor of the City of Austin. *Id*. at 298.

PRACTICE SIGNIFICANCE:

The holding in this matter reflects the common theme of continuing to grant broad discretion to municipalities in regard to sign regulation. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981). And, it is an important illustration of how legal issues raised by the off-premises / on-premises distinction may be analyzed following the Supreme Court's decision in *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61 (2022).

3. **Sign ordinance prohibiting off-premises digital billboards bearing commercial messages was subject to intermediate scrutiny and did not violate the First Amendment. *Adams Outdoor Advert. LTD v. City of Madison*, 56 F.4th 1111 (7th Cir. 2023).**

FACTS:

Adams owns 90 billboards in the city of Madison, Wisconsin. In the 1970s, Madison adopted a sign-control ordinance that comprehensively regulated billboards—or "advertising signs," under the ordinance—to promote traffic safety and aesthetics. The ordinance defined "advertising sign" as any sign advertising or directing attention to a business, service, or product offered offsite—a sign that advertises something unrelated to the premises on which the sign sits. In 1989, Madison amended the ordinance to ban the construction of new advertising signs, but allowed existing billboards to remain with the restriction that they could not be modified or reconstructed without a permit and were subject to strict size, height, setback, and other restrictions. In 2009, Madison again amended the ordinance to prohibit digital-image signs but under a preexisting provision, on-premises "electronic changeable copy signs"—signs that featured electronically changing message (like time and temperature displays) were permitted in a few locations subject to strict limitations. In 2017, Madison amended the ordinance's definition of "advertising sign" to remove references to noncommercial speech—currently the term "advertising sign" is limited to off-premises signs bearing commercial messages.

In 2016, Adams applied for a permit to construct a new advertising sign as a replacement for an existing sign that had been obstructed by recent construction in 2016. In 2017, Adams also filed an additional 26 permit applications seeking to modify or replace existing advertising signs. These additional applications proposed height increases, conversion to digital displays, and other modifications that were expressly prohibited by Madison's ordinance. Madison subsequently denied all but one of Adams' applications. Adams subsequently brought suit raising a First Amendment challenge to Madison's sign ordinance. However, Adams had previously brought the exact same type of suit in response to Madison's 1989 amendments. The 1989 suit was settled by a stipulated judgment, thus having a preclusive effect on most of this current suit, except for Adams' contention regarding the 2009 amendment banning digital displays.

PROCEDURAL HISTORY:

Adams filed suit relying heavily on the Supreme Court's decision in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). Based on *Reed*, Adams contended that any ordinance that treats off-premises signs less favorably than other signs is considered a content-based restriction on speech and thus, is unconstitutional unless it is able to survive strict scrutiny review. The district court disagreed with Adams, and applied intermediate scrutiny, ultimately rejecting Adams' First Amendment challenge. Adams appealed the district court's judgment relying on a Fifth Circuit case that supported Adams' reading of *Reed*, holding that sign codes that distinguish between on-premises signs and off-premises signs amounted to content-based regulatory classifications because they required municipal officials to read each sign to determine how to classify them. *See Reagan Nat'l Advert. Of Austin, Inc. v. City of Austin*, 972 F.3d 696, 706–07 (5th Cir. 2020). The Fifth Circuit accordingly applied strict scrutiny. Following the Supreme Court's granting of certiorari in *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022), the

Seventh Circuit held Adams' appeal pending the outcome of the *Reagan* case. In *Reagan*, the Supreme Court reversed the Fifth Circuit, holding that nothing in *Reed* altered the Court's earlier precedents that applied intermediate scrutiny to billboard ordinances and thus, the Court upheld the on-premises/off-premises sign distinctions as ordinary content-neutral "time, place, or manner" speech restrictions. *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1472–73, 1476 (2022).

SEVENTH CIRCUIT'S ANALYSIS:

The Seventh Circuit held that the district court correctly anticipated the Supreme Court's decision in *Reagan Nat'l Advert.* and thus, correctly applied intermediate scrutiny. *Adams Outdoor Advert. LTD*, 56 F.4th at 1120. The Seventh Circuit stated that content-neutral "time, place, or manner" restrictions such as on-/off-premises sign regulations need only be narrowly tailored to serve a significant governmental interest. *Id.* The Seventh Circuit also found that this standard aligned with the Supreme Court's landmark decisions in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In *Central Hudson*, the Court adopted the intermediate level of scrutiny for regulations pertaining to commercial speech. Later, in *Metromedia*, the Court applied the *Central Hudson* test and found the ordinance in question facially invalid.

The Seventh Circuit found that Adams did not meaningfully argue that Madison's digital-sign ban failed intermediate scrutiny because the prohibition on digital signs served Madison's stated interests in promoting traffic safety and preserving visual aesthetics. Furthermore, the Seventh Circuit held that it is well established that Madison's stated interests are significant governmental interests. Finally, the Seventh Circuit rejected Adams' contention that Madison's means did not fit its ends because Madison did not provide empirical evidence linking digital billboards to aesthetic or safety-related harms. *Adams Outdoor Advert. LTD,* 56 F.4th at 1120.

The Seventh Circuit reasoned that billboards, by their very nature, can be perceived as an aesthetic harm and that Madison need not try to prove that its aesthetic judgments are correct; furthermore, the connection between billboards and traffic safety is too obvious to require empirical proof. *Id.* (citing *Metromedia*, 453 U.S. at 510; *Leibundguth Storage & Van Serv., Inc. v. Village of Downers Grove*, 939 F.3d 859, 862 (7th Cir. 2019)). Finally, the Seventh Circuit held that because of the Supreme Court's decision in the *Reagan* case, the on-/off-premises distinction is a content-neutral distinction and thus, intermediate scrutiny applies. Because the Seventh Circuit saw "[n]o flaw in the [district court] judge's analysis and decision upholding [Madison's] ban on digital-image signs under that more lenient standard of review," it affirmed the district court's holding. *Adams Outdoor Advert. LTD*, 56 F.4th at 1120.

[The Seventh Circuit's discussion and facts regarding claim preclusion have been omitted from this summary because they are not relevant to the particularized First Amendment claim under Madison's ordinance at issue]

PRACTICE SIGNIFICANCE:

The primary issue in this case (on-/off-premises site regulation banning digital billboards) was ultimately decided by the Supreme Court in *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61 (2022) prior to the Seventh Circuit's decision. This case highlights how federal appellate courts apply the Supreme Court's First Amendment sign regulation precedent and subsequent reasoning/tests from cases such as *Central Hudson*, *Metromedia*, *Reed*, and *Reagan*. The Seventh Circuit's analysis shows that courts will defer to a municipality regarding its aesthetic judgments and that it likely will not question a municipality's determination that billboards affect traffic safety. This is especially important here as although the Seventh Circuit reviewed the district court's application of intermediate scrutiny, it did not require any empirical evidence from Madison regarding safety concerns presented by digital billboards, nor did it require Madison to justify its decisions regarding the aesthetic harm of billboards. Thus, an argument could be made that although intermediate scrutiny applies in cases such as this, this particular form of intermediate scrutiny is highly deferential to municipalities and a municipality's ordinance that distinguishes between on-premises and off-premises signs will likely be upheld unless the plaintiff can show that "[t]here is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction" or that the restriction is not "narrowly tailored to serve a significant governmental interest." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61 (2022) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

4. **Sign ordinance stating that signs lost their legal nonconforming status if they were "relocated," was ambiguous and therefore, the meaning of "relocated' was to be construed in favor of pole sign owner where posts were moved 18 to 36 inches behind their original location, after original posts were damaged by a storm. Movement did not constitute a "relocation" that would cause signs to lose their legal nonconforming status.** ***Noblesville Bd. of Zoning App. v. Reagan Outdoor Advert.*****, 217 N.E.3d 510 (Ind. 2023)**

FACTS:

Reagan Outdoor Advertising owns billboards in Noblesville, Indiana, which the city classifies as "pole signs." Pole signs "[a]re signs affixed to poles or other uprights installed in the ground." *Noblesville*, 217 N.E.3d at 511. In 1974, Noblesville passed an ordinance that regulates the display of signs within the city and prohibits pole signs. However, pre-existing pole signs, such as Reagan's billboards, retained their status as legal nonconforming uses. Under the ordinance, pole signs lose their legal status if they are relocated or fall into disrepair after six months. In April 2020, one of Regan's billboards was damaged by a storm. Reagan attempted to repair the damage by removing the billboard's front-facing display, cutting off the existing posts at ground level, and installing new posts 18 to 36 inches behind the original posts. Before these repairs were completed, Noblesville's Department of Planning and Development ("the Department") issued a stop-work order and later, a notice of violation stating that: (1) Reagan had not obtained a valid permit to install the sign; and (2) Reagan's replacement of the failed posts with posts 18 to 36 inches away "relocated" the signs under the ordinance. *Id.* at 512. Thus, the Department concluded the sign lost its legal nonconforming use status and Reagan was ordered to remove the sign immediately.

PROCEDURAL HISTORY:

Regan appealed the stop-work order and notice of violation to the Board of Zoning Appeals ("the Board"). The Board affirmed the Department's rulings, finding that Regan had relocated the sign, resulting in the loss of the sign's legal nonconforming use status. Reagan sought judicial review of the Board's decision under Indiana law. *See* IND. CODE § 36-7-4-1615.

The trial court found for Reagan, holding that Reagan did not need a permit under the ordinance to do necessary repairs. It also held that Reagan did not "relocate" its sign by installing new posts a few feet from the old posts.

The Board subsequently appealed, arguing that Reagan's sign lost its legal nonconforming use status because Regan needed a permit to install the new support posts and that, by installing the new posts in a different location, Reagan relocated the sign in violation of the ordinance.

The Court of Appeals agreed with the Board and reversed the trial court's decision, holding that the permit requirement was of no independent practical effect, and that the trial court failed to defer to the Board's reasonable interpretation that Reagan's movement of the support posts relocated the sign under the ordinance. *Noblesville*, 217 N.E.3d at 512.

Reagan appealed to the Indiana Supreme Court ("the court"). The court held that it was "[u]nclear under the ordinance whether "relocate" encompassed the *de minimis* movement of a

sign undertaken to repair the damaged support posts and that consistent with our interpretative canons, we must resolve this ambiguity in Reagan's favor." *Id.* at 513.

INDIANA SUPREME COURT'S ANALYSIS:

The court noted that although the Board argued that Reagan required a permit to repair the sign, the Board could not explain why this was so. Rather, the Board insisted Reagan needed a permit to complete its work because Reagan was constructing a new sign, not repairing an old one. The court found this "bare assertion . . . without legal support or briefing" insufficient, and as a result, could not serve as a basis for the Board to obtain appellate relief. *Id.* Thus, the only argument in front of the court was "whether Reagan's decision to move the posts 18 to 36 inches from their original position 'relocated' the sign in violation of the ordinance's ban on nonconforming signs." *Id.*

The court found that Reagan did not violate the sign ordinance because although the words "relocate" and "move" are words that normally have similar meanings, the two words—as used in the city's ordinance—had different meanings from one another. *Id.* at 514. Furthermore, because the ordinance offered no guidance on how far a sign must be "moved" before it has been "relocated," the term "moved" as used in the ordinance was too ambiguous and thus, must be construed in Reagan's favor. *Id.* The court found support for this ambiguity and lack of common meaning between the two terms in Article 11 of the ordinance, which states that nonconforming signs cannot be relocated; but does not say they cannot be moved. *Id.* The court noted that Article 14 of the same ordinance bans the movement of nonconforming structures "for any reason and for any distance whatever." *Id.* (quoting UDO § 14.E.4.). This language effectively bans even the slightest movement. However, the Board did not argue that Reagan violated Article 14 of the ordinance, but rather, that it had violated Article 11. The court noted that had the Board argued that Reagan violated Article 14, the Board likely would have prevailed. *See id.*

Because Article 11 did not mirror Article 14's ban on "movement," and lacked strict and uncompromising language, the court concluded that the term "relocated" was too ambiguous and thus, the ordinance must be construed in Reagan's favor. The court affirmed the trial court's judgment reversing the Board's decision.

PRACTICE SIGNIFICANCE:

Although this case is likely to be insignificant for the federal body of land use planning and zoning law given that it is a state court decision, this case highlights the general principle of strict construction. It has been well established in land use planning law that because zoning codes and regulations are in derogation of the common law and property owners' rights, zoning codes and regulations must be strictly construed and any ambiguity must be construed against the municipality and in favor of the property owner. *See* Daniel A. Himebaugh, *Tie Goes to the Landowner: Ambiguous Zoning Ordinances and the Strict Construction Rule*, 43 THE URB. LAW. 1061, 1063–64 n.16 (2011). Although this case exemplifies the strict construction principle, it also highlights how carefully written municipality ordinances can enable municipalities to wield a great deal of control over things such as billboards. The court in this case did state that had the Board

argued that Reagan violated Article 14 of the ordinance, as opposed to Article 11, the Board most likely would have prevailed. *See Noblesville*, 217 N.E.3d at 514.

5. **Sign Code provisions disallowing "changeable messaging" and distinguishing between on-premises and off-premises signs were not content-based as there was no evidence that the provisions were adopted to regulate speech because of a disagreement with the content; therefore, intermediate scrutiny review applied. *Norton Outdoor Advertising, Inc. v. Village of St. Bernard*, Slip Copy 2023 WL 4633895 (S.D. Ohio 2023).**

FACTS:

Plaintiff, Norton Outdoor Advertising, Inc. constructed, sold, and leased outdoor billboards, and currently has nine signs within the boundaries of St. Bernard, two of which are at issue. *Norton Outdoor Advertising, Inc. v. Village of St. Bernard*, Slip Copy 2023 WL 4633895 at *1 (2023). The land use regulations that govern advertising signs are controlled under two sections of the St. Bernard Code. *Id.* The St. Bernard Code requires that a permit be obtained before the installation of any sign. *Id*. (*See* V.C. § 1185.002). The Code also distinguished between "on-premises signs" and "off-premises signs". *See id*. There is a restriction on off-premises signs being "changeable messaging." *Id*. (*See* V.C. § 711.07(e)).

Plaintiff applied and received permits to install the two digital signs at issue. However, Defendants, the Village of St. Bernard, the Board of Zoning Appeals, and Building Commissioner, allege that there was no indication that the message displayed would be changeable. *Id*. Accordingly, the permits were revoked and notices of non-compliance were issued due to discrepancies between the permits granted and the final signs. *Id*.

PROCEDURAL HISTORY:

Norton Outdoor Advertising sued, alleging that St. Bernard's sign restrictions were unconstitutional and violated its First and Fourteenth Amendment rights. *Id*. The Magistrate Judge applied intermediate scrutiny review and found that the provisions of the sign code that Norton Outdoor Advertising had standing to challenge were constitutionally valid. The Magistrate Judge found that exemptions for government speech do not change the standard to strict scrutiny. *Id*. at *3. Norton Outdoor Advertising objected, arguing that: "(1) the challenged provisions are not facially content-neutral, and thus must be reviewed under strict scrutiny; (2) even if the provisions are not subject to strict scrutiny, the Court must still apply the four-part test from *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); and (3) St. Bernard did not establish the narrow tailoring necessary to withstand time, place, and manner scrutiny." *Id.* at *1.

OPINION & ORDER ANALYSIS:

Norton Outdoor Advertising argued that the provisions at issue are content-based because the only exemptions from the ban on changeable messages are "'based on the subject or message conveyed by the sign, the identity of the speaker, and in many instances both.'" *Id*. at *3. The district court held that the Magistrate Judge correctly applied intermediate scrutiny stating "Norton does not show that St. Bernard 'adopted a regulation of speech because of disagreement with the message it conveys. . . .'" *Id.*

Furthermore Norton Outdoor Advertising, argued that the Magistrate Judge erred by not applying the *Central Hudson* standard. The district court rejected this argument. According to the

district court, because the St. Bernard Code did not distinguish between commercial and non-commercial speech, analysis under *Central Hudson* was inapposite. *Id.* at *3. Therefore, St. Bernard was only required to establish that the relevant Code provision was a reasonable fit and that it was narrowly tailored to achieve St. Bernard's substantial interests in esthetics and traffic safety. *Id.*

After conducting *de novo* review, the district court overruled Norton Outdoor Advertising's objections, denied Norton Outdoor Advertising motion for summary judgment, and granted St. Bernard's motion for summary judgment, dismissing the matter. *Id*.

PRACTICE SIGNIFICANCE:

This is an interesting example of a court finding that a sign prohibition on "changeable content" and the designation of on-premises and off-premises signs are not content discriminatory. An appeal has been filed and the results may have an impact on the deference that municipalities are entitled to when it comes to regulating land use, specifically the regulations on signs. *Id*.

List of Recent Cases Interpreting and Applying Procedural Due Process Requirements in Land Use Disputes

STANDING

1. **Lockerbie Glove Co. Town Home Owner's Ass'n v. Indianapolis Historic Preserv. Comm'n,** 194 N.E. 3d 1175 (Ind. App. 2022) (a statute granting a party the statutory right to sue does not grant the party automatic standing).

2. **Gordon v. Town of Greenwich Planning**, 2022 WL 17101444 (Conn. Super. Ct. 2022) (plaintiff established classical aggrievement by alleging that granting the variance would negatively impact the plaintiff's property such as hurting the fair market value of the property and lowering the use and enjoyment of the property).

3. **Saugatuck Dunes Coastal Alliance v. Saugatuck Tp.,** 2022 WL 2903871 (Mich. 2022) (three criteria required to show standing as an aggrieved person: (1) participation in and taking a position at the challenged proceedings, (2) a protected interest or right likely to be affected, and (3) some evidence of special damages than what others in the local community will face).

3. **61 Crown Street, LLC v. City of Kingston Zoning Board of Appeals**, 211 A.D.3d 1134, 179 N.Y.S.3d 416 (3d Dep't 2022) (parking congestion considered an injury generally protected by zoning laws and not a sufficient injury to establish standing).

4. **Baldwin v. Sharon Standing Building Comm.,** 2023 WL 2490990 (Mass. Land Ct. 2023) (alleged harms that zoning decision will increase traffic resulting in safety concerns and cause a need for additional parking found not sufficient to establish standing as building committee demonstrated that the traffic would not be a concern and that the project's parking requirements complied with the town's zoning laws. Prior holding that required ownership of property is reversed).

5. **Morse v. Zoning Board of Appeals of Wellesley,** 2023 WL 2376231 (Mass. Ct. App. 2023) (although proposed plan would increase the number of contact points at intersections, causing "marginally longer delays", the plaintiff's complaint failed to demonstrate that the zoning board's approval of the site plan was "unreasonable, arbitrary, or capricious").

APPLICATION COMPLETENESS

6. **Taylor v. Planning and Zoning Comm'n of Town of Westport,** 218 Conn. App. 616 (2023) (prior to denying an application for incompleteness, the zoning board must give applicant the opportunity to be heard on whether their application was complete during the public hearing regarding their application).

EXHAUSTION OF ADMINISTATIVE REMEDIES

7. **Knick v. Township of Scott,** 139 S. Ct. 2162 (2019) (Overturning the Williamson County decision requiring completion of state law litigation of regulatory takings claims before federal claim is ripe).

8. **WG Woodmere LLC v. Town of Hempstead,** 2022 WL 17359339 (E.D. N.Y. 2022) (taking and equal protection claims not ripe for adjudication until final decision could be made on application as it was not possible to know whether the zoning went too far as the court could not know far the regulation went).

9. **Arcadians for Environmental Preservation v. City of Arcadia,** 88 Cal. App. 5th 418 (2023) (Presumption of standing exists for abutting property owner, but is lowered when evidence is presented showing the owner was not aggrieved. Burden then shifts to abutting property owner to present faces (not speculative opinions or general statements of opposition) showing aggrieved standards were met. Exhaustion not achieved until City has been presented with and an opportunity to respond to a specific cognizable claim).

10. **Stafa v. City of Troy,** 2023 WL 2938542 (Mich. Ct. App. 2023) (applicant must fully exhaust available administrative remedies in order to obtain declaratory relief. Following denial of an administrative site plan, exhaustion required filing an appeal to circuit court. Appeal requesting order declaring the site plan in full compliance was not ripe and inapplicable because the site plan denial was not legislative in nature).

NOTICE

11. **Markatos v. Planning and Zoning Comm'n. of Town of New Canaan,** 2022 WL 17101529 (Conn. Super. Ct. 2022) (commission's decision invalidated since public notice was woefully inefficient as a review of the record would not provide any reasonable understanding behind the commission's decision).

ADDITIONAL EVIDENCE / OUTSIDE ASSISTANCE

12. **Citizens of Upper Woodmont Group v. Upper Yoder Tp. Zoning Hearing Board**, 2022 WL 17840205 (Pa. Commw. Ct. 2022) (lower court erred in denying request for additional evidence requested by party regarding the location of the proposed cell tower as there was uncertainty about whether the proposed cell tower would be built on the borough or the township).

SPECIAL EXCEPTIONS / CONDITIONAL USE PERMITS

13. **Greer v. Fayette County, Tennessee Board of Zoning Appeals,** 2023 WL 3301427 (Tenn. Ct. App. 2023) (board acted within authority under state law and local ordinance to hear and grant special exceptions, and approval of special exception for solar farm was not a de facto rezoning of the property).

SCOPE OF DELEGATED AUTHORITY

14. **Hall County v Cook Communities**, 2023 WL 424612 (Ga. Ct. App. June 29, 2023) (board improperly acted in a legislative capacity when implementing several conditions for rezoning the subject property).

15. **Kinzol v. Ebner,** 2023 Ohio 164 (Ohio Ct. App. 2023) (city's charter issued a separate category of substantive ordinances known as "Emergency Measures" which were not subject to the procedural requirements for zoning amendments within the city's municipal code).

16. **Macgowan v. Town of Castle Rock,** 2022 WL 17176307 (10th Cir. 2022) (claim preclusion barred plaintiff's near identical second lawsuit over a denial of zoning variance request for a digital billboard to be put up next to an interstate highway within the town's limits).

STAYS AND INJUNCTIONS

17. **In re: Coggon Solar LLC,** 2023 WL 143211 (Iowa U.B. 2023) (utilities board denied residents request for stay as the residents failed to address or mention: (1) the likelihood of prevailing on judicial review; (2) the irreparable damage if the stay was not granted; (3) the harm that could be suffered by other parties without a stay; and (4) the public interest).

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PRACTICE DATA CENTERS

Zoning for Data Centers and Cryptocurrency Mining

By David Morley, AICP

Data centers are the physical facilities where the internet lives. Fundamentally, they consist of networked computer systems used for data storage and processing, along with supporting equipment, such as batteries, back-up power generators, and cooling devices. Modern data centers are the direct descendants of the, so-called, *telecom hotels* that began springing up in downtowns in the late 1990s to accommodate the rapid expansion of the commercial internet and, before that, of automated telephone exchange facilities that made it possible to place landline telephone calls across a city, the nation, or the world (Evans-Cowley 2002).

An emerging segment of the data center market consists of facilities dedicated in whole or part to "mining" cryptocurrency. A cryptocurrency is a decentralized digital currency that uses encrypted data strings to denote individual units, or coins, and a peer-to-peer database known as a blockchain to maintain a secure ledger of transactions. Several of the most popular cryptocurrencies, most notably Bitcoin, require extremely complex computations to verify each transaction and add a record, or block, for that transaction to the blockchain. Whoever verifies a transaction first receives a new cryptocurrency coin as a reward. While, theoretically, anyone with a computer server can "mine" new coins by helping to verify these transactions, large-scale cryptocurrency mining requires a massive amount of computing power.

This article explores the reasons why cities, towns, and counties may wish to define and regulate data centers and cryptocurrency mining as distinct uses in their zoning codes and provides a summary of contemporary approaches. It begins with a brief overview of the factors that drive demand for data centers or cryptocurrency mines in particular locations before examining the key planning issues that may merit special attention through zoning and posing a series of questions to guide code drafting.

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A hyperscale Google data center in Council Bluffs, Iowa.

The article concludes with short profiles of local zoning approaches that may serve as models for others.

DEMAND DRIVERS

Industry analysts predict sustained growth in data center construction in the coming years (Dunbar and Bonar 2021). This includes demand for larger and larger "hyperscale" data centers as well as more widely distributed "edge" data centers (Sowry et al. 2018). Data center developers (or operators) are attracted to sites with low latency to end users and dependable and affordable electricity.

While data centers have historically been clustered around major internet access points, information technology companies, and government employment centers, the proliferation of cloud computing and the internet of things is pushing demand out to network edges. This means more data centers in smaller metropolitan and nonmetropolitan areas.

Big technology companies are likely to continue looking for sites that can accommodate new, large single-story structures. But operators that specialize in leasing space in the same facility to multiple companies (i.e., collocated data centers) may be more open to infill sites and existing structures, especially if those sites have access to fiber optic infrastructure.

Data centers use a lot of electricity (see below) to power processing and storage hardware and to keep that hardware cool. The amount of electricity (and often water) needed for cooling is higher in warm, humid climates than in cool, dry areas. Consequently, holding other factors equal, developers favor locations with low electricity rates and cooler climates. Furthermore, because these facilities operate continuously, developers are also looking for sites that are less vulnerable to natural hazards.

Cryptocurrency miners are also looking for locations with cheap electricity and low hazard risk; however, dedicated mining facilities are not concerned about proximity to customers and are less likely to invest in backup power. While there seems to be a widespread consensus that data centers are essential to global communications and the global economy, cryptocurrency miners

have a more limited "social license" to operate. Widespread concerns about the energy use of mines and the limited utility of the coins they produce has led some countries, including China, to ban Bitcoin mining. Consequently, many cryptocurrency miners are relocating to the U.S. (Obando 2022).

PLANNING ISSUES

From the exterior, data centers and cryptocurrency mining facilities may be physically indistinguishable from many commercial or light industrial uses. However, the operational characteristics of these facilities are typically quite distinct from those of surrounding land uses. From a planning perspective, the most noteworthy characteristics relate to their electricity and water use, noise production, enhanced safety and security needs, and low employment densities.

They Use a Lot of Electricity (and Water)

In 2020, data centers used between 200 and 250 terawatt hours (TWh) of electricity, accounting for approximately one percent of global consumption (IEA 2021). While the total consumption has grown steadily along with global power demand, this ratio has held relatively constant over the past 20 years as efficiency improvements have proportionally offset increased demand from data centers. However, this pattern is unlikely to hold as growth in streaming video, online gaming, cloud computing, machine learning, virtual reality, and the internet of things begins to outstrip efficiency improvements.

The figures above exclude cryptocurrency mining. Bitcoin miners alone used an estimated additional 60 to 70 TWh in 2020. According to Cambridge University, if Bitcoin was country, it's annual electricity consumption would be slightly higher than that of Poland or Malaysia (2022).

Data center and cryptocurrency mining equipment also generates a tremendous amount of waste heat, which must be dissipated by fans or absorbed by a cooling medium to avoid hardware damage and ensure efficient operations. Many data centers and cryptocurrency mines use water as a cooling medium. Water is also necessary for most forms of electricity production. In aggregate, a medium-sized data center typically uses more water each year than two 18-hole golf courses (Mytton 2021).

They Can Be Noisy

Inside a data center or cryptocurrency mine server room, the noise can make it difficult to carry on a conversation at a normal volume. While most data centers and large cryptocurrency mines incorporate construction and soundproofing techniques that ensure this server noise isn't audible outside of the building, air conditioner compressors mounted on the roof or on ground near these facilities can generate noise that carries across property lines.

In some contexts, vegetation or other structures may rapidly attenuate this sound. In others, the sound may travel over long distances. Obviously, the degree to which these sounds constitute nuisance "noise" depends on surrounding land uses and ambient noise levels. The problem is typically most acute when data centers or mines are near residences.

They Have Enhanced Safety and Security Needs

Data centers typically aim to run continuously, and any outage or downtime can threaten business operations. Furthermore, data centers house expensive, highly specialized hardware, and many handle sensitive data. Consequently, most data centers incorporate enhanced safety and security features, such as gated access points, fencing, or bright lighting, to prevent unauthorized access and to minimize the likelihood of disruption.

Cryptocurrency mines have similar safety and security needs, with two key distinctions. First, miners want to maintain network access, but the stakes are lower than for data centers because an outage wouldn't negatively affect any other services or users. Second, cryptocurrency mines generally aren't receiving any clients and have little incentive to draw attention to themselves with fencing or lighting.

They Have a Low Employment Density

Data centers typically have far fewer workers per square foot than professional offices or light industrial facilities (Tarczynska 2016). And cryptocurrency mines generally have even lower employment densities than data centers. For some communities, data centers (and potentially cryptocurrency mines) are highly desirable from an economic development perspective because they often generate a large property tax surplus that can subsidize more service-intensive land uses, such as single-family homes. Others, however, are reluctant to devote too much commercial or light industrial space to uses that generate few jobs.

ZONING CONSIDERATIONS

Any community interested in regulating data centers and cryptocurrency mining through zoning should consider three key questions:

1. Do these uses need new use definitions?
2. Where should these uses be permitted?
3. Do these uses need special development or performance standards?

Do They Need New Use Definitions?

New land uses don't necessarily require new use definitions in the local zoning code. It depends, in part, on whether the use fits

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The roof of eBay's Topaz data center in South Jordan, Utah.

neatly under a broader use category or is substantially like another defined use. And it depends on whether treating the new use the same as this use category or other similar use would be likely to generate negative effects on nearby properties or the community as a whole.

Many communities have defined data centers (or some closely analogous term) as a distinct use in their zoning codes. These definitions typically reference the general function of the facility and the degree to which it is occupied by computer systems and related equipment. For example, Anne Arundel County, Maryland, defines *data storage center* as "a facility used primarily for the storage, management, processing, and transmission of digital data, which houses computer or network equipment, systems, servers, appliances, and other associated components related to digital data storage and operations" (§18-1-101.(44)).

Comparatively fewer communities have defined cryptocurrency mining as a distinct use. Many of these definitions focus on the specialized purpose of the facility, often with references to other newly defined terms, such as *high density load* or *server farm*, that clarify its distinct characteristics. For example, Moses Lake, Washington, specifies that *cryptocurrency mining* often uses more than 250 kilowatt-hours per square foot each year (§18.03.040).

Where Should They Be Permitted?

Communities that choose to regulate data centers or cryptocurrency mines as distinct uses may permit these uses either by right or with a discretionary use permit (i.e., conditional, special, or special exception use permits) in one or more existing base or overlay zoning districts. Alternatively, they may elect to establish a new special-purpose base or overlay zoning district for either use.

Many communities permit data centers and cryptocurrency mines either by right or with a discretionary use permit in commercial and industrial districts. While data centers and mines can fit in a wide range of existing commercial or industrial buildings, purpose-built facilities are often single-story structures with large floorplates.

Given that they generally have few employees and visitors, these uses may not be appropriate in ground-floor street-frontage spaces in pedestrian-oriented commercial areas. Wenatchee, Washington, addresses this issue by permitting data centers and cryptocurrency mines by right in multiple pedestrian-oriented commercial districts, with a simple stipulation that they cannot occupy "grade level commercial street frontage" (§10.10.020).

A new special-purpose zoning district can help steer data centers or cryptocurrency mines toward corridors or other subareas that have suitable utility infrastructure. When adopted as floating zones, special districts can also provide an extra layer of review for large projects that may cover dozens or hundreds of acres.

Prince William County, Virginia, added a Data Center Opportunity Zone Overlay District to its zoning code in 2016 (§32-509). The county has mapped this overlay to more than 70 percent of its industrially zoned land. The overlay permits data centers and includes design standards for these facilities; however, it does not otherwise modify the existing use permissions for underlying districts.

Do They Need Special Development or Performance Standards?

Communities that decide to regulate data centers or cryptocurrency mines as distinct uses may choose to adopt use-specific standards that modify or supplement other relevant universal or district-specific development or performance standards. This approach can help communities target standards to the distinct features of these uses to address specific community concerns.

Use-specific standards can help minimize reliance on discretionary approvals and improve the consistency of local decisions. Without these standards, local officials may be more likely to require all data centers and cryptocurrency mines to obtain a discretionary use permit, and they may be more likely to adopt wildly varying conditions of approval for substantially similar proposals.

Communities that have adopted use-specific standards for data centers and cryptocurrency mines often establish building design and buffering or screening requirements to minimize the visibility or improve the appearance of these facilities from public streets or nearby properties. Other common standards address environmental performance, including noise and light pollution, and evidence of electric utility approval.

EXAMPLES OF DEFINED USES

Jurisdiction	Defined Uses
Alpharetta, GA	Data center (§1.4.2)
Anne Arundel County, MD	Data storage center (§18-1-101.(44))
Fairfax County, VA	Data center (§9103)
Frederick County, MD	Critical digital infrastructure facility (§1-19-11.100)
Moses Lake, WA	Cryptocurrency mining; Data center/server farm/cluster (§18.03.040)
Pitt County, NC	Data processing facility (large scale) (§15)
Plattsburgh, NY	Commercial cryptocurrency mining; Server farm; High density load service (LL 6-2018)
Prince George's County, MD	Qualified data center (§27-2500)
Prince William County, VA	Data center (§32-100)
Somerville, MA	Data center (§9.8.b)
Vernal, UT	Data center (§16.04.173)
Wenatchee, WA	Cryptocurrency mining; Data center (§10.08)

POTENTIAL MODEL APPROACHES

It would be difficult to find a community with more experience with data centers than Loudon County, Virginia. And the county's approach to zoning for data centers serves as a potential model for other communities with suitable sites and sufficient infrastructure to accommodate data center development. In contrast, Missoula County, Montana, was one of the first local jurisdictions to craft zoning regulations for cryptocurrency mining operations. And its emphasis on mitigating the potential climate impacts represents a different type of potential model.

Loudon County, Virginia

Northern Virginia's Data Center Alley, primarily clustered around Routes 7 and 267 in Loudon and Fairfax Counties is the largest data center market in the world (Fray and Koutsaris 2022). Its combined power consumption capacity is more than 1.6 gigawatts (GW), nearly twice as much as the next largest market. And within Data Center Alley, Loudon County has the highest concentration of data centers. As of October 2021, data centers occupied more than 25 million square feet, with another 4 million square feet in development (LCDED 2022).

Several important factors have driven demand for data center development in Loudon County. It is home to the Equinix internet exchange, one of the largest internet access points in the world and a successor to Metropolitan Area Exchange, East, the first U.S. exchange. The county has abundant (and redundant) fiber optic infrastructure, relatively cheap power, and sufficient water. Additionally, it has a high concentration of skilled technology workers and businesses that support the data center industry.

By the year 2000, there was already an emerging data center cluster in Loudon County. However, the county did not define and regulate data centers as a distinct use in its zoning code until 2014 (ZOAM 2013-0003). According to Acting Planning & Zoning Director James David, prior to this, the county defined data centers as commercial offices.

The latest version of the county's zoning ordinance permits data centers by right in Planned Office Park, Research and Development Park, Industrial Park, and General Industrial districts and as a special exception use in Commercial Light Industry districts. New data centers (without vested rights) must comply with a set of use-specific standards governing façade design, screening of mechanical equipment, exterior lighting, pedestrian and bicycle facilities, and landscaping, buffering, and screening (§5-664).

According to David, these standards are intended to improve the aesthetics of data centers, minimize visibility from nearby residential areas, and ensure continuous sidewalk and trail networks. Overall, they represent a light-touch approach that has, so far, worked well for a county with enormous demand for data centers and relatively modest competition for space from other commercial and industrial uses.

However, in February 2022, county officials directed staff to research regulatory options to prevent new data centers in the

EXAMPLES OF USE-SPECIFIC STANDARDS FOR DATA CENTERS AND CRYPTOCURRENCY MINING

Jurisdiction	Use-Specific Standards
Alpharetta, GA	Requires evidence of compliance with noise standards; specifies exterior lighting fixture design; establishes minimum building height; requires building façade design elements; establishes other fencing, screening, and landscaping requirements to minimize visibility from adjacent roads and properties (§2.7.2.1)
Anne Arundel County, MD	Establishes minimum lot size and setbacks; prohibits residences on the same lot; establishes limit on outdoor storage (§18-10-119)
Fairfax County, VA	Requires all equipment to be enclosed within a building; establishes maximum floor area by zoning district (§4102.6.A)
Frederick County, MD	Establishes criteria for reducing setbacks; specifies building design standards; specifies landscaping, screening, and buffering requirements; clarifies parking, loading, signage, and lighting standards; establishes criteria for private roads; establishes noise and vibration standards (§1-19-8.402)
Moses Lake, WA	Clarifies review process for business license; prohibits container storage; requires evidence of electrical utility approval; requires evidence of electrical permit and inspection; establishes environmental performance standards, addressing noise, heat, and electric and magnetic fields; limits amount of exposed equipment on facades (§18.74)
Pitt County, NC	Limits height; requires separation from sensitive uses; requires noise study and compliance with noise standards; requires underground wiring; requires security fencing and vegetative screening; requires evidence of electrical utility approval; clarifies signage standards; requires notification of abandonment (§8(UUUU))
Plattsburgh, NY	Requires fire suppression and mitigation techniques; limits internal ambient temperature and the direct release of heat on colder days; establishes permissible noise levels (LL 6-2018)
Prince George's County, VA	Requires building façade design elements; specifies exterior lighting fixture design; requires screening for security fencing and limits fence height; requires compliance with landscape manual; clarifies applicable off-street parking standard; clarifies signage standards; requires an acoustical study; specifies additional site, locational, and noticing requirements for facilities in rural residential districts (§27-5102(e)(4)(B))
Somerville, MA	Establishes special review criteria related to aesthetic impacts and employment opportunities (§9.8.b)
Vernal, UT	Requires fencing and structural screening for electrical generators; requires noise mitigation plan for facilities near residential zones or existing hotels or motels (§16.20.250)
Wenatchee, WA	Clarifies review process for business license; prohibits container storage; requires evidence of electrical utility approval; requires evidence of electrical permit and inspection; clarifies blank wall limitation standards; requires an affidavit verifying operating sound levels (§18.48.310)

Route 7 corridor. While data center demand remains high in this area, the county's comprehensive plan designates most of this corridor as Suburban Mixed Use, which envisions a compact, pedestrian-friendly mix of commercial, residential, cultural, and recreational uses. Furthermore, the existing electricity network infrastructure is insufficient to accommodate the existing demand for new data centers (LCDED 2022).

The county is working on its first complete overhaul of its zoning code since 1993. And it intends to incorporate any new regulations for data centers into the new code, which officials hope to adopt by the end of 2022.

Google Earth

The heart of Northern Virginia's Data Center Alley in Ashburn, Virginia.

Google Earth

The former Bonner sawmill in Missoula County, Montana, was once home to the HyperBlock cryptocurrency mine.

Missoula County, Montana

In April 2019, Missoula County, Montana, adopted an interim zoning resolution that established a cryptocurrency mining overlay (Resolution No. 2019-026). The county had one large cryptocurrency mine already, and its low electricity rates and cool climate made it an attractive area for prospective miners. While a few other jurisdictions had already defined cryptocurrency mining in their zoning codes, Missoula County appears to be the first to explicitly position its zoning approach as a response to climate change.

According to county planner Jennie Dixon, AICP, local officials originally took an interest in regulating cryptocurrency mining as a distinct use after multiple complaints of noise from cooling fans at an existing Bitcoin mine operating out of a former sawmill in unincorporated Bonner. Soon, though, the county expanded its focus to include energy consumption and electronic waste.

Montana law only authorizes interim zoning in the case of an emergency involving "public health, safety, morals, or general welfare" (§76-2-206). Dixon says the Intergovernmental Panel on Climate Change's 2018 Special Report on *Global Warming of 1.5° C* helped justify climate change as a local emergency that warranted interim zoning to mitigate greenhouse gas emissions (and other potential environmental impacts) from cryptocurrency mining.

The interim zoning regulations defined cryptocurrency mining as a distinct use and created a Cryptocurrency Mining Overlay Zone, mapped to the entire unincorporated geographic extent of the county (which includes some un-zoned areas). The overlay restricted cryptocurrency mining operations to industrial districts and required operators to obtain a discretionary use permit if the mine was adjacent to a residential district or within 500 feet of a residential property boundary. These regulations also required all mining operations to verify that all electronic waste be handled by a licensed recycling firm and that all electricity use be offset by new renewable energy production.

Caroline Lauer, the county's Sustainability Program Manager, stresses the importance of this last requirement. If cryptocurrency miners purchased existing supplies of renewable energy, it could actually displace existing utility customers to dirtier sources. While most of the county's electricity comes from hydropower, coal accounts for much of the remainder.

Missoula County's 2016 *Growth Policy* plan includes an objective to "reduce the county's contribution to climate change" (4.1) and lists policies that promote alternative energy development (4.1.3) and reduce energy use and waste generation as implementation actions (4.1.6). A day before it adopted the interim cryptocurrency mining regulations, the county further strengthened its policy rationale by adopting a joint commitment with the City of Missoula to achieve 100 percent clean electricity use by 2030.

County officials extended the interim zoning for another year in 2020 before adopting the same regulations as a permanent zoning amendment in March 2021 (§1.04

& §5.05). According to Dixon, the Bonner mine ceased operations during the interim zoning period, but not because of the county's zoning. It declared bankruptcy two days after the "Black Thursday" Bitcoin crash in March 2020, leaving the tribal-owned independent power producer that provided its electricity with a $3.7 million unpaid bill (Rozen 2020).

CONCLUSIONS

The rapid rise in data center development has coincided with dramatic decreases in the costs of producing solar and wind power. This, in combination with a growing trend toward clean power commitments among technology companies, has blunted some of the climate impacts of an increased demand for data storage and processing.

The increased digitalization of life virtually guarantees that data centers will continue proliferating in strategic locations across the country (Gomez and DeAngelis 2022). Soon, communities may start seeing a sharp increase in interest in very small edge data centers that could fit in underutilized commercial spaces or even be collocated with other telecommunications infrastructure, such as small cell facilities, in public rights-of-way (Sowry et al. 2018).

The future of cryptocurrency mining facilities is less certain. Bitcoin and other energy-intensive cryptocurrencies are facing social pressure to transition to more energy-efficient transaction verification methods, and several existing cryptocurrencies already use these methods. However, we are still at the very beginning of the cryptocurrency story. While this form of currency currently exists primarily as a speculative investment vehicle, this could change rapidly if valuations stabilize and large numbers of goods and service providers accept cryptocurrencies for payment.

Not every community will see the value in defining data centers or cryptocurrency mines as distinct uses in their zoning codes. Nevertheless, doing so can give local jurisdictions a leg up when it comes to signaling preferences to developers and operators and minimizing or mitigating potential adverse impacts.

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6

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ZONING PRACTICE

Unique Insights | Innovative Approaches | Practical Solutions

Making Drive-Thrus a Boon, Not a Bane

In This Issue:

Making Drive-Thrus a Boon, Not a Bane

By Dwight Merriam, FAICP

In considering drive-through service as a planning and zoning issue, we might look back to the first zoning case to make its way to the U.S. Supreme Court, *Euclid v. Ambler* (1926), where the court in upholding zoning famously said: "A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." Most zoning is ultimately contextual. So too it is with drive-throughs, which are exceedingly beneficial for everyone in some locations, and utterly destructive to some objectives of planning and zoning when they are allowed in the wrong places. The challenge, sometimes a conundrum, is to decide when they are appropriate and, if so, how to best regulate them, leveraging the benefits and avoiding the burdens.

This issue of *Zoning Practice* explores how good planning and zoning can respond to increased demand for drive-through service since the onset of the COVID-19 pandemic. It begins with a quick look back to the days of car-hops and their effects on subsequent drive-through services. Then, recognizing how the pandemic has affected a sea change in service, it looks at how drive-through and related services have evolved and where they may go, with good planning and regulation, for the benefit of all.

A prototype Taco Bell drive-through in Brooklyn Park, Minnesota (Credit: Taco Bell Corp.)

The Drive-Through Genome Project

We most often think of inertia as uniform motion in a straight-line, but it is equally the resistance to change. Zoning is often like that, evidencing a resistance to change and reflecting irrelevancies of the past. If we could ever have a genome project in zoning, including drive-throughs, we doubtless would find that current regulations and the difficulties we have in deciding where and how they might be used can be found in the DNA of zoning from the 1950s, when carhops were the rage. They probably date to the early 1920s, the term reportedly derived from bellhop. The film, *American Graffiti* (1973), set in 1962, featured Mel's Drive-In on South Van Ness in San Francisco, though the movie was set in Modesto, California. For a diversion from the seriousness of planning and zoning for drive-throughs, you may wish to watch **Bob's Big Boy 1947 training film for carhop service**, including some views of parking layout and queuing that only a planner might appreciate.

A mid-20th century drive-in restaurant (Credit: Getty Images)

Ryland Heights, Kentucky, for example, reflects that carhop history by defining a drive-in eating establishment to be inclusive of carhops: "A restaurant where consumption of food is encouraged in a vehicle on the premises, where food is provided by 'car-hop' or self-service, with or without incidental sit-down and carry-out facilities" (**§7.0)**.

The Pandemic Push

Reference to carhops continues today and has had a rebirth in the response to the pandemic, as communities sought ways to increase flexibility in food service and retailing, generally, to provide social distancing and a contactless experience. Bellevue, Kentucky, is illustrative in recently adding a new reference to car hops with this change to its regulations:

> DRIVE IN. An establishment offering food and beverages ~~which are sold within the building, or to persons~~ where the consumption is encouraged while in ~~motor~~ a vehicles on the premises. *Food is generally provided by "car-hop" or self-service.* ~~in an area designated for drive-in or drive-thru service, and for consumption on or off the premises. Food and beverages are served in disposable containers~~. [emphasis added] (**Ordinance No. 2021-06-05**)

It is hard to overstate what the pandemic did to promote drive-through service. In March 2020, two months after the first case of COVID-19 in the U.S., Wendy's reported that 90 percent of its sales were drive-through (Coley 2020). Restaurants across the country "pivot[ed] to an old-fashioned carhop model," as one report on what a 93-year-old owner of a restaurant had to do to keep open during the pandemic in Cloquet, Minnesota (Hollingsworth 2021). The decision to go to other service models was often not voluntary. One restaurant, eight months into the pandemic, was ordered to shut down and defied the order, had its liquor license suspended, and incurred fines, only to switch to delivery service and a carhop model to escape being closed (Kurylandchick 2020).

The changes from inside service to carhops, drive-through, drive-up, and carry out was widespread, including chains like Steak 'n Shake, Bob's Big Boy, and White Castle. As one restaurant manager put it: "A lot of our regulars are older people who want to be safe… Even after COVID ends, we're going to keep doing it..." (Kim 2021). It is this resurgence in service to cars, particularly from locations that had not previously offered drive-up or drive-through, that now impels the interest in determining how to provide those advantages to consumers, while preventing the nuisances that these services sometimes cause. Alan Hess, an architect who wrote *Googie Redux: Ultramodern Roadside Architecture*, believes we can use the drive-in experience from more than half a century ago to solve current problems:

> It had a purpose, and still has a purpose. If out of this we can gain a new respect for the automobile, which in many ways has been a scapegoat for the demise of cities and communal living, we will have an "old" tool that we can use in a new way to solve problems we had no idea we were ever going to face (Kiniry 2020).

Floating Zones and Mapped Overlays

Walkability and drive-throughs do not mix well in many situations. Driveways in and out endanger pedestrians and cyclists and create some commercial sprawl by consuming frontage. They can coexist with careful site planning and site-specific review, review that provides the greatest discretion for the local government, the applicant, and other stakeholders (Davis 2016).

The best approach may be a floating zone just for drive-through, drive-up, and take-out service. With a floating zone, a concept plan is reviewed, and then a purely legislative, policy decision is made to allow the zone to descend and apply to the site. Courts have held that the tired "spot zoning" claim does not apply to small-area and even single-lot floating zones, in part because the standards can apply to other parcels (Vasser 2021; McCarthy 2006). The applicant's concept site planning costs are small, making them more willing to make modifications. Courts almost always defer to legislative decisions, less so with administrative decisions like special permit or conditional uses. All around, even though it may seem complicated, which it is not, the floating zone is nearly perfect for the drive-through and related uses.

The best approach may be a floating zone just for drive-through, drive-up, and take-out service.

The "secret sauce," however, that will make the floating zone a tasty addition to the regulations is found in the criteria for where the floating zone can land and what criteria are applied in making that decision. That takes a lot of hard thought. Have in mind that 1974 Burger King jingle, "hold the pickles, hold the lettuce, special orders don't upset us." Make each drive-through a special order, applying the locational and decisional criteria that you carefully thought out in advance. Consider testing those regulations, before you enact them, by trying to apply them to sites throughout the community. Do some role playing. It can be fun, actually, but it also will help surface problems, both procedural and substantive, with your draft regulations. Not many planning bodies do this, but it can be highly effective.

Another approach, though somewhat less desirable because it comes with less discretion, might be a fine-grained overlay zone coupled with a conditional use. With the overlay zone, the underlying zoning remains, and it enables additional regulations to be applied in subareas on top of the existing zone.

Most regulations permit drive-throughs, conditionally or otherwise, in an entire zoning district. That leaves the door open to applications for drive-throughs where they are not appropriate. It is better to take a hard look at where they can work and make that an overlay. If using the floating zone, the criteria for landing the floating zone can use an overlay to limit the areas where applications are permitted. It does not approve the floating zone in advance, but it makes a clear statement as to where they might be possible.

Two strategies might help in enabling some drive-through service along pedestrian-focused streetscapes. One is not a drive-through at all, but drive-up, where curbside service is allowed with people delivering goods to a vehicle along the curb, typically as one form of "buy online pick up in store" (BOPIS) service. Add that to your book of planners' acronyms, and impress your friends. BOPIS, which is less expensive for retailers than drive-through service, requires short-term parking. This avoids curb cuts and is practical today with smartphone ordering. Some measure of how digital sales have increased just recently can be seen at McDonalds, where digital sales in its six biggest markets are up 60 percent in just one year, totaling over five billion dollars and 30 percent of sales (Maze 2022). The Harvard Business Review reports that, one year into the pandemic, retailers offering curbside pickup had jumped 44 percent and 40 percent of Americans want to continue curbside pickup, BOPIS, and delivery (Ketzenberg and Akturk 2021). The challenge is to provide for sufficient curbside space to meet the need and to avoid double parking during high volumes. There was widespread local experimentation during the pandemic, and much can be learned from that in fashioning local drive-up standards.

The other strategy in areas where you need to protect walkability is to plan for multiple, adjoining sites to share entrance and exit drives to reduce curb cuts. This is typically done with abutting commercial-use parking lots, as in Zebulon, North Carolina: "Parking lot connections shall join parking lots on two or more different lots… A parking lot connection shall be included on at least two sides of a lot except when conditions prevent connections …" (**§5.1.8.D**). For this to work, there must be pre-planning of how separately owned properties might connect through cross-easements or some form of association.

A bank in Portland, Oregon, with a dedicated bike-through lane (Credit: Richard Drdul / Flickr)

A Proposed Regulatory Framework

The same issues appear across the full range of drive-through regulations. What differentiates them are the standards to be applied, which vary greatly. Here is a rough outline of what might be in a regulation, but it is by no means a model. One size does not fit all.

Purpose

Start with a statement about the purpose. This is visioning to a degree. Think what you want to accomplish with drive-through service. Maybe something like: Drive-through service is enabled in appropriate locations to improve service to customers, permit people with disabilities to have equal access, protect the public from contagion, and promote economic development.

Salt Lake City is more specific (§21A.40.060.A):

> Purpose: The regulations of this section are intended to allow for drive-through facilities by reducing the negative impacts they may create. Of special concern are noise from idling cars and voice amplification equipment, lighting, and queued traffic interfering with on-site and off-site traffic and pedestrian flow. The specific purposes of this section are to
>
> 1. reduce noise, lighting, and visual impacts on abutting uses, particularly residential uses;
> 2. promote safer and more efficient on-site vehicular and pedestrian circulation; [and]
> 3. reduce conflicts between queued vehicles and traffic on adjacent streets.

Definitions

Much of any regulation is found in the definition of what is regulated. A typical definition of *drive-through service* is like this one from Brunswick, Maine (§1.7):

> Any structure through which a product or service is provided directly to a customer seated in a motor vehicle including, but not limited to, take-out or pick-up windows, banking terminals, automatic teller machines and other facilities commonly referred to as drive-up, drive-through, or take-out. This definition excludes gasoline service stations, car washes, drive-in theatres, and drive-in restaurants where orders are taken and food delivered to a motor vehicle that remains in a parking space.

This definition suggests the range of drive-through uses and expressly excludes carhops. It does not acknowledge curbside service and BOPIS. For a more holistic view of curb functions, see San Francisco's ***Curb Management Strategy*** (2020) and guidance from the Boston Region Metropolitan Planning Organization (2019; 2022).

With nearly all zoning regulation, the definition is key as to what is in and what is out. Spend a good part of your time here defining what you mean by drive-through, drive-up, walk-up, BIPOS, carhop, and so on.

Applicability

Will your regulations include only new construction, or also rebuilding or replacement of existing drive-throughs and alterations to add new drive-through service? If there is existing drive-through service, it might be prudent to require as a condition of approval that there be a review when the floor area of the building serviced is expanded, say by 25 percent or 1,000 square feet, as that will likely increase traffic at the drive-through.

Submission Requirements

What will your regulations require applicants to submit before final approval? Important elements of the site plan are a parking and circulation plan, driveway locations, and placement of audio equipment. An on- and off-site litter cleanup plan, with a schedule and map, are worth considering. Almost aways a traffic study by a qualified person, usually a professional engineer, is required. The traffic study, based on the specific identified use of the property, should describe peak hours of operations, volume of customers per hour, stacking space for anticipated volume of drive-through vehicles, turning movements, roadway capacity, and the level of service of nearby streets.

Building Design

Canopies for service windows can have a substantial visual impact. Regulating color and how many colors, where it is permitted by law, might be included, as well as prohibiting corporate colors and patterns on the canopies which are ersatz signs. Drive-through facilities, including windows and other related features, should be architecturally compatible with the building and the existing and planned streetscape.

Access

The total width of access lanes in and out should be limited, something in the order of 25 feet, unless a turning lane is required.

Typical regulations provide for accessway width, often 10 feet, and minimum turning radii of 10 feet. Sometimes it is specified that the width of curved segments of the stacking lane be 12 feet.

Specify that drive-through lanes to and from drive-through windows and order boards shall not obstruct on-site vehicular traffic flow to and from required parking and loading spaces or other driveways providing ingress and egress into and within the site. Sometimes, regulations may require entrances and exits be separated by some distance, say 25 feet, from abutting properties. That may foreclose drive-throughs at some sites. Using the floating zone approach could allow more flexibility in all the dimensional standards by offering suggested, but not mandated, design requirements.

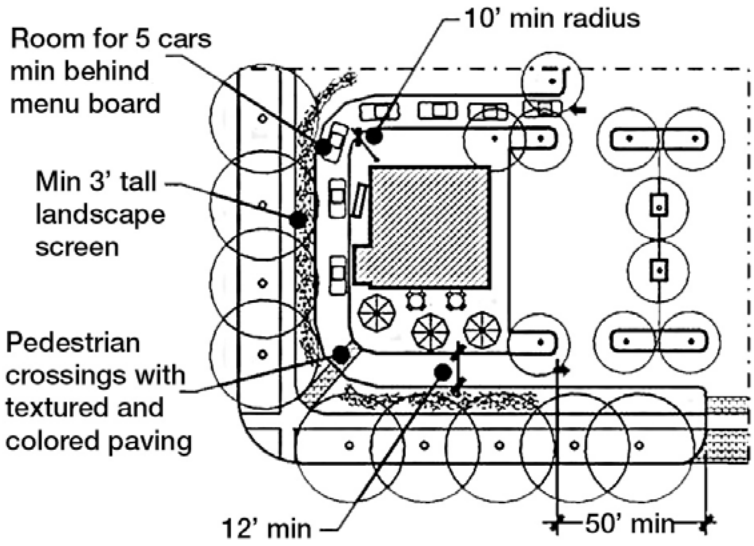
Each entrance to, and exit from, a drive-through lane should be clearly marked to show the direction of traffic flow by signs and pavement markings or raised curbs.

To limit damage to buildings in the vicinity of drive-through facilities, a minimum of 10 feet of clear height may be required for the drive-through lane with bollards located adjacent to drive-through windows to prevent damage to the building from vehicles.

As noted in the context of drive-throughs on walkable streetscapes, where possible the design should include joint-use and cross-access connections, even where a present connection is not feasible, just as would be done with a temporary cul-de-sac and stub road. There are no obvious standards for how long that unused connection might be, but some limitation is reasonable. The accessway need not be constructed with the current development if a physical connection is impossible at the time, but the approval should require construction when joint use or cross access is feasible.

Landscaping

Typical regulations may require a landscaped strip between the access drive and parking and screening of the of the access drives from the roadway. It is difficult to be highly specific about landscaping because site design for drive-throughs varies greatly.



Elk Grove, California's zoning code includes an illustration of its landscaping requirements for drive-throughs (Figure 23.78-1) (Credit: City of Elk Grove)

Stacking

This is perhaps the hardest standard to settle on. Frankly, it is a crapshoot. The objective is to keep vehicles from backing up onto the street, but even with a traffic study, it is a guessing game. Some regulations measure stacking length in numbers of vehicles, but how long is a vehicle with a couple of feet front and back for spacing? A Mini Cooper is 12.9 feet, a Ford Super Duty LWB Crew Cab is almost twice as long at 22.2 feet. The best approach may be to have a single total length for the queue. Queue lengths vary by uses in some regulations.

The problems in establishing the "right" stacking length are many. There is not much data by uses. The size of the use matters in how many vehicles will be in line. How popular the destination may be is unpredictable. [I once got stuck in a line down the street with police directing traffic when my then-young son talked me into taking him to Connecticut's first Sonic restaurant and gave up after an hour.]

In 2022, a wildly popular Chick-fil-A in Santa Barbara, California, had such a backup that the street was blocked every day for 70 to 91 minutes, causing the city to consider declaring it a public nuisance (Lee 2022). That was avoided by a traffic

management plan addressing employee parking, not allowing truck deliveries during peak hours, a widened driveway, and a new third lane for waiting customers (Hayden 2022).

The takeaway from these bad experiences is to plan for the worst: contingency plans for traffic control at the opening of the store; required expansion of the stacking, if it proves necessary, with design built into the site plan; escalating penalties for back-ups; requiring the operator to engage off-duty police officers to direct traffic if necessary; and a clear understanding that the drive-through will be lost, or at least temporarily suspended, if there are problems with back-ups.

Required queue lengths are minimums. Extra-long required queue lengths are wasteful. The operator can make the stacking longer if they think it is necessary. If they elect to do the minimum and can defend it with the traffic report, then they must bear the burden of underestimating.

Stacking lengths are often in the range of 120–160 feet for restaurants and 80 feet, more or less, for retail and banking. Elk Grove, California, bucks the trend a bit by requiring 180 feet for *drive-up windows and bank tellers*, while going to 60 feet for *nonfood and/or nonbeverage businesses* (§23.78.030.A.2).

Regulations may provide for decreasing or increasing the recommended length based on a traffic report by a professional engineer. The decision to modify requirements for queuing, and perhaps other design requirements, should be based on written findings of fact that the alternate design, given the characteristics of the site, will be equally or more effective in protecting on- and off-site pedestrian and vehicular traffic safety and minimizing traffic congestion.

One solution to the conundrum of site- and use-specific differences might be to have a preapplication meeting with the applicant or even a two-step permitting process to establish acceptable stacking and access design based on a preliminary traffic report before the full application is prepared for the development. The scale of the development and its configuration is driven in large part by the need to handle the drive-through, and bifurcating the approval may facilitate better design and ultimate approval. It is not in anyone's interest to have to deny a fully engineered site plan over a dispute about stacking length.

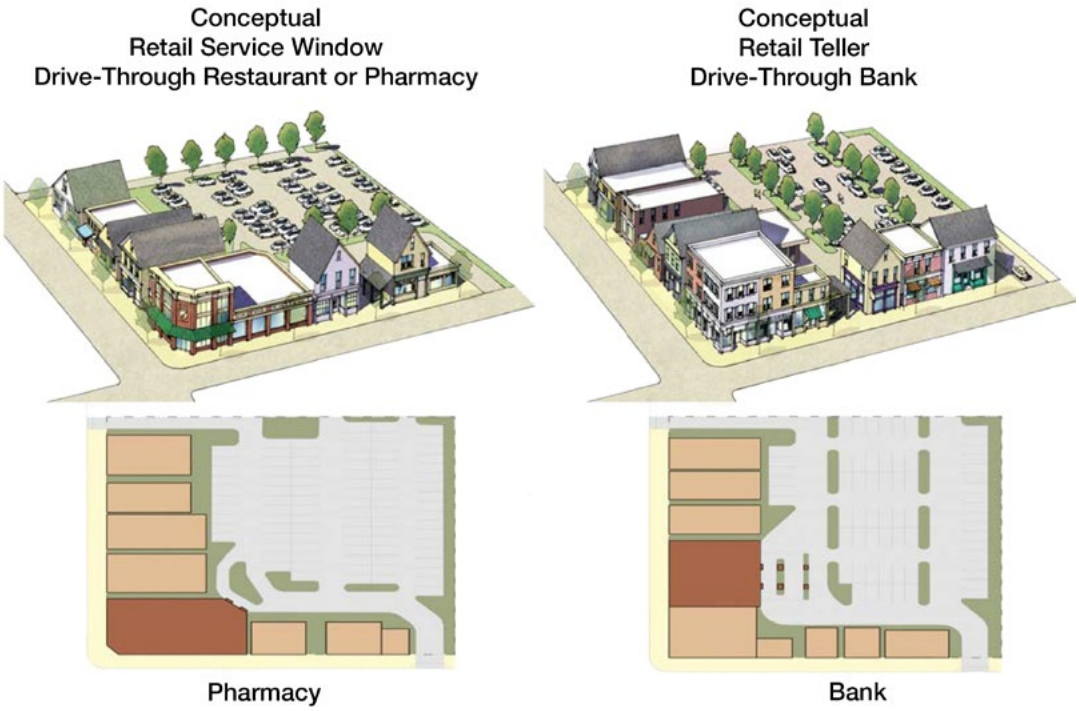
Stacking necessarily requires knowing where it starts and ends. Windows and menu/order boards should be placed as far to the rear of the building as possible to increase available stacking. The starting point measurement is often an offset of some distance, say 25 feet, from the curb line or, if there is no curb line, to the edge of the sidewalk if there is one, and otherwise to the edge of the street pavement. The end point is the pick-up window.

Walk-up windows might be encouraged, not just enabled, in the regulations or even mandated, especially in areas considered most walkable and where people are more dependent on walking and cycling.

According to David Sullivan, U.S. Manager of Traffic and Transportation Planning for SLR, operators should place the order board far enough behind the pick-up window to ensure it does not constrain service. For example, if it takes 30 seconds to place an order and two minutes to fulfill an order, the order board should be about four cars from the pick-up window.

In some settings where preservation of the streetscape is of special concern, it may be advisable to mandate that the service window be at the back of the building and that no part of the accessway be used for queuing. A graphic can help.

Importantly, the queue space should not interfere with the safe use of the required parking spaces and their required drives, interior pedestrian and other circulation, and the accessway from any public street. However, Sullivan notes that it may be okay to block employee parking or trash storage areas if access to those areas is not essential during peak drive-through usage periods.



Standish, Maine, includes examples of pedestrian-friendly site designs for drive-throughs in its Form Based Code Village Districts regulations (§181-7.1) (Credit: Town Planning and Urban Design Collaborative / Town of Standish)

Noise

Those loudspeakers at the order windows can be a problem. To reduce the potential nuisance, regulations may include a setback of order windows from residential properties, say 40 feet. Outside speaker use might be prohibited during certain hours, but that would effectively shut down the business during those hours. Hours of operation, of course, is an important consideration as many drive-through restaurants are now open late and even 24/7. Outdoor loudspeakers for any drive-through window might be limited to a noise level below 50 dB at the closest property line, nearest building of a separate use, or a public sidewalk off-site.

Lighting

There is nothing special about lighting with drive-throughs, but generally property owners and regulators are not doing the best job possible with lighting. It is most often too much and, more recently, too harsh with LED lighting. Guidance is available in the **Outdoor Lighting** collection in APA's **Research KnowledgeBase** and in a *PAS Memo* titled "**the Future of Outdoor Lighting**." In developing new drive-through regulations, it might be timely to consider revamping lighting requirements.

Walk-Up and Bike-Up Service

But what about pedestrians and cyclists? The safety issues for people on foot and on bicycles using vehicular lanes would seem to preclude joint use, but Portland, Oregon, thinks otherwise (**§33.224.070**):

> When a drive-through facility is open and other pedestrian-oriented customer entrances to the business are unavailable or locked, the drive-through facility must serve customers using modes other than a vehicle such as pedestrians and bicyclists.

Salt Lake City enabled joint use by cyclists in 2014, only to have the state legislature enact a law the next year prohibiting local governments from requiring a business to "allow a person other than a person in a motorized vehicle to use the drive-through service" (**§10-8-44.6**).

What can be done? Provide for them expressly in the zoning regulations as Madison, Wisconsin, does by authorizing a *walk-up service window* as a conditional use when located within 10 feet of a public right-of-way (**§28.151**). Many ordinances permit walk-up automated teller machines, but few allow other services.

Walk-up windows might be encouraged, not just enabled, in the regulations or even mandated, especially in areas considered most walkable and where people are more dependent on walking and cycling. Incentives might be offered, such as modest increase in lot coverage or building floor area, excluding them from setbacks, or a partial tax abatement for a few years. Waiving application fees for the addition of walk-up/bike-up windows might be a good idea.

Businesses always have the right to make their own decisions on service to walk-ups and cyclists. Reach out to them. Offer some design solutions. Honor the ones who do the right thing. Promote the advantages: they deter crime with more "eyes on the street," they are interesting and promote walkability by making the street more pedestrian friendly, and they are a great convenience for shoppers who need not walk into a store to be served with the added benefit that they preserve the opportunity for social distancing that many continue to find is essential to their being out in public (Malouff 2012).

Conclusions

We can learn much from the long history of drive-in and drive-through service, particularly in the context of the recent pandemic experience. The public wants it in all its variations, needs it, and expects to continue to use it. The challenge is to plan for these new and evolved types of service and to find way to make sure they work on individual sites. The effort is worth it. The public's interest will be served, economic development and redevelopment promoted, walkability protected and enhanced, and public nuisances avoided. That is what good planning is all about.

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Dwight Merriam, FAICP, a lawyer and a land-use planner, is a Fellow in the American College of Real Estate Lawyers, Past President of the American Institute of Certified Planners, and Past Chair of the ABA Section of State and Local Government Law. He has published over 200 articles and 13 books, including co-editing the treatise *Rathkopf's the Law of Zoning and Planning*. UMass BA (cum laude), UNC MRP, and Yale JD. www.dwightmerriam.com

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Caveat Lector

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THE 2023 ZiPLeRs:
THE TWENTY-NINTH ANNUAL ZONING AND PLANNING LAW REPORT LAND USE DECISION AWARDS

Dwight Merriam*

The 2023 ZiPLeR Awards:

- World's Biggest Cover-Up Award
- Half-Baked Zoning Enforcement Award
- Working to Transform the Neighborhood Award
- What the Hey, HOA? Award
- Let Me Show You How It All Stacks Up Award
- Zoning Made Me Do It Award
- Zoned Out Award
- Retail Run Amok Award
- Going Out on a Limb Award
- Proud Boys Not Welcome Award
- INCOMING! Award
- Bigger Is Not Better Award
- Ultimate Enforcement Remedy Award
- Zoning Definition of the Year Award
- Fungus Amongst Us Award
- You Actually Look Better in Drag Award
- Prurient Zoning Award
- Informal Salary Adjustment Award
- NBA NIMBY Award
- You Can't Clown Around With Freedom of Information Law Award
- Dress for Success Award

What Are the ZiPLeR Awards

The idea for this annual review of mostly zoning cases came from the frustration and depression felt by some that they alone had the dumbest matters and there couldn't be anything worse.

Our job became finding the worst and it was easy. Just scanning the media revealed incredibly foolish and truly unbelievable land use misadventures all over.

We collected those, many coming by nomination from our vast network and international staff. The nominations then go to the International ZiPLeR Awards Committee, which along with the Research Department, spends weeks poring over the nominations, rejecting in the first round about 80% of them and then from the remaining 20% selecting just the few that you see here. It's a highly selective process and people have sometimes spent their entire working lives just trying to get a nomination, never mind the award.

The culmination of the year's activity is the Grand Gala to which you are all invited.

The ZiPLeR Awards for some may be an "acquired taste," like poi, haggis, kimchee, and rocky mountain oysters. But apparently enough people have acquired it so that it has continued these 29 years. Some critics of the ZiPLeR Awards believe that it may have slipped into the goblin mode.

"Goblin mode," you say? It's a term that probably grew out of the pandemic and it was chosen as the 2022 word of the year,[1] announced early in 2023 after over 300,000 people cast their vote. It now joins the English language along with previous winners such as "vax" in 2021, "climate emergency" in 2019, and the insanely popular "selfie" which first entered our language in 2013.

Goblin mode is described as: "a type of behaviour which is unapologetically self-indulgent, lazy, slovenly, or greedy, typically in a way that rejects social norms or expectations." It first appeared in 2019 on X, when it was known as Twitter. The Guardian says that the "Goblin mode is like when you wake up at 2am and shuffle into the kitchen wearing nothing but a long t-shirt to make a weird snack, like melted cheese on saltines."

The International ZiPLeR Awards Committee considers the pseudo-intellectual characterization of the ZiPLeR Awards as something in the goblin mode to be more of a compliment than a criticism. Just as you can buy "Birds Aren't Real" T-shirts from that important movement[2] with which the ZiPLeR Awards enjoys a strategic alliance, ZiPLeR Awards at the annual Grand Gala will be unveiling its "I'm in Goblin Mode with the ZiPLeR Awards" T-shirts.

And by the way, Oxford may have its word of the year, but the Washinton Post reports on another word of the year, “FAFO”,[3] meaning "eff around and find out", a double-edged taunt. It comes from the Nancy Dickinson Writing Center at Augustana University in Sioux Falls, South Dakota.[4]

The Grand Gala

And speaking of the Grand Gala, our inveterate annual ZiPLeR Award banquet venue/menu planners, Trenholm Walker and Andy Gowder of Charleston, South Carolina, have done it again. It is truly unbelievable. Those of you who have followed ZiPLeR awards for over a quarter of a century know how diligent Trenholm and Andy have been in searching the world for the perfect venue, one that epitomizes the sophistication of the ZiPLeR Awards and the savoir faire of the crème de la crème gathered to celebrate the occasion on which we present them. We have been to the smallest restaurants in the world, some of them in the most unusual places from prisons to caves to vice palaces.

2009 – Bluffton, South Carolina, Squat and Gobble Restaurant
2010 – San Diego, California, Carnival Cruise Lines ship SPLENDOR
2011 – Camden, New Jersey, Motel 2
2012 – Grand Forks, North Dakota, home of cream of wheat
2013 – Kuappi in Iisalmi, Finland, smallest restaurant in the world
2014 – all Red Robin locations, satellite links; 3,500 calorie meal
2015 – O.NOIR in Toronto, Canada, where you eat in the dark;
2016 – the Safe House in Milwaukee, Wisconsin, based on a CIA theme;
2017 – Fortezza Medica restaurant in Volterra, Italy, in a high-security prison;

2018 – Eternity Restaurant in Truskavets, in the Ukraine, in the shape of a giant coffin and coffins are lined up along the wall inside the restaurant;
2019 – Robot Restaurant in Tokyo, Japan, with dance performances by robots to techno beats and strobe lights;
2020 – The Big Table, a potluck in Louisville, Kentucky, to maintain social distancing; and
2021 – Andy and Trenholm published THE SPECIAL EXCEPTION COOKBOOK, we cooked from it and shared online.
2022 – Chodovar Brewery & Beer Spa – The Original Czech Beer Spa on the edge of Slavkovský Les, a nature reserve, in the small town of Chodová Planá, Czech Republic (where Trenhom enjoyed the beer bath)

This year, as Trenholm and Andy did their research, they came across a New York Times article featuring the Füde Dinner Experience[5] in the Lower East Side of New York City and they have scheduled us there, appropriately on April Fools' Day.

The Times calls it a "naked vegan dinner party with a bunch of strangers." Perfect. Charlie Ann Max, an artist and model, hosts the dinner which she describes on her website as an opportunity for her guests to come together to enjoy "a liberating space that celebrates our most pure selves, through plant-based cooking, art, nudity, & self-love." It is hard to imagine something that better epitomizes what the ZiPLeR Awards is all about.

The guests will be coming fully clothed, with a variety of outfits from very formal to sweatshirts and jeans, before they head off to the chairs that are sent off to one side of the room.

After getting in the attire for the evening, which of course is no attire at all, they then gather in different groups and begin their conversations. As one of the guests spoke of the attraction of this dining experience: "I think nudity allows us to connect in a different way," she said. "To strip away what the patriarchy has put on us. Like, uber-sexuality or hyper-sexuality."

Ms. Max plans these events principally for women, but men are permitted to attend if they have a previous participant vouch for them and describe in advance why they want to attend. Most applicants are accepted, as Ms. Max describes it, just so long as they are not "some creepy dude that found my Instagram somehow." It doesn't get more exclusive than that, and if the ZiPLeR Awards stand for anything at all they are about being choosy beyond all other endeavors. We will leave you to read the article in full to get more details on the typical Füde Dinner Experience. Our ZiPLeR Awards Grand Gala will be a variant of that, but the dress code will be the same, conveniently avoiding the ambiguity of "business casual" and "cocktail attire."

And, of course, somewhere along the line someone has to do food preparation for the garmentless gastronomy. The New York Times three years ago covered this critical issue in an article entitled "The Joy of Cooking Naked" in which they reported, if only briefly, on the hazards of splattering.[6]

Now for the 2023 ZiPLeR Awards…

World's Biggest Cover-Up Award

The **World's Biggest Cover-Up Award** goes to Vermont Law School for its un-Solomon-like solution to criticism of murals painted by the artist Samuel Kerson in 1993. His murals, two of them 8 by 24 feet, in the Chase Community Center illustrate the time of slavery in America and, as the Second Circuit described it, the work "commemorates Vermont's role in the Underground Railroad, depicting scenes from the United States' sordid history with slavery and Vermont's participation in the abolitionist movement."[7] Initially the murals were well received, but public opinion began to shift a couple of decades ago, and ultimately after the 2020 George Floyd protests, over 100 members of the law school community petitioned to remove the murals.

The Second Circuit quoted from some of the criticism:

> Among the concerns, viewers perceived the Murals as depicting enslaved African people "in a cartoonish, almost animalistic style," with "large lips, startled eyes, big hips and muscles eerily similar to 'Sambos' or other racist . . . caricatures." Beyond these stereotypical representations, some also took issue with the Murals' depiction of "white colonizers as green, which disassociates the white bodies from the actual atrocities that occurred." In light of such complaints, in 2014, VLS installed plaques beside the Murals to explain their "intent to depict the shameful history of slavery as well as Vermont's role in the Underground Railway."

Kerson has described his art:

> The mural is about liberation. All people from Africa who are depicted in the slavery panel, they are liberating themselves … taking the great risk and the brilliant march north saying, 'That star is north of here and by God we are going to follow it!' That is not racist. CNN

From United States District Court for the District of Vermont
Note to editor: https://www.cnn.com/style/vermont-law-school-slavery-mural-lawsuit/index.html image in the public domain so we can use it.

The Law School decided it would just paint over the murals and be done with it. But then they learned about the Visual Artists Rights Act of 1990 ("VARA") protecting art from modification or destruction.

Option B was to have Kerson remove the offending murals. But it wasn't that easy because they were painted directly on the drywall and would be destroyed during removal in violation of VACA.

Only a law school administration, packed with lawyers, could come up with an Option C, which they chose in this case:

> VLS ultimately settled on concealing the Murals behind a barrier of fabric-cushioned acoustic panels, which was installed after the conclusion of the district court proceedings. The barrier consists of three layered components: (1) a thin wooden frame affixed to the wall surrounding the Murals, bordering, but not touching Kerson's work; (2) a wooden overlay frame constructed of thin wooden boards fastened to the outer frame to act as a surface for the acoustic panels, sitting approximately one inch from the face of the Murals; and (3) a series of cushioned acoustic panels mounted to the overlay frame. The

acoustic panels, now fully constructed, are suspended approximately two inches away from the Murals' surface.

But wait a minute, hold your pneumatic nail drivers and your 2x4's, because certainly VACA must protect against a cover-up like that which precludes the public from ever seeing the murals again. Kerson's art will remain just as "missing" as the 13 works of art stolen from the Isabella Stewart Gardner Museum in 1990.[8] The Second Circuit in its 44-page slip opinion holds that VACA does not prohibit the cover up[9] and maybe, just maybe, VLS and the artist will find a way to move the wall:

> This case presents weighty concerns that pin an artist's moral right to maintain the integrity of an artwork against a private entity's control over the art in its possession. On the facts presented here, we resolve this tension by hewing to the statutory text, which reflects Congress's conscientious balancing of the competing interests at stake. As we have previously explained, for the protections that VARA affords artists, the statute does "not mandate the preservation of art at all costs and without due regard for the rights of others." Because mere concealment of the Murals neither "modifies" nor "destroys" them, the Law School has not violated any of VARA's prohibitions. As such, VARA does not entitle Kerson to an order directing the Law School to take the barrier down and continue to display the Murals. That said, nothing in our decision today precludes the parties from identifying a way to extricate the Murals from the Chase Community Center so as to preserve them as objects of art in a manner agreeable to all.

The ZiPLeR International Awards Committee was, in a word, gobsmacked by the whole affair. Yes, gobsmacked. Why? Because the easiest and right thing to do, especially given the differences of opinion and the need for people to make their own judgment as to the art,[10] is to have a QR code on that wall with brief text as to the story of the mural behind it and invite people to click through on their smartphones and view the art…if they wish, …warning the potential viewers that it has been found offensive by some.

A similar controversy over a mural occurred when the new Idaho Law and Justice Learning Center opened in the Ada County Courthouse and former state Capitol Annex in 2015:

> BOISE - The University of Idaho will keep two murals inside the old Ada County Courthouse covered for the grand opening of its new campus in July.
>
> KIVI-TV reported the murals depicting white settlers lynching an American Indian is part of a large painting spread throughout the old courthouse. The UI, which is leasing out the building as a satellite campus for its law school, has no interest in keeping the mural on display.
>
> "They're the fevered imagination of a Southern California artist and have no connection to the history of Idaho, and at all levels they're inappropriate," said Lee Dillion, associate dean of the college. "People that are interested in seeing (the murals), we'll make sure they're displayed under controlled circumstances. But otherwise, those two murals will be covered.[11]

What is depicted is not historically correct. There were no reported lynchings of Indians or African Americans in Idaho.[12]

Half-Baked Zoning Enforcement Award

It's not just our friends at VLS who have a mural problem, but so does its northern New England neighbor, North Conway, New Hampshire, where are all across the full length of the building of Leavitt's Country Bakery is a large painting depicting a rising sun and mountain range made up of pastries including "raspberry turnovers, warm cinnamon rolls, and a wide variety of doughnuts" which, it just happens, are available inside.[13] High school students painted the mural last spring, but apparently local officials are not impressed with the art, all 90 square feet of it, which they have found to violate, you guessed it, the sign ordinance.

Insert photograph

https://bostonglobe-prod.cdn.arcpublishing.com/resizer/JW8AwIFFCzp7e-fqNrSqTBUsl90=/1440x0/cloudfront-us-east-1.images.arcpublishing.com/bostonglobe/YWDDYOKXMFFXDJAMQNGZN4GRWI.jpeg

Courtesy the Institute for Justice

The opposition to the town's efforts to enforce its sign regulations has been great, most of to be found on Facebook and in testimony during the zoning board of appeals hearing.[14] Here's one post similar to many others:

> Dawn McHenry
> I applaud Leavitt's Country Bakery for giving the students of Kennett such a unique and wonderful creative outlet for their ART. My high schooler isn't one of the artists who helped make this yet even he is proud to see the work of his peers on display. It breaks my heart to hear the town wants to see this removed. In a society where teens are constantly being painted in a negative light (pun intended 😜) you would think our town officials would be thrilled to have something this beautiful on display representing our community.[15]

The fight to keep the mural continues in federal district court, according to the most recent news.[16] The Institute for Justice is now in as co-counsel. This will be worth watching.[17]

Come on, North Conway, let the students' art remain. Maybe a variance for a term of years?

For now, the International ZiPLeR Awards Committee recognizes North Conway's unnecessary rigidity with the first ever **Half-Baked Zoning Enforcement Award** for the town's failure to recognize the value of this youthful art over the incidental incorporation of some pastries.

And thank you, Jeff Mills, of J.M. Communications for making this nomination.

Working to Transform the Neighborhood Award

And it's not just murals, but other art that has had a tough time with the locals this last year. My goodness, even Transformers statuary has run into opposition.[18] Everyone is wound up today with the perceived threat of Artificial Intelligence, but back in the ancient days of 2007, when the struggle continued between two Cybertronian races, the heroic Autobots and the evil Decepticons, and it came to Earth, we should have seen the future, especially autonomous robots.

Dr. Newton Howard is a Professor of Computational Neurology and Functional Neurosurgery at the University of Oxford and Nuffield Department of Surgical Sciences at John Radcliffe Hospital and a researcher at Georgetown University School of Medicine. He is an aficionado extraordinaire of Transformers, enough so that he paid $25,000 each for two 10-foot metal transformers statues, Bumblebee and Optimist Prime, that he landed in the front yard of his Georgetown $3.75 million townhouse which is next door to his more recently acquired $4.8 million townhouse.

The statuary has become so popular that it is identified on Google maps as a point of interest with 4.9 stars.[19] Says Dr. Howard: "People are at my door every day. It doesn't bother me. I find it to be beautiful that actually people are appreciating things." He's a cognitive scientist and machine-learning expert with patents including "Wireless Network for Routing a Signal Without

Using a Tower" and "System and Method for Automated Detection of Situational Awareness." Transformers fit nicely with his work. And for his Transformers, he is receiving the **Working to Transform the Neighborhood Award**.

Of course, not all the neighbors are of a like mind with Dr. Howard, but he has his supporters,[20] including the biographer, Kitty Kelley (books on Jacqueline Kennedy Onassis, Oprah, and Nancy Reagan), who measures her tenure in the neighborhood by the number of husbands she has had during her time there (two) or since 1977.

> All you have to do is take a walk through Georgetown, and you're going to see gnomes and wrought-iron benches. You'll see cement lions of all sizes. So why should this man be deprived of using the space right outside his front door? Maybe it isn't Picasso, isn't a sculpture by Degas, but I think he's entitled.

Dr. Howard's problem is that he never applied for approval of Bumblebee and Optimus Prime, including from the Advisory Neighborhood Commission and the Old Georgetown Board, given Georgetown's historic status.

The most recent report is that Bumblebee and Optimus Prime have lost with the Old Georgetown Board which has ordered their removal.[21]

<u>What the Hey, HOA? Award</u>

Sometimes the dispute arises out of mere personal expression and even something as trivial as your yard decoration, rather than art. For example, Sean McGarry, who lives in the RainDance[22] community in Windsor, Colorado, decided to decorate his front yard with a festive seasonal display. It started when some unknown person dumped a white porcelain toilet in his front yard. McGarry seems to be an easy-going fellow who takes things in stride: "I'm kind of a really positive person and try to find the best in every situation so instead of getting mad, I thought let's have fun with this thing. The International ZiPLeR Awards Committee is conferring upon him the widely recognized and highly regarded **What the Hey, HOA? Award**.

The next day McGarry found a gold skeleton, hard as they are to come by, and perched it on the toilet seat. Other folks joined in, adding a candle, a magazine, and a toilet brush, evidencing a community spirit we don't find everywhere.

McGarry continued to embellish the display, keeping up with the changing holidays and seasons of the year which included at one point a turkey taking the place of the gold skeleton and the later transformation of the toilet into Santa's sleigh.

Cleverly, he managed to convert the toilet seat itself into a kissing booth for Valentine's Day and we will stop there. Imagine it or go look at the photograph in the reference.

While McGarry was getting ready for what March might require as to the decorations, he received the letter from the homeowners' association's management company informing him that

he was in violation of the rules and that to get into compliance he needed to appear before the architectural review committee.[23]

Part of the controversy is the interpretation of the HOA rules as they might apply to what McGarry has been creating on his front lawn:

- Figurines, lawn ornaments or other displays may not be mounted on roofs or located outside of lot fences
- Sensitivity to light levels should be applied when installing decorative holiday lighting.
- Exposed spotlights are prohibited.
- Decorations for any other holiday may be displayed no more than two weeks prior to the holiday and must be removed within one week following the holiday.

The ZiPLeR Research Department has taken a deep dive and come up with the entire set of HOA rules that you may inspect yourself and draw your own conclusions as to whether the decorated toilet is verboten.[24]

The HOAs are taking over the world. They regulate in many ways more extensively and more strictly than the government and, because they are not governments, they are beyond the reach of some constitutional protections, such as freedom of expression and due process. The proliferation of HOAs ought to be of concern. There are over 351,000 HOA's, with 73 million people living in homes subject to the controls of HOAs. That is over 53% of all households in America. About 8,000 new HOAs form each year and 62% of newly constructed homes are part of HOA communities.

How many local land use agencies even look at the HOA documents when approving residential development? Of course, it's not just about people like McGarry and decorated toilets, but more seriously about the legally enforceable exclusion that comes with many of the standards that preclude affordability, such as exclusively single-family use, large lots, and large minimum floor areas. Most of the covenants are in perpetuity foreclosing orderly redevelopment to higher densities The place to start might be to review and critique the HOA documents as part of the development approval process, assessing their long-term impact on the community.

One state, Maryland, has limited the HOA's authority over the installation of some low impact storm water techniques, such as xeriscaping and rain gardens.[25] In California, the owner of an affordable housing development, when faced with existing covenants that prevent development at higher density, may apply to modify the restrictions to increase the number or size of residences that may be built or the number of persons that may reside on such property.[26]

Let Me Show You How It All Stacks Up Award

As to art being in the eye of the beholder, one of this year's two architectural awards goes to a yet unidentified homeowner on Diane Circle, Indialantic, Brevard County, Florida, who cleverly stacked up two shipping containers, one above the other, to create the ultimate man

cave. He has been ordered to take it down within 10 days or suffer a fine of $1000 a day.[27] He will receive the **Let Me Show You How It All Stacks Up Award**.

The complainant was Bluma Bofford (no, this is not a fictitious name to protect the actual complainant). Apparently, she is not opposed as such to having a man cave made from shipping containers because she is quoted in the news reports as saying, "You're only allowed to have one container in the back for storage purposes. That's all code allows you to do." Let's call it the "one container" rule. As an added service for our loyal ZiPLeR Award readers, the ZiPLeR Research Department has located an excellent video on how to turn your container into the perfect man cave.[28]

Zoning Made Me Do It Award

The second winner this year is Bjarke Ingels Group ("BIG"), Vancouver, British Columbia, for their design of a 500-unit, 490-foot-high residential tower that met a trilogy of zoning requirements: distance from the street, about 30 meters (about 100 feet) from the Granville Bridge for that portion of a building below 30 meters, and avoidance of shadows.[29] It took 10 years and 100 of BIG's people to design the building. BIG may have created a new field of architecture: contortionism. The building comes up out of the small lot and at 30 meters begins to step out a total of 80 feet. The floor plates are larger towards the top and it is asymmetrical because the setback from the bridge does not apply to all sides of the building.[30]

Cables run through its walls to tension it, connecting with a 2'x3' concrete core, not only because the building is in a sense unbalanced, but because this is a seismically active area.

Illustration here
https://assets.bwbx.io/images/users/iqjWHBFdfxIU/idGyH08LNfXs/v1/2000x1447.jpg
[awaiting copyright release]

For its spectacular building, BIG receives the **Zoning Made Me Do It Award**.

Zoned Out Award

The International ZiPLeR Awards Committee is always on the lookout for state-of-the-art zoning regulations, and sometimes it stumbles upon regulations that might be a tad bit short of state-of-the-art, as the Committee may have found in Seattle, Washington, where one wag has calculated that the city has 285 zoning districts.[31] Assuming that is accurate, the International ZiPLeR Awards Committee is pleased to give the city of Seattle the coveted **Zoned Out Award**

Of the 285 zones, 88 are used just once, and 50 others only twice. Those 138 zones cover a total area in the city of about 2.2%.

Here is an illustration of some of those single use zones:

https://www.theurbanist.org/wp-content/uploads/2023/09/Bitter-Lake-Zoning-scaled.jpg

Retail Run Amok Award

The **Retail Run Amok Award** goes to Dollar Tree and Dollar General which are receiving pushback in all corners of the country for the damage they are doing to local retailers. The current opposition to the dollar stores is reminiscent of that with Walmart decades ago, but then part of it was driven by labor issues and Walmart was limited to some extent by its large format such that it did not go directly into small communities as the dollar stores have. The opposition back then was also in large measure brought by the large grocery chains that Walmart threatened, not the small-town grocers, even though many of them succumbed.

Since 2019, more than 70 proposed dollar stores have failed to get approvals and many places are adopting moratoria and imposing permanent restrictions on them because of their impacts.[32] [33]

Dollar store workers are paid less than most others in retail with about 20% of Dollar General employees being paid less than $10 an hour. Dollar General workers making $15 an hour or less are fully 92% of the employees The average hourly wage as of this writing at Dollar General is $11.04.[34]

Their impact incrementally, when you add up all those small stores, has been large. In 2021 and 2022 more than one third of all stores that opened in the United States were dollar stores. Nearly 2,000 of those were Dollar General stores. Dollar General has 19,000 stores, more than twice Walmart and Target combined. Dollar General, and Dollar Tree, which owns Family Dollar, in total have 35,000 stores. Troubling is the fact that there is evidence Black communities are more adversely impacted than others.[35]

One salient criticism is the lack of healthy food choices in areas where they are displacing existing groceries and have become the principal or sole outlet. The Center for Science in the Public Interest notes the lack for healthy food and calls for dollar stores to improve access:

> Dollar stores are rapidly multiplying, especially in low-income and rural areas, where larger, national grocers are less prevalent. Dollar stores' shelves are stocked with fewer options than traditional grocery stores, with a predominance of nutrition-poor items like candy, chips, and soda. Healthy food options are limited. To improve access to nutritious foods and beverages, dollar stores should stock more fresh, healthy options.[36]

Shopping comparisons have revealed packaging and pricing that can't be defended:

> While the products seem cheaper, many of the products are packaged in smaller quantities and cost more per unit size. One example: Old Spice deodorant. At Dollar Tree, a 0.8-ounce of Old Spice deodorant costs $1.25, but it's less than one-third the size of the standard size. The same 0.8-ounce stick costs $1.08 or less at Target and Walmart, respectively. A 16-ounce carton of milk is about $8 a gallon, more than quality milk at Whole Foods.[37]

The Center for Science in the Public Interest has a model dollar store ordinance that is by no means an end all, but it may be the place to start in talking about what regulation is appropriate. It includes specific requirements for providing staple foods.[38]

Going Out on a Limb Award

The first ever **Going Out on a Limb Award** goes to the town of Canton, Connecticut, which decided to save a 100-year-old, 80-foot-high sycamore tree from being cut down because that tree had the gall to grow up in the middle of the road at an intersection. You may wish to look at the photograph that is with the cited article so that you will understand what was going on here, but imagine if you will… you're driving down the road and heading to a "T" intersection and right as you get to the "T" intersection ahead of you is a very large sycamore tree in the middle-of-the-road. Maybe this is an idea for traffic calming; it certainly slows people down.

The tree is much loved by the townspeople who didn't want to see it cut down, but it almost was as a result of a report described in the media which noted the safety problems it presented:

> The sycamore, there before the road was built, was slated to be taken down based on memo that states in summary:
>
> -Since 2011 there have been five documented accidents at the intersection where - the tree may have been a contributing factor.
> -The road posed a safety hazard to large school buses, creating close calls.
> -Large vehicles, especially trucks outfitted with snowplows, block the entire southbound lane of Cherry Brook Road to gain a sight line when they attempt to turn off of West Mountain Road.
> -The intersection presents a problem to fire vehicles that must take another route.
> -As the tree grows, so do the firefighting obstacles.
>
> Further, West Mountain Road was built around the tree long before large fire apparatus, public works vehicles and school buses came into service.
> "Liability for neglect or default of maintenance of this intersection falls to the Town if known sight line issues contribute to an accident."

That report seemed the death knell for the sycamore, but the public opposition grew and branched out.[39] The sycamore was saved in the end when the state Department of Transportation altered its plans and will now narrow the roadway from 12 feet to 11 feet and restripe the area to give drivers the sightline that they need.[40]

As a local resident said when the tree was saved: "It gives me faith that our local politicians are actually listening to the citizens of Canton. Don't just blindly follow the government if you feel an injustice is being done. Say something, speak up, peacefully protest. There is strength in numbers."

Proud Boys Not Welcome Award

Check your zoning regulations for paramilitary training as a permitted use. It may be coming soon to your town now that Vermont has banned it after troubles at Slate Ridge.[41] Slate Ridge is, or more correctly has been, a paramilitary training camp run by a controversial former military contractor who set up a shooting range on residential property and purported to train people to handle certain scenarios, such as home invasion, carjacking, and shipboard combat.[42]

The state has made owning or operating a paramilitary training facility a criminal offense punishable by up to five years in prison or a $50,000 fine or both. Vermont joins 25 other states[43] that prohibit firearms training for anti-government paramilitary activity. It may be time to brief your zoning enforcement officers to be on the lookout for this kind of activity as described in the Vermont law:

> (a) A person shall not:
> (1) teach, train, or demonstrate to any other person the use, application, or making of a firearm, explosive, or incendiary device capable of causing injury or death, or techniques capable of causing injury or death to persons, if the person knows or reasonably should know that the teaching, training, or demonstrating is intended to be used in or in furtherance of a civil disorder; or
> (2) assemble with one or more other persons for the purpose of practicing or being taught, trained, or instructed in the use, application, or making of a firearm, explosive, or incendiary device capable of causing injury or death, or in techniques capable of causing injury or death to persons, if the person knows or reasonably should know that the practicing, teaching, training, or instruction is intended to be used in or in furtherance of a civil disorder.[44]

Police and collegiate military training programs are exempt.

The State of Vermont gets the **Proud Boys Not Welcome Award** for shutting them down.

INCOMING! Award

The **INCOMING! Award** goes to the Swanson Meadows Condominium Association in Billerica, Masschusetts, for its members being this year's hapless victims of the worst golfers at the adjacent Swanson Meadows golf course. Last year, the International ZiPLeR Awards Committee gave the **Fore! Award** to a couple in Kingston, Massachusetts, for much the same things…errant golf balls peppering their home and terrorizing their family and guests. We reported then:

> Flying balls shattered windows in their house with such force they sent glass spraying into the next room; the siding on the house was peppered with circular dents, like a battleship in a war zone. Fearful neighbor children wore bicycle helmets when they went out to play, the Tenczars said. "When it hits, it sounds like a gunshot," said Athina Tenczar, 36. "It's very scary." "We're always on edge," added Erik Tenczar, 43. "It's been emotionally taxing on us."

The Tenczars won $5 million, only to have the judgment overturned on appeal.[45]

This time, it is Michael and Mary Coway:

> "It sounds like a gunshot," said Conway, 63, who lives on a cul-de-sac next to the golf course with her husband, Michael, and has spent about $2,000 on repairs. "You're taking your life in your hands when you're out in front of the house."

One of the members of the Billerica Select Board observed:

> "People will say, 'You bought a home next to a golf course.' Well, golfers should play at a golf course — not whoever's hitting these balls," he said, making a dig at the players' skill level. "If someone's hitting balls like that, they should be at the driving range with me. Because it's bad."

Maybe the solution is to provide funding for training the bad golfers. The town manager sent a letter in June to the golf course suggesting changing the course layout, adding warning signs, and perhaps installing safety netting. The residents have already made claims, twice, for insurance coverage for which they were paid and have argued with the golf course over the installation of netting. So far, there is no reported resolution.

One real estate broker advertises the beauty of being right there by the golf course: "Elegant condos at a golf course setting are available at Swanson Meadows, built in 2004. The condos offer views of the golf course and pond and are on a quiet cul-de-sac."[46] Brokers may wish to check their errors and omissions coverage for liability arising out of failing to disclose a material fact, just in case some day a court says they had a duty, or maybe give the buyers bike helmets with their firm logo. Now that's marketing.

Bigger Is Not Better Award

The International ZiPLeR, Awards Committee has selected the Worcester family to receive the **Bigger Is Not Better Award** for its proposal to construct the world's tallest flagpole in Columbia Falls, Maine, as part of a 2,500-acre, $1 billion patriotic theme park. Columbia Falls is way Down East, just southwest of Machias, and 200 miles from Portland.[47][48] Population 530.

The Flagpole of Freedom Park would be 1,461 feet high, which not so coincidentally is 1776 feet above sea level and would be the tallest in the world… by far… several hundred feet in fact. "Flagpole" is actually a misnomer because it will be a multistory building with an observation deck at the top. The park would include all manner of other attractions.

The cofounder of the project, Rob Worcester, proclaims that: "This will be a place that's known as the most patriotic place there is."

The town enacted a 180-day moratorium in March 2023. In August 2023, the moratorium was extended for another six months.[49]

The Worcester family did not get off to a good start. They built some 70 cabins without permits.[50]

Ultimate Enforcement Remedy Award

The **Ultimate Enforcement Remedy Award** goes to District Judge Alex Boyd (Magistrates' courts) Northern Circuit, based at Blackburn Magistrates' Court.[51] The International ZiPLeR Awards Committee had never seen anything like this.

The Punch Bowl Inn in Lancaster, England, was built in the 1700s and was noted for being one of the most ghost-filled pubs in northwest England. Developers purchased the property and demolished the historic building without approval. Their lawyer argued in their defense: "Their intentions were good, irrespective of the prosecution in this court case saying they were reckless."

Judge Boyd didn't buy it. He found the five developers guilty of illegally demolishing the building, ordered them to pay a combined $85,000 in fines and court costs, and directed them to rebuild the pub, brick by brick, exactly as it was before, at least to the extent possible one assumes. He gave the developers one year to rebuild the pub. They will be working with a team of experts to figure out how to do it.[52]

After selecting this award winner, the International ZiPLeR Awards Committee was gobsmacked (can't get enough of that word) to discover that something similar had happened a year earlier in England. The developers tried to pull a fast one: "After being denied planning permission to convert it into 10 flats, and two days before Historic England was due to recommend the pub be granted Grade-II listed status, the owners ordered its demolition."[53]

The local government ordered the rebuilding and it is complete, not exactly brick by brick as with the Punch Bowl, but with the original materials:

> James Watson, the pub protection adviser for the Campaign for Pubs, advised the Carlton campaign. "I never imagined that I would see a planning inspector order a developer to put back what he'd just knocked down, to look exactly as it was. I thought the developer would get a slap on the wrist, a £6,000 fine. But I was flabbergasted – and it has set an incredibly useful precedent. Other planning inspectors will remember it, and so will developers."

By the way, before we go on, you should know that the Oxford English Dictionary says that gobsmacked and flabbergasted mean the same thing: "gobsmacked, adj. Chiefly predicative. Flabbergasted, astounded; speechless or incoherent with amazement."[54]

The developers did a good job in piecing the pub back together, said Polly Robertson, a leading member of the Rebuild the Carlton Tavern campaign: "They have done amazing work," It looks fantastic." But she went on: "I doubt they will be [at the reopening]. The community would eat them alive."

Zoning Definition of the Year Award

The **Zoning Definition of the Year Award**, truly one of the most coveted ZiPLeR Awards, an award that people often work a lifetime to win and still don't get it, goes to the Waxahachie Planning and Zoning Commission. Waxahachie, Texas, as you doubtless know, is the Crape Myrtle[55] Capital of Texas, so designated by the Texas state legislature in 1997.[56] We assume that as to the crape myrtle designation that Waxahachie decided to skip the Latin genus name which would make them the "*Lagerstroemia* Capital of Texas". Doesn't have quite the same ring.

The deciduous crape myrtle isn't native to Texas, which has almost 300 native trees,[57] or North America, but came from south Asia, southeast Asia, northern Australia, and other parts of Oceania and was introduced through Charleston, South Carolina in 1790.[58] The Texas A&M Forest Service has this interesting factoid as to carpe myrtle: "A common - but incorrect - pruning practice of removing the entire top of the tree each winter is called 'crape murder.'" Just another example of the "added value" you get with the ZiPLeR Awards.

As if being the Crape Myrtle Capital of Texas were not enough, Waxahachie is also the "Gingerbread City":

> Waxahachie is also known for architecture. Its abundance of restored historic homes inspired the nickname "Gingerbread City," and the Romanesque Ellis County

Courthouse, built in 1895, is among the state's most visually striking. For Hollywood nostalgia, the Munster Mansion—a full-scale replica of the house from the 1960s sitcom *The Munsters.*[59]

Finally, even with all that, Waxahachie has a U.S. Navy ship named after it, quite an honor. Other cities have had major vessels named after them, such as the USS San Francisco, previously two cruisers and now a nuclear submarine. The USS New York was a WWI era battleship which also fought in WWII and the current namesake is the USS New York (LPD-21), a San Antonio-class amphibious transport dock. Her bow is made of steel salvaged from the September 11 attacks.

The USS Waxahachie, well, was a tugboat in Pearl Harbor, no longer in commission. She sadly served out the end of her useful life for the Navy as a target.[60]

With all that build up, you would think Waxahachie couldn't possibly distinguish itself further, but it has, and the International ZiPLeR Awards Committee is pleased to recognize the city for inking its revised tattoo regulations defining a new sub-type of tattooing as few, if any, communities have. If you are on pins and needles to know more, you can search "restorative tattoo zoning regulation" on any popular search engine and you will discover the first, and only two hits are, Waxahachie.

So right here, when you are most unlikely to ever have it from any other source, are the new definitions:

> Tattoo or Body Piercing Shop Primary - An establishment operated for the principal purpose of producing an indelible design, mark or figure on the human body by scarring or inserting a pigment under the skin using needles, scalpels, or other related equipment. This definition includes the creation or piercing of openings in the body of a person for the purpose of inserting jewelry or other decorations; however, Cosmetic and Restorative Studio (Accessory) or incidental micro-blading activities are not included under this use.
>
> a) *Cosmetic and Restorative Studio (Accessory)* -An establishment that provides permanent or semi- permanent pigmentation into the skin for eyebrows, eyeliner, lip liner/color/blend, blush, beauty marks, hair imitation, microblading or restorative tattoo services performed by licensed professionals that have been trained in the field of corrective cosmetics. Restorative services aim to restore the natural appearance of a certain area of the body or skin, such as areola repigmentation or scar camouflaging. Restorative tattoo services exclude traditional tattoo services, which are provided solely for artistic purposes. A cosmetic and restorative studio may be an accessory use to a tattoo and

body piercing shop, barber, hairdresser or beauty shop.

> *Cosmetic and Restorative Studio (Permanent)* - An establishment that provides permanent or semi- permanent pigmentation into the skin for eyebrows, eyeliner, lip liner/color/blend, blush, beauty marks, hair imitation, microblading or restorative tattoo services performed by licensed professionals that have been trained in the field of corrective cosmetics. Restorative tattoo services aim to restore the natural appearance of a certain area of the body or skin, such as areola repigmentation or scar camouflaging. Restorative tattoo services exclude traditional tattoo services, which are provided solely for artistic purposes. A permanent cosmetic and restorative studio will serve as the primary use and will not be an accessory to another use.[61]

The International ZiPLeR Awards Committee had to look up "microblading" and where else would one go for that other than Cosmo:

> Microblading is a semi-permanent form of cosmetic tattooing. But unlike traditional tattoos, which use a tattoo gun, **microblading uses a blade-shaped tool with a row of tiny, barely visible needles** to create hair-like strokes along your brows while depositing pigment into your skin. The result? Realistic-looking brow hairs that don't wash off for a year or more.[62]

The things you learn in the ZiPLeR Awards issue…

Fungus Amongst Us Award

The **Fungus Amongst Us Award**, we are sorry to say, goes to the Jack Daniel's distillery in Moore County, Tennessee. The International ZiPLeR Awards Committee confers this award as part of its global initiative to improve air quality.

It seems that as alcohol vaporizes from the aging whiskey, the fungus feeds on it. That particular fungus, genus Baudoinia, is named after Antonin Baudoin, who identified it around 1870, during the time he was director of the French Distillers Association and noticed that the walls of distilleries in Cognac, France, were blackened with what he described as a "plague of soot."[63]

That is essentially how residents of Lincoln County, Tennessee, neighboring the distillery have described it, as the New York Times reports: "[S]ome residents have complained that a sooty, dark crust has blanketed homes, cars, road signs, bird feeders, patio furniture and trees as the fungus has spread uncontrollably, fed by alcohol vapors wafting from charred oak barrels of aging Jack Daniel's whiskey."

The owner of a nearby local mansion built in 1900 hosting weddings has sued Jack Daniel's. At least one of the barrel houses constructed near her property was built without the necessary permits. She describes what she is experiencing: "If you take your fingernail and run your fingernail down our tree branch, it will just coat the tip of your finger. It's just disgusting."

The general manager of Jack Daniel's claims that they comply with all federal, state, and local regulations with regard to the design, construction and approval of their barrel houses and goes on to say: "We are committed to protecting the environment and the safety and health of our employees and neighbors,"

The director of technical services at Jack Daniel's claims that the fungus is not hazardous and doesn't damage property but acknowledges that it could be a nuisance: "Yeah, sure. And it can easily be remedied by having it washed off." But she didn't go so far as to offer to power wash any home which has inadvertently come to serve, shall we say, as a petri dish for the fungus.[64]

Others, perhaps more knowledgeable than the Jack Daniel's employee, dispute the notion that the fungus is harmless, at least as to property. James A. Scott, a professor at the Dalla Lana School of Public Health at the University of Toronto, has studied the fungus for over a decade: "The fungus is pretty destructive, and the only way to stop it is to turn off its alcohol supply. It wrecks patio furniture, house siding, almost any outdoor surface. I've seen trees choked to death by it. It is a small mercy that it does not also appear to have a negative impact on human health."

Jack Daniel's is ruling out putting filters on the barrel houses because they claim it affects the taste of the whiskey. Indeed, the liquor that evaporates during the aging process is fondly called "the angel's share."[65]

You Actually Look Better in Drag Award

Is there nothing that can't be zoned in or zoned out? Maybe not, as cities are beginning to amend their zoning and other regulations to prohibit drag shows in their communities as a land use. Dyersville, Pella, and Waukee Iowa, for example, are classifying performances by "male or female impersonators" as adult entertainment or adult cabaret and requiring approvals as such.[66]

The International ZiPLeR Awards Committee is pleased, maybe not all that pleased, to present Gov. Bill Lee of Tennessee with the **You Actually Look Better in Drag Award** for his regrettable initiative in getting his state to enact a law prohibiting drag shows, making it the first state in 2023 to do so.[67] Thank you to Andrea Derwin for the nomination.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 7-51-1102, is amended by adding the following new subdivisions:

( ) "Adult cabaret entertainment":

(A) Means entertainment suitable for mature audiences, including entertainment erotic in nature, and featuring go-go dancers, exotic dancers, topless dancers, male or female impersonators, or similar entertainers; and

(B)Includes a single performance or multiple performances by an entertainer;

( ) "Compensation" means a salary, wage, fee, payment, reimbursement, or other valuable consideration;

SECTION 2. Tennessee Code Annotated, Section 7-51-1102(2), is amended by deleting the second sentence and substituting instead the following:

"Adult cabaret" includes a commercial establishment that features adult cabaret entertainment as a principal use of its business;

SECTION 3. Tennessee Code Annotated, Section 7-51-1102(10), is amended by deleting the subdivision and substituting instead the following:

(10) "Entertainer" means a person who provides:

(A) Entertainment within an adult-oriented establishment, regardless of whether a fee is charged or accepted for entertainment and regardless of whether entertainment is provided as an employee, escort, or an independent contractor; or

(B) Adult cabaret entertainment, regardless of whether a fee is charged or accepted for entertainment and regardless of whether entertainment is provided as an employee or an independent contractor;

SECTION 4. Tennessee Code Annotated, Section 7-51-1115, is amended by designating the existing language as subsection (a) and adding the following as a new subsection (b):

(b) A person shall not provide adult cabaret entertainment for compensation without a valid permit issued by the board pursuant to this part.

SECTION 5. Tennessee Code Annotated, Section 7-51-1114, is amended by adding the following as a new subsection:

(h) A public, private, or commercial establishment shall not allow a person younger than eighteen (18) years of age to attend a performance featuring adult cabaret entertainment.

SECTION 6. Tennessee Code Annotated, Section 7-51-1401, is amended by deleting subdivision (2) and adding the following as new subdivisions:

( ) "Adult cabaret" means a cabaret that features adult cabaret entertainment;

( ) "Adult cabaret entertainment":

(A) Means entertainment suitable for mature audiences, including entertainment erotic in nature, and featuring go-go dancers, exotic dancers, topless dancers, male or female impersonators, or similar entertainers; and

(B) Includes a single performance or multiple performances by an entertainer;

SECTION 7. Tennessee Code Annotated, Title 7, Chapter 51, Part 14, is amended by adding the following as a new section:

A public, private, or commercial establishment shall not allow a person younger than eighteen (18) years of age to attend a performance featuring adult cabaret entertainment.[68]

While they were at it, they shortly thereafter banned gender-affirming care for youths under 18, prohibiting prescribing puberty blockers and hormones and performing gender-affirming surgery.[69] Gov. Lee already got the hat trick of anti-LGBT+ legislation in 2023 because the anti-drag law was Number Four for this kind of legislation in the Volunteer State. Tennessee has distinguished itself among all 50 states in having adopted more anti-LGBT+ legislation than any other state since 1995…count 'em…19 laws as of May 18, 2023; make it 20 with the prohibition on gender-affirming treatment for youths.[70]

With the ZiPLeR Awards, behind very dour development lies a little delight, and maybe some light, and we have that with Gov. Lee, who, it has been discovered, dressed in drag as youth for perhaps some high school tradition of boys cross-dressing to play a football against the girls. You'll have to read the article,[71] but the Governor took a hit for it and tried to dismiss it. As one person commented, his position seemed to be that it's okay for straight people to cross-dress but not those who are non-binary.

Insert photo here. It is in the public domain.

https://media-cldnry.s-nbcnews.com/image/upload/t_fit-560w,f_auto,q_auto:eco,dpr_2.0/rockcms/2023-02/230227-possible-gov-tenn-bill-lee-high-school-image-ac-838p-7f1c06.jpg

Prurient Zoning Award

What are sex businesses and what aren't can cause problems, too. Minneapolis, which receives the **Prurient Zoning Award**, discovered it might be prohibiting a sauna business[72] that only offered a chance to sit and relax[73] because its regulations, from decades ago, lumped saunas in with sex businesses:

Section 3. - 1963 Zoning Code regulated uses.

(a) Purpose. In the development and execution of this section, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the use and enjoyment of adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area. Uses subject to these controls are as follows:

Adults-only bookstores;

> Adults-only motion picture theaters;
> Adult entertainment centers;
> Massage parlors;
> Rap parlors;
> Saunas.
> …
> Sauna: An establishment or place primarily in the business of providing (i) a steam bath and (ii) massage services.[74]

A quick survey by the planning department would likely reveal that not everyone in a sauna is having sex.

Informal Salary Adjustment Award

In what has become practically a perennial award, the International ZiPLeR Awards Committee recognizes Jose Fermin, a Paterson, New Jersey, housing and zoning inspector with its **Informal Salary Adjustment Award** for having accepted bribes from an "unknown conspirator" to assist supplying "Co-Conspirator #1" with fraudulent building permits and other entitlement records.[75]

In the spirit of "if you give someone a fish, they will be hungry tomorrow, if you teach someone to fish, they will be richer forever," Fermin taught Co-Conspirator #1 how to forge the planning director's signature. It looks like Fermin might not be available to receive his award in person at the Grand Gala.

NBA NIMBY Award

The **NBA NIMBY Award** goes to Stephen "Steph" Curry of the Golden State Warriors and the fifth highest paid athlete in the world last year, thanks to the nomination by Diane McGrath. Curry, who has a $30 million abode in Atherton, California, opposes a proposed low-income housing development.[76] He didn't hesitate to say he hesitated to oppose it:

> We hesitate to add to the 'not in our backyard' (literally) rhetoric, but we wanted to send a note before today's meeting. Safety and privacy for us and our kids continues to be our top priority and one of the biggest reasons we chose Atherton as home.[77]

He went on to request that the state build a high fence and plant screening around his property if the project went forward.[78]

You Can't Clown Around With Freedom of Information Law Award

The **You Can't Clown Around With Freedom of Information Law Award** goes to the New City Police Department for protecting the personal privacy of a complainant and keeping her from danger by not releasing 911 call recordings to the person who harassed her. Thank you to Amy Lavine for the nomination, a ZiPLeR Award Instant Winner®. The FOI laws sufficiently

touch and concern planning and zoning so the International ZiPLeR Awards Committee cleared this nomination for an award.

The matter started with the petitioner in the case, Michael Howard, harassing a fellow Walgreens employee by telling her that her hairdo made her look like "Bozo the clown." She felt harassed and called the police, who investigated and did nothing.

Along the line, Howard mailed the image below of the clown to the police, go figure.

Inert image here
clown picture
https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=ePRyqP6kHHTRiPEeoInx_PLUS_w==

Howard sued the police to get the 911 recording of the call by the employee.[79] And the police in turn as respondents to the FOI action in court produced the image as evidence of the contentious nature of the alleged harassment. That was enough for the court to deny the petitioner's request for the 911 calls.

Dress for Success Award

Finally, also a nomination from Amy Lavine, who is ever helpful and travels all over the world in pursuit of potential ZiPLeR Nominees, comes not another clown but a kangaroo and offers us a lesson in proper attire for court. The International ZiPLeR Awards Committee had one last award in its virtual marsupial pouch to hand out and has given this one to Scott P. Lewis…the **Dress for Success Award**.

Apparently, Scott missed the course in civility and posted two videos on social media in which he said the local Village Court was a "kangaroo court." In one video, according to the news report, he said:

> "Judge, I think that you're falling asleep on your current job as well and I am coming to court on February 16th in a kangaroo costume." The defendant goes on to say, "I've been pokin a lot of people in power, a lot of people in power, and I just want there to be a record that I have a 1.2 million dollar life insurance policy with a direct beneficiary for the . . . . NAACP". The defendant then states that if something weird happens to him he wants to make sure that the NAACP gets the money. He closes the video with this statement: "Give me liberty or give me death. Can't stop, won't stop. Here it comes."

You get the sense of what's to come.

Lewis showed up in court in a kangaroo suit. The judge, not the one he was maligning in the video, ordered him to go change. He argued, but ultimately left, changed, and returned… "wearing shorts and carrying a small black bag, the costume, and the stuffed animal kangaroo."

He was charged with contempt, but the court dismissed the charge,[80] holding as to the kangaroo costume: "There was no evidence that the defendant's appearance in the costume immediately imperiled the administration of justice, or caused or created a disruption to or interruption of the court proceedings."

Still, it is the majority view of the International ZiPLeR Awards Committee and the worldwide staff of ZiPLeR Awards that all things considered it is better to wear more traditional garb in court. You might get away with shorts if your legs are as good looking as Governor Lee's when he dressed up like a girl, but even that is risky in most courts.

Until Next Year

And so ends another busy year, busier even post-pandemic, but with seemingly intractable problems in producing enough housing people can afford, in dealing with climate change, and in achieving environmental equity. We have little choice but to grin and bear it, do what we can to make it better, and feed ZiPLeR Awards with the best of the worst.

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He is President of Rivers Alliance of Connecticut and Past Vice Chair of the board of the Connecticut Legal Rights Project, a legal aid organization serving clients with mental health disabilities.

He has taught land use law at the University of Memphis, the University of Bridgeport, Vermont Law School, the University of Connecticut School of Law, and the Quinnipiac University School of Law and has published over 200 articles and thirteen books including INCLUSIONARY ZONING MOVES DOWNTOWN, THE TAKINGS ISSUE, THE COMPLETE GUIDE TO ZONING, EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT, and GROUP HOMES. He is a co-author of the leading casebook in his field, PLANNING AND CONTROL OF LAND DEVELOPMENT, co-editor of the leading treatise in the field, RATHKOPF'S THE LAW OF ZONING AND PLANNING AND 4TH, and author of CONNECTICUT LAND USE LAW.

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Note: For most citations you can enter the title of the reference into your search engine and be led to the page without having to enter the weblink.

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