

Planning Law Today

THE RULING by the Maryland Court of Appeals limiting the use of “quick take” authority in assembling land for urban redevelopment (story, page 59) could have significance beyond the relatively narrow issue of Baltimore’s use or misuse of the tool.

The court made it clear that it would view with considerable skepticism takings not supported by better evidence of a public purpose than the Baltimore Development Corp. offered in this case. That would be true even if the agency had proceeded by way of a conventional condemnation, the court said. It pointed out that in the Supreme Court’s *Berman* and *Kelo* decisions, the high court noted the takings were carried out under comprehensive development plans that were in place before the takings. In contrast, in this case, the city has not even drafted a request for development proposals.

* * *

A COLLISION of historic preservation rules with the First Amendment resulted in free speech coming out on top, at least in the 2nd Circuit (story, page 58). The court ruled a village regulation requiring prior approval for signs to be affixed to houses in the historic district was an invalid prior restraint.

This case was remarkably similar to *City of Ladue v. Gilleo*, the court said, where the Supreme Court held a city’s legitimate objective in barring signs on residential front lawns, to reduce visual clutter, did not justify the foreclosure of a unique and important means of communication. Even if a regulation that shuts off an entire medium of expression is content-neutral, a reviewing court must balance the government’s interest in regulating that form of speech against the interest of individuals and the general public in maintaining it.

The court acknowledged, but left for another day, the question of the validity of a standard allowing the historic district review board to consider the “compatibility” of proposed changes, as applied to signage. Confined to physical characteristics of signs, the rule would be valid. But if used to judge the historical appropriateness of the sign’s content, the rule would leave too much to the board’s unfettered discretion. Some day, someone might complain that the board abused its authority, but this was not that case.

Inside ...

Free Speech

Historic District Rule Violated
First Amendment.....Page 58

Eminent Domain

‘Quick Take’ Power
Limited.....Page 59
No Compensation For
Loss of Visibility.....Page 60

Wetlands

Corps’ ‘Fallback’ Rule
Held Invalid.....Page 61

Procedural Issues

Nearby Landowners Can
Challenge Development...Page 62

Nonconforming Uses

Abandonment Provision
Upheld.....Page 64

Courtspeak ...

“... the only ‘plan’ for the Property is that a private developer will possibly, at some future time, create a plan that the City might approve. The evidence, or lack thereof, as presented in this case, is not sufficient to demonstrate an immediate public interest necessitating the City’s use of quick-take condemnation, ... Nor does it, in our view, fully comport with the holdings of the Supreme Court in *Kelo*, *Midkiff*, and *Berman*.”
Mayor and City Council of Baltimore City v. Valsamaki, page 59

Historic District Permit Rule Invalid Prior Restraint

A New York village's regulation requiring prior approval for physical alterations to buildings in its historic district was an unconstitutional prior restraint on speech, as applied to a homeowner's display of political signs on his property, the 2nd U.S. Circuit Court of Appeals has ruled (*Lusk v. Village of Cold Spring*, No. 05-4999-cv, Jan. 31, 2007).

Donald Lusk owns a house on Main Street in Cold Spring's Architectural and Historic District. The front of the house is flush against the sidewalk. In June 2004, Lusk began placing signs on or leaning against his front porch, protesting a pending real estate development on the village's Hudson River waterfront. On July 19, the village served him with a violation notice for displaying the signs without obtaining prior approval. While criminal proceedings in state court were pending, Lusk sued in federal court, claiming the village code provisions he was charged with violating infringed his First Amendment rights.

Lower Court Rules Regulation Valid

The district court ruled Chapter 64 of the code, which regulates the appearance of properties within the historic district, was constitutional. The code provision requires residents seeking to make an alteration to "any improvement" in a historic district to apply for a certificate of appropriateness (COA) or a certificate of economic hardship from the village's architectural and historic district review board. The board has 45 days after its first formal review of the application to act on it. The trial court concluded the provision, which it agreed applied to signs placed on property in the district, was content-neutral, served a significant government interest, and left open ample alternative means of communication.

The appeals court concluded Chapter 64 was invalid. At the heart of the ordinance's invalidity, the court said, was that it acts to freeze the speech of persons living in a historic district who want to use signs to convey a message, at least for the length of time it takes to obtain a COA. The facts in this case were remarkably similar to those in *City of Ladue v. Gilleo*, 512 U.S. 43, where the Supreme Court held the valid purpose of a city ordinance prohibiting signs on residential front lawns, to reduce visual clutter, did not justify its almost complete foreclosure of "a venerable

means of communication that is both unique and important," the court said. The approach taken in *City of Ladue* was reinforced in *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150, where the high court held a law requiring persons engaging in door-to-door canvassing to first obtain a permit was unconstitutional.

The teaching of these cases, the appeals court said, was that even if a law that forecloses an entire medium of expression is content-neutral, a reviewing court must balance the state's interest in regulating speech against the individual and public interest in protecting it. Because the provision at issue in this case addresses the entire medium of outdoor signs in the historic district, the *City of Ladue* test applies, the court said.

Entire Medium of Expression Shut Off

The court took note of the village's contention, and the lower court's finding, that residents of the historic district were free to post signs on their property as long as they did not attach the signs to "improvements" on the property. Even if the text of the ordinance could support that reading, it would not help Lusk and similarly situated residents who did not have space in front of their houses to erect a free-standing sign. No less than the ordinance in *City of Ladue*, this regulation almost completely foreclosed a unique and important means of communication. The government's concededly valid interest in preserving the aesthetics of the historic district cannot justify such a broad restriction on speech.

It was true, the court conceded, that the village's ordinance does not ban speech outright, but it does prohibit speech for as long as 75 days while the village considers the COA. The review board holds regular meetings only once a month, and has 45 days after receiving an application to act upon it. Where a property owner wants to take a public position on a pressing public issue, or the qualifications of a candidate for public office in an upcoming election, the time required to gain approval may prevent him from doing so until after the issue is settled on the election is over, the court pointed out. Delayed approval is of little help to Lusk and those like him in this regard.

The possibility that Lusk might use other more expensive or less convenient ways to convey his message does not allow the ordinance to survive constitutional scrutiny, the court continued. In the end, the approval process itself makes the regulatory scheme invalid.

City Cannot Use 'Quick Take' Power Without Immediate Need

The Maryland Court of Appeals has ruled a city may not use its statutory quick-take authority to assemble property for an undefined potential urban renewal project (*Mayor and City Council of Baltimore City v. Valsamaki*, No. 55, September Term, 2006, Feb. 8, 2007). Under the statutory scheme, the court said, the city has the burden of proving immediate necessity to have title to property in order to proceed with a quick-take condemnation.

George Valsamaki owns a three-story building on North Charles Street in Baltimore that houses a bar and liquor store. On March 9, 2006, the city filed a petition for condemnation and immediate possession of the building. The trial court granted the petition March 15, before the owner had been served with any papers in the case. Valsamaki filed an answer within the 10-day period after service of the order, claiming the city had no right to condemn the property. After a hearing, the trial court denied the city's condemnation petition. The city took a direct appeal to the Court of Appeals.

No Specific Plan for Land's Reuse

The court noted Valsamaki's building is located within an area the city has designated for urban renewal. The broad general plan for the area is to create a mixed-use neighborhood, remove blighting influences, establish a positive image for the renewal area and protect existing residential neighborhoods, among other purposes. At trial, the project manager for the urban renewal area conceded that there was no specific plan for the development of Valsamaki's property. He stated that a specific plan would have to await the results of a request for proposals that did not then exist. He admitted the only reason for seeking immediate possession was to assemble parcels of land.

M. J. Brodie, president of the Baltimore Development Corp., provided similar testimony. He stated the plan presented to the city council was as specific as most urban renewal plans are at that point in time. He also conceded that the corporation had no specific use in mind for the Valsamaki property at the time it sought to take it; that no RFP had been issued; no developers had been identified; and the specific design for redevelopment will come out of a proposal by a private-sector developer.

The court noted that the Maryland Constitution authorizes the legislature to allow quick-take condemnation by a limited number of local government bodies and agencies, and generally, for limited purposes. Those entities include Baltimore City, Baltimore County, Montgomery County, Cecil County, the State Roads Commission and the Washington Suburban Cemetery Commission. The constitutional provision for Baltimore provides that the legislature may authorize "immediate" taking of property upon payment of the property's estimated fair market value. The Baltimore Public Local Laws provide the city may institute a quick-take condemnation by filing "a petition under oath stating that it is necessary for the City to have immediate possession of, or immediate title to and possession of, said property, and the reasons therefore."

Need for Immediate Taking Not Shown

By requiring the city to establish under oath the immediacy of the need for a quick take, the legislature has imposed the burden of proof upon the city to establish immediate need, the court continued. The property owner does not have a burden to prove the contrary. In a quick-take proceeding, the city has the burden not only to present a prima facie case that the taking is for a public use, but also the burden to establish the necessity for an immediate taking. Unlike earlier cases where the court approved quick takes on the basis of evidence that the taking was necessary to preserve the public health, safety and welfare, in this case, there was "a dearth of any specific evidence showing a necessity for the immediate possession of the property," the court said.

The condemnation petition simply stated that the property will be used for redevelopment purposes. It referenced an attached affidavit containing only the conclusory statement that the property must be in the city's possession at the earliest time possible "in order to assist in a business expansion in the area," the court noted. The trial court correctly found that the city had failed to demonstrate sufficient grounds to warrant a finding of necessity, it said. General statements by city agents that they are using quick take because sometime in the future they will be seeking proposals from unnamed and unknown developers to construct something that will help renew the area simply do not suffice.

(Continued on page 60)

Quick Take (Continued from page 59)

“In cases involving this type of condemnation, courts should also seriously consider whether the condemning entity is using this quick-take merely to gain a procedural advantage or to stockpile properties that it will later sell to private developers, or simply to freeze the value of the property in a time of a rising economy. These improper, potential considerations dictate that the entity attempting to utilize this process clearly assert the specific immediacy of the need,” the court declared.

Evidence of Public Purpose Lacking

The court also questioned whether the city had established a public purpose to support the taking. Urban renewal certainly may justify government’s taking of private property, but the government must give some assurance that the urban renewal will constitute a public use or public purpose for the property taken. It is not enough, especially in quick-take situations, for the government to simply say it is conducting urban renewal and leave it at that. It was clear from the U.S. Supreme Court’s *Kelo* decision and its predecessors that the existence of a “carefully considered” development plan was an essential element in establishing that a taking was for a public purpose or public use, the court said.

Even if this case had involved the use of regular condemnation, the evidence presented for public use was sparse, the court declared. The evidence, or lack thereof, was not sufficient to demonstrate an immediate public interest requiring the use of quick take, nor did it fully comport with the Supreme Court’s holdings in *Kelo*, *Midkiff* and *Berman*. While economic development may be a public purpose, it must be carried out under a comprehensive plan, the court said.

No Compensation for Visibility Loss, But Maybe for Loss of View

The Utah Supreme Court has ruled the owners of a fast-food restaurant are not entitled to compensation for loss of visibility from a rebuilt highway, but may be entitled to compensation for the loss of the view of the highway from the property (*Ivers v. Utah Department of Transportation*, No. 2006 0061, Feb. 6, 2007).

James Ivers et al. own an Arby’s restaurant at the intersection of U.S. Highway 89 and Shephard Lane in Farmington. As part of a project to elevate Highway 89

over Shephard Lane, the highway department took a small piece of the Arby’s lot for construction of a new frontage road along the highway. The elevation of the highway has obstructed both the view from Arby’s land and the visibility of Arby’s from the highway.

Arby’s sought severance damages, claiming the condemnation and the loss of view and visibility reduced the market value of the remaining land. The trial court ruled Arby’s could not introduce evidence of damages from the loss of view and visibility because the loss arose from construction on property not actually taken from Arby’s. The intermediate appellate court affirmed.

No Right to Visibility

The supreme court noted that the question of a landowner’s property interest in the visibility of his land was one of first impression in Utah. Other jurisdictions virtually unanimously agree that there is no right to compensation for lessened visibility where there is no physical taking of land. Where the loss of visibility is coupled with a partial taking, there seems to be no generally accepted rule, the court said. A Utah case holds a landowner has no property right to a free and unrestricted flow of traffic past his premises, so any impairment of that flow does not entitle the owner to compensation. Likewise, the court declared, a landowner has no property right to unrestricted visibility of his property by passing traffic, and no right to compensation for impairment of that visibility.

Utah law does recognize that the view from one’s property is a protectable property right, the court continued. Severance damages are available when the state condemns part of a parcel of land and builds a structure directly on the condemned property, impairing the view and causing damage to the portion of the parcel not condemned. But there is no Utah precedent addressing the situation where land was condemned as part of a single project to build a structure that would impair the view from the remaining portion of the property, but the structure was not built on the severed land. In this case, the elevated highway was not built on any part of the condemned portion of Arby’s lot.

If the use of the condemned property was essential to the completion of the project as a whole, then the property owner is entitled to severance damages. Whether Arby’s land was or was not essential to the highway project was a factual question that must be answered by the trial court on remand, the court said.

Dredging 'Fallback' Rule Invalid, District Court Rules

The U.S. District Court for the District of Columbia has ruled the Corps of Engineers' most recent attempt to write a regulation governing "incidental fallback" from ditching and dredging operations in wetlands violates the Clean Water Act and must be rewritten (*National Association of Home Builders v. U.S. Army Corps of Engineers*, No. 01-0274, Jan. 30, 2007).

As the court notes in its opinion, this case is the latest phase in a long-running dispute over what constitutes discharge of dredged material into waters of the United States. Section 301 of the CWA prohibits "discharge of any pollutant" into waters of the United States without a Corps permit. The law defines a discharge as the addition of any pollutant to navigable waters from any point source. Before 1993, the Corps defined discharge of dredged material as any addition of dredged material to the waters of the United States, except for "de minimis, incidental soil movement occurring during normal dredging operations."

De Minimis Exception Repealed

In 1993, however, as part of a settlement of a lawsuit by the North Carolina Wildlife Federation against the Corps, the agency adopted a new rule eliminating the de minimis exception (*Tulloch I*). It defined the discharge of dredged material as including the redeposit of such material. A group of trade associations sued to block the new definition. The district court declared the rule invalid in 1997. Its ruling was upheld on appeal in 1998. The appeals court said that the statutory term "addition" could not reasonably be construed to cover the situation where material is removed from waters of the United States and a small part of it happens to fall back.

In 2001, the Corps issued a new rule defining discharge of dredged material (*Tulloch II*). The new rule stated the Corps and EPA regarded the use of mechanized earthmoving equipment to carry out such operations as land clearing, ditching, channelization and in-stream mining in waters of the United States as resulting in a discharge of dredged material unless evidence specific to the project shows the activity results in only incidental fallback. The rule defined incidental fallback as redeposit of small volumes of dredged material in substantially the same place as the initial removal and that is incidental to the excavation activity.

NAHB and other groups challenged the new rule. The court held the case was not ripe for decision, but was overruled on appeal.

The court noted that in an earlier ruling in this dispute, another judge cautioned the agencies against interpreting prior court decisions so as to render a narrow definition of incidental fallback that was inconsistent with a good-faith reading of those decisions. Nevertheless, by defining incidental fallback partly in terms of volume, the agencies appear to have done exactly what they were warned not to do, the court said. Although prior decisions have described incidental fallback in terms of volume, neither the trial court nor the court of appeals has gone so far as to require that the volume of fallback be small, the court observed. In determining whether fallback is incidental, that is, not an addition within the terms of the CWA, the volume being handled is irrelevant, it said.

Corps Must Address Volume, Timing Issues

The difference between incidental fallback and redeposit is better understood in light of the time the material is held before being dropped to earth, and the distance between the place where the material is collected and the place where it is dropped, the court continued. In overturning *Tulloch I*, one of judges on the appeals court panel noted that the word addition carries both a temporal and geographic ambiguity. If material that otherwise would fall back is carried some distance away and dropped, it might well be an addition, Judge Silberman said. Or, if were held for some time and then dropped back to the same spot, it might be an addition.

Although *Tulloch II* acknowledges this ambiguity, it makes no reference to the amount of time the material is held before it is dropped, the court said. For that reason, and because of the improper inclusion of a volume requirement, the rule must be rewritten. As the Corps rewrites its definition, it should also reconsider its statement that regards the use of mechanized earthmoving equipment as resulting in a discharge of dredged material unless project-specific evidence demonstrates otherwise, the court said. That statement "essentially reflects a degree of official recalcitrance that is unworthy of the Corps."

The court of appeals said in *Tulloch I* a "reasoned attempt" by the agencies to draw a bright line between incidental fallbacks and other redeposits would be

(Continued on page 62)

‘Fallback’ Rule *(Continued from page 61)*

entitled to considerable deference, but the agencies have made no such effort, the court said. The appeals court has made it clear that not all uses of mechanized earthmoving equipment may be regulated. The agencies cannot require project-specific evidence concerning projects over which they have no regulatory authority, the court declared.

Nearby Landowners Had Standing To Challenge Development

The owners of three apartment complexes situated across the street from a proposed mixed-use development could bring a legal challenge to the city’s grant of variances for the development, the Arizona Court of Appeals (Division I) has ruled (*Center Bay Gardens, LLC v. City of Tempe City Council*, No. 1-CA-CV 05-0460, Jan. 30, 2007).

Center Bay Gardens, LLC, Wood River University Square, LLC, and University Pointe Ltd. Partnership (Center Bay) own apartment complexes on East Lemon Street in Tempe, near Arizona State University. In 2003, Meyer Residential, LLC proposed a five-story mixed-use development for a parcel, then occupied by a mobile home park, directly across the street. The development would consist of four floors of apartments above three levels of parking, two of which would be underground. There would be some retail space on the ground floor. Meyer requested and was granted a zoning change, general plan amendment, and seven variances for the project.

Abutter’s Objections Dismissed

Center Bay voiced its opposition to the proposed project at all stages of the administrative review process, and sued to block it. The owner of the mobile home park (UMHP) was allowed to intervene in the lawsuit after Meyer decided not to proceed with the project. The trial court granted UMHP’s motion to dismiss two of the counts in Center Bay’s complaint, relating to the zoning change and general plan amendment. It ruled Center Bay lacked standing because it did not claim any particular injury other than general economic and aesthetic damages.

Meanwhile, UMHP submitted another development plan for its property, using another developer, that was

essentially identical to the first proposal. The city approved the application, again over Center Bay’s objections. Center Bay filed another lawsuit, claiming the city improperly granted the requested variances. The trial court granted UMHP’s motion to dismiss, on the same grounds on which it dismissed the first action.

In its appeal, Center Bay first argued the court should adopt the view of a number of other states that an adjacent property owner has standing to challenge a zoning decision without having to show any particularized injury. The court noted that under existing Arizona case law, an adjoining property owner who suffers no special damage from the grant of a variance cannot get judicial review of the decision. However, the court said, it did not have to address Center Bay’s request to overturn existing precedent, because Center Bay showed sufficient specialized harm to provide standing.

Plaintiff Showed Particularized Harm

In Arizona, a person aggrieved by a zoning decision must show particularized harm, or at least harm greater than that suffered by the community at large, to have legal standing to appeal the decision, the court noted. The court agreed with Center Bay that it had made a sufficient showing of such specific harm. Center Bay argued the zero setbacks, building mass and height, minimal landscaping, and density of the proposed project created a particularized injury. As to density, Center Bay argued it was inappropriate to permit an increase from 24 units per acre to 63 units per acre, all of which would contain four bedrooms. From the aesthetic point of view, Center Bay argued the project’s lack of setbacks and the building’s height would have an adverse effect on the aesthetic values of its complexes.

In previous cases where the court found nearby property owners had standing, the owners claimed specific damage to the use and enjoyment of their property, it noted. Close proximity was a factor because the nature of the proposed use of the property made the harm greater to persons located close to the property. Viewing the facts in the light most favorable to Center Bay, the proposed development project across the street from its property that would come close to tripling the existing density, doubling the existing mass, and eliminating previously required landscape setbacks satisfied the standing requirement of a particularized injury, the court concluded.

SHORT TAKES

PEOPLE IN GLASS HOUSES: Landowners who complained about a county's allegedly lax enforcement of zoning regulations against a nearby housing development, and then were cited for their own violations of the zoning regulations, did not have a cause of action for retaliation against county officials, the 8th U.S. Circuit Court of Appeals has ruled (*Osborne v. Grussing*, No. 06-2021, Feb. 26, 2007).

Richard Osborne and Jerome Sammon own houses on Circle Lake in Rice County, Minn. They repeatedly criticized the county planning commission and the office of planning and zoning for failing to enforce environmental and zoning regulations against a lakeside housing development being developed by two local businessmen. The developers filed formal complaints with the planning and zoning office charging that two or three years earlier, Osborne had installed riprap along his shoreline and Sammon built a retaining wall within the shore impact zone, without obtaining permits.

After being notified of the claimed violations, Osborne and Sammon applied for "after-the-fact" conditional use permits. The permits were eventually granted, but required Sammon to remove his retaining wall, and Osborne to remove his riprap. The two landowners then filed a civil rights suit in federal court, claiming county officials had retaliated against them for exercising their First Amendment rights. The district court granted the officials' motion for summary judgment.

The appeals court agreed with the lower court that the landowners had failed to establish a causal connection between their protected First Amendment activity and the county's enforcement of its environmental regulations. It noted that there is a strict causation requirement in the context of criminal prosecutions or regulatory enforcement. For example, the Supreme Court has held that where the claimed retaliatory injury is a criminal prosecution, the plaintiff must prove the prosecutor lacked probable cause to commence the prosecution.

Likewise, the court said, one who seeks relief from a valid regulatory enforcement action on the ground it was unconstitutional retaliation for protected speech must make the same showing that would be

required in a claim of selective prosecution, i.e., that he has been singled out for prosecution while others similarly situated have not been prosecuted for similar conduct, and that the government's discriminatory selection was based upon the exercise of his free-speech rights.

It was undisputed that Rice County investigates violations of the zoning ordinance only when a citizen files a complaint. While the complaints in this case were filed by persons with a motive to injure the landowners, regulatory and law-enforcement agencies routinely act on the basis of information provided by persons who harbor a grudge or hope to benefit personally from the complaints, the court observed. The complainer's ulterior motive is not attributed to the government enforcers. Lacking evidence that county employees induced the developers to file the complaints in order to camouflage an intent to retaliate, the source of the complaints against the landowners was irrelevant.

* * *

SALES OF EXISTING HOUSES rose 3.0 percent in January, the National Association of Realtors reported Feb. 27. David Lereah, the association's chief economist, said people should be wary of putting too much stock in a one-month upturn. "Although we are expecting existing in home sales to gradually rise this year, and buyers are responding to the price correction, some unusually warm weather helped boost sales in January," he said. On the other side, storms that affected much of the country in February could have a negative impact on the housing market, he noted.

By region, sales in the West rose 5.6 percent, and a sales in the Midwest were up 4.8 percent. Sales in the South showed a 2.0 percent gain, while in the Northeast, the sales rate was unchanged from December.

* * *

A MASSACHUSETTS TRIAL COURT has dismissed a lawsuit by a Boston man challenging the city's redevelopment authority's sale of a parcel of land to a Muslim group for a mosque at a price significantly below its appraised value. The parcel sold for \$175,000, and had been appraised at over \$400,000. The judge said James Policastro missed the deadline for appealing the agency's decisions. She rejected his argument that he was not bound by the 30-day time limit, because he had raised constitutional issues. Policastro plans to appeal.

Nonconforming Use Abandonment Provision Held Constitutional

A zoning ordinance provision that a nonconforming structure suffering 75 percent or more destruction that is not reconstructed within one year shall be deemed to have been abandoned did not violate a landowner's due process rights, the New Hampshire Supreme Court has ruled (*McKenzie v. Town of Eaton Zoning Board of Adjustment*, No. 2005-778, Jan. 31, 2007).

In 1981, Nancy Burns built a storage shed 59 feet from the shore of a lake abutting her property. In 1989, the town increased the required setback from the lake shore for structures to 125 feet. It also enacted the provision requiring nonconforming structures damaged by fire, deterioration or other casualty to be rebuilt within one year, or be deemed to have been abandoned.

Intent to Abandon Not Required

In June 2002, a windstorm damaged Burns' shed in excess of 75 percent of its floor area. In March 2003, Burns told the town selectmen she wanted to rebuild the shed. The selectmen informed her the shed was grandfathered and could be replaced on the same footprint. By June 2, 2003, Burns had not rebuilt the shed or removed the debris. Her neighbor, McKenzie, asked the selectmen to enforce the ordinance provision against her. Instead, the selectmen granted Burns a building permit. McKenzie appealed to the zoning board of appeals, which reversed the selectmen's decision. On rehearing, however, the board reversed itself, and upheld the building permit. On appeal, the trial court reversed the board.

The supreme court agreed with the parties that the zoning ordinance provision precludes consideration of a property owner's subjective intent when determining whether the owner has abandoned a destroyed nonconforming use or structure. But Burns argued consideration of intent is constitutionally required, citing the court's 1976 decision in *Lawlor v. Town of Salem*, 116 N.H. 61. It was true, the court said, that the test of abandonment in *Lawlor* considered the property owner's intent. However, it pointed out, that test was established in the absence of an applicable ordinance defining abandonment. In this case, the ordinance clearly permits a finding of abandonment without a consideration of intent.

Burns argued the ordinance was unconstitutional as applied. Hence, the court said, it would consider whether the provision was rationally related to a legitimate governmental interest. The purpose of the provision clearly was to discourage continuation of nonconforming uses by setting a time limit on their reconstruction. It is well-established, the court pointed out, that reduction and elimination of nonconforming uses is a legitimate purpose of zoning. Therefore, the ordinance's purpose, to reduce nonconforming uses, is a legitimate governmental interest.

The remaining question was whether the provision as applied bore a rational relationship to the legitimate governmental goal, the court said. By imposing a time limit on reconstruction, the provision reduced the possibility that Burns would reconstruct her nonconforming shed, and increased the possibility that if the shed was rebuilt it would be rebuilt in compliance with the zoning ordinance. Accordingly, the court concluded, as applied, the ordinance provision bore a rational relationship to the legitimate governmental purpose of reducing nonconforming uses, and therefore did not violate Burns' substantive due process rights.

END

LAND USE LEGAL REPORT	
614 Hillsboro Drive Silver Spring, MD 20902 Published twice monthly	
<input type="checkbox"/> PDF via e-mail: \$398.00	<input type="checkbox"/> Hard Copy: \$438.00 (via first-class mail)
MD residents please add 5% sales tax, or supply tax-exempt number.	
<input type="checkbox"/> Check enclosed, payable to James D. Lawlor	
<input type="checkbox"/> Bill my organization. P.O. No. _____	
PLEASE PRINT	
Name _____	
Organization _____	
Address _____	
City, State, Zip _____	
E-mail _____	