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## The Takings Clause in Billboard Control

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## Part III: Zoning Aesthetics

### Chapter 5: The Takings Clause and Signs

#### The Takings Issue in Billboard Control

Charles F. Floyd\*

“It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an esthetic harm.”<sup>1</sup>

The extent that billboards should be permitted in a community often raises vehement policy and legal arguments. The outdoor advertising industry argues that billboards are an effective, low cost method of delivering an advertising message to a large number of people. Others, however, agree with the U.S. Supreme Court and consider them an “esthetic harm,” a harm they believe should be reduced or eliminated.

Communities desiring to reduce billboard clutter face a number of legal obstacles, particularly issues of free speech and takings. This article focuses on the latter—does the forced removal of billboards after a period of time, a process commonly called amortization, constitute a constitutional “taking” of the outdoor advertising company’s property? Are there other ways to achieve this objective? What legislative impediments have been placed in the path of communities that want to reduce the number of billboards along their streets and highways?

#### I. THE OUTDOOR ADVERTISING INDUSTRY

Billboards, more properly referred to as off-premise outdoor advertising signs, must be distinguished from on-premise signs. The

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1. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (White, J.).

on-premise sign is an integral part of the business where it is located and serves to index the business environment, that is, to inform potential customers where they can find various goods and services. The off-premise advertising sign, on the other hand, is designed to use the roadside environment to advertise a good or service found at some other location.

#### *A. Types of Off-Premise Signs*

Off-premise signs can be subdivided into several different categories. Some billboards provide directional information to motorists while others feature product advertising. Directional signs usually are located in rural areas and on urban highways with large volumes of long-distance travelers, while billboards featuring product advertising are located primarily, but not exclusively in urban areas.

Off-premise signs can also be subdivided into standardized and nonstandardized industries. The latter consists primarily of advertiser-owned billboards giving information regarding tourist and other highway related services. These nonstandardized signs come in a great variety of sizes, but are generally smaller than those erected by the standardized industry.

#### *B. Posters and Bulletins*

The firms comprising the standardized outdoor advertising industry own outdoor advertising structures and sell billboard space to advertisers. They employ two basic types of signs, poster panels and painted bulletins.

The poster panel is designed for the posting of paper “bills”—hence the name “billboard” that is now commonly applied to all off-premise outdoor advertising signs. The standardized poster panel is three hundred square feet in size (twelve by twenty-five feet), although the industry also uses a smaller poster panel of seventy-two square feet (six by twelve feet), appropriately called a junior panel or eight-sheet poster.<sup>2</sup>

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2. KEN SAMMON, *PLANNING FOR OUT-OF-HOME MEDIA* (1987).

The second type of standardized industry sign is the painted bulletin usually measuring fourteen feet by forty-eight feet (672 square feet), although various other sizes are also used, particularly ten feet by forty feet (four hundred square feet) and ten feet by thirty-six feet (thirty-six hundred square feet). The industry also offers a "Super Bulletin" of twelve hundred square feet (twenty feet by sixty feet) in some large markets, and a few bulletins range in size to twenty-five hundred square feet or even larger. Most bulletins are painted, but increasingly advertisers are providing printed plastic faces to the outdoor advertising companies.

### *C. Ground Leases*

Outdoor advertising firms normally do not own the land under their billboards but lease the ground. These leases vary greatly in length, from as little as month-to-month to as long as twenty years. The most common length is perhaps five years, with one five year extension at the option of the outdoor advertising company. Since most landowners do not want to tie up their land for long periods, billboard ground leases commonly contain a clause permitting the lessor to cancel the lease if the land is needed for development.

### *D. The Nature of Billboard Structures*

Billboard ground leases commonly state that signs located on the property are personal property trade fixtures. Other leases do not specifically characterize the billboards as trade fixtures or personal property, but they almost always state that the signs remain the property of the outdoor advertising company and can be removed at the expiration of the term of the lease. This clearly shows the intent that the signs are not permanently attached to the land.<sup>3</sup>

Except in a few states that rely on the particular provisions of their state's revenue law to tax billboards as real property, billboards in

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3. For cases that ruled that billboards are personal property, see *Hernando County v. Anderson*, 737 So. 2d 569, (Fl. Dist. Ct. App. 1999); *City of Norton Stores v. Whiteco Metrocom*, 517 N.W.2d 872 (Mich. Ct. App., 1994); *Bilo v. Acme*, 765 S.W.2d 12, (Ark. Ct. App., 1989); *Manderson & Assoc., Inc. v. Gore*, 389 S.E.2d 251 (Ga. Ct. App., 1989); *Aquafine Corp. v. Fendig Outdoor Adver. Co.*, 272 S.E.2d 526 (Ga. Ct. App., 1980).

almost all states are taxed as personal property.<sup>4</sup> The outdoor advertising industry zealously guards this classification. For example, relying on a New Jersey Attorney General's opinion, Galloway Township taxed the R.C. Maxwell Company's billboards as real property. The outdoor advertising company, supported by an amicus brief from the New Jersey Outdoor Advertising Association contended the signs: (1) were personal property, not real property, (2) were not "improvements" to the real estate, but "personal property affixed to the real property," (3) could be removed "without material injury to the real property," (4) could be removed "without material injury to the personal property itself," and (5) were "not intended to be affixed permanently to the real property." The industry also indicated that normally the face was not damaged at all when it was moved and that about eighty percent of the remainder of the structure could be used at other locations. The New Jersey Supreme Court agreed with the industry.<sup>5</sup>

The outdoor advertising industry also sued the Internal Revenue Service to have their signs declared as "tangible personal property," making them eligible for the investment tax credit that only applied to personal property. They won.<sup>6</sup> As I show later, the issue of whether billboards are personal property or real property is of crucial importance to the takings controversy.

### *E. Billboards as a Use of the Road*

The question of whether billboards are a use of the road or a use of private property also is of great significance to the takings issue. The outdoor advertising industry sells exposure opportunities based on the number of vehicles passing sign locations. In other words, they depend solely on the traffic that is produced by the public's

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4. For the exceptions, see *Western Outdoor Advertising Co. v. Board of Review of Mills County*, 364 N.W.2d 256 (Iowa 1985); *Missouri ex rel. Thompson v. Osage Outdoor Adver.*, 674 S.W.2d 81 (Mo. Ct. App. 1984); *Metromedia, Inc. v. Tax Comm'n of New York*, 455 N.E.2d 1252 (N.Y. 1983).

5. *R.C. Maxwell Co. v. Galloway Township*, 679 A.2d 141 (N.J. 1996).

6. *Alabama Displays, Inc. v. United States*, 507 F.2d 844 (Ct. Cl. 1974); *National Advertising Co. of United States*, 507 F.2d 850 (Ct. Cl. 1974); *Whiteco Indus., Inc. v. Commissioner*, 65 T.C. 664 (1975).

investment in roads and highways for their “circulation.” Thus, although billboards are located on private property, their value to the outdoor advertising business comes from the use of the public road not of private property. The only “use” of a billboard occurs where the reflected image meets the eye, on the road; no good or service is provided at the location of the sign.

#### *F. Direct or Indirect Use of the Roadways*

The outdoor advertising industry contends that billboards benefit from the roads in the same fashion as do all highway-oriented business such as motels, restaurants, service stations, and even businesses in general. This argument ignores the difference between direct and indirect uses of the roads.

Many types of businesses gain advantages from their close proximity to major highways, and particularly from nearness to important roadway junctions or interchanges. These considerations are a major factor in locational decisions, either because firms depend on motorists for clientele or because they need easy access to roads for the transportation of goods. While quite important to many firms, these benefits are still indirectly derived and are almost impossible to measure with any degree of accuracy. The highway billboard business, on the other hand, benefits directly and solely from its use of the roadway and in direct relationship to the volume of traffic on the road. As discussed above, the outdoor advertising industry recognizes this direct relationship in its pricing policies.

## II. THE VIEW FROM THE COURTS

The courts have long recognized the fact that the billboard business is a use of the public’s investment in the roadways rather than a use of private property. A very early case pointed out this obvious fact:

The success of billboard advertising depends not so much upon the use of private property as it does upon the use of the channels of travel used by the general public. Suppose that the owner of private property, who so vigorously objects to the restriction of this form of advertising, should require the

advertiser to paste his posters upon the billboards so that they would face the interior of the property instead of the exterior. Billboard advertising would die a natural death if this were done, and its real dependency not upon the unrestricted use of private property but upon the unrestricted use of the public highways is at once apparent. Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares.<sup>7</sup>

In upholding the state's Outdoor Advertising Control Law, the Massachusetts Supreme Court also pointed to the billboard's use of the roadway:

[The outdoor advertising business] depends entirely for its success upon the occupation of places along the sides of highways and near parks and similar public places. Billboards are designed to compel attention. The advertising matter displayed upon them in words, pictures, or devices is conspicuous, obtrusive and ostentatious, being designed to intrude forcefully and persistently upon the observation and attention of all who come within the range of clear normal vision. The only real value of a sign or billboard lies in its proximity to the public thoroughfares within public view. In this respect the plaintiffs are not exercising a natural right; they are seizing for private benefit an opportunity created for quite a different purpose by the expenditure of public money in the construction public ways and the acquisition and improvement of public parks and reservations.<sup>8</sup>

The importance of use of the road to outdoor advertising also was emphasized by New York's highest court in a case which involved the forced removal of a billboard along the Thruway for safety reasons:

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7. *Churchill v. Rafferty*, 32 Phil. Rpt. 580, 609 (Phil. 1915), *appeal dismissed*, 248 U.S. 591 (1918).

8. *General Outdoor Adver. Co. v. Department of Public Works*, 193 N.E. 799 (Mass. 1935), *appeal dismissed*, 297 U.S. 725 (1936).

[I]t is to be borne in mind that it was the very construction of the Thruway which created the element of value in the land abutting the road. Billboards and other advertising signs are obviously of no use unless there is a highway to bring the traveler within view of them.<sup>9</sup>

This view of billboards as a use of the roadway was reiterated in a California case:

Most of respondents' arguments relating to their "use" of the land upon which their signs are located are mere exercises in sophistry, for in no real sense are the signs "used" upon the land on which they are located. . . [T]he signs are used in a realistic sense only where the light reflected therefrom strikes the eyes of the users of the public streets or adjoining private property.<sup>10</sup>

In a more recent amortization case, *Modjeska Sign Studios, Inc. v. Berle*, the court stated:

Billboards and advertising signs are of little value and small use unless great highways bring the traveling public within view of them, and their enhanced value when they are seen by a large number of people was created by the State in the construction of the roads and not by the signs' owners.<sup>11</sup>

### III. BANNING NEW BILLBOARDS

The first and most essential step in reducing billboard clutter in a community is enacting a partial or total ban on the erection of new billboards. Not only will this keep billboards off new roads, it will reduce the number of billboards in other areas as existing signs are taken down to make way for expanded development or when signs are destroyed by storms or other similar occurrences. A ban on new billboards may also encourage outdoor advertising companies to agree to take down older signs that are considered objectionable by

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9. New York State Thruway Auth. v. Ashley Motor Court, 176 N.E.2d 566 (N.Y. 1961).

10. Metromedia, Inc. v. City of Pasadena, 216 Cal. App. 2d 270 (1963).

11. Modjeska Sign Studios, Inc. v. Berle, 55 A.D. 2d 340 (1977).

the community in return for being allowed to erect a limited number of new signs.

*A. Does the Forced Removal of Non-conforming Billboards Violate the Fifth Amendment?*

Can communities force outdoor advertising firms to remove non-conforming billboards after a reasonable period of time without triggering a “taking” under the Fifth Amendment? The termination of non-conforming uses has long been a contentious issue in American land use law, particularly with regard to billboards. It also is one that is bitterly contested by the outdoor advertising industry.

An extensive discussion of the general takings issue is beyond the scope of this article, but certain aspects are central to this inquiry:

- Does amortization involve a physical invasion of the property?
- What is the proper unit of analysis?
- What are the property interests subject to a “taking?”
- Does amortization go “too far” in regulating billboards, thereby creating a compensable taking?

*B. Physical Invasion of Property*

One type of governmental action that involves a categorical taking occurs when a property owner is compelled to suffer a physical invasion of his property. Thus, when New York City required that apartment house owners allow television cable companies to install cables in their buildings, this was deemed a taking.<sup>12</sup>

Does amortization of non-conforming billboards involve a physical invasion of property? No. The governmental entity does not take possession of the personal property billboard structure. It merely requires that it be removed. The billboard remains the property of the outdoor advertising company. For example, in *Major Media of the Southeast, Inc. v. City of Raleigh*, the Court noted that “the city has no intention of seizing non-conforming billboards, and plaintiff will

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12. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

be able to salvage at least parts of those structures and use them elsewhere.”<sup>13</sup>

### *C. Proper Unit of Analysis*

Another question that is critical to the billboard amortization issue is what constitutes the proper unit of analysis. Is it those billboards that must be removed under the ordinance or the entire business of the company?

In 1978 the U.S. Supreme Court upheld New York City’s Landmarks Preservation Law.<sup>14</sup> The Penn Central Transportation Co. had leased the air rights above its 1913, Beaux-Arts, Grand Central Terminal for a proposed fifty-five-story office tower, but the Landmarks Commission rejected the plan, calling it “an aesthetic joke” that “would reduce the landmark itself to the status of a curiosity.”<sup>15</sup>

Penn Central challenged the constitutionality of the Landmarks Law, contending that historic preservation was not a legitimate state interest and that the law resulted in the taking of private property without compensation. The Court disagreed. It found that although Penn Central could continue to use its property exactly as it had been used, the Landmarks Law would prevent the building of the office tower, and Penn Central would lose millions of dollars in future revenue from this source. This did not result in a taking, however, because the focus was not on what the regulation took but what valuable uses remained. In other words, a property owner cannot establish a regulating taking “simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development.”

Of great importance to this article’s inquiry regarding amortization of billboards, the decision established the principle that in order to determine whether a regulation involves a taking, one must examine how the regulation affects the property as a whole, not

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13. *Major Media of the Southeast, Inc. v. City of Raleigh*, 621 F. Supp. 1446, 1453 (E.D.N.C. 1985), *affid.*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987).

14. *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978).

15. *Id.* at 117-18.

just a piece of the parcel. The Court states: “‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”<sup>16</sup>

Thus, in analyzing the impact of a billboard amortization regulation, one must examine the economic impact on the entire property of the outdoor advertising company, or at least the company’s property in the entire market area, not just the portion that is affected by the regulation.

Another relevant takings case involved not the regulation of land but a prohibition on the sale or trade of parts of certain species of endangered birds.<sup>17</sup> The Supreme Court held there was no taking, even though owners were forbidden to sell parts legally purchased or otherwise obtained before the regulations became effective. The plaintiffs had been denied the most profitable uses of their property, but it was not clear that the property had lost all economic value. The Court stated: “a property restriction—unaccompanied by a physical invasion—provides a slender reed upon which to rest a takings claim. A reduction in the value of property is not necessarily equated with a taking.”<sup>18</sup> Here again, the Court ruled that the property rights at issue needed to be analyzed as a whole, not just one element of those rights.

In still another case, the Supreme Court restated the principle that in determining whether a taking had occurred, it was necessary to examine the property as a whole.<sup>19</sup> A Pennsylvania law prohibited coal mining that would cause damage under existing public buildings, dwellings, and cemeteries. The companies presented evidence that the act would force them to leave some twenty-seven million tons of coal unmined to support the ground above. Since this coal had significant value that was destroyed one hundred percent, they argued this constituted a taking. The Court disagreed, holding that one cannot segment property in order to conclude that all economically viable use of that particular segment has been destroyed. “The 27

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16. *Id.* at 130.

17. *Andrus v. Allard*, 444 U.S. 51 (1979).

18. *Id.* at 66.

19. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

million tons of coal do not constitute a separate segment of property for takings law purposes.”<sup>20</sup> When the property was analyzed as a whole, the companies could still mine approximately ninety-eight percent of their coal. An economically viable use remained. The statute did not make coal mining unprofitable or interfere with the companies’ investment-backed expectations.

This principle has been applied to billboard amortization regulations. For example, when Naegele Outdoor challenged Durham, North Carolina’s ordinance, the court ruled that the proper unit of analysis was the company’s entire business in the area, not just the billboards that had to be removed:

Clearly the unit is not composed of the affected billboards, which, like the coal pillars in *Keystone*, do not constitute a separate segment of property for taking purposes. . . . [S]ince the reality of Naegele’s business is that Naegele combines the leasehold interests in its signs into a unit in selling outdoor advertising in the Durham area, it follows that the unit of property to be considered for takings purposes is the combined group of Durham metro area signs.<sup>21</sup>

#### *D. Loss of Beneficial Use*

The Supreme Court has handed down several additional decisions regarding how far a regulation could go in affecting property values. Agins owned five acres of unimproved land overlooking San Francisco Bay. The City of Tiburon enacted a zoning ordinance that restricted density on the tract to between one and five single-family residences, and Agins sued, asserting that the city had effectively taken the value of their property. In upholding the ordinance, the Court first stated a general rule which remains the overriding principle: “The application of a general zoning law to a particular property effects a taking if (1) the ordinance does not substantially advance legitimate state interests, or (2) denies an owner

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20. *Id.* at 198.

21. *Naegele Outdoor Adver., Inc. v. City of Durham*, 803 F. Supp. 1068, 1074 (M.D.N.C. 1992).

economically viable use of his land.”<sup>22</sup>

In this case the Court felt the open-space zoning ordinance protected “the residents of Tiburon from the ill-effects of urbanization,” a “legitimate governmental goal.” Furthermore, the property owners were not denied “economically viable use” of their land because it could still be developed for residential purposes, albeit not a the density that *Agins* preferred. The *Agins* decision established the general rule for land use regulation in the United States: if a regulation advances a legitimate state interest, its negative impact on the value of a property does not require compensation as long as the owner is left with “an economically viable use.”

In a case that overturned the longstanding presumption that regulations considered critical to public health or safety were immune to any takings claim, the U.S. Supreme Court ruled that in cases of a total value loss caused by a challenged regulation, the government may avoid payment only if the prohibited uses were never part of the owner’s title. In 1986, David Lucas purchased two residential ocean-front lots on the Isle of Palms in South Carolina, the last two vacant lots in the area. Two years later, however, the State enacted a beachfront management act that had the effect of prohibiting Lucas from building any habitable structure on his properties. Lucas sued, contending that although the act was a valid exercise of the State’s police powers, its application had destroyed the value of his property, and entitled him to compensation.

The trial court agreed, holding that the prohibition on building deprived Lucas of any reasonable economic use of the lots and rendered them valueless.<sup>23</sup> The South Carolina Supreme Court reversed this decision, however, ruling that when a regulation was enacted “to prevent serious public harm,” no compensation was owed under the taking clause, regardless of the regulation’s effect on the property’s value.<sup>24</sup>

In its decision, the U.S. Supreme Court reversed, holding that in cases of a total value loss caused by the challenged regulation, the

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22. *Agins v. Tiburon*, 447 U.S. 255 (1980).

23. *Id.* at 1009.

24. *Id.* at 1009-10.

government may avoid payment only if the prohibited uses were never part of the owner's title:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. . . . [W]e think the notion pressed by the Council that title is somehow held subject to "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Taking Clause that has become part of our constitutional culture.<sup>25</sup> In other words, if the government is simply prohibiting by regulation a use that was always prohibited by principles of nuisance and property law in that state, then the property owner had never really lost anything and no taking had occurred. The decision also contained an important statement of law that is of critical importance to the personal property billboard amortization issue: "In the case of personal property, by reason of the State's traditionally high degree of control over commercial dealing, [the property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless."<sup>26</sup>

In one of the first cases that applied the *Lucas* decision to billboard regulation, a Burlington, Iowa billboard amortization ordinance was upheld. Outdoor Graphics had purchased a number of billboards in residential areas that had long been non-conforming and subject to removal. When the City required that the signs be removed, the billboard company sued, charging that the regulation constituted a taking of their property because it denied them all economically beneficial use. The court disagreed, holding that Outdoor Graphics purchased the property knowing the signs were subject to removal. Thus, their continued use was never part of their

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25. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

26. *Id.* at 1028.

property rights and there was no taking.<sup>27</sup>

In a related case, when the Barton Wilson Company was required to remove a number of signs in Louisville, Kentucky, they sued, charging, violations of free speech and takings. The court upheld the ordinance on both counts. Regarding the takings claim, the court noted that approximately eighty percent of Wilson's business was outside Louisville. Wilson could market the remainder of his inventory in these areas. "Even if he could not, a 20 percent decrease in the value of his inventory does not necessarily constitute a taking. The Court should view the owner's property as a whole, not in parcels."<sup>28</sup> The Court went further, however, noting that even if it could be shown there was a total loss of value, "it is questionable whether the ordinance would constitute a taking. . . . The Supreme Court has stated that it is unlikely that an owner of personal property who has a reasonable expectation that its property will be regulated, or regulated further as is the case here, would have a takings claim."<sup>29</sup>

An opposing, distinctly-minority judicial view was expressed by the Michigan Court of Appeals.<sup>30</sup> The court ruled that the provision in the East Lansing sign ordinance requiring non-conforming signs to be removed after a twelve-year amortization period was an unconstitutional taking. It brushed aside the Supreme Court's dicta that regulations that might make personal property worthless were not a taking, holding that the ordinance "took" Adams Outdoor's real property leasehold interest:

The property interests claimed to have been taken by East Lansing's sign code are Adams' real property interests, whether leasehold or fee simple, in the places where its billboards are located. East Lansing's argument that no taking occurred because the billboards are personal property misapprehends the nature of the property interest claimed to have been taken in this case and is therefore rejected. The Court also refused to regard all of Adams' billboards in the market area as the unit of property, rather considering it to be

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27. *Outdoor Graphics v. City of Burlington*, 103 F.3d 690, (8th Cir. 1996).

28. *Barton Wilson v. City of Louisville*, 957 F. Supp. 948 (W.D. Ky. 1997).

29. *Id.* at 955.

30. *Adams Outdoor v. City of East Lansing*, 591 N.W.2d 404 (Mich. Ct. App. 1998).

each individual ground leasehold. At this writing, the case is under appeal to the Michigan Supreme Court.<sup>31</sup>

### *E. The Statute of Limitations Issue*

A favored litigation tactic employed by outdoor advertising companies when challenging the validity of amortization provisions in sign ordinances has been to wait until the expiration of the amortization period before bringing suit. This strategy had two principal objectives. First, it kept the non-conforming signs up and still earning income during the pendency of the litigation. Second, by dragging out any resolution of the issue for a number of years, the chances of reaching a compromise favorable to the outdoor advertising company was increased. However, the success of this tactic has been greatly reduced in recent years, if not eliminated, by successful application of the statute of limitations.

The issue here was whether any potential “harm” to the outdoor advertising company would begin at the time the ordinance was passed or when the amortization period expired. Both Federal and state courts have ruled in recent years that any potential harm begins when the ordinance is passed. For example:

Any injury to plaintiff’s property occurred at the time the statute was enacted. Enactment of the zoning ordinance made plaintiff’s billboards nonconforming, thereby subjecting them to removal after the amortization period of seven years. As of [the date of passage of the ordinance], the consequences of the existence of nonconforming billboards were conclusively set, and the expected useful life of plaintiff’s billboards was shortened.<sup>32</sup> Thus, the ordinance must be challenged within a relatively short period of time, not at the end of the amortization period.<sup>33</sup>

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31. 1999 Mich. LEXIS 2748 (Mich. Nov. 30, 1999).

32. *Naegele Outdoor v. City of Winston-Salem*, 457 S.E.2d 874, 875 (N.C. 1995).

33. *See also National Adver. Co. v. City of Raleigh*, 947 F.2d 1158, (4th Cir. 1991); *Lamar Adver. of Mobile, Inc. v. City of Lakeland*, 980 F. Supp. 1455 (M.D. Fl. 1997); *Capitol Outdoor Adver., Inc. v. City of Raleigh*, 446 S.E.2d 289 (N.C. 1994).

#### IV. SUMMARY OF THE VALIDITY OF AMORTIZATION

The principle of using amortization as a method to remove non-conforming billboards has won overwhelming support in the courts. In addition to those cases cited elsewhere in this article, the list of cases upholding amortization of outdoor advertising signs is quite extensive.<sup>34</sup> Decisions striking down amortization also are few. One

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34. *Naegele Outdoor Adver., Inc. v. City of Durham*, 844 F.2d 172, 177 (4th Cir. 1988) (amortization valid but remand for determination of whether five and one-half year period was reasonable); *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269, 1274 (4th Cir. 1986) (amortization valid); *National Adver. Co. v. City of Ashland*, 678 F.2d 106, 107 (9th Cir. 1982) (five-year amortization not preempted by Highway Beautification Act); *Art Neon Co. v. City & County of Denver*, 488 F.2d 118, 122 (10th Cir. 1973) (five-year amortization upheld); *E.B. Elliott Adver. Co. v. Metro. Dade County*, 425 F.2d 1141, 1155 (5th Cir. 1970) (five-year amortization period valid); *Sign Supplies of Texas, Inc. v. McConn*, 517 F. Supp. 778, 787 (S.D. Tex. 1980) (amortization valid); *Fisher Buick, Inc. v. City of Fayetteville*, 689 S.W.2d 350, 351-52 (Ark. 1985) (amortization valid); *Donrey Communications Co. v. City of Fayetteville*, 660 S.W.2d 900, 905 (Ark. 1983) (four-year amortization reasonable); *City of Fayetteville v. McIlroy Bank & Trust Co.*, 647 S.W.2d 439, 441 (Ark. 1983) (seven year amortization valid); *National Adver. v. County of Monterey*, 464 P.2d 33, 36 (Cal. 1970) (one-year amortization valid); *City of Salinas v. Ryan Outdoor Adver. Inc.*, 234 Cal. Rptr. 619, 623-24 (Cal. Ct. App. 1987) (amortization concept valid and five-year amortization period reasonable); *Veterans of Foreign Wars v. City of Steamboat Springs*, 575 P.2d 835 (Colo. 1978) (amortization valid); *Mayor and Council of New Castle v. Rollins Outdoor Adver., Inc.* 475 A.2d 355, 358 (Del. 1984) (amortization valid); *Lamar Adver. Assoc. of East Florida, Ltd. v. City of Daytona Beach*, 450 So. 2d 1145, 1150 (Fla. Dist. Ct. App. 1984) (ten-year amortization valid); *Webster Outdoor Adver. Co. v. City of Miami*, 256 So.2d 556, 557 (Fla. Dist. Ct. App. 1972) (five-year amortization period valid); *City of Doraville v. Turner Communication Corp.* 233 S.E.2d 798, 801 (Ga. 1976) (amortization valid); *Village of Skokie v. Walton on Dempster, Inc.*, 456 N.E.2d 293, 296-97 (Ill. App. Ct. 1983) (seven-year amortization upheld); *Board of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1027 (Ind. 1998) (amortization valid); *State v. National Co.*, 409 A.2d 1277, 1289 (Me. 1979) (five-year amortization period valid); *Town of Boothbay v. Nat'l Adver. Co.*, 347 A.2d 419, 425 (Me. 1975) (ten-month amortization upheld); *Donnelly Adver. Corp. of Maryland v. City of Baltimore*, 370 A.2d 1127, 1134 (Md. 1977) (amortization valid); *Grant v. City of Baltimore*, 129 A.2d 363, 370 (Md. 1957) (five-year amortization valid); *John Donnelly & Sons, Inc. v. Outdoor Adver.*, 339 N.E.2d 709 (Mass. 1975) (amortization upheld); *Naegele Outdoor Adver. Co. of Minnesota v. Village of Minnetonka*, 162 N.W.2d 206, 213-14 (Minn. 1968) (three-year amortization valid); *Beals v. County of Douglas*, 560 P.2d 1373, 1374 (Nev. 1977) (amortization upheld); *Temple Baptist Church, Inc. v. city of Albuquerque*, 646 P.2d 565 (N.M. 1982) (amortization valid); *Suffolk Outdoor Adver. v. Town of southampton*, 455 N.E.2d 1245, 1246 (N.Y. 1983) (amortization valid and not preempted by Highway Beautification Act); *Syracuse Sav. Bank v. Town of DeWitt*, 436 N.E.2d 1315, 1316 (N.Y. 1982) (four-year amortization valid); *Modjeska Sign Studios, Inc. v. Berle*, 373 N.E.2d 255, 262-63 (N.Y. 1977) (amortization upheld); *New York State Thruway auth. v. Ashley Motor Court*, 176 N.E.2d 566, 568-69 (N.Y. 1961) (instant removal of a billboard as a safety hazard held valid); *R.O. Givens, Inc. v. Town of Nags Head*, 294 S.E.2d 388, 390 (N.C. Ct. App. 1982) (five and a half year amortization period held

is a decision by the Georgia Supreme Court invalidating the state's "bonus law" which is widely quoted for its lack of judicial reasoning and hysterical tone. Georgia courts, to their eternal credit, have never allowed taking or damaging private property without first paying; therefore, this court stands ready to strike down any legislative attempts to do so. The court held:

We believe this matter is important enough to justify the following observations. Private property is the antithesis of Socialism or Communism. Indeed, it is an insuperable barrier to the establishment of either collective system of government. Too often, as in this case, the desire of the average citizen to secure the blessings of a good thing like beautification of our highways, and their safety, blinds them to a consideration of the property owner's right to be saved from harm even by the government. The thoughtless, the irresponsible, and the misguided will likely say that this court has blocked the effort to beautify and render our highways safer. But the actual truth is that we have only protected constitutional rights by condemning the unconstitutional method to attain such desirable ends, and to emphasize that there is a perfect constitutional way which must be employed for that purpose. Those whose ox is not being gored by this Act might be impatient and complain of this decision, but if this court yielded to them and sanctioned this violation of the Constitution we would thereby set a precedent whereby tomorrow when the critics are having their own ox gored, we would be bound to refuse them any protection. Our decisions are not just good for today but they are equally valid tomorrow.<sup>35</sup> The Georgia Court reaffirmed its position in *Lamar Advertising of South Georgia v. City of Albany*.<sup>36</sup>

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reasonable); *County of Cumberland v. Eastern Federal Corp.*, 269 S.E.2d 672, 675 (N.C. Ct. App. 1980) (three-year amortization upheld); *City of Houston v. Harris County Outdoor Adver. Assoc.*, 732 S.W.2d 42, 49-50 (Tex. App. 1987); *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 938 (Tex. Civ. App. 1978) (amortization valid); *Ackerley Communications v. City of Seattle*, 602 P.2d 1177, 1180 (Wash. 1979) (amortization upheld); *Markham Adver. Co. v. State*, 439 P.2d 248, 261 (Wash. 1968) (amortization valid).

35. *State Highway Dep't v. Branch*, 152 S.E.2d 372, 374 (Ga. 1966).

36. *Lamar*, 389 S.E.2d 216 (Ga. 1990).

Likewise, the Colorado Supreme Court struck down a Denver ordinance on the basis that it destroyed an entire business, which exceeded the city's powers.<sup>37</sup> Thus, except in a few states, the use of amortization has been found to be a constitutionally valid technique to remove non-conforming billboards.

## V. OTHER REMOVAL TECHNIQUES

Forced removal under an amortization schedule is not the only way for a community to reduce the number of billboards. The first, of course, is a ban on the construction of new billboards. When billboards are removed or destroyed for some reason they cannot be replaced. Also, if a community has a ban on new billboards, they may be able to negotiate with outdoor advertising companies to have them remove existing billboards in return for being allowed to build some new ones, so-called "cap and replace" provisions. Many communities also make billboards a primary use of a lot. Thus, if the property owner wants to develop it for another use, the billboards must be removed as a condition for approval. These "vacant-lot" provisions have been held to not be a taking.<sup>38</sup>

### A. *The Highway Beautification Act*

It is ironic that the Highway Beautification Act, an act that was passed to "promote the safety and recreational value of public travel and to preserve natural beauty," has served to protect billboards from local sign removal ordinances.<sup>39</sup> The 1965 act was supposed to achieve two objectives: to prohibit the erection of new billboards, except in genuine commercial or industrial areas, and to remove by 1970 all billboards that did not conform with the provisions of the Act by 1970. In reality, of course, it has done neither.

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37. Combined Communications Corp. v. City & County of Denver, 542 P.2d 79 (Colo. 1975).

38. Outdoor Systems v. City of Mesa, 997 F.2d 604 (9th Cir. 1993); Naegele Outdoor v. City of Lakeville, 532 N.W.2d 249 (Minn. Ct. App. 1995).

39. 23 U.S.C. § 131 (1994).

Despite the fact that twenty-two states were removing non-conforming signs using amortization under the 1956 Bonus Act designed to protect Interstate highways from billboard clutter, cash compensation was made mandatory on the states in the 1965 act. Although over two hundred twenty million dollars has been spent to remove non-conforming billboards, a General Accounting Office study concluded that the removal program was largely ineffective.<sup>40</sup>

The greatest impact of the Act has been to protect billboards from removal under local regulatory ordinances. All billboards located along protected highways, Interstate, Primary, and National Highway System roads, cannot be removed except upon the payment of “just compensation” for: (1) “The taking from the owner of all right, title, leasehold, and interest in the sign, display, or device and; (2) The taking from the owner of the real property on which the sign is located the right to erect and maintain such signs, display, and devices thereon.”<sup>41</sup>

The Federal Highway Administration interpreted this provision to prohibit the removal of signs under a state’s police powers.<sup>42</sup> Even so, courts in several states ruled that cash compensation was not required for billboards on protected roads that were removed for purposes other than highway beautification.<sup>43</sup> In 1978, however, the outdoor advertising industry secured an amendment to the Act that mandated cash compensation for all billboards that were removed, “regardless of whether the sign was removed because of this section.”<sup>44</sup>

The practical result has been that the Highway Beautification Act serves as a shield to protect billboards from removal by state and local governments under their police powers.<sup>45</sup> For example, after an

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40. GENERAL ACCOUNTING OFFICE, THE OUTDOOR ADVERTISING CONTROL PROGRAM NEEDS TO BE REASSESSED (1985).

41. 23 U.S.C. § 131(g).

42. *Vermont v. Brinegar*, 379 F. Supp. 606, 617 (D.Vt. 1974).

43. *See, e.g., Modjeska Sign Studios v. Berle*, 373 N.E.2d 255, 263 (N.Y. 1977) (removal of billboards in state park area); *Donnelly Adver. v. City of Baltimore*, 370 A.2d 1127, 1134 (Md. 1977) (removal in urban renewal area).

44. 23 U.S.C. § 131(g).

45. For cases invalidating local sign amortization provisions on this basis, see *National Adver. Co. v. City of Ashland*, 678 F.2d 106 (9th Cir. 1982); *Lamar Corp. v. City of Mandeville*, 1995 U.S. Dist. LEXIS 14762 (E.D.La. 1995); *Lamar-Orlando Outdoor Adver. v. City of Ormond Beach*, 415 S.E.2d 1312 (Fla. Dist. Ct. App. 1982); *RHP Inc. v. City of Ithaca*, 457 N.Y.S.2d 645 (N.Y. App. Div. 1982); *City of Ft. Collins v. Root Outdoor Advertising*, 788

eleven-year legal battle the City of Raleigh, North Carolina finally was able to remove almost all billboards in the City—except those that were protected by the Highway Beautification Act.

*B. State Legislation Inhibiting Billboard Removal*

The outdoor advertising industry is acknowledged to wield political power far beyond its relative economic size would indicate. This power is quite evident in anti-amortization laws that have been passed in at least nineteen states. (In addition, several other states, including Ohio and Virginia prohibit the forced discontinuance of any non-conforming use.) Some of these laws were passed in response to the 1978 amendment to the Highway Beautification Act; the outdoor advertising industry using the argument that unless local governments were prohibited from using amortization to remove billboards, the state might be subject to a ten percent penalty in its federal highway funds under the Act. Others were passed to block billboard removal initiatives by local governments. For example, after the Mesa and Tucson “vacant-lot” provisions were upheld in the courts, the outdoor advertising was able to secure legislation containing the following restriction on local governments in the state:

A municipality shall not require as a condition for a permit or for any approval, or otherwise cause, an owner or possessor of property to waive the right to continue an existing nonconforming outdoor advertising use or structure without acquiring the use or structure by purchase or condemnation and paying just compensation unless the municipality, at its option, allows the use or structure to be relocated to a comparable site in the municipality with the same or a similar zoning classification, or to another site in the municipality acceptable to both the municipality and the owner of the use or structure, and the use or structure is relocated to the other site. The municipality shall pay for relocating the outdoor advertising use or structure including the cost of removing and

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P.2d 149 (Colo. 1990).

constructing the new use or structure that is at least the same size and height.<sup>46</sup>

A similar California law goes even further in its restrictions on local governments:

Notwithstanding any other provision of this chapter, no advertising display which was lawfully erected anywhere within this state shall be compelled to be removed, nor shall its customary maintenance or use be limited, whether or not the removal or limitation is pursuant to or because of his chapter or any other law, ordinance, or regulation of any governmental entity, without payment of compensation. . . . The compensation shall be paid to owner or owners of advertising display and the owner or owners of the land upon which the display is located.

The requirement by a governmental entity that a lawfully erected display be removed as a condition or prerequisite for the issuance of continued effectiveness of a permit, license, or other approval for any use, structure, development, or activity other than a display constitutes a compelled removal requiring compensation under section 5412, unless the permit license, or approval is required for the construction of a building, or structure which cannot be built without physically removing the display.<sup>47</sup>

#### CONCLUSION

Reducing billboard clutter in a community is a difficult task, and one that is bitterly opposed by the outdoor advertising industry. One way to do so, and perhaps the most effective way, is to ban the construction of new billboards, thus reducing the number of billboards as some are removed for development or other reasons.

Except in a few states, the amortization method of requiring non-conforming billboards to be removed does not constitute a taking, requiring the payment of cash compensation. Even so, the outdoor advertising industry has been successful in a number of states in

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46. ARIZ. REV. STAT. § 9-462.02(B) (1996).

47. CAL. BUS. & PROF. CODE §§ 5412 and 5412.6 (1996).

securing legislation that reduces, and in some cases severely curtails or eliminates, the ability of local governments to use amortization or other land use restrictions to remove non-conforming billboards. Ironically, the Highway Beautification Act has provided the outdoor advertising industry with its most effective shield from local amortization ordinances.