

TREES, BILLBOARDS, AND THE RIGHT TO BE SEEN FROM THE ROAD

by Charles F. Floyd

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Vista, (n), “a opening in the landscape through which one can see a billboard.”
– UNKNOWN from Wagster’s Unexpurgated Dictionary.

Introduction

The outdoor advertising industry depends for its very existence on its billboards being seen from the public roadway. If trees grow up in front of a sign and block this view, the billboard no longer has value to the outdoor advertising company’s business. Pressure from the industry to remove these obstructions to their use of the road has led to the controversial practice in a number of states of permitting the cutting of trees on the public right-of-way to provide a clear view of billboards, and the billboard industry is pushing hard to extend the practice to other states.

Cutting the public’s trees on the right-of-way to provide a better view of billboards gives rise to several questions. What is the relationship between the outdoor advertising business and the roadway? Are billboards a use of private property or a use of the road? Does an outdoor advertising company have the inherent right to a clear view from the roadway? If the highway authority refuses to cut the trees to provide this view, does the obstruction of view constitute a compensable taking for the billboard’s owners? Finally, if the public authority allows trees on the right-of-way to be destroyed in order to provide a clear view of billboards, does this constitute an illegal gift of public property for a non-profit purpose or an illegal relinquishment of right-of-way?

Billboards As A Use Of The Road

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 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.

This dependence on the public’s investment in the roadways is acknowledged by the outdoor advertising industry. For example, an official of the Outdoor Advertising Association of America testified: “The Outdoor Advertising Association members do not sell signs; they sell circulation.” [From testimony of George McInturff given before a public hearing to consider a challenge to the constitutionality of the State of College Borough, Pennsylvania, Sign Ordinance 888, March 13, 1978]. In their publication,

Planning for Out-of-Home Media, the Traffic Audit Bureau defines “circulation” as follows [Ken Sammon, Planning for Out-of-Home Media, Revised Edition, New York: The Traffic Audit Bureau, Inc., 1987]:

Circulation (potential viewers) is the foundation for determining the advertising value of the Out-of-Home media. Outdoor circulation is based on traffic volume. Traffic volume is made up of three modes of transportation: automotive, pedestrian and mass transit . . . For the most part, outdoor circulation reflects people in vehicles.

Outdoor Advertising Industry Practices

The firms comprising the standardized outdoor advertising industry own outdoor advertising structures and lease 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 300 square feet in size (12 by 25 feet), although the industry also uses a smaller poster panel of 72 square feet (6 by 12 feet), appropriately called a “junior” panel, or 8-sheet poster [Ibid.].

The second type of standardized industry sign is the painted bulletin usually measuring 14 feet by 48 feet (672 square feet), although various other sizes are also used, particularly 10 feet by 40 feet (400 square feet) and 10 feet by 36 feet (360 square feet). The industry also offers a “Super Bulletin” of 1,200 square feet (20 feet by 60 feet) in some large markets, and a few bulletins range in size to 2,500 square feet, or even larger. Most bulletins are painted, but some advertisers, and particularly cigarette companies, now provide printed faces to the outdoor advertising company.

The advertiser usually furnishes the paper posters for billboards, and the outdoor advertising company “posts” the bill on their signboards for a fee. Poster panels are normally sold by the month in packages of what the industry refers to as “gross rating points.” Thus, a 100-G.R.P. package (a #100 showing) supposedly will provide enough panels to deliver in one day the opportunity for the advertiser’s message to be seen by 100 percent of the population of the market area. A 50-G.R.P. or #50 showing supposedly will be seen by half of the population; a 25-G.R.P. showing by 25 percent of the population. For example, a #100 showing in the Chicago market in March 1994 was defined as 43 non-illuminated and 285 illuminated panels; a #50 showing consisted of 21 non-illuminated and 143 illuminated panels. The monthly cost of the #100 showing was \$191,880, or approximately \$585 per billboard [Outdoor Advertising Association of America, The Buyer’s Guide to Outdoor Advertising, Vol. 30, No. 1, March 1984].

Painted bulletins are usually sold for a longer period of time, commonly a year. Sometimes a firm leases a particular sign, although many are sold in packages similar to poster showing. Often the painted faces are “rotated” to different locations periodically

to reach various sub-markets. For example, in March 1994 a large outdoor advertising firm offered 672 square foot billboards in Jacksonville, Florida for \$2,450 a month on a year's lease. The faces were "rotated" (moved) every 60 days to different locations within the market area.

The cost to the advertiser of these bulletins varies with supply and demand conditions in the particular locale. For example, the same size billboard that leased for \$2,450 in Jacksonville would cost \$4,725 per month in Los Angeles, or \$950 in Mobile, Alabama.

For this analysis of outdoor advertising industry pricing policies, it is apparent that although off-premise outdoor advertising signs are located on private property, their value to the outdoor advertising business clearly derives solely from their direct use of the roadway. 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.

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, and service stations – or even as business 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 measures 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 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 itself recognizes this direct relationship in its pricing policies.

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 [Churchill and Tait v. Rafferty, 32 Philippine Rpts. 580 (Phil. Isl. Sup. Ct. 15) app. dismissed 248 U.S. 591 (1918)]:

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.

In upholding the state's Outdoor Advertising Control law, the Massachusetts Supreme Court also pointed to the billboard's use of the roadway [General Outdoor Advertising Co. v. Department of Public Works, 193 N.E. 799 (Mass. Sup. Jud. Ct. 1935) App. dismissed 296 U.S. 542 (1935) and 297 U.S. 725 (1936)]:

[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.

Similarly, the United States Supreme Court observed [Packer Corp. v. Utah, 285 U.S. 105, 110, 52 S.Ct. 273, 274]: Billboards, . . . placards and such are a class by themselves . . . Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard.

This intrusiveness of billboard advertising is acknowledged by the outdoor advertising industry, which regards it as a marketing advantage. For example, Chris Carr, a vice-president of Gannet Outdoor Group, was recently quoted [The Boston Globe, August 9, 1994, p. 41]:

People can't shut off a billboard. TV and radio ads can be turned off or tuned out; billboards are the last unavoidable medium.

The fact that billboards are an intrusion on privacy and a use of the roadway was repeated by the Massachusetts court in upholding Brookline's billboard ban [John Donnelly & Sons, Inc. v Outdoor Advertising Board, 339 N.E.2d 709 (1975)].

The important of use of the road to outdoor advertising also was emphasized by New York's highest court in a case which involved the removal of a billboard along the Thruway for safety reasons [New York State Thruway Authority v. Ashley Motor Court, 176 N.E. 2d 566, 1961]:

[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.

This view of billboards as a use of the roadway was reiterated in a California case [Metromedia, Inc., et al., v. City of Pasadena, 216 Cal. App. 2d 370, 30 Cal. Rptr. 731, 1963]:

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.

In a more recent case, Modjeska Sign Studios, Inc. v. Berle, the court stated [373 N.E.2d 255, (Court of Appeals of New York, 1977)]:

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.

Billboards As An "Appurtenant" Use

The recognition that billboards are a direct use of the road led to a holding by the Vermont Supreme Court that the right to view from the roadway was "appurtenant" to the adjacent property and included only the right to display an on premise sign advertising the business conducted on the property. In this decision, Kelbro, Inc. v. Myrick, the court upheld a state billboard control ordinance, concluding [30 A.2d 527, (Supreme Court of Vermont, 1943)]:

The plaintiff is . . . seeking to use the highway for commercial purposes analogous to the use made of it by common carriers. Such use, this Court has held, the Legislature in the exercise of its police powers may wholly deny, or may permit to some and deny to others as will best promote the general good of the public. There is no inherent right to use the highways for commercial purposes.

This logic was reaffirmed by a 1967 decision which held that the state had the constitutional power to force the removal of nonconforming billboards [Micralite Sign Corporation v. State Highway Department, 120 Vt. 498, 236 A.2d 680]. It was also relied on by a Kentucky court in upholding "Bonus Act" billboard control legislation in that state [Moore v. Ward, 377 SW2d 881 (1964)].

In a case which upheld Maine's total ban of commercial billboards, the court held that because billboards were a use of the road they were afforded less free speech protection [John Donnelly & Sons v. Campbell, 639 F.2d 6 (1980)]:

The use of land adjoining the highway for commercial advertising is really use of the highway itself.

The Right to Be Seen From The Road

Having reached the inescapable conclusion that billboard advertising is a use of the roadway rather than of private property, we next must address questions regarding the right to be seen from the road. Do outdoor advertising companies have an inherent right to the clear view from the roadway that is essential for their business? If they are unable to secure this clear view because trees and other vegetation have grown up on the public right-of-way and the highway authority refuses to cut the trees to provide an unobstructed view, does this give rise to valid compensable "taking" claims for billboard owners?

While the general case law regarding the right to be seen from the roadway is not extensive, there appears to be no support for the proposition that one property owners must destroy his property in order to provide a clear view of an adjoining road for another property owner [Compensability of Loss of View From Property – State Cases, 25 ALR4th 671]. The courts have also consistently refused to agree with the outdoor advertising industry that they have a right of visibility for their signs.

About sixty years ago, Perlmutter leased land next to an approach to the mid-Hudson bridge at Poughkeepsie, New York, on which he erected a fifty-three foot long and ten-foot high billboard advertising his furniture store. Greene, the State Superintendent of Public Works, concerned about the distraction cause by the billboard on the narrow and curvy bridge approach, erected a screen to block the view of the billboard. Perlmutter sued, contending he had a right to be seen from the roadway and that the screen was an illegal interference with that right. The lower courts accept this argument, ruling that (1) the state could not erect the screen so as to obscure the billboard, (2) the state could not prevent Perlmutter from using the property for advertising purposes, and (3) the erection of the screen to obscure the billboard did not safeguard the traveler or serve any highway purpose. The state's highest court disagreed [Perlmutter v. Greene, 182 N.E. 5 (1932)]:

[The Superintendent] may plant shade trees along the road to give comfort to motorists and incidentally to improve the appearance of highway. By so doing he aims to make a better highway than a mere scar across the land would be. If trees interfere with the view of the adjacent property from the road, no right is interfered with . . . No contract exists between the State and the owner that the latter may forever use his property to erect billboards anywhere along the highway; no right in rem exists, for the adjacent owner has no title to the highway

. . . No adjacent owner has the vested right to be seen from the street in his backyard privacy.

In a judicial period when aesthetics generally were not recognized as a valid basis for use of the police power, this landmark opinion by Chief Justice Pound also advanced the cause of aesthetic regulation:

Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality, or decency.

[The Superintendent] may act reasonably in his discretion for the benefit of public travel in screening a billboard at a dangerous curve when by its enormity such a structure may divert the attention of the motorist from the road. He then interferes with no property right of the adjacent owner, and he should not be interfered with by the courts. If incidentally the outlook from the road is improved by shutting off the view of the billboard, so much the better.

In the late 1970's there was considerable debate concerning illegal tree cutting on Tennessee highways. When the state refused to destroy trees blocking a clear view of billboards, the Outdoor Advertising Association of Tennessee sued, contending that planting or permitting vegetation on highway rights-of-way obstructing licensed billboard was unlawful and unconstitutional. In particular, the outdoor advertising company argued that because they had obtained permits from the state costing five dollars each, planting or maintaining vegetation "in such a way as to obstruct state inspected licensed and approved sign structures and render them non-productive constitutes a constructive condemnation of those structures without just compensation in violation of [the Highway Beautification Act]." The Court disagreed, holding the outdoor advertising companies had no basic right to be seen from the highway and that the State's refusal to cut the trees did not constitute a taking of the affected billboards [Outdoor Advertising Association of Tennessee v. Shaw, 598 S.W. 2d 783 (1980)]:

This Court has concluded the plaintiffs' complaint shows no common law, constitutional or statutory right to compensation for the impairment of the visibility of their signs on any theory of "constructive taking." This Court is unaware of any statutory or common law which requires an adjoining land owner to refrain from planting or to actively trim vegetation on his own property to avoid obscuring the view from or to his neighbor's property.

Plaintiffs seem to insist that the licensing of a billboard confers some special right of visibility and imposes some special duty upon the State to maintain visibility of the licensed billboard. No authority has been cited or found to sustain this novel theory which this Court is unwilling to incorporate for the first time into the law.

Encouraged by recent favorable Supreme Court "takings" decisions, the outdoor advertising industry again contended in a North Carolina case that the planting of trees

and other vegetation within the right-of-way of highways in front of billboards constitutes a taking of property requiring compensation. Again they lost [Adams Outdoor Advertising of Charlotte v. North Carolina Department of Transportation, 434 S.E.2d 666 (1993 N.C. App.)]:

In its brief, the outdoor advertising company acknowledged that the outdoor advertising business is dependent upon its use of the roadway, but claimed this use of the roadway created a right of visibility:

The economic viability of a billboard is dependent entirely upon the ability to see it from an adjacent roadway, and whether its visibility is obliterated by a screen of trees, a screen of concrete or the billboard is simply cut down, the complete loss a billboard's economic value is no less.

The court disagreed. Noting that the planting of trees in its right-of-way was clearly within the powers of the Department of Transportation, the court observed that the outdoor advertising company had notice when it entered into the lease of the property that the State might plant trees or shrubs on the right-of-way in front of its signs. It ruled that this loss of view did not constitute a "taking:"

Plaintiff fails to present any compelling reason why we should find a basis or authority for a taking based upon the "right to be seen," and we refuse to do so.

"Vegetation Control" Programs

Failing to prevail in the courts, the outdoor advertising industry has sought to achieve its goal of unimpeded visibility from the roadway through administrative procedures or favorable legislation. In this effort they have been much more successful.

Eighteen states (Alabama, California, Connecticut, Florida, Georgia, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, New Jersey, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Virginia, Tennessee, and Wisconsin) now permit or require that trees be cut on the public right-of-way to provide a clear view of billboards.

For example, after losing their legal challenge in Tennessee, the outdoor advertising industry was successful in securing legislation requiring that vegetation be cut to permit a clear view for 500 feet on each side of a billboard. [Tenn. Code Ann. 54-21-119(a)]. In Florida, the Department of Transportation formulated a rule which provides a 1,000 foot billboard viewing zone on each side of a billboard, a clear zone of over one-third of a mile for each billboard [Florida DOT Rules, Chapter 14-13.006, Vegetation Management at Advertising Display]. In 1993, New York Governor Cuomo vetoed a billboard that would have mandated that a billboard be visible for five seconds from a passing vehicle traveling at the speed limit [The Buffalo News, August 5, 1993].

These “vegetation control” programs give rise to other legal questions. If vegetation on the public right-of-way is destroyed to provide better visibility for billboards, does this practice violate laws and regulations relating to highway maintenance or relinquishment of right-of-way? Does it constitute an illegal gift of public property for a non-public purpose?

Policies of the Federal Highway Administration

As trees on Interstate highways, many of which were planted with funds provided by the 1965 Highway Beautification Act, gained some size, a number of those located near billboards began to die from poisons or be cut down in the middle of the night. For example, in 1972 the Florida Department of Transportation presented testimony to the Commission on Highway Beautification showing that more than 1,500 trees had been destroyed along I-75, all in front of billboards. This vandalism was addressed by the Federal Highway Administration in their Federal-Aid Program Manual Transmittal 156, dated September 26, 1975 which urged the states to “take all legal and administrative actions at its disposal to abate these practices.”

In 1976, the outdoor advertising industry proposed to eliminate the problem of illegal tree cuttings by making this practice legal. Their “environmental consultant” proposed to the FHWA what he euphemistically referred to as a “vegetation control” policy that would permit the billboard companies to destroy the public’s trees in front of billboards. The industry was successful, securing a policy change in March 1977 which permitted the states to enter into “maintenance agreements” with outdoor advertising companies to cut trees and other vegetation on the right-of-way for the purpose of providing a clear view of billboards.

The Federal Highway Administration’s tree destruction policy supposedly permits such cutting only “if it is consistent with State maintenance policies, good landscaping practices, and the guidance provided by the American Association of State Highway and Transportation Officials Maintenance Manual.” Section 5.160 of that manual, Trees and Brush, encourages natural growth of trees on the edge of the right-of-way. There are no provisions encouraging, recommending, or even permitting the destruction of trees to make billboards more visible.

The Inspector General and General Accounting Office Reports

In August 1984, the U.S. Department of Transportation’s Office of Inspector General completed its report on audit of the Highway Beautification Act in Federal Highway Administration Region 4 (the Southeast). The report specifically criticized the tree cutting policy, particularly because it prolonged the life of billboard that were supposed to be removed under the Highway Beautification Act:

FHWA and state policies permit sign owners to clear vegetation and trees on highway right-of-way to make their signs more visible to motorists. If this practice was not permitted, more nonconforming signs would be abandoned, or

removed with no compensation, since highway advertising media has no economic value when obscured by vegetation growth.

The General Accounting office's report of January 1985, The Outdoor Advertising Control Program Needs to Be Reassessed, also criticized the vegetation destruction program. Even so, the Federal Highway Administration refused to take any action to rescind the policy.

The Federal Highway Administration finally modified its position in 1990:

To clear vegetation solely to improve the visibility of signs subject to removal under the Highway Beautification Program is not environmentally responsive. It is Federal Highway Administration policy to be sensitive to environmental concerns, therefore such vegetation clearance can no longer be endorsed. Direction should be provided the Division offices to assist the States in rescinding their existing vegetation clearance agreement and/or permit programs.

As might be expected, this change drew a furious response from the outdoor advertising industry and their friends in Congress, and the Federal Highway Administration quickly "unrescinded" their directive, saying that their memorandum was only a "statement of policy" which the states could ignore.

FHWA's Obligations and Powers of Enforcement

Two basic questions arise regarding the Federal Highway Administration's policy of allowing the public's trees to be destroyed to provide a better view of billboards: What obligation does the FHWA have to insure that highways constructed under the federal-aid program are maintained in a manner consistent with public highway purposes? What powers does the FHWA have to force the states to conform with regulations and policies regarding maintenance of these highways?

Obligation to Maintain Federal-Aid Highways

The obligation to properly maintain highways built with federal aid is not optional, either with the states or the Federal Highway Administration. The United States Code (23 U.S.C. 116) requires that any highway that is built with Federal aid must be maintained by the state as long as it is part of the federal-aid system. "Maintenance" specifically includes the roadside. Further, the Code of Federal Regulations (23 CFR 1.23) requires that "All real property within the right-of-way boundaries of a project **shall be devoted exclusively to public highway purposes.**" (Emphasis added.)

It is difficult to visualize how destruction of trees and other vegetation on the highway right-of-way for the sole purpose of making billboards more visible could qualify as "maintenance" or be characterized as "consistent with sound landscape practice." To the contrary, allowing the outdoor advertising companies to cut down the public's trees on

the right-of-way appears to constitute destruction of public property for a non-public, non-highway purpose.

Where the highway project specifically contained landscaping elements, the Federal Highway Administration's obligation seems to be even clearer. In 1979, the FHWA's Assistant Chief Counsel for Right-of-Way and Environmental Law determined that:

The FHWA's concurrence is required before the State can be relieved of its obligation to maintain a federally funded landscape project . . . The removal would be governed by 23 CFR, Part 520 [Relinquishment of Highway Facilities], since such removal of vegetation would essentially amount to a relinquishment of a federally funded highway facility.

Despite this clear directive, and the authorities it cites, the Federal Highway Administration has not followed the law or its own regulations. No state that wished to destroy landscaping elements to benefit the billboard companies has ever been required to comply.

Powers of Enforcement

The powers of the Federal Highway Administration to require that the states maintain the highways in conformance with applicable laws and regulations are quite clear.

As the Assistant Chief Counsel's memorandum explained:

If the State were to remove vegetation in violation of the above conditions, it would be in violation of 23 U.S.C. section 116. Under that section sanctions would include withholding further project approvals until maintenance is restored.

Illegal Gift of Public Property

There is also the question of whether the cutting of trees on the right-of-way to provide a clear view of billboards is an illegal gratuity under the constitutions of some states. For example, the Georgia Attorney General ruled [April 17, 1991] that this action would "possibly constitute a gratuity in violation of Art. III, Section 6, Par. 6 of the Georgia Constitution."

Conclusions

From the above discussion it seems apparent:

1. The billboard business is a use of the road, not a use of private property.
2. Outdoor advertising companies have no inherent right to be seen from the roadway.

3. The refusal of public authorities to destroy trees and other vegetation on the right-of-way to provide a clear view of billboards does not constitute a “taking.”

4. There is considerable question whether “vegetation control” programs which permit such cuttings comply with federal laws and regulations dealing with maintenance of highway facilities, and whether the practice constitutes an illegal gratuity under some state constitutions.