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Billboard Legislation and the Takings Issue

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BILLBOARD LEGISLATION AND THE TAKINGS ISSUE

> When a man throws an empty cigarette package from an automobile, he is liable for a fine of $50. When a man throws a billboard across a view, he is richly rewarded. –*California Governor Pat Brown*

Over the past few years there has been a determined effort by the billboard industry to secure state legislation reducing the rights of local governments to require removal or alteration of billboards along local roads. The industry has been richly rewarded as a result, but the adverse consequences to the public welfare are just now becoming visible.

For purposes of this discussion, the term "local roads" means those roadways other than the Interstate System and the Federal-aid primary system (which are referred to herein as "federal roads"), which are treated differently due to the provisions of the federal Highway Beautification Act (sometimes referred to as the "HBA").[1] The billboard industry's goal has been to completely eliminate amortization as a land use tool. In its place, the billboard industry would limit local governments to only eminent domain principles. However, under their formula for calculating the payment[2] of just compensation, the industry would require a local government to pay to a billboard owner an amount far in excess of the original cost of the billboard.[3]

The industry suggests that the *federal model* involving the "payment" of just compensation for billboards along federal roads should be applied to local roads as well. To understand the inappropriateness of such a model, one must understand the origin of the federal Highway Beautification Act and why the Act has been described by scholars as (a) "how the legislative process can be subverted,"[4] (b) how "a law initially ambitious in scope can be turned on its head by a seemingly insignificant amendment,"[5] (c) "a failure, both in removing nonconforming signs and in preventing the spread of billboard clutter to much of the rural countryside,"[6] and (d) an "object lesson in what not to do."[7] Other commentators have been far less charitable in their descriptions of the *federal model*.[8]

Prior to 1965, federal efforts toward curbing billboard proliferation along the nation's highways was limited to the build-out of the Interstate System. The federal government offered

financial incentives (carrots) to states that would exercise control to prohibit billboards from lining their highways. This initial approach was known as the Bonus Act and was passed in 1958 during the Eisenhower Administration.[9] The Bonus Act allowed the federal government to grant states that controlled billboards an additional 0.5% in federal-aid highway funds.[10] Unfortunately, the carrot approach had very limited success during the seven year period it was in effect. Only 195 miles of federal roads had received benefits for effectuating billboard control as of 1965.[11]

But by the spring of 1965, it had become fairly well established that the police power formed a sufficient basis for requiring the eventual removal of non-conforming billboard structures and other nonconforming land uses following reasonable amortization periods.[12] To be reasonable, an amortization period generally had to be sufficient in length so as to allow a billboard owner to recoup its original investment in the sign structure. In practice, amortization periods of five or more years allow a billboard company the opportunity to recoup far more than its original investment in the construction and erection of the sign structure. Moreover, a sign structure and many of its components can often be reused at other locations. Suggestions that the government is either "destroying" the structure or "physically taking" the structure away from the sign owner are untrue.[13]

As of the summer of 1965, the specific use of the police power to require the removal of nonconforming billboards over reasonable amortization periods was supported by several decisions. See *Grant v. City of Baltimore*, 129 A.2d 363 (Md. 1957); *New York State Thruway Auth. v. Ashley Motor Court*, 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (Ct.App.N.Y. 1961); *National Advertising Co. v. County of Monterey*, 211 Cal. App.2d 375, 27 Cal. Rptr. 136 (Cal.App.1st Dist. 1962). The use of amortization periods for the gradual removal of other nonconforming uses was supported by other decisions.[14] Judicial support for this particular use of the police power expanded in later years.[15]

In fact, every reported federal decision dealing with this topic has rejected *per se* challenges to the constitutionality of billboard amortization ordinances. See *E.B. Elliott Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970), *cert. dismissed*, 400 U.S. 805, 27 L. Ed.2d 35, 91 S. Ct. 12 (1970); *Art Neon Co. v. City and County of Denver*, 488 F. 2d 118 (10th

Cir. 1973), *cert. denied*, 417 U.S. 932, 41 L. Ed. 2d 236, 94 S. Ct. 2644 (1974); *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102, 94 L. Ed. 2d 185, 107 S. Ct. 1334 (1987); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988); *A.E. Brewster d/b/a Brewster Realty and Investment Co. v. City of Dallas*, 703 F. Supp. 1260 (N.D. Tex. 1988); *Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 900 F.2d 783 (4th Cir. 1990); *National Advertising Company v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), *cert. denied*, 504 U.S. 931, 118 L. Ed. 2d 593, 112 S. Ct. 1997 (1992); *Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3rd 690 (8th Cir. 1996).

The successes that had been achieved as of the summer of 1965 through the use of the police power and the opportunities for the future were dramatically impacted by ill-conceived provisions included in the final version of the Highway Beautification Act.

The HBA chose to follow a "stick" approach to the states, in lieu of the previous "carrot" approach. States which failed to adhere to the federal guidelines for "effective control" were subject to losing 10% of their federal highway funds. There was no sliding scale in applying this penalty. It was a flat 10% penalty; no more, no less. At the time of its introduction, the proposed legislation would have allowed the states to continue utilizing their police powers to require the removal of billboards that did not conform to federal requirements, i.e., states could utilize reasonable amortization periods that would allow a sign owner to recoup its full investment. Under some state constitutions and/or statutes and/or decisional law, this use of the police power might be prohibited; however, it was clear in 1965 that many states could proceed with this use of the police power as long as the time frame was reasonable. During the Congressional committee process, this critical state right was jettisoned in exchange for a requirement that states must "pay" - not "provide" - "just compensation" for their 25% share for nonconforming billboards required to be removed along federal roads in order to meet the HBA's "effective control" provisions.

As the quid pro quo for the states' loss of the right to utilize their police power, the HBA provided that the federal government would contribute 75% of the funding for the removal of nonconforming billboards. The states would only have to come up with 25% of the funding. The HBA extended federal jurisdiction to billboards not just along the Interstate System [17,000

miles], but also to billboards along the entire Federal-aid primary ("FAP") system [225,000 miles]. By restricting the states to eminent domain principles and prohibiting states from utilizing their police power, the HBA's provisions had a significant impact as federal law now affected more than 240,000 miles of existing federal roads as well as new roads that would be added later to the Interstate and FAP systems.

In 1968, three years after passage of the Act, one legal commentator observed, "it is not surprising that several of the public-service-oriented civic organizations have withdrawn their support from the Act."[16] Even so, the states' loss of the police power would not have had been a disaster – first for the states in 1965 and then for local governments in 1978 - if the billboard industry had agreed that "just compensation" for a billboard structure meant the structure's original cost, less depreciation. However, the billboard industry argues that eminent domain principles support the utilization of a gross income multiplier ("GIM") approach in determining "just compensation." This approach certainly doesn't square with the Congressional understanding of just compensation in 1965. In discussing the "just compensation" provisions, Senator Allcott (R-Colo.) stated:

> Mr. President, it is fairly easy to ascertain <u>the cost of a sign.</u> <u>There is an invoice</u> somewhere; <u>there is a check</u> somewhere which will show how much the sign cost.
>
> Statement of Senator Allott, 111 Cong. Record 24,134 (September 16, 1965) (emphasis added).[17]

Ultimately, the dollar amount of "just compensation" for a removed sign (which the owner keeps) is a matter of state law. State legislatures have the power to ensure that "just compensation" doesn't turn into an "unjust enrichment" scheme. There is almost no judicial support for the billboard industry's application of the gross income multiplier formula where there is a place to relocate a removed structure. Frequently, in determining areas where structures can be relocated, the courts have overlooked the fact that structures can be relocated hundreds of miles away at nominal transportation costs or held in storage yards until reused within a reasonable period of time. However, the GIM approach is particularly inappropriate when one considers the fact that billboards are taxed as tangible personal property based upon

the premise that they are not permanently affixed to the land. Billboard owners have secured favorable tax treatment for more than 30 years, even obtaining investment tax credit treatment based upon treating billboards as personal property.

The HBA and its subsequent amendments have been coined "the Great Billboard Double-Cross."[18] This unsavory appellation is grounded first in the failure of Congress to live up to its end of the quid-pro-quo arrangement, which contemplated Congressional funding for 75% of the removal cost for nonconforming billboards in exchange for the states giving up their police powers. The HBA provided that no billboards would be "required" to be removed until 1970 – five years after the initial passage of the Act. Based upon a review of the testimony, one Senator observed, "the signboard industry feels it can amortize its investments in signboards in five years." Statement of Senator Neuberger (D-Ore.) 111 Cong. Record 23,872 (September 15, 1965)[19] Although nonconforming billboards did not have to be removed during the first five years, it was certainly envisioned that nonconforming billboards would start to be removed before then. Congress initially authorized a funding level for billboard removal of $20 million in each of the first 2 fiscal years of the program. Shortly thereafter, the billboard industry's allies in Congress sought to block funding for the program. By 1970, not a single nonconforming sign had been removed! In 1970, a conference committee reported:

> [O]f the $42 million authorized for the program, less than $3 million has been appropriated and only $1.9 million dollars expended. Most of the funds were expended on the sign inventory conducted prior to the cost estimate filed with the Congress in January, 1967. To date, no nonconforming signs have been removed as a result of the Highway Beautification Act of 1965.
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> 116 Congressional Record 42,716 (December 19, 1970) (emphasis added).

The lack of meaningful authorization and appropriation of federal monies to require removal of nonconforming billboards along federal roads continued throughout the 1970's. It was quite easy for the industry's allies in Congress to thwart the HBA. They could limit authorization of funds, and then block any appropriation of authorized funding.

In 1978, the second major blow to billboard control occurred. The HBA's requirements for the mandatory "payment" of just compensation (and the concomitant ban on amortization) were extended to local governments. The industry's supporters argued that the states should not be able to avoid paying just compensation by permitting their local governments to undertake removal of billboards along federal roads through amortization in reliance upon the state's police powers. The 1978 amendment was introduced with little opportunity for hearings and debate, but the impact affected every city, county, borough, township, and community in the nation.

By 1980, the Carter Administration decided not to request further appropriations in the Budget.[20] In making its 1980 budget decisions, the Carter Administration noted that the 1978 amendment had interjected Federal requirements "into an area that has historically been the prerogative of local government."[21]

In 1982, a General Accounting Office Report stated: "[I]n the light of the problems and limited progress by most States in removing non-conforming signs, it appears that the objectives of the Highway Beautification Act will not be accomplished in the near future."[22] The "near future" has now turned into two decades. Hence, the unsavory appellation of 'The Great Billboard Double-Cross' in the June 1985 issue of <u>The Reader's Digest</u>.

Since the late 1980's, the billboard industry has turned its lobbying efforts toward the state legislatures. The principal thrust has been to eliminate the rights of local governments to use the police power (amortization) to require the gradual removal of billboards along <u>local roads</u>. The industry makes the simple argument that since the federal government requires that billboard owners be <u>paid</u> "just compensation" when their property is "taken from them," then the same basic "constitutional" protection should be accorded to their billboards along local roads.

> Advertising is the art of making whole lies out of half-truths.
> --*Edgar A. Shoaff.*

In an Issue Paper circulated by the Florida Outdoor Advertising Association to legislators during Florida's 2001 Legislative Session, the FOAA stated: "The Federal Government has repeatedly found amortization to be an unfair and unconstitutional method of compensation."[23] Of course, this statement was blatantly false. The Federal Government has <u>**never**</u> found

amortization of billboards to be an unconstitutional method of compensation. In fact, in the early 1990's, the Office of the Comptroller General of the United States reviewed and analyzed existing case law with regard to the constitutionality of billboards in response to a request from Senator John H. Chafee (R-R.I.). The Comptroller General concluded: "Our review indicates that a vast majority of the cases hold that billboard amortization is a reasonable exercise of the police power of a state and not violative of the constitution."[24]

As mentioned earlier, every reported federal decision has upheld amortization against *per se* constitutional attacks. The focus is traditionally on the length of the amortization period. While a few states have held amortization provisions to be unconstitutional under their state constitutions, most states have upheld amortization. The most recent decision came from the Supreme Court of Mississippi on March 1, 2001, which in a 6-2 decision upheld a five year amortization period for on-site signs against a constitutional attack. See *Red Roof Inns, Inc. v. City of Ridgeland*, 2001 Miss. LEXIS 49 (March 1, 2001). The Mississippi Supreme Court ruled:

> The City in this instance has not sought to appropriate non-conforming signs for public use. Rather, the City has adopted an ordinance requiring the removal of non-conforming signs pursuant to an exercise of police power.
>
> * * *
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> A large majority of cases have upheld a variety of sign amortization provisions. Jay M. Zitter, Validity of Provisions for Amortization of Non-Conforming Uses, 8 A.L.R.5th 391, 408 (1992). The cases cited by this annotation discuss cases in which courts have upheld amortization provisions requiring the removal of non-conforming signs. For example, in *E.B. Elliot Adver. Co. v. Metropolitan Dade County*, a case directly on point, the Fifth Circuit determined that an ordinance providing for the discontinuance of non-conforming use after a five year amortization period for non-conforming signs did not constitute a deprivation of property without due process of law. 425 F.2d 1141, 1155 (5th Cir. 1970).

The billboard industry recognizes the fact that it is facing a losing battle in the courts, especially if the courts focus on the "reasonableness" of the length of amortization periods being adopted by local governments. Hence, the industry has concentrated on efforts to totally outlaw

amortization and to take advantage of their lobbying prowess before state legislatures to frustrate land use decisions at the local level.

> It is within the power of the legislature to determine that the community should be beautiful. . . . –Justice Douglas in *Berman v. Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27, 38 (1954).

In each of the past three years, the billboard industry has successfully lobbied at least one state legislature to completely eliminate local governments' rights to use the amortization approach for the removal of billboards. Local governments lost their rights in Minnesota in 1999,[25] in Virginia in 2000,[26] and in Nevada in 2001.[27] The changes in the Nevada statute went beyond simply prohibiting amortization, and actually legislated a much higher valuation methodology to determine "just compensation." The Nevada statute implicitly eliminates the cost approach to valuation. It is extremely unlikely that Nevada legislators understood the radical and inappropriate change that they were making to their state statute. The Nevada legislation is a clear indication that the billboard industry will now be focusing state lobbying efforts on boosting the formula for determining "just compensation" in an effort to exclude the traditional "cost approach" to valuation.

In addition to these legislative efforts, it is now anticipated that the industry will lobby for the imposition of cash payment requirements whenever local governments require alterations of billboards, such as reducing the height or size of billboards (known as "downsizing") over reasonable amortization periods. The first state to impose this requirement on local governments was the State of Oklahoma in 2001.[28]

A similar effort failed in Florida in 1994. Instead of a blanket requirement for cash payment for downsizing, the Florida Legislature required the payment of compensation only if the alteration amounted to a "taking" under Florida law.[29] In 2001, legislation similar to the Oklahoma legislation actually passed the Florida Legislature in a transportation bill that was later vetoed by Governor Jeb Bush.[30]

One reason for the industry's lobbying success is the fact that it is directed by lobbyists for three multi-billion dollar conglomerates: Clear Channel Communications, Inc., Viacom, Inc.,

and Lamar Advertising Company. These three entities collectively own almost ninety percent (90%) of all the billboards in the United States.[31] Following a consolidation of hundreds of billboard companies into these three entities, they have been reporting record profits for the past few years.

> We find it hard to conceive that our constitutional founders believed that visual blight and ugliness were a fundamental aspect of our national heritage or that our state and local governments would be powerless in protecting the beauty and harmony in our human as well as our natural environments. --Judge Clark in *County of Cumberland v. Eastern Federal Corp.*, 48 N.C. 518, 269 S.E.2d 672, 676 (N.C. 1980).
>
> We do need legislation. But the way it's really going to have to be done is place by place and one place after another by the people who live there. – Charles Kuralt (Address to Secnic America's National Conference, May, 1997).

By restricting local governments in their ability to deal with billboard blight, state legislatures are simply enhancing the "risk-free" environment for existing and future billboards.[32] The industry's successes before state legislatures will have the direct effect of encouraging billboard proliferation. America the Beautiful is becoming America the Ugly in many states across the country.

Justice Douglas correctly observed in 1954 that it is within the power of the legislature to *determine* that a community shall be beautiful. The question today is whether the legislatures will *allow* a community to be beautiful. Starting in 2002, state legislatures should reverse course and give freedom to local communities to legislate in this area, to be limited only by the parameters of the state and federal constitutions, and thereby remove the obstacles that they (perhaps unwittingly) have been imposing on the people who live in those communities and who are striving to retain or restore America the Beautiful.

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[1] The "Interstate System" is described and designated in 23 U.S.C. Section 103(e). In connection with the Federal-aid primary highway system, 23 U.S.C. Section 131(t) provides: "(t) Primary system defined.--For purposes of this section, the terms 'primary system' and 'Federal-aid primary system' mean the Federal-aid primary system in existence on June 1, 1991, and any highway which is not on such system but which is on the National Highway System."

[2] There is a distinct difference between the term "provide" and the term "pay" (or its derivative, "payment"). The term "provide" can encompass a reasonable amortization period as a method of compensation. The terms "pay" or "payment" connote only cash. "Amortization has been accepted by most courts as a form of compensation when private property is taken by a governmental entity for the public good." Letter to The Honorable John H. Chafee dated February 6, 1991 (B-239187) from the Comptroller General of the United States. See *Lamar Advertising Associates of East Florida, Limited v. City of Daytona Beach*, 450 So.2d 1145, 1150 at n.7 (Fla. 5th DCA 1984) ("Amortization, at least in this case [a 10-year amortization period], amounts to a reasonable substitute for lump sum compensation").

[3] The industry and its experts have promoted the concept that under eminent domain principles, billboards should not be valued based upon either (a) their original cost as adjusted for depreciation, or (b) their replacement cost, but instead should be based upon a gross income multiplier, where the average monthly net income is multiplied by the number of months that the billboard structure is estimated to remain at a given location. This approach can lead to outrageous results. For example, assume there is a double-sided bulletin-size (672 square feet) I-Beam billboard that originally cost $25,000, that has a current depreciated value of $10,000, and that has a replacement cost of $30,000. If each of the two advertising faces net $2,500 per month, then the industry will argue that the billboard structure is worth $600,000 or more – assuming that the structure will remain in place for another 10 years with an increasing revenue stream. In fact, a billboard owner might argue that the billboard is worth well over $1 million based upon the gross income multiplier approach favored by the industry and its appraisers and eminent domain lawyers. In the meantime, the billboard structure is on the tangible personal property tax rolls for $10,000 or less. In almost all states, billboards are taxed as tangible personal property.

[4]Lamm and Yasinow, *The Highway Beautification Act of 1965: A Case Study in Legislative Frustration*, 46 Denver Law Journal 437, 438 (Summer 1969). Their full observation was more damning: "The fate of the act serves as an excellent illustration of how the legislative process can be subverted, in that a single section in legislation by a clever lobby or overlooked in the political process can render the legislation inoperative and in effect make it counterproductive." *Id.*

[5] Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 University of Kansas Law Review 463, 543 (2000).

[6] Charles F. Floyd and Peter J. Shedd, Highway Beautification: The Environmental Movement's Greatest Failure, p. 145 (1979).

[7] Norman Williams, Jr., *Legal Techniques to Protect and to Promote Aesthetics Along Transportation Corridors*, 17 Buffalo Law Review 701, 714 (1968).

[8] "[A]s the highway beautification bill moved through Congress, it was diluted in some parts and mangled in others..." "There can be no consensus when the other guys don't believe in consensus." Elizabeth Drew, *Lady Bird's Bill*, The Atlantic Monthly, at pages 168 and 172 (December 1965).

"I remember, on the night before the vote in 1965, seeing billboard lobbyists come out of a fashionable Washington restaurant with the chairman and two other powerful members of the House committee responsible for the highway legislation. There had been plenty of wining and dining, and the next day all three legislators capitulated to the lobby. . . . Most of the more than one million billboards were to have been removed by July 1, 1970. Mr. Tocker [OAAA President] and his friends so diluted the legislation and have so effectively opposed its implementation that by the deadline not one sign had come down. Not one." Bill Moyers, Listening to America: A Traveler Rediscovers His Country, at page 267 (Harper's 1971).

"In April 1968 the Washington State Roadside Council labeled the act 'a fraud on the public expectations' and said that it was 'moribund and of little positive value.'" Lewis L. Gould, Lady Bird Johnson and the Environment, at page 186 (Univ. Press of Kansas 1987).

"By 1982, so completely had the industry turned the Highway Beautification Act to its benefit that Vermont's Senator Robert Stafford (R-Vt.), one of the most tenacious of the billboard reformers, bitterly observed the law would be more aptly labeled the Billboard Compensation and Protection Act, and sought to repeal the 1965 law. Ironically, only the billboard industry sought to keep the law regulating signs on and near federal highways." Philip M. Stern, The Best Congress Money Can Buy, at page 48 (Pantheon Books 1988).

"[U]nder the Highway Beautification Act, the American public is losing miles of rural scenery, thousands of public trees, and millions of dollars each year." The Highway Beautification Act – A Broken Law, at p. ii (Scenic America 1996).

[9] President Eisenhower had declared his own opposition to the billboard problem, stating: "I am against those billboards that mar our scenery." Peter Blake, God's Own Junkyard, at page 15 (Holt, Rinehart and Winston 1964).

[10] The Federal-Aid Highway Act of 1958 (P.L. 85-381). The bill, as initially proposed by Senator Prescott Bush (R-Conn.) and Senator Thomas Kuchel (R-Calif.), was weakened by an amendment (the "Cotton Amendment") offered by Senator Norris Cotton (R-N.H.), which had the effect of limiting advertising control to new Interstate roads, i.e., those constructed after July 1, 1956. The Bonus Act was further weakened in 1959 when Congress passed an amendment (the "Kerr Amendment") offered by Senator Robert S. Kerr (D-Okla.). Senator Kerr had led the fight against the Bonus Act in 1958. The Kerr Amendment mandated that Bonus Act agreements not apply to certain commercial and industrial areas adjacent to the Interstate System as of September 21, 1959. See H.R. 8678, 86th Congress, 1st Session.

For a good overview of the Bonus Act, the Cotton Amendment, and the Kerr Amendment, see Clifton W. Enfield, "Federal Highway Beautification: Outdoor Advertising Control, Legislation and Regulation," in Outdoor Advertising – History and Regulation, ed. John W. Houck (University of Notre Dame Press, 1969), pp. 149-182.

[11] "Since 1958, for example, only approximately $500,000 in bonus payments has been paid out for control of less than 200 miles of interstate highway. This is less than 1 percent of the interstate mileage already completed, and this result obtained during 7 long years." Statement of Representative Fallon (D-Md.) 111 Cong. Record 26,250 (October 7, 1965). "The best indication that it was a bad law administratively is the fact that bonus payments have been made on only 195 miles of the Interstate System out of the total mileage open to traffic of some 17,000 miles." Statement of Senator Randolph (D-W.Va.), 111 Cong. Record 24,132 (September 16, 1965).

[12] An "amortization" provision requires the termination of a nonconforming use by the expiration of a specified time. A "nonconforming use" is the use of a building or land that does not agree with the regulations of the use district in which it is located. See generally *Validity of Provisions for Amortization of Nonconforming Uses*, 8 A.L.R.5th 391.

[13] In addition to an owner's ability to reuse portions of the structures at other locations, steel structures often have inherent salvage values that exceed any removal costs.

[14] *State ex rel. Dema Realty Co. v. McDonald*, 168 La.172, 121 So. 613 (1929), *cert. denied*, 280 U.S. 556, 74 L.Ed. 612 (1929); *State ex rel. Dema Realty Co. v. Jacoby*, 168 La. 752, 123 So314 (1929); *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410 (5th Cir. 1950) *cert. denied*, 340 U.S. 892, 95 L.Ed. 647, 71 S.Ct. 208 (1950); *Los Angeles v. Gage*, 127 Cal. App.2d 442, 274 P.2d 34 (Ct. App., 2d Dist. 1954); *Spurgeon v. Board of Commissioners*, 181 Kan. 1008, 317 P.2d 798 (1957); *Harbison v. Buffalo*, 4 N.Y.2d 553, 152 N.E. 2d 42 (1958); *Seattle v. Martin*, 54 Wash.2d 541, 342 P2d 602 (1959); *Wolf v. Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964).

[15] *Naegele Outdoor Adver. Co. of Minnesota v. Village of Minnetonka*, 162 N.W. 2d 206, 213-14 (Minn. 1968); *Markham Adver. Co. v. State*, 439 P.2d 248, 261 (Wash. 1968), *appeal dismissed*, 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512 (1969); *E.B. Elliott Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970), *cert. dismissed*, 400 U.S. 805, 27 L. Ed. 2nd 35, 91 S. Ct. 12 (1970); *National Adver. v. County of Monterey*, 464 P.2d 33, 36 (Cal 1970), *cert. denied*, 398 U.S. 946 (1970); *Webster Outdoor Adver. Co. v. City of Miami*, 256 So.2d 556, 557 (Fla. Dist. Ct. App. 1972); *Art Neon Co. v. City and County of Denver*, 488 F. 2d 118 (10th Cir. 1973), *cert. denied*, 417 U.S. 932, 41 L. Ed. 2d 236, 94 S. Ct. 2644 (1974); *Town of Boothbay v. National Adver. Co.*, 347 A.2d 419 (Me. 1975); *John Donnelly & Sons, Inc. v. Outdoor Adver.*, 339 N.E.2d 709 (Mass. 1975); *City of Doraville v. Turner Communication Corp.*, 233 S.E.2d 798 (Ga. 1976); *Donnelly Adver. Corp. of Maryland v. City of Baltimore*, 370 A.2d 1127 (Md. 1977); *Beals v. County of Douglas*, 560 P.2d 1373 (Nev. 1977); *Modjeska Sign Studios, Inv. v. Berle*, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (Ct.App.N.Y. 1977), *appeal dismissed*, 439 U.S. 809 (1978); *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741 (N.D. 1978), *appeal dismissed*, 439

U.S. 808 (1979); *Ackerley Communications v. City of Seattle*, 602 P.2d 1177 (Wash. 1979); *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935 (Tex. App.1979), *cert. denied,* 444 U.S. 833 (1979); *Metromedia, Inc. v. City of San Diego*, 610 P.2d 407 (Cal. 1980), *rev'd on other grounds*, 453 U.S. 490 (1981); *Temple Baptist Church, Inc. v. City of Albuquerque*, 646 P.2d 565 (N.M. 1982); *R.O. Givens, Inc. v. Town of Nags Head*, 294 S.W.2d 388 (N.C.App.), *cert. denied and appeal dismissed*, 297 S.E.2d 400 (N.C. 1982); *Village of Skokie v. Walton on Demptser, Inc.*, 456 N.E.2d 293 (Ill.App. 1983); *Lamar Advertising Associates. Of East Florida, Ltd. v. City of Daytona Beach*, 450 So.2d 1145 (Fla. 5th DCA 1984); *Mayor & Council v. Rollings Outdoor Advertising Co.*, 475 A.2d 355 (Del. 1984); *Donrey Communications Co. v. City of Fayetteville*, 660 S.W.2d 900 (Ark. 1983), *cert. denied*, 466 U.S. 959 (1984); *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102, 94 L. Ed. 2d 185, 107 S. Ct. 1334 (1987); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988); *A.E. Brewster d/b/a Brewster Realty and Investment Co. v. City of Dallas*, 703 F. Supp. 1260 (N.D. Tex. 1988); *Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 900 F.2d 783 (4th Cir. 1990); *National Advertising Company v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), *cert. denied*, 504 U.S. 931, 118 L. Ed. 2d 593, 112 S. Ct. 1997 (1992); *Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3rd 690 (8th Cir. 1996); *Adams Outdoor Advertising v. City of East :Lansing*, 463 Mich. 17, 614 N.W.2d 634 (2000); *cert. denied*, 149 L.Ed.2d 286, 121 S.Ct. 1356 (2001); *Red Roof Inns, Inc. v. City of Ridgeland*, 2001 Miss. LEXIS 49 (March 1, 2001).

[16] Williams, *supra*, at p. 716.

[17] It was quite clear that Senator Allcott was discussing the significance of just compensation:

> I should like to move over to another section of the bill, subsection 2 on page 12. That becomes a really significant section. I had better read that which goes before, under subsection (g):
>
>> (g) Just compensation shall be paid upon the removal of outdoor advertising signs, displays, and devices, provided that they were erected and maintained on the effective date of this subsection pursuant to agreements with the owner, or one claiming through the owner, of the real estate on which they are located, and Federal funds shall be used to pay the Federal pro rata share of such compensation. Such compensation shall be paid for the following:
>>
>> (1) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in the fixture; that is, such sign, display, or device at such location, as secured by the agreement in effect on the effective date of this subsection.
>
> Mr. President, it is fairly easy to ascertain the cost of a sign. There is an invoice somewhere; there is a check somewhere which will show how much the sign cost.

Statement of Senator Allott, 111 Cong. Record 24,134 (September 16, 1965).

[18] See *The Great Billboard Double-Cross*, The Readers' Digest (June 1985).

[19] "Mrs. NEUBERGER: The point I was making was regarding the police power to rid the highways of these unsightly billboards. As I look through the testimony, I gather that the signboard industry feels that it can amortize its investments in signboards in 5 years. Thus, if we give them 5 years, from 1965 to 1970, to complete the amortization of their investments, I would say, as one of those who are opposed to billboards – which will be more concretely declared if this bill is enacted into law – Why should we use taxpayers' money to buy them out? Instead of giving them 5 years to know that they must get out, why not use the police power now and save the taxpayers' money?

Mr. COOPER: Whatever interest remains at the particular time the States act to compensate them, they would be paid, but as the amortization period advanced, of course, their property interests would be of less value.

Mr. MUSKIE: Mr. President, will the Senator from Kentucky yield?

Mr. COOPER: I yield.

Mr. MUSKIE: Answering further, let me say that the 5-year period would be cut by whatever time it would take for the States to act to implement the legislation. That could be as long as 3 years, leaving only 2 years. Second, emphasizing the point, which the Senator has made, under the bill, all that can be compensated for, is whatever remains of the leaseholds or the un-amortized values, so that if, in fact, the billboard has been completely amortized or the leasehold has expired, no compensation will be paid under this bill.

Mr. COOPER: That would be correct."

111 Cong. Record 23,872 (emphasis added).

[20] In his 2000 article, *Your Ad Goes Here*, Professor Craig Albert opines that Congress's failure to fund the billboard removal program within a reasonable time-frame rendered the existing restraints on the states to be unconstitutional under the Tenth Amendment. Albert, *supra*, at pages 515-538.

[21] Albert, *supra*, at page 505, quoting Department of Transportation and Related Agencies Appropriations for 1982: Hearings Before a Subcomm. Of the Comm. On Appropriations, 97th Cong. pt. 1, at 293 (1981).

[22] See 1982 Appropriations Hearings] Department of Transportation and Related Agencies Appropriations for 1982: Hearings Before a Sub-Committee of the Committee on Appropriations, 97th Cong. Pt. 1 at 293] (statement by the U.S. Department of Transportation regarding the future of the Highway Beautification Act).

[23] The billboard industry's 2001 Issue Paper also stated: "Amortization allows a short-term return on the owner's investment, but it never provides a full return of the investment." (Emphasis added.) This was another outright falsehood. However, statements like these delivered in person by trained lobbyists can easily poison the well.

In some states, like Florida, Missouri, Montana, and South Carolina, the billboard industry has actually formed corporations or entities with names like "Scenic Florida, Inc." One can only imagine what mischief the billboard industry can accomplish with these Trojan Horses. For information on the billboard industry's own "Scenic Florida, Inc." see http://www.scenicflorida.org/foaascenic2000.html

[24] Letter dated February 6, 1991 (B-239187) to The Honorable John H. Chafee from Office of the Comptroller General of the United States. For the full text, see www.scenicflorida.org/bbamcomptgen91.html

[25] In 1999, the Minnesota Legislature amended the Minnesota Statutes to expressly prohibit the use of amortization, with an exception for "adults-only" businesses and "nuisances." Per the amendment, subdivisions 1a and 3 were added to Section 394.21, Minnesota Statutes, as follows:

> 394.21 Authority to carry on county planning and zoning activities.
>
> Subdivision 1. Except most populous counties. For the purse of promoting the health, safety, morals, and general welfare of the community any county in the state having less than 300,000 population according to the 1950 federal census is authorized to carry on county planning and zoning activities.
>
> Subd. 1a. Amortization prohibited. Except as otherwise provided in this subdivision, a county, regardless of population, under this chapter or under a special or local law, must not enact, amend, or enforce an ordinance providing for the elimination or termination of a use by amortization which use was lawful at the time of its inception. The subdivision does not apply to adults-only bookstores, adults-only theaters, or similar adults-only businesses, as defined by ordinance.
>
> Subd. 2. Repealed, 1974 c 571 s 51
>
> Subd. 3. Nuisance. Subdivision 1a does not prohibit a county from enforcing an ordinance providing for the prevention or abatement of nuisances, as defined in section 561.01, or eliminating a use determined to be a public nuisance, as defined in section 617.81, subdivision 2, paragraph (a), clauses (1) to (9), without payment of compensation.

And Section 462.357, Minnesota Statutes, pertaining to municipalities, was also amended by the addition of Subdivisions 1c. and 1d. as follows:

> 462.357 Procedure for plan effectuation; zoning.

Subd. 1c. Amortization prohibited. Except as otherwise provided in this subdivision, a municipality must not enact, amend, or enforce an ordinance providing for the elimination or termination of a use by amortization which use was lawful at the time of its inception. This subdivision does not apply to adults-only bookstores, adults-only theaters, or similar adults-only businesses, as defined by ordinance.

Subd. 1d. Nuisance. Subdivision 1c does not prohibit a municipality from enforcing an ordinance providing for the prevention or abatement of nuisances, as defined in section 561.01, or eliminating a use determined to be a public nuisance, as defined in section 617.81, subdivision 2, paragraph (a), clauses (1) to (9), without payment of compensation.

[26] In 2000, the Virginia Legislature in Chapter 432 of the Virginia Acts of Assembly made critical changes to section 33.1-351 and 33.1-370 of the Code of Virginia, as follows:

Section 33.1-351. Policy; definitions.

.....

A "nonconforming sign," "nonconforming advertisement," or "nonconforming advertising structure" is one which was lawfully erected adjacent to any highway in the ~~interstate, national highway system, or federal-aid primary system as that system existed on June 1, 1991~~ Commonwealth, but which does not comply with the provisions of state law, state regulations, or ordinances adopted by local governing bodies passed at a later date or which later fails to comply with state law, state regulations, or ordinances adopted by local governing bodies due to changed conditions.

.....

E. Notwithstanding any other provision of law, lawfully erected and maintained nonconforming signs, advertisements, and advertising structures shall not be removed or eliminated by amortization under state law or local ordinances without compensation as described in subsection F of this section.

.....F. The Commonwealth Transportation Commissioner is authorized to acquire by purchase, gift or the power of eminent domain and to pay just compensation upon the removal of nonconforming signs, advertisements or advertising structures lawfully erected and maintained under state law or state regulations. Provided, however, subsequent to November 6, 1978, whenever any local ordinance which is more restrictive than state law requires the removal of such signs, advertisements, or advertising structures, the local governing body shall initiate the removal of such signs, advertisements, or advertising structures with the Commissioner, who shall have complete authority to administer the removal of such signs, advertisements, or advertising structures. Upon proof of payment presented to the local governing bodies, the local governing bodies shall reimburse the Commissioner the funds expended which are associated with the removal of such signs, advertisements, or advertising structures required by local ordinances, less any federal funds received for such purposes.

Notwithstanding the above, nothing shall prohibit the local governing bodies from removing signs, advertisements, or advertising structures which are made nonconforming solely by local ordinances so long as those ordinances require the local governing bodies to pay 100 percent of the cost of removing them and just compensation upon their removal.

Such compensation is authorized to be paid only for the taking from the owner of such sign or advertisement of all right, title, leasehold and interest in such sign or advertisement, and the taking from the owner of the real property on which the sign or advertisement is located, of the right to erect and maintain such sign or advertisement thereon.

The Commonwealth Transportation Commissioner shall not be required to expend any funds under this section unless and until federal-aid matching funds are made available for this purpose.

Note: Section F, above, was not modified. But it is included in this endnote in light of its continuing reference to "federal-aid matching funds." Perhaps someone should inform the Virginia Assembly that the federal government broke its implied compact with the states over two decades ago.

[27]In 2001, the Nevada Legislature added a brand new section to Chapter 278 of the Nevada Statutes.

Nevada Senate Bill 265 provided as follows:

Section 1. Chapter 278 of NRS is hereby amended by adding thereto a new section to read as follows:

1. If a city or county, through the adoption, operation or enforcement of any ordinance or code, requires the removal of nonconforming outdoor advertising structure, the city or county shall:

(A) pay just compensation for the loss of nonconforming outdoor advertising structure to the owner of the nonconforming outdoor advertising structure and to the owner of the real property upon which the nonconforming outdoor advertising structure is located; or

(B) authorize the owner of the nonconforming outdoor advertising structure to relocate that structure to a site which is determined to be a comparable site by the owner of the nonconforming outdoor advertising structure and which is approved by the city or county as an appropriate site for the structure.

2. If a city our county prohibits the owner of a nonconforming outdoor advertising structure from engaging in routine maintenance of the nonconforming outdoor advertising structure, the city or county shall provide just compensation or authorize a comparable alternative location for the nonconforming outdoor advertising

structure in the same manner as if the city or county had required the removal of the nonconforming outdoor advertising structure pursuant to the subsection 1.

3. A city or county shall not require the removal of a nonconforming outdoor advertising structure to occur pursuant to an amortization schedule, regardless of the length of the period set forth in the amortization schedule

4. The requirements of subsection 1 do not apply to a nonconforming outdoor advertising structure that is:

(a) required to be removed as a result of the owner of the real property upon which the nonconforming outdoor advertising structure is located terminating the lease that governs the placement of the nonconforming outdoor advertising structure on that property pursuant to the terms of that lease; or

(b) destroyed or damaged in excess of 50 percent of its material structural value as a result of natural disaster, including, without limitation, a fire, flood, earthquake, windstorm, rainstorm and snowstorm.

5. A city or county shall not require the removal of a nonconforming outdoor advertising structure as a condition to the development or redevelopment of the property upon which the nonconforming outdoor advertising structure is located without first holding a public hearing at which the owner of the nonconforming outdoor advertising structure has an opportunity to be heard. The requirements of subsection 1 do not apply if, after the public hearing required by this subsection, a city or county requires the removal of the nonconforming outdoor advertising structure.

6. If the owner of a nonconforming outdoor advertising structure or the owner of the real property upon which the nonconforming outdoor advertising structure is located disagrees with the amount of just compensation the city or county determines should be paid to him, the owner may appeal the determination to a court of competent jurisdiction. In determining the amount of just compensation that should be paid to an owner pursuant to subsection 1, the court shall consider:

(a) the uniqueness of the location of the property upon which the nonconforming outdoor advertising structure is erected;

(b) whether the nonconforming outdoor advertising structure can be relocated to a comparable site;

(c) the amount of income generated by the nonconforming outdoor advertising structure; and

(d) the length of time remaining on any applicable term of a lease governing the nonconforming outdoor advertising structure.

7. As used in this section:

(a) "amortization schedule" means an extended period over which a person is required to remove a nonconforming outdoor advertising structure.

(b) "just compensation" means the most probable price that a nonconforming outdoor advertising structure would bring in a competitive and open market under the conditions of a fair sale, without the price being affected by undue stimulus.

(c) "material structural value" means the cost of labor and materials necessary to erect an outdoor advertising structure. The term does not include any revenue or expenses related to the lease of real property upon which the outdoor advertising structure is located.

(d) "nonconforming outdoor advertising structure" means an outdoor advertising structure which is constructed or erected in conformance with all applicable local ordinances and codes in effect on the date a building permit is issued for the outdoor advertising structure and which does not conform subsequently because of a change to the local ordinances or codes. The term does not include an outdoor advertising structure that is authorized by a special use permit, conditional use permit, variance, waiver, condition of zoning or other approval for the use of land was limited by a specific condition which allowed or required the governing body of the city or county to conduct a review of the structure.

(e) "outdoor advertising structure" means any sign, display, billboard or other device that is designated, intended or used to advertise or inform readers about services rendered or goods produced or sold on property other than the property upon which the sign, display, billboard or other device is erected.

(f) "routine maintenance" means normal repair and upkeep of the structural integrity and appearance of a nonconforming outdoor advertising structure. The term does not include any increase in the size or height of the structure or any addition or enhancement to the structure that increases the visual effect of the structure of increases the impact on the use of the land in the area around the structure.

Sec. 2. This act becomes effective upon passage and approval.

[28]In 2001, the Oklahoma Legislature through Senate Bill 476 amended 69 O.S. 1191 Section 1280, to require the payment of compensation for any alteration of billboards, including their downsizing in length or size.

SECTION 1. AMENDATORY 69 O.S. 1991, Section 1280, is amended to read as follows:

~~(a)~~ A. Outdoor advertising and property rights pertaining thereto may be acquired by the Department Of Transportation under agreement between the Department, the owner of the outdoor advertising and the owner of the land upon which the outdoor advertising is located if the outdoor advertising is lawfully in existence ~~on the effective date of this act~~. pursuant to Sections 1274 and 1275 of this title and located within areas prohibited to advertising by ~~this act~~ the Highway Advertising Control Act of 1968. The compensation must be based on fair market value.

(~~b~~) B. Outdoor advertising is a trade fixture, and owners shall be awarded just and fair compensation for its taking.

(~~c~~) C. If the Department and the owners are unable to agree upon the amount of compensation to be paid by the Department, the Department may acquire by condemnation such outdoor advertising and property rights pertaining thereto. This right of eminent domain or condemnation shall be exercised in the manner provided by law.

(~~d~~) D. Any outdoor advertising authorized under Sections 1274 and 1275 of this title which does not conform with standards ~~contained in regulations set forth in this act,~~ set for in Sections 1274 and 1275 of this title except as provided in Section 1278 of this title, and any outdoor advertising prohibited by ~~this act~~ law and not subject to compensation under other terms of this ~~act.~~ Section shall, ~~after the effective date of this act,~~ be a public nuisance. The Department shall give notice by certified mail to the owner of the sign and to the owner of the land upon which the outdoor advertising is located, ordering the notified owners to cause the outdoor advertising to conform with ~~regulations,~~ rules relating to outdoor advertising or to remove prohibited outdoor advertising. If the owner of the sign or the landowner fails to act within ninety (90) days after mailing of the notice, the Department may, at its discretion, remove the outdoor advertising devices.

(~~e~~) E. All persons or business entities engaged in the outdoor advertising business, which includes but is not limited to, the erection, maintenance and selling of advertising space on and along the interstate and federal-aid primary highways of this state, shall, not later than October 31, 1972, furnish the Director of the Department of Transportation a written inventory of all outdoor advertising signs, displays or devices erected and being maintained by ~~such~~ the person or entity. ~~Such~~ The inventory shall include, with respect to each such sign, not less than the following information.

(~~1~~)1. Location and dimensions of the sign;

(~~2~~)2. Distance from the nearest edge of the right-of-way;

(~~3~~)3. Date erected; and

(4)4. Name and address of the owner of the property on which the sign is located.

(~~f~~) F. For failure to comply with the conditions set forth in subsection(~~e~~) E of this section, the Department may declare such outdoor advertising signs, displays or devices to be a public nuisance and remove them in the manner provided by subsection (~~d~~) D of this section.

(~~g~~) G. Regardless of any local ~~regulation or~~ ordinance requiring amortization, the compensation provided in subsections A through C of this section and subsections (A) through (D) of Section 1279 of this title shall be the exclusive remedy for taking such outdoor advertising property rights pertaining thereto. Such compensation shall also be required for partial taking or diminishment of the value of such outdoor advertising and property right caused by any local ordinance which forces the owners of such outdoor advertising to downsize, reduce the height or width or otherwise alter legal nonconforming signs.

SECTION 2. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

[29] A thorough discussion of the 1994 compromise on alterations is found at http://www.scenicflorida.org/1994compromise.html.

[30] It is interesting to note that Governor Jeb Bush is the grandson of the late Senator Prescott Bush (R-Conn.). His grandfather co-sponsored the original version of the 1958 Bonus Act – the first national effort to reign in billboards by encouraging the prohibition of billboard construction along new segments of the Interstate System. The State of Florida is one of the few states that has elevated scenic beauty to a state policy in its state constitution. See Article II, Section 7(a), 1968 Florida Constitution ("Section 7. Natural resources and scenic beauty. --(a) It shall be the policy of the state to conserve and protect its natural resources and scenic beauty.")

[31] Clear Channel Communications, Inc. owns 10% of all the radio stations in the United States – nearly 1,100 radio stations. Viacom, Inc. also owns a plethora of radio stations, as well as CBS, Paramount Pictures, Simon & Shuster, MTV, TNN, Showtime, and many other media outlets. These two entities now own and control over 50% of the billboards in the United States. Both are now using many of their outdoor advertising platforms to cross-promote their products, including syndicated radio personalities such as Howard Stern and Bubba the Love Sponge.

[32] Professor Albert described the risk-free environment created in 1965 as follows: "At that point [passage of the HBA], a rational operator of billboards could view his investment as virtually risk free. Unlike most businesses, which were subject to the possibility that a state might limit or regulate their operations, the billboard business was guaranteed either the stream of income from the billboards themselves or the guarantee of payment from the government. The rational response to such a reduction in risk is to build as many lawful billboards as

possible." See Albert, *supra*, at page 498. The "enhanced" risk-free environments being created today by some state legislatures are certain to foster a further proliferation of billboards.

In fact, some billboard operators are looking at small communities to see which ones have potentially flawed sign ordinances. They are submitting permits "in bulk" to small communities where billboards have been prohibited for decades, and then suing those communities when the permits are rejected. The billboard operators typically allege a wide array of constitutional claims, thereby forcing those communities to engage in expensive litigation or roll over and allow billboards to proliferate. The enhanced "risk-free environment" being created by state legislatures is encouraging this type of behavior by billboard operators. Other billboard interests are simply erecting billboards without permits and then forcing local governments to choose between suing or settling for the status quo. Again, the financial incentives for this behavior have been created by the state legislatures and by Congress's flawed HBA.