

CHAPTER 23

CONDEMNATION OF BILLBOARD INTERESTS*

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§ 23.01 Introduction

Outdoor advertising through the medium of billboards has existed in this country for over one hundred years.¹ Yet, billboards were not singled out for special consideration or treatment in the law of eminent domain until very recently, and that special attention has primarily been the result of efforts to treat billboards as a type of second-class property undeserving of protection against governmental takings without compensation.²

The term "billboard" stems from the early practice of posting "bills," or "posters" on buildings, and later, on wooden structures, to announce or advertise events, services or products for sale. The term "poster" was an early moniker that is still in use today for wood and metal sign structures upon which preprinted posters are adhered. The other type of outdoor advertising seen on America's roads is the "bulletin," originally constructed of wood and called a "painted bulletin," although today this type of sign structure is typically constructed of metal, with a vinyl "canvas" bearing the advertising message stretched across it like a painting on a frame.³

Although posters were originally attached to the walls of buildings, occasionally without the permission of the owner, today they can be more commonly found on self-supporting structures erected on leased land. While these sign structures were originally constructed of wood and placed on the land with minimal annexation, a billboard erected in an urban area within the last decade is more likely to have a concrete foundation weighing several tons, one or more steel supports buried deep in the ground, and a welded superstructure that must meet stringent building code standards to withstand high wind loads.⁴

In the early age of the automobile, signs sprouted along the nation's highways in a haphazard fashion, often in otherwise scenic areas, which led to a movement for regulation at all levels of government, local, state and federal. As a result, most cities and counties now either regulate or completely prohibit the erection of new billboards, and many require their removal.

Additionally, all states now regulate billboards on interstates and most federal highways in accordance with the 1958 and 1965 federal mandates to control

¹ Berry, *Valuation of Outdoor Advertising Sites I* (FHWA reprint 1971) (Urban Property Research Co. 1969).

² See, e.g., Floyd, *Billboards, Aesthetics and the Police Power*, 42 Am J Econ & Soc 369 (1983). These attacks have been more visceral than rational, evoking such epithets as "billboard blight," "visual pollution" and "billboard barons." *Id.* at 370, 378, 380.

³ See Sutte, *Appraisal of Roadside Advertising Signs*, Chs. 2-4 (Am. Inst. of Real Estate Appraisers 1972), see also Sutte, *The Appraisal of Outdoor Advertising Signs*, Chs. 1, 4-5 (Appraisal Inst. 1994); Berry, *Valuation of Outdoor Advertising Sites I*.

⁴ See Sutte, *Appraisal of Roadside Advertising Signs*, Chs. 2-4 (Am. Inst. of Real Estate Appraisers 1972), see also Sutte, *The Appraisal of Outdoor Advertising Signs*, Chs. 1, 4-5 (Appraisal Inst. 1994); Berry, *Valuation of Outdoor Advertising Sites I*.

outdoor advertising on those roads, as well as to remove signs that fail to comply with the new regulations. These regulations will be discussed in detail later in this chapter.

In 1966, a nationwide survey mandated by Congress⁵ determined that there were over 11 million outdoor advertising signs on the interstate and federal primary highways, nearly 840,000 of which were either illegal or did not conform to local or state regulations. But by 1985, approximately 700,000 of these illegal or nonconforming signs had been removed, including, as early as 1978, all nonconforming signs in Alaska, Hawaii and Vermont. By 1992, Maine and Utah had also removed all nonconforming signs and the Federal Highway Administration estimated that only 92,000 nonconforming signs remained.⁶

Many of the signs that have been removed—primarily nonconforming, low-income producing signs in rural areas—were voluntarily sold to state highway departments pursuant to a negotiated payment schedule that was based on the adjusted reconstruction cost estimate for the affected signs.⁷ Consequently, until the late 1970s there was relatively little litigation involving condemnation of billboards, as federal funding held out and sign owners were willing to sell their billboards for the scheduled payment.

Of course, there were occasional road widenings that required billboard removal or relocation, but for the most part signs could be relocated and reconstructed in those situations and the removals were accomplished without litigation,⁸ with the significant exception of the state of New York, as will be

⁵ Pub. L. No. 89-285, Title I, § 302, 79 Stat. 1032 (1965).

⁶ Outdoor Adver. Ass'n Am., History of the Highway Beautification Act of 1965, As Amended 5-6 (1993) (unpublished manuscript), Letter from T. Peter Ruane, Pres., Am. Rd. & Transp. Builders Ass'n, to Hon. Andrew Jacobs, Jr., U.S. House of Rep. (May 20, 1992) (unpublished tabulation prepared in response to proposed Intermodal Surface Transportation Efficiency Act), 57 Fed. Reg. 8167, 8168 (1992), Floyd, *Billboard Control Under the Highway Beautification Act*, The Real Estate Appraiser and Analyst, 23-24 (July-August 1979).

⁷ Claus, 2 Visual Communication Through Signage: Sign Evaluation 48-53, 57-58, 61 (Sign of the Times Publ'g Co. 1975). In the early 1970s, the Federal Highway Administration (FHWA) encouraged the states to use payment schedules based on depreciated cost in an attempt to avoid the costs associated with individual sign appraisals and determination of just compensation through litigation. This policy was authorized and encouraged by FHWA's Policy and Procedure Manual, PPM 80-5.2, published in 1972 and by FHWA's implementing regulations adopted in 1974. 23 C.F.R. § 750.304. The policy was implemented through agreements between the FHWA and the various state's Highway Administrators, but was not well received by all sign owners. While depreciated cost might approximate just compensation for low-income producing signs in rural areas or signs that could be relocated, it fell drastically short of compensating for the income that would be lost from the removal of high-income producing signs in urban areas. *Id.* at 48.

⁸ Removal and relocation is an option that rarely exists in today's environment of extensive regulation and the prohibition of erection of new billboards. Recognizing the higher public purpose of preserving public funds in a constitutional and equitable manner, a few states have enacted legislation expressly authorizing the relocation of signs that are forced to move.

discussed Today, however, road widenings have frequently touched off vigorous litigation, as the dwindling inventory of billboards becomes more precious to its owners, and, of course, the best and most valuable signs are on the busiest roads, the roads most likely to be widened

California Cal Bus & Prof Code §§ 5412, 5443, 5443.5

Florida Fla Stat §§ 70.20, 479.27

Idaho Idaho Code § 40-1910A(3)

Nevada Nev Rev Stat § 278.0215

North Carolina NC Gen Stat §§ 153A-143 (counties), 160A-199 (cities)

Oklahoma 69 Okla Stat §§ 1275(c)(4)-(5)

Oregon Or Rev Stat §§ 377.765(1), 767-68

South Carolina S C Code Ann § 57-25-190(E)

Texas Local Gov't Code Ann § 216.001, *et seq*

Utah Utah Code Ann § 72-7-509, 510, 513, 516

§ 23.02 Historical Perspective

[1]—Earliest Case Law

The first reported opinion specifically addressing the compensability and valuation of billboards in eminent domain proceedings was the 1951 New York Court of Claims case, *George F. Stein Brewery, Inc. v. State* ¹

The property in *Stein Brewery* was leased from year-to-year to a tenant that had improved its leasehold by erecting two outdoor advertising signs. The signs had been placed on the land in a manner that necessitated dismantling prior to removal, retaining only salvage value. The lease provided that the signs were the personal property of the tenant.

The state gave notice of the proposed land acquisition for its road project and instructed the tenant to remove the signs, which the tenant did, following the transfer of title to the land to the state in an eminent domain proceeding. The tenant, apparently desiring to relocate its signs nearby, claimed compensation for a return of its prepaid rent beyond the date of the taking of the land, the costs of removing its signs, and the costs of re-erecting the signs elsewhere.

The Court of Claims disallowed all of these claims, finding instead that the taking of the land included the signs. “[t]hus, the claimant, whose leasehold interest was destroyed by the State is entitled to compensation for the fixtures taken as well as for the value of the leasehold.”² As for the tenant’s claim for a return of prepaid rent, the court held that “[i]n this respect claimant’s measure of damages would be the fair market value of [the] unexpired term.”³

In a brief digression that confused the development of the law, the court noted that although it had not raised the argument, the state might have asserted that, as a result of the tenant’s compliant removal, an implicit agreement existed that the signs were personal property that was not appropriated and for which no compensation was owed.

Although New York courts subsequently rejected this argument on factual grounds,⁴ the courts of Ohio did not. In a 1958 case, *Ohio Valley Advertising Corp. v. Linzell*,⁵ the Ohio Supreme Court held that “voluntary compliance” with the state’s request to remove outdoor advertising signs effectively constituted a surrender of any claims for the taking of the signs which might otherwise have existed due to the appropriation of the land by condemnation. Nor was the sign owner entitled to any other compensation in *Linzell* because it merely held a

¹ 200 Misc. 424, 103 N.Y.S.2d 946 (Ct. Cl. 1951).

² 200 Misc. at 426, 103 N.Y.S.2d at 949.

³ 200 Misc. at 427, 103 N.Y.S.2d at 950.

⁴ See cases cited in § 23.03, n.1 *infra*.

⁵ 168 Ohio St. 259, 153 N.E.2d 773 (1958).

revocable license in the condemned property which, in Ohio, was not considered to be a constitutionally protected property interest ⁶

[2]—The Bonus Act of 1958

The *Stein Brewery* and *Linzell* cases constituted the whole of American common law specifically addressing the compensability of billboards in eminent domain proceedings when, in 1958, Congress passed the “Bonus Act” ⁷

The Bonus Act was the first legislation intended to regulate outdoor advertising at the national level, the stated objective being “to protect the public investment in the National System of Interstate and Defense Highways” ⁸ The Act took its popular name from the fact that it provided for payment of a “bonus” in federal highway funds to those states that would agree to enact comprehensive legislation, in accordance with national standards to be prepared by the Secretary of Transportation, regulating signage within 660 feet of the edge of interstate highways within their boundaries ⁹ Congress mandated that the national standards would limit signs on the interstate system to four categories, except in incorporated municipalities and in unincorporated industrial or commercial areas 1) directional and official signs, 2) signs advertising the sale or lease of the property upon which they were located, 3) signs advertising activities within 12 miles, and, 4) signs providing “information in the specific interest of the traveling public” ¹⁰

The Bonus Act did not expressly require the removal of existing nonconforming outdoor advertising signs, but did provide that federal funds would be available for any state’s acquisition of the “right to advertise” within the controlled area adjacent to the interstate right-of-way ¹¹ Half the states, including

⁶ *Ohio Valley Adver Corp v Linzell*, 107 Ohio App 351, 152 NE 2d 380 (1957), *aff’d*, 168 Ohio St 259, 153 NE 2d 773 (1958)

⁷ Pub L No 85-767, § 1, 72 Stat 904 (1958) (codified as amended at 23 U S C § 131) For a general review of the legislative history and implementation of the Bonus Act, see 1 Nichols on Eminent Domain®, § 1 42[10][a][I][A] n 59 16 (Matthew Bender)

⁸ Pub L No 85-767, § 1(a)

⁹ Pub L No 85-767, § 1(c)

¹⁰ Pub L No 85-767, at §§ 1(a)(3)–(4), 1(b) The Act originally left it to the discretion of the Secretary of Transportation to enter into agreements with the states that excluded incorporated municipalities and unincorporated commercial or industrial areas, however, the Act was amended in 1959 to simply exempt commercial and industrial zones in both incorporated and unincorporated areas from the agreements that the states were required to enter into with the Secretary See Pub L No 86-342, Title I, § 106, 73 Stat 612 (1959)

¹¹ Pub L No 85-767, § 1(e), 72 Stat 904 (1958) A few reported cases have addressed landowners’ claims when “advertising rights” have been condemned as a result of the Bonus Act *Nebraska* Fulmer v State, Dept of Roads, 178 Neb 20, 131 NW 2d 657 (1964)

Oklahoma State, Dept of Highways v Allison, 372 P 2d 850 (Okla 1962)

Colorado State Dept of Highways, Div Of Highways v Pigg, 656 P 2d 46 (Colo Ct App 1982) (same issue under Highway Beautification Act of 1965)

all of the Pacific Coastal and Middle Atlantic states, and all of New England with the exception of Massachusetts, complied with the Bonus Act ¹²

[3]—Early Regulation of Outdoor Advertising

By the time Congress passed the Bonus Act in 1958, it was well established that outdoor advertising could be regulated by local government under the Police Power ¹³ However, an attempt to extend the Police Power to bring about the forced removal of existing signs without compensation, based on the assertion that billboards were “nuisances per se,” had not been well received by the courts ¹⁴ Nevertheless, in an effort to both obtain and retain federal funds, several state legislatures sought to prospectively regulate outdoor advertising as encouraged by Congress through the Bonus Act, as well as to find ways to remove existing signs without obligating themselves to compensate the sign owners whose property was to be destroyed

The first test of such measures came in 1961 when the New Hampshire legislature sought an advisory opinion from its highest court concerning the constitutionality of contemplated legislation Without the benefit of the adversarial system to fully raise objections to the proposal from the standpoint of an affected party, the New Hampshire Supreme Court held, in *Opinion of the Justices*,¹⁵ that the state legislature’s declaration that billboards were “nuisances per se” was facially valid “as a general proposition” and that existing billboards could be removed from the highways without compensation The Court had the foresight to note, however, that “[i]f in a specific situation a sign which is in fact not a nuisance is forbidden by the [state Act,] its removal should be required

¹² 1 Nichols on Eminent Domain®, § 1 42[10][a][1][A] n 59 16 (Matthew Bender)

¹³ See *St Louis Poster Adver Co v City of St Louis*, 249 U S 269, 39 S Ct 274, 63 L Ed 599 (1919), *Thomas Cusack Co v City of Chicago*, 242 U S 526, 37 S Ct 190, 61 L Ed 472 (1917), see generally 1 Nichols on Eminent Domain®, § 1 42[10][a] (Matthew Bender), 3 Zoning & Land Use Controls, § 17 01[2] (Matthew Bender), Warren, Annot , Municipal Power as to Billboards and Outdoor Advertising, 58 A L R 2d 1314 (1958), Travers, Annot , Validity and Construction of State or Local Regulation Prohibiting Off-Premises Advertising Structures, 81 A L R 3d 486 (1977), Travers, Annot , Validity and Construction of State or Local Regulation Prohibiting the Erection or Maintenance of Advertising Structures Within a Specified Distance of Street or Highway, 81 A L R 3d 564 (1977)

¹⁴ Prior to 1958, the following state courts had enjoined ordinances whose purpose was to terminate non-conforming signs (in addition to prohibiting them prospectively) where the signs did not constitute nuisances in fact

Illinois *Illinois Life Ins Co v Chicago*, 244 Ill App 185 (1927)

Indiana *General Outdoor Adver Co v Indianapolis*, 172 NE 309 (Ind 1930)

Iowa *Stoner McCray Systems v City of Des Moines*, 78 NW 2d 843, 58 A L R 2d 1304 (Iowa 1956)

But see Maryland *Grant v Mayor of Baltimore*, 212 Md 301, 129 A 2d 363 (1957)

¹⁵ 103 N H 268, 169 A 2d 762 (1961)

only upon payment of compensation ”¹⁶ In other words, the Court held that such a statutory scheme might well be facially valid, but potentially unconstitutional in application ¹⁷

¹⁶ 103 N H at 271, 169 A 2d at 765

¹⁷ The New Hampshire Supreme Court did not engage in any sophisticated legal analysis or have any evidence before it for consideration, contenting itself with a theoretical determination as to “whether the act has some rational tendency to promote the objects it seems to advance” 103 N H at 268, 169 A 2d at 763 The court proceeded to answer this question in the following manner

With vehicles hurtling along at the speed which characterizes travel on interstate or so called super highways, an instant’s inattention or confusion may be disastrous We need not labor the point that anything beside the road which tends to distract or confuse the driver of a motor vehicle directly affects public safety Signs of all sizes, shapes and colors, designed expressly to divert the attention of the driver and occupants of motor vehicles from the highway to objects away from it, may reasonably be found to increase the danger of accidents, and their regulation along highways falls clearly within the police power Another consideration bearing on the constitutionality of the bill rests on the fact that New Hampshire is peculiarly dependent upon its scenic beauty to attract the hosts of tourists, the income from whose presence is a vital factor in our economy That the general welfare of the State is enhanced when tourist business is good and affected adversely when it is bad is obvious It may thus be found that whatever tends to promote the attractiveness of roadside scenery for visitors relates to the benefit and welfare of this state and may be held subject to the police power

103 N H at 270, 169 A 2d at 764

See also *Ohio Ghafter Properties, Inc v Preston*, 176 Ohio St 425, 200 NE 2d 328 (1964)

But see *Georgia State Highway Dept v Branch*, 222 Ga 770, 152 S E 2d 372 (1966), in which the Georgia Supreme Court found a similar statutory scheme, that state’s Outdoor Advertising Control Act of 1964, Ga L, 1964, p 128, § 12, *et seq*, facially infirm The court made no qualms about the fact that it saw the real issue as being whether forced, uncompensated removal of billboards was a justifiable means to reach a lauded end result, something the New Hampshire Court seemed to take for granted

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, blind them to a consideration of the property owner’s right to be saved from harm by even 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

222 Ga at 772, 152 S E 2d at 374

Ironically, it turned out that there were two “perfect constitutional ways” to accomplish the legislature’s goals At the following general election in November, 1966, the Georgia electorate voted to amend the Georgia Constitution, Art I, Sec II, Par I(A), so that the legislature could enact the Georgia Outdoor Advertising Control Act of 1971, Ga L, 1971, Ex Sess, p 5, *et seq*, to comply with the 1965 rewrite of the Bonus Act, subsequently known as the Highway Beautification Act of 1965 The 1971 Georgia Act, insofar as it dealt with prospective prohibition

Such was the state of the law at the height of the undertaking of federal interstate highway construction in America outdoor advertising could be regulated or prohibited prospectively, but existing signs were likely to be treated as vested property interests, removable only with payment of compensation, public acquisition of land for government projects incorporated all that was annexed to it, including billboards, provided that the sign owner had some property interest in the land appropriated, and, compensation was measured as the fair market value of the sign and property rights taken, unless the sign owner and the condemnor agreed that the sign was not being acquired

of billboards from Georgia's highways, was held constitutional in *National Adver Co v State Highway Dept* 230 Ga 119, 195 S E 2d 895 (1973) Nevertheless, with regard to uncompensated, forced removal of nonconforming signs, the Georgia Supreme Court has reaffirmed its holding in *Branch* in finding a municipal amortization ordinance unconstitutional for failing to provide just compensation See *Lamar Adver of South Georgia, Inc v City of Albany*, 260 Ga 46 389 S E 2d 216 (1990)

§ 23.03 Compensability

[1]—Development of the Common Law in New York

In the early 1960s, the state of New York developed its common law regarding the compensability of billboards in public acquisitions in a series of cases arising in the Fourth Department of the Appellate Division, following and building upon the *Stein Brewery* case above ¹

In the first of these cases, *Whitmier & Ferris Co., Inc v State*,² the lease contracts at issue were all terminable by the landlord upon sale or development of the property. The trial court dismissed the sign company's claims as relating to non-compensable rights,³ but the intermediate appellate court reversed, holding

We see no reason to grope about in the mysterious world of “estates” and “interests not estates.” The law of New York has put the matter on a very practical basis: a right with respect to property taken in condemnation may be so remote or incapable of valuation that it will be disregarded in awarding compensation, otherwise it will not be disregarded.⁴

Although recognizing the rule that “pure personal property may not be compensated for as though it were fixtures”—in a case where the sign company conceded that it had kept possession of the signs and re-erected them at other sites—the court held

To the extent that the value of the real property as a whole is enhanced by the fixtures annexed thereto, the value of the fixtures must be included in what the [condemnor] pays, and the tenant is entitled to part of the award, not because the fixtures added to the value of the leasehold, but because they belonged to him and their value enters into the value of what the [condemnor] has taken.⁵

¹ These cases, listed chronologically, were *Whitmier & Ferris Co., Inc v State*, 197 Misc 2d 70, 197 N.Y.S.2d 100 (Ct. Cl. 1959), *rev'd*, 12 A.D.2d 165, 209 N.Y.S.2d 247 (4th Dept. 1961), *Rochester Poster Adver. Co. v State*, 27 Misc. 2d 99, 213 N.Y.S.2d 812 (Ct. Cl.), *aff'd*, 15 A.D.2d 632, 222 N.Y.S.2d 688 (4th Dept. 1961), *aff'd*, 11 N.Y.2d 1036, 230 N.Y.S.2d 30 (1962), *City of Buffalo v Michael*, 19 A.D.2d 853, 244 N.Y.S.2d 30 (4th Dept. 1963), *aff'd*, 16 N.Y.2d 88, 262 N.Y.S.2d 441 (1965), *Richards-Dowdle, Inc v State*, 24 A.D.2d 824, 264 N.Y.S.2d 179 (4th Dept. 1965), *Richards-Dowdle, Inc v State*, 52 Misc. 2d 416, 276 N.Y.S.2d 795 (Ct. Cl. 1966) (on remand), *Richards “Of Course,” Inc v State*, 36 A.D.2d 572, 317 N.Y.S.2d 827 (4th Dept. 1971). Of particular note, Julius L. Sackman of Albany, New York, the co-author of *Nichols on Eminent Domain*® (3rd ed.), represented the condemnor in the *Whitmier* and *Rochester Poster* appeals.

² 12 A.D.2d 165, 209 N.Y.S.2d 247 (4th Dept. 1961).

³ *Whitmier & Ferris Co., Inc v State*, 197 Misc. 2d 70, 197 N.Y.S.2d 100 (Ct. Cl. 1959).

⁴ 2 A.D.2d at 166, 209 N.Y.S.2d at 248 (quoting *United States v 53 1/4 Ac. of Land*, 139 F.2d 244, 247).

⁵ 2 A.D.2d at 167–168, 209 N.Y.S.2d at 249–250 (quoting *Matter of City of New York* (Allen St.), 256 N.Y. 236).

The next case to be decided was *Rochester Poster Advertising Co v State*,⁶ published as a trial court memorandum opinion and subsequently affirmed by the intermediate and highest appellate courts of New York.⁷ In this case, the tenant owned six billboards which were located on either side of a highway that was being widened by the state. The lease provided that the signs were the "personal property" of the sign company which "may be removed by it at any time." The landlord reserved the right to terminate the lease with 60 days notice in the event he wanted to erect a permanent building on the land. The sign owner demolished its signs when notified by the state to do so and claimed entitlement to the difference between the fair market rent and the contract rent set forth in the lease, the fair market value of the billboard structures, and, the costs of removing the signs from the property. The state took the position that the signs were non-compensable personal property.

Citing *Whitmier*, the court determined that the "lease," although terminable, was a compensable property interest in the nature of an easement in gross and that the signs had been appropriated along with the land. The court then reviewed the sign owner's evidence that the fair market value of the signs should be measured by their depreciated reconstruction cost and awarded that amount, together with an amount for the "net fair rental value of the leases beyond the rent reserved," but the court refused to award the costs of removal.⁸

The next case also reached the state's highest court. In *City of Buffalo v Michael*,⁹ an urban redevelopment case, the landlord, at the city's urging, notified the tenant that its year-to-year lease would not be renewed and that its roof-top sign would have to be removed. The trial court in *Michael* ruled that the sign, which according to the lease was owned by the tenant, had the "characteristics of personal property and, consequently, was not a 'compensable' fixture."¹⁰

The appellate court reversed and held that the tenant was entitled to an award for its sign separate from the award made to the landowner. The court, citing *Whitmier* and *Rochester Poster*, said,

⁶ 27 Misc.2d 99, 213 N.Y.S.2d 812 (Ct. Cl. 1961).

⁷ *Rochester Poster Adver. Co v State*, 27 Misc.2d 99, 213 N.Y.S.2d 812 (Ct. Cl.), *aff'd*, 15 A.D.2d 632, 222 N.Y.S.2d 688 (4th Dept. 1961), *aff'd*, 11 N.Y.2d 1036, 230 N.Y.S.2d 30 (1962).

⁸ 27 Misc.2d at 105, 213 N.Y.S.2d at 818.

⁹ 16 N.Y.2d 88, 209 N.E.2d 776, 262 N.Y.S.2d 441 (1965). The trial court had rendered its opinion just prior to the decision in *Whitmier & Ferris*, *supra*, 12 A.D.2d 165, 209 N.Y.S.2d 247 (4th Dept. 1961) and was consequently reversed by the intermediate appellate court in *City of Buffalo v Michael*, 19 A.D.2d 853, 244 N.Y.S.2d 30 (4th Dept. 1963). After remand for a new trial, which resulted in a judgment in favor of the sign company, the City appealed to the Court of Appeals, whose decision was published as *City of Buffalo v Michael*, 16 N.Y.2d 88, 262 N.Y.S.2d 441 (1965).

¹⁰ 16 N.Y.2d 88, 91, 262 N.Y.S.2d 441, 442 (1965).

It is settled that a tenant is entitled to compensation in condemnation proceedings for fixtures annexed to real property “whenever the city in taking the real property destroys the leasehold interest of the tenant,” even though they may remain, in consequence of an agreement between the parties, the personal property of the tenant with a right in the latter to remove them upon termination of the lease. For the rule to apply, the annexation must, of course, be such that the fixtures “would have become part of the real property if they had been installed permanently by the owner of the fee” and, indeed, it has recently been held, signs and billboards permanently affixed to land or buildings are compensable fixtures ¹¹

The court found irrelevant the fact that the lease had “expired” as of the date the city took title to the land and building in the condemnation case, finding instead that

[I]t was solely because of the city’s initiation of the [eminent domain] proceeding that the landlord had notified the tenant that the lease would not be renewed and requested it to remove the sign. By thus forcing the premature removal of the claimant’s fixture, the city effectively destroyed the value of the tenant’s sign except for the salvageable portions ¹²

The court expressed its rationale for awarding compensation to the sign owner in this situation to be that “[t]he parties might have chosen to preserve the value of the fixtures “either by renewal of the lease or by transfer of title to the fixtures from the tenant to the owner of the fee. Choice lay with the tenant and landlord.”¹³

In *Richards-Dowdle, Inc v State*,¹⁴ the intermediate appellate court was again presented with the condemnor’s assertion that the sign owner’s removal of parts of the sign established that the sign was purely personal property and, therefore, non-compensable. The court remanded for a new trial so that the extent of removal could be considered “because such removal would be evidence of a determination by claimant that the sign, or some part of it, was personalty.”¹⁵

On remand,¹⁶ the trial court concluded that the “claimant intended to keep this sign on the property permanently, and that claimant had no intention of removing the sign had it not been for the appropriation.”¹⁷ Consequently, the

¹¹ 16 N Y 2d at 92-93, 262 N Y S 2d at 442-443 (citations omitted)

¹² 16 N Y 2d at 93, 262 N Y S 2d at 443

¹³ 16 N Y 2d at 93, 262 N Y S 2d at 444 (quoting *Marraro v State*, 12 N Y 2d 285, 189 N E 2d 606, 239 N Y S 2d 105, 108)

¹⁴ 24 A D 2d 824, 264 N Y S 2d 179 (4th Dept 1965)

¹⁵ 24 A D 2d at 824, 264 N Y S 2d at 180 (emphasis added)

¹⁶ *Richards-Dowdle, Inc v State*, 52 Misc 2d 416, 276 N Y S 2d 795 (Ct Cl 1966)

¹⁷ 52 Misc 2d at 419, 276 N Y S 2d at 798 “The sign in this case meets the test of the united

court determined that the sign was compensable in the amount testified to by the sign owner's expert which had its basis in the sign's reconstruction cost, less depreciation ¹⁸

Thus, by 1965, New York's courts had consistently held, in the five reported opinions discussed above, that billboards are acquired along with the land, absent a conscious decision on the part of the sign owner to retain his sign for relocation or reuse, regardless of the characterization of the billboard as personal property of the tenant or the tenuousness of the property interest held by the sign owner in the underlying land. Although it would not be overturned, this rule of law would soon be attacked—but later, accepted—due to a change in the federal legislation intended to control billboards along interstate highways.

[2]—The Highway Beautification Act of 1965

The Administration of President Lyndon B. Johnson, at the urging of the President's wife, Lady Bird, prevailed upon Congress to enact the Highway Beautification Act of 1965¹⁹ which required all fifty states to enact legislation controlling outdoor advertising on interstate and federal-aid primary highways.²⁰ Federal transportation funding was again the tool used to enforce this federal edict, but this time through the threat of loss of a portion of a state's apportionment for failure to comply, rather than by offering a bonus for compliance. The Act provided, as codified at 23 U.S.C. § 131(b), that

application of the three requisites determining it to be a fixture, namely it was annexed to the real property, its use was well adapted to its location, and it was the intention of claimant that its installation was to be permanent." 52 Misc.2d at 422, 276 N.Y.S.2d at 801 (*quoting Treatise*)

¹⁸ *Id.* The final case in this line, *Richards "Of Course," Inc. v. State*, 36 A.D.2d 572, 317 N.Y.S.2d 827 (4th Dept. 1971), held that where a condemnation award for a billboard was based upon its depreciated cost, builder's overhead and profit should be included in the calculation of reproduction costs.

¹⁹ Pub. L. No. 89-285, Title I, § 101, 79 Stat. 1028 (1965) (codified as amended at 23 U.S.C. § 131). For a general review of the legislative history and implementation of the Highway Beautification Act, see 1 Nichols on Eminent Domain®, §§ 1.42[10][a][I][A] n.59-16, 1.42[10][a][i][B] (Matthew Bender), Cunningham, *Billboard Control Under the Highway Beautification Act of 1965*, 71 Mich. L. Rev. 1295 (1973).

²⁰ President Johnson mentioned a program to beautify America's highways in his State of the Union message in January, 1965, and on February 8, 1965, he announced a White House Conference on Natural Beauty for mid-May. This conference, held in Washington, D.C., on May 24 and 25, 1965, was attended by 800 delegates. The day after the Conference, President Johnson recommended four draft bills to Congress for highway beautification. On June 3, 1965, Sen. Jennings Randolph, then Chairman of the Senate Subcommittee on Public Roads, sponsored the administration's proposal as Senate Bill 2084 which was subsequently amended and, as amended, signed into law by President Johnson on October 22, 1965, as Pub. L. No. 89-285, Title I, § 101, 79 Stat. 1028. Outdoor Adver. Ass'n Am., *History of the Highway Beautification Act of 1965*, As Amended 5-6 (1993) (unpublished manuscript).

Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary [of Transportation] determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State, until such time as such State shall provide for such effective control ²¹

By the Spring of 1972, all states except Missouri, Vermont and South Dakota were in compliance with the Act ²²

²¹ Pub L No 89-285, Title I, § 101(b) (1965) (codified as amended at 23 U S C § 131(b))

²² Cf Outdoor Adver Ass'n Am, History of the Highway Beautification Act of 1965, As Amended 7-8 (1993) (unpublished manuscript) ("By March, 1972, all states except South Dakota had complied with Title I of the Act"), with 1 Nichols on Eminent Domain@, § 1 42[10][a][1][B] (Matthew Bender) (concluding that not all states had complied or intended to comply by 1972 or thereafter) See generally Cunningham, *Billboard Control Under the Highway Beautification Act of 1965*, 71 Mich L Rev 1295, 1327-1329 (1973)

Missouri The State of Missouri was penalized ten percent when, on February 10, 1972, the Secretary of Transportation determined that the 1965 Missouri billboard act, Mo Rev Stat , §§ 226 500- 600, did not comply with the Federal Act The withheld funds were restored to Missouri after it amended its legislation on March 30, 1972, pursuant to an agreement between the State and the Secretary See *Whitman v State Highway Comm'n*, 400 F Supp 1050, 1072 (W D Mo 1975), *National Adver Co v State Highway Comm'n*, 549 S W 2d 536, 538 (Mo Ct App 1977)

Vermont Although Vermont's statute was considered to be in compliance generally, its implementation was not, due to Vermont's refusal to provide just compensation upon removal in accordance with 23 U S C § 131(g) See *State of Vermont v Brinegar*, 379 F Supp 606 (D Vt 1974) (upholding ten percent penalty)

South Dakota South Dakota apparently made only a half-hearted attempt to comply with the Highway Beautification Act provisions on effective control See *State of South Dakota v Volpe*, 353 F Supp 335 (S D S D 1973), *State of South Dakota v Adams*, 506 F Supp 50, 60 (S D S D), *aff'd*, *State of South Dakota v Goldschmidt*, 635 F 2d 698 (8th Cir 1980)

The fifty state Acts regulating outdoor advertising statewide are found at

Alabama Ala Code 1975, § 23-1-270, *et seq*

Alaska Alaska Stat §§ 19 25 080- 180

Arizona Ariz Rev Stat § 28-7901, *et seq*

Arkansas Ark Code Ann § 27-74-101, *et sq*

California Cal Bus & Prof Code § 5200, *et seq*

Colorado Colo Rev Stat § 43-1-401, *et seq*

Connecticut Conn Gen Stat § 13a-123

Delaware 17 Del Code Ann § 1101, *et seq*

Florida Fla Stat § 479 01, *et seq*

Georgia Ga Code Ann § 32-6-70, *et seq*

(Text continued on page 23-16)

Hawaii Haw Rev Stat § 264-71, *et seq*
Idaho Idaho Code § 40-1901 *et seq*
Illinois 225 Ill Comp Stat § 440/1, *et seq*
Indiana Ind Code § 8-23-20-1, *et seq*
Iowa Iowa Code §§ 306B 1, *et seq*, 306C 10, *et seq*
Kansas Kan Stat Ann § 68 2231, *et seq*
Kentucky Ky Rev Stat Ann § 177 830- 890
Louisiana La Rev Stat Ann § 48 461, *et seq*
Maine 23 Me Rev Stat Ann § 1901, *et seq*
Maryland Md Code Ann Transp § 8-714, *et seq*
Massachusetts Mass Gen Laws chap 93D, § 1, *et seq*
Michigan Mich Comp Laws § 252 301, *et seq*
Minnesota Minn Stat § 173 01, *et seq*
Mississippi Miss Code Ann, §§ 49-23-1 to -29
Missouri Mo Rev Stat § 226 500- 600
Montana Mont Code Ann § 75-15-101, *et seq*
Nebraska Neb Rev Stat § 39-201 01, *et seq*
Nevada Nev Rev Stat § 410 220- 410
New Hampshire NH Rev Stat Ann § 236 69, *et seq*
New Jersey NJ Stat Ann § 27 5-5, *et seq*
New Mexico NM Stat Ann §§ 67-12-1, *et seq*, 42A-1-34
New York Highway Law §§ 86 88 (McKinney)
North Carolina NC Gen Stat § 136-126, *et seq*
North Dakota ND Cent Code § 24-17-01 *et seq*
Ohio Ohio Rev Code Ann § 5516 01, *et seq*
Oklahoma 69 Okla Stat § 1271, *et seq*
Oregon Or Rev Stat § 377 700, *et seq*
Pennsylvania 36 Pa Cons Stat § 2718 101, *et seq*
Rhode Island R.I Gen Laws § 24-10 1-1, *et seq*
South Carolina SC Code Ann § 57-25-110, *et seq*
South Dakota SD Codified Laws § 31-29-1, *et seq*
Tennessee Tenn Code Ann § 54-21-101, *et seq*
Texas Tex Transp Code Ann § 391 001, *et seq*
Utah Utah Code Ann § 72-7-501, *et seq*
Vermont See 9 Vt Stat Ann § 3683a
Virginia Va Code Ann § 33 1-351, *et seq*
Washington Wash Rev Code § 47 42 010, *et seq*
West Virginia W Va Code § 17-22-1, *et seq*
Wisconsin Wis Stat § 84 30
Wyoming Wyo Stat Ann §§ 24-10-102 to 115

Like the Bonus Act, the Highway Beautification Act originally applied to “control zones” within 660 feet of the edge of the right-of-way, although it was amended in 1975 to also apply beyond that distance to signs erected outside of urban areas primarily for the purpose of being viewed from the highway.²³ Unlike the Bonus Act, however, which sought only to regulate interstates, the Highway Beautification Act required “effective control” of federal-aid primary highways.²⁴

“Effective control” meant that after January 1, 1968, signage along interstates and federal-aid primaries outside commercial and industrial areas would be restricted to three types of signs: 1) directional and official signs, subject to national standards, 2) signs advertising the sale or lease of property upon which they were located, and, 3) signs advertising activities conducted on the property.²⁵ Within areas zoned commercial or industrial or within unzoned commercial or industrial areas—but only in those areas—outdoor advertising signs would be allowed, subject to regulation of size, lighting and spacing “consistent with customary use.”²⁶

²³ Pub. L. No. 89-285, Title I, § 101(b), 79 Stat. 1028 (1965), amended in 1975 to apply to signs beyond 660 feet from the edge of right-of-way by Pub. L. No. 93-643, § 109, 88 Stat. 2284 (1975) (codified as amended at 23 U.S.C. § 131(b)).

²⁴ The federal government redesignated federal roads in 1991, creating the “National Highway System.” The Highway Beautification Act originally applied only to highways on the interstate and federal-aid primary systems. These roads, “in existence on June 1, 1991,” have been incorporated into the new National Highway System designation. The Act continues to apply to the original highways and any other highways now on the National Highway System. Pub. L. No. 102-240, Title I, § 1046(b), 105 Stat. 1995 (1991).

²⁵ Pub. L. No. 89-285, Title I, § 101(c), 79 Stat. 1028 (1965), amended in 1975 to apply to signs beyond 660 feet from the edge of right-of-way erected after July 1, 1975, by Pub. L. No. 93-645, § 109, 88 Stat. 2281 (1975) (codified as amended at 23 U.S.C. § 131(c)). The 1975 amendment also added to the list of permissible signs those signs lawfully in existence on October 22, 1965, that the state determined, subject to federal approval, to be landmark signs of historic or artistic significance. In 1978, during a fit of micro-management, Congress added to the list signs of nonprofit organizations advertising “free coffee.” Pub. L. No. 95-599, Title I, § 121(c), 92 Stat. 2700 (1978).

²⁶ Pub. L. No. 89-285, Title I, § 101(d), 79 Stat. 1028 (1965) (codified as amended at 23 U.S.C. § 131(d)). The original Act effectively left it in the discretion of the Secretary of Transportation to determine, on a state-by-state basis, what constituted “customary use” with respect to size, lighting and spacing and to define “unzoned commercial or industrial areas.” The Secretary was required to hold public hearings in each state and to report to Congress, by January 10, 1967, the standards to be applied. Pub. L. No. 89-285, Title III, § 303, 79 Stat. 1033 (1965). These determinations were to be put into effect by agreement between the states and the Secretary. The first two agreements were executed on June 28, 1967, with Vermont and Rhode Island. In 1968, Congress amended the Act to provide that a determination of “customary use” by a state, county or local zoning authority within commercial or industrial zones in its jurisdiction would be accepted in lieu of federal standards. Pub. L. No. 90-497, § 6(a), 82 Stat. 817 (1968). The final agreement was signed with Texas on May 2, 1972. Outdoor Adver. Ass’n Am., History of the Highway Beautification Act of 1965, As Amended 7 (1993) (unpublished manuscript).

Besides the change from offering a bonus to threatening a penalty, the most important difference between the Bonus Act and the Highway Beautification Act was the implicit mandate of the latter that signs that did not conform to the new regulations were to be removed. Subsection (e) of the Highway Beautification Act provided

Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.²⁷

But the Highway Beautification Act did not contemplate that nonconforming signs would be removed without compensation to either the owner of the sign or the owner of the land upon which the sign was located. In what is, for purposes of this discussion, the most important provision of the original Act,²⁸ Congress mandated, in subsection (g), that

Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays, and devices—(1) those lawfully in existence on the date of enactment of this subsection [October 22, 1965], (2) those lawfully on any highway made a part of the interstate or primary system on or after the date of enactment of this subsection and before January 1, 1968, and (3) those lawfully erected on or after January 1, 1968. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following: (A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device, and (B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.²⁹

The first sentence of this subsection was amended in 1975 to simply provide “Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law.”³⁰

²⁷ 23 U.S.C. § 131(e).

²⁸ Pub. L. No. 89-285, Title I, 23 U.S.C. § 131(g), 79 Stat. 1028 (1965) (codified as amended at 23 U.S.C. § 131(g)). Shortly after enactment, Ramsey Clark, the acting Attorney General, issued an opinion that the Act mandated compensation upon removal of outdoor advertising signs, even if a state had authority under its own laws to force removal through an exercise of the Police Power. See 42 Op. Att’y Gen. No. 26 (1966). This opinion was generally ignored by several states, including Vermont. See n.22 *supra*.

²⁹ Pub. L. No. 89-285, Title I, § 101(g) (1965) (codified as amended at 23 U.S.C. § 131(g)).

³⁰ Pub. L. No. 93-643, § 109, 88 Stat. 2284 (1975). The original Act created a hiatus affecting signs constructed between October 22, 1965, the effective date of the Highway Beautification Act, and January 1, 1968, the date by which the states were to have established effective control of

In relevant part, the vast majority of states adopted the substance, if not the actual language, of 23 U S C § 131(g) in the outdoor advertising control statutes that they passed in order to comply with the Act, although no two statutes are exactly alike ³¹ In fact, several statutes are unique in their treatment of the just

outdoor advertising in compliance with the Act The legality of such signs, and the requirement that compensation be paid upon their forced removal, was consequently placed in question and became the subject of several lawsuits See, e g, *State v National Adver Co*, 409 A 2d 1277 (Me 1979), *State By and Through Dept of Transp v National Adver Co*, 387 A 2d 745 (Me 1978), *Newman Signs, Inc v Hjelle*, 268 N W 2d 741 (N D 1978), *People ex rel Dept of Transp v Desert Outdoor Adver*, 68 Cal App 3d 440, 137 Cal Rptr 221 (1977)

³¹ It appears that only Massachusetts and Vermont do not have statutory provisions regarding just compensation in the event of removal in accordance with 23 U S C § 131(g), as amended in 1978 The other states' just compensation provisions can be found at

Alabama Ala Code 1975, §§ 23-1-280, -281

Alaska Alaska Stat. § 19 25 140

Arizona Ariz Rev Stat § 28-7906

Arkansas Ark Code Ann § 27-74-208

California Cal Bus & Prof Code § 5412

Colorado Colo Rev Stat § 43-1-414

Connecticut Conn Gen Stat § 13a-123(f)(2)

Delaware 17 Del Code Ann § 1122

Florida Fla Stat §§ 479 15, 479 24 See Division of Admin, *State Dept of Transp v Allen*, 447 So 2d 1383 (Fla. Dist Ct App 1984) (even if sign is determined to be personal property, just compensation still must be paid under state Highway Beautification Act), see also cases cited at § 23 04[3] in n 13, *infra*

Georgia Ga Code Ann §§ 32-6-82 to -85

Hawaii Haw Rev Stat § 264-75

Idaho Idaho Code §§ 40-506, 40-1910A, 40 1913

Illinois 225 Ill Comp Stat § 440/9, see also 735 Ill Comp Stat § 5/7-101 See Department of Transp v Drury Displays, Inc, 327 Ill App 3d 881, 764 N E 2d 166 (Ct App), *appeal denied*, 201 Ill 2d 564, 786 N E 2d 182 (2002) (eminent domain code provision applicable to any sign that is forced to be removed "might be rephrased colloquially as 'Billboard owners have a right to just compensation for any condemned sign'", but see *City of Chicago v Harris Trust and Savings Bank*, 346 Ill App 3d 609, 804 N E 2d 724 (2004)

Indiana Ind Code §§ 8-23-20-10, -11, -12

Iowa Iowa Code §§ 306B 4, 306C 15- 17, 306C 24

Kansas Kan Stat Ann § 68-2238

Kentucky Ky Rev Stat §§ 177 867, 880

Louisiana La Rev Stat Ann §§ 48 461 6, 48 461 19

Maine 23 Me Rev Stat Ann § 1915

Maryland Md Code Ann, Transp §§ 8-734, -735, -737, -743

Michigan Mich Comp Laws §§ 252 322

Minnesota Minn Stat, §§ 173 04, 173 05, 173 17 See *State v Weber-Connelly, Naegle, Inc*, 448 N W 2d 380 (Minn Ct App 1989) (even if sign is otherwise non-compensable personally, it is compensable under state Highway Beautification statute)

(Text continued on page 23-20)

Mississippi Miss Code Ann § 49-23-17

Missouri Mo Rev Stat §§ 226.527, 226.570

Montana Mont Code Ann § 75-15-123

Nebraska Neb Rev Stat §§ 39-203, -212, -272

Nevada Nev Rev Stat § 410.350

New Hampshire NH Rev Stat Ann § 236:80

New Jersey NJ Stat Ann § 27:5-21

New Mexico NM Stat Ann §§ 67-12-6, 42A-1-34

New York Highway Law § 88(7) (McKinney)

North Carolina NC Gen Stat § 136-131, *see also* § 136-131.1 *See* National Adver. Co. v. North Carolina Dept. of Transp., 124 N.C. App. 620, 478 S.E.2d 248 (1996) (statute "authorizes," but does not "require," payment of just compensation, unlike the Federal Act, and if it did, it would not apply where state acts in its capacity as an owner) *Cf.* NC Gen Stat § 40A-64(c) ("If the owner is to be allowed to remove any permanent improvement of fixtures from the property, the value thereof shall not be included in the compensation award, but the cost of removal shall be considered as an element to be compensated.")

North Dakota ND Cent. Code § 24-17-05

Ohio Ohio Rev. Code Ann. §§ 163.31-33 and §§ 5516.07-08 *See* Wray v. Stvartak, 121 Ohio App. 459, 700 N.E.2d 347 (Ct. App. 1997) ("R.C. 163.31 to 163.33 apply to the removal of advertising devices in conjunction with the appropriation of real property. R.C. 5516.08, on the other hand, applies only to the removal of advertising devices.")

Oklahoma 69 Okla. Stat. §§ 1279, 1280

Oregon Or. Rev. Stat. §§ 377.765, 377.780

Pennsylvania 36 Pa. Cons. Stat. § 2718.109

Rhode Island RI Gen. Laws § 24-10.1-6

South Carolina S.C. Code Ann. §§ 57-25-180, -190

South Dakota S.D. Codified Laws §§ 31-29-72, -73, -75

Tennessee Tenn. Code Ann. § 54-21-108

Texas Tex. Transp. Code Ann. § 391.033, *see also* § 395.005, Local Gov't Code Ann. § 216.008(a)

Utah Utah Code Ann. § 72-7-510

Vermont *Cf.* 9 Vt. Stat. Ann. § 3688

Virginia Va. Code Ann. § 33-1-370(E)-(F)

Washington Wash. Rev. Code §§ 47.42.102 to 47.42.107

West Virginia W. Va. Code §§ 17-22-3, -5, -6

Wisconsin Wis. Stat. § 84.30(6)-(7), (15) *See* Vivid, Inc. v. Fiedler, 219 Wis. 2d 644, 580 N.W.2d 644 (1998) ("§ 84.30 is exclusive remedy for determining just compensation for signs meeting criteria of § 84.30(6)"), *see also* Vivid, Inc. v. Fiedler, 182 Wis. 2d 71, 512 N.W.2d 771 (1994)

Wyoming Wyo. Stat. Ann. § 24-10-110

compensation requirement ³²

[a]—Amortization

Several state legislatures believed they could comply with the mandate of the Highway Beautification Act through legislation that prohibited billboards, declared them nuisances per se, “amortized”³³ them over a period years, and then required their removal without payment under the Police Power ³⁴ Most of these states set their amortization periods at five years, in compliance with subsection (e) of the Act, asserting that amortization constituted just compensation in compliance with subsection (g) ³⁵

As might be expected, a number of lawsuits were brought challenging the validity of these legislative acts What is surprising, in light of the development of the law on this point as of 1965,³⁶ is that all but one³⁷ of these challenges failed ³⁸ Following the approach taken in *Opinion of the Justices*,³⁹ the decisions

³² See statutes cited § 23 04[1] n 2 and § 23 04[4][a] n 25 *infra*

Texas See, e g, Tex Local Gov’t Code Ann, ch 216A Although cast as enabling legislation, this chapter grants municipal authority to allow for compensated relocation, as well as mandating specific compensation for removal

For an off-premise sign that is required to be removed, the compensable cost is an amount computed by determining the average annual gross revenue received by the owner from the sign during the two years preceding September 1, 1985, or the two years preceding the month in which the removal date of the sign occurs, whichever is less, and by multiplying that amount by three

Tex Local Gov’t Code Ann § 216 008(a)

It appears that the power to regulate signage in Texas is not otherwise delegated, nor is it considered delegated as part of the zoning power generally See Tex Local Gov’t Code Ann § 211 003

³³ The word is derived from the Latin root, mors, meaning death Most dictionaries define “amortization” as the process of gradually extinguishing a debt by making installment payments, or setting aside money by use of a sinking fund to pay off a future debt As an accounting procedure, it means writing off an expense by prorating it over a certain period See, e g, Black’s Law Dictionary (6th ed 1990), The American Heritage College Dictionary (3rd ed 1993), Webster’s New Collegiate Dictionary (1977), Thorndike Barnhart Comprehensive Desk Dictionary (1958)

³⁴ See cases cited n 38 *infra*, see generally 1 Nichols on Eminent Domain®, § 1 42[10][a][u] (Matthew Bender), 3 Zoning & Land Use Controls § 17 03[10] (Matthew Bender)

³⁵ For the opposing view, see Berger, *Amortization as “Just Compensation” If It Works for Billboards, Can Office Buildings Be Far Behind?*, Institute on Planning, Zoning, and Eminent Domain, ch 7 (Matthew Bender 1992)

³⁶ See § 23 02[3] & n 14 *supra* (cases cited therein)

³⁷ *Georgia* State Highway Dept v Branch, 222 Ga 770, 152 S E 2d 372 (1966), see § 23 02 n 17 *supra*

³⁸ *California* People *ex rel* Dept of Transp v Desert Outdoor Adver, Inc, 68 Cal App 3d 440, 137 Cal Rptr 221 (1977), People *ex rel* Dept of Pub Works v Ryan Outdoor Adver, Inc, 39 Cal App 3d 804, 114 Cal Rptr 499 (1974), People By and Through Dept of Pub Works v Adco Advertisers, 35 Cal App 3d 507, 110 Cal Rptr 849 (1973)

upholding statewide amortization against facial challenges focused on whether the elimination of billboards from state roads was a legitimate objective of the Police Power, leaving the door open for sign owners to challenge such statutes on an *ad hoc* basis as being unreasonably applied in individual cases.⁴⁰ These challenges never materialized for reasons soon to be explained

Iowa Iowa Dept of Transp v Nebraska-Iowa Supply Co, 272 N W 2d 6 (Iowa 1978)

Maine State v National Adver Co, 409 A 2d 1277 (Me 1979), State By and Through Dept of Transp v National Adver Co, 387 A 2d 745 (Me 1978)

New Hampshire Opinion of the Justices, 103 N H 268, 169 A 2d 762 (1961) (Bonus Act)

New York Modjeska Sign Studios Inc v Berle, 43 N Y 2d 408, 402 N Y S 2d 359, 373 N E 2d 255 (1977), *appeal dismissed*, 439 U S 809, 99 S Ct 66, 58 L Ed 2d 101 (1978)

North Dakota Newman Signs, Inc v Hjelle, 268 N W 2d 741 (N D 1978)

Ohio Ghaster Properties, Inc v Preston, 176 Ohio St 425, 200 N E 2d 328 (1964) (Bonus Act)

Vermont Micalite Sign Corp v State Highway Dept, 126 Vt 498, 236 A 2d 680 (1967)

Washington Markham Adver Co v State, 73 Wash 2d 405, 439 P 2d 248 (1968), *appeal dismissed*, 393 U S 316, 89 S Ct 553, 21 L Ed 2d 512, *reh'g denied*, 393 U S 1112, 89 S Ct 854, 21 L Ed 2d 813 (1969)

³⁹ 103 N H 268, 169 A 2d 762 (1961) While not mentioned in *Opinion of the Justices* or any of the cases cited in n 38 *supra*, this approach is traceable to the seminal zoning case, *Village of Euclid v Ambler Realty Co*, 272 U S 365, 47 S Ct 114, 71 L Ed 303 (1926) As recently noted by the United States Court of Appeals for the Fourth Circuit, in *Georgia Outdoor Adver, Inc v City of Waynesville*, 900 F 2d 783 (4th Cir 1990)

Before the provisions of a land use ordinance may be declared facially unconstitutional, "it must be said that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" *Village of Euclid v Ambler Realty Co*, 272 U S 365, 395, 47 S Ct 114, 121, 71 L Ed 303 (1926), [other citation omitted] Therefore, if one seeks an injunction against the enforcement of a land use ordinance in general, to deny relief a court need only determine "that the ordinance in its general scope and dominant features is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them" *Village of Euclid*, 272 U S at 397, 47 S Ct at 121

Id at 783

⁴⁰ See *Opinion of the Justices* 103 N H 268, 169 A 2d 762 (1961), *Modjeska Sign Studios, Inc v Berle*, 43 N Y 2d 408, 402 N Y S 2d 359, 373 N E 2d 255 (1977), *Newman Signs, Inc v Berle*, 268 N W 2d 741 (N D 1978)

The test applied in these cases is probably best stated in *Modjeska*

If an owner can show that the loss he suffers as a result of the removal of a nonconforming use at the expiration of an amortization period is so substantial that it outweighs the public benefit gained by the legislation, then the amortization period must be held unreasonable

402 N Y S 2d at 367

The general analysis used by the courts cited in this note above is, however, questionable in light of the United States Supreme Court's ruling in *Nollan v California Coastal Comm'n*, 483 U S 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), that a regulation can be a legitimate exercise of the Police Power but still constitute a taking if it deprives an owner of economically viable use of his land *But see* *Naegele Outdoor Adver, Inc v City of Durham*, 844 F 2d 172, 177, 178 (4th Cir 1988), *Tahoe Reg'l Planning Agency v King*, 233 Cal App 3d 1365, 285 Cal Rptr 335, 351, 352 (1991)

Meanwhile, municipal and county governments followed suit and amortization ordinances abounded. The majority of these enactments have survived facial challenges and fared quite well when challenged in individual cases, although there have been exceptions.⁴¹

⁴¹ See generally Zitter, Annot., Validity of Provisions for Amortization of Nonconforming Uses, 8 A L R 5th 391 (1992), Travers, Annot., Classification and Maintenance of Advertising Structure as Nonconforming Use, 80 A L R 3d 630 (1977).

The following cases have generally upheld billboard amortization ordinances against facial or "as applied" challenges prior to the 1978 amendment of the Highway Beautification Act.

Federal (Iowa) Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690 (8th Cir. 1996) (five and one-half-year amortization period, no proof signs were lawfully constructed), (North Carolina) Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986) (five and one-half-year amortization period, Highway Beautification Act not implicated), (Florida) E. B. Elliott Adv. Co. v. Metro Dade Co., 425 F.2d 1141 (5th Cir. 1970) (five-year amortization period).

Florida Lamar Adver. Ass'n of E. Fla., Ltd. v. City of Daytona Beach, 450 So. 2d 1145 (Fla. Dist. Ct. App. 1984) (ten-year amortization period, Highway Beautification Act not implicated), Webster Outdoor Adver. Co. v. City of Miami, 256 So. 2d 556 (Fla. Dist. Ct. App. 1972) (five-year amortization period).

Maine Inhabitants of Boothbay v. National Adver. Co., 347 A.2d 419, 81 A L R 3d 474 (Me. 1975) (10-month amortization period).

Maryland Donnelly Adver. Corp. v. City of Baltimore, 279 Md. 660, 370 A.2d 1127 (1977) (five-year amortization period), Grant v. Mayor of Baltimore, 212 Md. 301, 129 A.2d 363 (1957) (five-year amortization period).

Michigan Adams Outdoor Adver. v. City of East Lansing, 463 Mich. 17, 614 N.W.2d 634 (2000) (twelve-year amortization of rooftop signs).

Minnesota Naegle Outdoor Adver. Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968) (three-year amortization period).

Mississippi Red Roof Inns, Inc. v. City of Ridgeland, 797 So. 2d 898 (Miss. 2001) (five-year amortization period, Highway Beautification Act not implicated).

Missouri University City v. Diveley Auto Body Co., 417 S.W.2d 107 (Mo. 1967) (three-year amortization period).

New York Suffolk Outdoor Adver. Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), appeal dismissed, 439 U.S. 808, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978), Rochester Poster Adver. Co. v. Town of Brighton, 49 A.D.2d 273, 374 N.Y.S.2d 510 (4th Dept. 1975) (34-month amortization period).

North Carolina Summey Outdoor Adver., Inc. v. County of Henderson, 96 N.C. App. 533, 386 S.E.2d 439 (1989) (five-year amortization period, Highway Beautification Act not implicated).

Ohio Northern Ohio Sign Contractors Ass'n v. City of Lakewood, 32 Ohio St.3d 316, 513 N.E.2d 324 (1987) (five and one-half-year amortization period, Highway Beautification Act not implicated).

Texas Eller Media Co. v. City of Houston, 101 S.W.3d 668 (Tex. Ct. App.—Houston [1st Dist.] 2003) (twenty-one- and seventeen-year amortization periods, Highway Beautification Act not implicated), Lubbock Poster Co. v. City of Lubbock, 569 S.W.2d 935 (Tex. Ct. App.—Amarillo 1978) (six and one-half-year amortization period).

Washington Ackerley Communications, Inc. v. City of Seattle, 92 Wash. 2d 905, 602 P.2d 1177 (1979) (en banc) (three-year amortization period).

(Text continued on page 23-24)

There is, however, a question regarding when the cause of action accrues

Federal (North Carolina) *National Adver Co v City of Raleigh*, 947 F 2d 1158 (4th Cir 1991) (accrual upon adoption)

North Carolina *Naegele Outdoor Adver, Inc v City of Winston-Salem*, 113 N C App 758, 440 S E 2d 842, 843 (1994) (accrual upon adoption)

But see Washington *Horan v City of Federal Way*, 110 Wash App 204, 39 P 3d 366 (2002) (accrual upon enforcement)

The following cases held amortization ordinances facially constitutional, but remanded for a determination of whether they were being constitutionally applied

Federal See (North Carolina) *Georgia Outdoor Adver, Inc v City of Waynesville*, 900 F 2d 783 (4th Cir 1990) (five and one-half-year amortization period), *Naegele Outdoor Adver, Inc v City of Durham*, 844 F 2d 172 (4th Cir 1988) (five and one-half-year amortization period), *but see* *Naegele Outdoor Adver, Inc v City of Durham*, 803 F Supp 1068 (M D N C 1992), *aff'd*, 19 F 3d 11 (4th Cir 1994) (same case on remand, five and one-half-year amortization ordinance upheld as applied), *cf* (Colorado) *Art Neon Co v City and Co of Denver*, 488 F 2d 118 (10th Cir 1973) (invalidated in part a two to five-year amortization period)

Arkansas *American Television Co v City of Fayetteville*, 253 Ark 760, 489 S W 2d 754 (1973), *but see* *Donrey Communications Co v City of Fayetteville*, 280 Ark 408, 660 S W 2d 900 (1983) (same case on remand, four-year amortization ordinance upheld as applied)

California *Tahoe Reg'l Planning Agency v King*, 233 Cal App 3d 1365, 285 Cal Rptr 335 (1991) (five-year amortization period), *cf* *National Adver Co v County of Monterey*, 83 Cal Rptr 577, 464 P 2d 33 (Cal 1970) (enjoined as to one-year amortization period without showing of reasonableness)

The following cases have held an amortization ordinance unenforceable

Colorado *Combined Comm Corp v City and Co of Denver*, 189 Colo 462, 542 P 2d 79 (1975) (five-year amortization and total prohibition on outdoor advertising invalidated)

Georgia *Lamar Advert v City of Albany*, 260 Ga 46, 389 S E 2d 216 (1990)

Besides restrictions imposed by several states through their outdoor advertising control statutes, n 31 *supra* and *see also* n 43 *infra*, the following legislation prohibits or restricts the use of amortization to remove nonconforming billboards

Arkansas Ark Code Ann § 14-56-421(c)

California Cal Bus & Prof Code § 5412, *et seq*

Florida Fla Stat § 70 20

Idaho Idaho Code § 40-1910A(4)

Illinois 735 Ill Comp Stat § 5/7-101

Indiana Ind Code § 8-23-20-16

Louisiana La Rev Stat Ann § 48 461 6(4)

Maryland Md Code Ann § 25-122E (limited to depreciated cost)

Mississippi Miss Code Ann § 49-23-17(1), (2)

Nebraska Rev Neb Stat § 19-904 01

Nevada Nev Rev Stat § 278 0215

North Carolina N C Gen Stat §§ 153A-143 (counties), 160A-199 (cities)

Ohio Ohio Rev Code Ann §§ 163 31-33

Oklahoma 69 Okla Stat § 1280G

[b]—The Highway Beautification Act Amendment of 1978

In 1978, in reaction to the inequities of amortization, Congress again amended the first sentence of subsection (g) of the Highway Beautification Act to read, as it does now ⁴²

Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, *whether or not removed pursuant to or because of this section* (Emphasis added)

For the most part, the 1978 amendment put an end to amortization of billboards on all Interstate and federal-aid primary highways throughout the nation, not because it preempted state law, but because every state was required to amend its own outdoor advertising regulations in order to retain full federal funding ⁴³

Rhode Island RI Gen Laws § 45-24-39(a)

South Dakota SD Codified Laws § 31-29-75

Tennessee Tenn Code Ann § 13-7-208(h)

Texas Local Gov't Code Ann § 216.001, *et seq* (enabling legislation)

Wyoming Wyo Stat Ann § 16-8-101

The following legislation also appears to prohibit amortization with regard to all types of nonconforming uses and/or structures, including billboards

Connecticut Conn Gen Stat § 8-2(a) ("use, building or structure")

Colorado Colo Rev Stat § 38-1-101(3) ("nonconforming property")

Kentucky Ky Rev Stat Ann § 100.253(1) ("use of premises")

Michigan Mich Comp Laws § 125.583a ("use of land or a structure")

Minnesota Minn Stat §§ 394.21, 462.357 ("use")

New Hampshire NH Rev Stat Ann § 674.28 ("nonconforming properties")

New Jersey NJ Stat Ann § 40.55D-68 ("use or structure")

Ohio Ohio Rev Code Ann § 713.15 ("any dwelling, building, or structure and of any land or premises")

Oregon Or Rev Stat § 215.150(5) ("building, structure or land")

Virginia Va Code Ann § 15.2-2307 ("land, buildings, and structures and the uses thereof")

West Virginia W Va Code § 8-24-50 ("use of any land, building or structure")

Wisconsin Wis Stat § 60.61(5)(a) ("use of any building or premises")

⁴² Pub L No 95-599, Title I, § 122(a), 92 Stat 2700 (1978) (codified as amended at 23 U S C § 131(g)), *see also* § 122(b) which amended subsection 23 U S C § 131(k)

⁴³ The following cases have generally upheld amortization ordinances against facial challenges, but have not allowed them to apply to protected signs (typically nonconforming signs) on interstate or federal-aid primary highways, holding that state outdoor control statutes enacted or modified to comply with the 1978 amendments to the Highway Beautification Act preempt such ordinances

Federal (Oregon) National Adver Co v City of Ashland, 678 F2d 106 (9th Cir 1982) (five-year amortization period) (remanded to determine effect of state law)

Arkansas Donrey Communications Co v City of Fayetteville, 280 Ark 408, 660 S W 2d 900 (1983) (four-year amortization period)

[3]—Supreme Court Decisions in Related Cases

As previously pointed out, the court in *Stein Brewery*, the first reported billboard condemnation case, mentioned that in some circumstances the government might be able to argue that billboards on land being acquired are “personal property” which is not included in the acquisition and for which no compensation is due.⁴⁴ The New York appellate courts correctly assessed this argument in later

California *Metromedia, Inc v City of San Diego*, 26 Cal 3d 848, 164 Cal Rptr 510, 610 P 2d 407 (1980), *rev'd on other grounds*, 453 U S 490, 101 S Ct 2882, 69 L Ed 2d 800 (1981) (amortization period ranging from 90 days to four years, depending upon location and “depreciated value” of sign), *City of Salinas v Ryan Outdoor Adver, Inc*, 189 Cal App 3d 416, 234 Cal Rptr 619 (1987) (five-year amortization period), *cf Tahoe Reg'l Planning Agency v King*, 233 Cal App 3d 1365, 285 Cal Rptr 335 (1991) (regulation enacted pursuant to state compact between California and Nevada not preempted by Highway Beautification Act)

Colorado *City of Fort Collins v Root Outdoor Adver, Inc*, 788 P 2d 149 (Colo 1990) (five-year amortization period), *see also* *National Adver Co v Board of Adjustment of City and Co of Denver*, 800 P 2d 1349 (Colo Ct App 1990) (height ordinance may effectively constitute forced removal and be preempted), *cf National Adver Co v Dept of Highways*, 751 P 2d 632 (Colo 1988) (en banc) (state statute preempted municipal ordinance that would have allowed signs in violation of Highway Beautification Act)

Delaware *Mayor & Council of Newcastle v Rollings Outdoor Adver Co*, 475 A 2d 355 (Del 1984)

Florida *Lamar-Orlando Outdoor Adver v City of Ormond Beach*, 415 So 2d 1312 (Fla Dist Ct App 1982) (ten-year amortization period), *see also* *City of Lake Wales v Lamar Adver Ass'n of Lakeland*, 399 So 2d 981 (Dist Ct App 1981), *rev'd on other grounds*, 414 So 2d 1030 (Fla 1982) (prohibition ordinance)

Maryland *Eller Media Co v Montgomery County*, 143 Md App 562, 795 A 2d 728 (2002) (five-year amortization period)

New Mexico *Battaglini v Town of Red River*, 100 N M 287, 669 P 2d 1082 (1983) (five-year amortization period)

New York *RHP, Inc v City of Ithaca*, 91 A D 2d 721, 457 N Y S 2d 645 (3d Dept 1982) (seven-year amortization period)

North Carolina *R O Givens, Inc v Town of Nags Head*, 58 N C App 697, 294 S E 2d 388 (1982) (five and one-half-year amortization period, *cf National Adver Co v North Carolina Dept of Transp*, 124 N C App 620, 478 S E 2d 248 (1996) (state outdoor advertising control statute does not require compensation where sign owner has no property interest in underlying realty)

Texas *City of Houston v Harris Co Outdoor Adver Ass'n*, 732 S W 2d 42 (Tex App 1987) (six-year amortization period)

Washington *Horan v City of Federal Way*, 110 Wash App 204, 39 P 3d 366 (2002) (five-year amortization period)

Although beyond the scope of this chapter, it should be noted that where the 1978 amendment to the Highway Beautification Act has not resulted in state statutory preemption of amortization ordinances, the dispute continues, although the new battleground is the First Amendment to the United States Constitution. *See, e g*, *Metromedia, Inc v City of San Diego*, 453 U S 490, 101 S Ct 2882, 69 L Ed 2d 800 (1981), *see generally* 3 Zoning & Land Use Controls, § 17 02 (Matthew Bender)

⁴⁴ See § 23 02[1] & ns 5-6 *supra* (see text)

cases, holding that in determining whether a tenant's billboard is acquired together with the land upon which it is located, the issue must be addressed on a case-by-case basis to determine if the sign was installed on the property in a manner that it "would have become part of the real property if [it] had been installed permanently by the owner of the fee"⁴⁵

In other words, the focus of the analysis is not whether the tenant's intention was to retain title to the sign rather than convey it to the landlord at the expiration of the lease. The appropriate analysis should be: has the sign been annexed to the land in a permanent manner? In this regard, the right of a tenant to remove the sign, which makes it a "trade fixture," becomes irrelevant.⁴⁶

Three United States Supreme Court cases are frequently cited in connection with the compensability of billboards in condemnation cases, even though none of them involved signs. The first two cases, decided prior to the New York cases discussed above, involved the condemnation of leasehold interests by the federal government during the Second World War under the War Powers Acts. *United States v. General Motors Corp.*⁴⁷ and *United States v. Petty Motor Co.*⁴⁸ The third case, *Almota Farmers Elevator and Warehouse Company v. United States*,⁴⁹ was commenced in the trial court in 1967 and ruled on by the Supreme Court in 1973. All three cases involved condemnation actions initiated by the United States government.

⁴⁵ See cases cited in § 23 03[1] in n l and text at ns 5-6 *supra*. But see *City of Cleveland v. Zimmerman*, 51 Ohio Op 2d 50, 253 NE 2d 327 (Prob Ct 1969) (*dicta* in trial court opinion), *City of Lakewood v. Rogolsky*, 50 Ohio Op 2d 423, 252 NE 2d 872 (Prob Ct 1969) (*dicta* in trial court opinion).

⁴⁶ See Cunningham, Valuation and Condemnation of Advertising Signs and Related Property Interests Under the Highway Beautification Act, in 2 *Selected Studies in Highway Law* 571, *et seq.* (J. Vance, ed., Transp. Research Bd. 1979) (citing New York cases at 583, 585-586). Professor Cunningham points out that the trade fixture doctrine, an exception to the strict common law rule by which fixtures would otherwise become the property of the landlord, evolved to permit the tenant to remove fixtures at or prior to the end of the lease. However, they are effectively treated as part of the real estate until such time as the tenant removes them. *Id.* at 580-587. Several other commentators have misconstrued this rule. See Anonymous, Annot., Eminent Domain Determination of Just Compensation for Condemnation of Billboards or Other Advertising Signs, 73 A L R 3d 1122, 1124 (1976) (the anonymous author of this annotation gives no case citation for his conclusion that "the sign owner's intention as to its status as a permanent accession will generally be the controlling factor in the determination of whether it is a fixture"), see also Floyd, *Compensation for Billboard Removal in Eminent Domain Proceedings*, Zoning and Plan L Rep., Vol. 17, No. 2, 9-15 (Feb., 1994) (failing to distinguish trade fixtures from personal property), Floyd, *Outdoor Advertising Signs and Eminent Domain Proceedings*, Real Estate Appraiser & Analyst, Vol. 56, No. 2, 4-17 (Summer 1990) (same), Floyd, *Issues in the Appraisal of Outdoor Advertising Signs*, Appraisal Journal, 422, *et seq.* (July 1983) (same).

⁴⁷ 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945).

⁴⁸ 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946).

⁴⁹ 409 U.S. 470, 93 S. Ct. 791, 35 L. Ed. 2d 1 (1973).

[a]—Trade Fixtures and Equipment: *United States v. General Motors*

In *General Motors*, the government condemned a temporary sub-leasehold interest from the tenant, General Motors Corp. This action dispossessed General Motors, although the company remained liable on the lease after the government's occupancy. Due to the taking, General Motors was required to relocate and store all of its reusable personalty and to dismantle and remove its installed equipment which was made valueless as a result of being removed from the premises. General Motors made claims for the value of its leasehold, its costs of relocating and storing its reusable personalty, and the value that its installed equipment had lost, together with the original costs of installation.

The Court, distinguishing General Motors' other claims from its claims related to the equipment, the value of which had been destroyed as a result of being removed, held ⁵⁰

For fixtures and permanent equipment destroyed or depreciated in value by the taking, the [tenant] is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking. This is true whether the fixtures and equipment would be considered such as between vendor and vendee, or as a tenant's trade fixtures. In respect of them, the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value. And since they are property distinct from the right of occupancy such compensation should be awarded not as part of but in addition to the value of the occupancy as such. (Footnotes omitted)

The Court effectively adopted what became the New York rule, *citing* as authority for the above-quoted holding the same earlier New York cases later relied upon by *Stein Brewery* and its progeny in concluding that the rule applied to billboards in condemnation proceedings ⁵¹

⁵⁰ 323 U.S. 373, 384, 65 S. Ct. 357, 362 (*citing* existing legal authority for rule in ordinary condemnation cases at ns 9-12 of the opinion), *see also* *United States v. Petty Motor Co.*, 327 U.S. 372, 382 (1946) (Rutledge, J., concurring).

⁵¹ *Id.* at ns 10-12 (the New York cases cited in common are *Matter of New York*, 118 A.D. 865, 103 N.Y.S. 908, *Jackson v. State*, 213 N.Y. 34, 106 N.E. 758 and *In Re Allen Street and First Avenue*, 256 N.Y. 236, 176 N.E. 377, cited in *George F. Stein Brewery, Inc. v. State*, 103 N.Y.S.2d 946, 949 (Ct. Cl. 1951), *Whitmier & Ferris Co., Inc. v. State*, 12 A.D.2d 165, 209 N.Y.S.2d 247, 249, 250 (4th Dept. 1961), *Rochester Poster Adver. Co. v. State*, 27 Misc.2d 99, 213 N.Y.S.2d 812, 816 (Ct. Cl. 1961), *City of Buffalo v. Michael*, 40 Misc.2d 966, 262 N.Y.S.2d 441, 442 (1965), and *Richards-Dowdle, Inc. v. State*, 52 Misc.2d 416, 276 N.Y.S.2d 795, 801 (Ct. Cl. 1966).

[b]—Leaseholds and Moving Costs: *United States v. Petty Motor*

In *Petty Motor*, the government filed a condemnation action against the fee owner and all of the tenants, one of whom was in possession pursuant to a lease that waived claims for apportionment of any condemnation award and also provided for automatic termination in the event of a taking in eminent domain. The government settled with the fee owner and took the position with respect to this tenant that it held no compensable property interest and was, therefore, not entitled to compensation. The Court agreed, holding that “at least in the absence of a contrary state rule, the tenant has no right which persists beyond the taking and can be entitled to nothing.”⁵²

The remaining tenants’ leases, including Petty’s, did not automatically terminate upon condemnation, however, and they were held to be entitled to compensation for the taking of their interests since their terms were to end during the government’s tenure. Because this was not a “temporary removal” like the situation in *General Motors*, the Court held that these tenants were not entitled to compensation for the costs of removing their personalty from the premises, an expense, said the Court, they would have incurred anyway. Also unlike *General Motors*, there was no issue in this case that removal of any installed equipment would effectively destroy it or cause it to lose substantial value.

The Court held that the measure of damages for the taking of Petty’s leasehold was the difference between “the value of the use and occupancy of the leasehold for the remainder of the tenant’s term, plus the value of the right to renew in the lease of Petty, less the agreed rent which the tenant would pay for such use and occupancy.”⁵³

[c]—Fair Market Value: *Almota Farmers Elevator v. United States*

In *Almota*, the government condemned railroad property in 1967 that had been leased to the owner of a grain elevator located on the property. Almota’s relationship with the railroad had been in effect for over fifty years with one short-term lease succeeding the next. At the time of the condemnation, however, there was only a remaining term of seven and one-half years which Almota asserted it expected would be extended, as it had in the past, since both the railroad and Almota benefitted from Almota’s use of the property. The “buildings, machinery and equipment in place”⁵⁴ had a remaining useful life exceeding the remaining lease term and Almota asserted that a private buyer, in the absence of the taking, would have recognized that fact and paid substantially for it, even though the lease had only a short duration.

⁵² 327 U.S. 372, 376, 66 S. Ct. 596, 90 L. Ed. 729 (1946).

⁵³ 327 U.S. 372 at 381, 66 S. Ct. at 601, 90 L. Ed. at 736.

⁵⁴ 409 U.S. 470, 471, 93 S. Ct. 791, 793, 35 L. Ed. 2d 193 (1973).

The Court framed the issue before it as “[w]hether, upon condemnation of a leasehold, a lessee with no right of renewal is entitled to receive as compensation the market value of its improvements without regard to the remaining term of its lease, because of the expectancy that the lease would have been renewed”⁵⁵ The Court answered this question in the affirmative, over the government’s objection that *Petty Motor* limited recovery to the value of the lease, less contract rent⁵⁶

The Court noted that just compensation under the Fifth Amendment is generally considered to be the fair market value of the property taken, that is, what a willing buyer would pay a willing seller In this case, the property taken was a short term lease, improved with buildings, structures and equipment with a useful life longer than the term remaining on the lease The Court said

By failing to value the improvements in place over their useful life—taking into account the possibility that the lease might be renewed as well as the possibility that it might not—the Court of Appeals in this case failed to recognize what a willing buyer would have paid for the improvements⁵⁷

In conclusion, the Court said, “It is, of course, true that Almotra should be in no better position than if it had sold its leasehold to a private buyer But its position should surely be no worse”⁵⁸

The Court also rejected the argument that the government could have simply purchased the railroad’s interest, waited until the end of the existing lease term, and then evicted Almotra without being obligated to compensate it for its structures and equipment, providing, in a footnote quoting this treatise, the following rationale

It frequently happens in the case of a lease for a long term of years that the tenant erects buildings or puts fixtures into the buildings for his own use Even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property In the absence of a special agreement to the contrary, such buildings or fixtures may be removed by the tenant at any time during the continuation of the lease, provided such removal may be made without injury to the freehold

⁵⁵ 409 U.S. at 473, 93 S. Ct. at 794, 35 L. Ed. 2d at 7

⁵⁶ The Court distinguished *Petty Motor* in this way

But the Court was not dealing there with the fair market value of improvements Unlike *Petty Motor*, there is no question here of creating a legally cognizable value where none existed, or of compensating a mere incorporeal expectation The petitioner here has constructed the improvements and seeks only their fair market value *Petty Motor* should not be read to allow the Government to escape paying what a willing buyer would pay for the same property

409 U.S. at 476, 93 S. Ct. at 795–796, 35 L. Ed. 2d at 9

⁵⁷ 409 U.S. at 474, 93 S. Ct. at 794, 35 L. Ed. 2d at 7–8

⁵⁸ 409 U.S. at 478, 93 S. Ct. at 797, 35 L. Ed. 2d at 10

This rule, however, exists entirely for the protection of the tenant, and cannot be invoked by the condemnor. If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award. But in apportioning the award, they are treated as personal property and credited to the tenant.⁵⁹

[4]—Uniform Real Property Acquisition Policies: The Federal Act of 1970

To ensure fair and uniform treatment in federal and federally funded government acquisitions, Congress enacted the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.⁶⁰ As a condition to receiving federal funding for public acquisitions, the Act required the states to give assurance that by July 1, 1972, they would comply with certain minimum requirements in federally funded acquisitions and would also provide certain minimum payments to people displaced by federally funded projects.⁶¹

The Uniform Act was divided into three sub-chapters: General Provisions,⁶² Uniform Relocation Assistance,⁶³ and, of significance to this discussion, Uniform Real Property Acquisition Policy.⁶⁴ Sub-chapter III, Uniform Real Property Acquisition Policy, consisted of four provisions: uniform policy on real property acquisition practices,⁶⁵ mandatory requirements relating to buildings, structures

⁵⁹ 409 U.S. at 478 n.5, 93 S. Ct. at 797, 35 L. Ed. 2d at 10 (citing *Nichols on Eminent Domain*®), accord *United States v. Seagren*, 50 F.2d 333, 75 A.L.R. 1491 (D.C. Cir. 1931). See also *United States v. 12 1/2 Acres of Land in Jefferson Co., Kansas*, 623 F.2d 131 (10th Cir. 1980) (applying same rule where government took title more than five years after railroad had terminated tenant's lease pursuant to an agreement it had with the government to do so and tenant had removed its trade fixtures). In *Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470, 93 S. Ct. 791, 35 L. Ed. 2d 1 (1973), the Court noted that it may be permissible for the government to acquire property and step into the shoes of the private landlord where it has no public project in mind at the time of the acquisition. However, where the taking is clearly within the scope of the public project at the time the government acquires or becomes committed to acquiring the property, the tenant is entitled to just compensation. 409 U.S. at 477-479, 93 S. Ct. at 796-797, 35 L. Ed. 2d at 9-10, 12 1/2 Acres, 623 F.2d at 132-133. Cf. *State, by Humphrey v. Card*, 413 N.W.2d 577 (Minn. Ct. App. 1987) (attempting to distinguish *12 1/2 Acres*, but apparently misreading that decision).

⁶⁰ Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. No. 91-646, 84 Stat. 1894 (1971) (codified as amended at 42 U.S.C. § 4601, *et seq.*) See 42 U.S.C. § 4621 for Congress' declaration of policy for implementing the Uniform Act. See generally Lazuran, Annot., Uniform Relocation Assistance and Real Property Acquisition Practices Policies Act of 1970 (42 U.S.C. §§ 4601-4655), 33 A.L.R. Fed. 9 (1977).

⁶¹ Pub. L. No. 91-646, Title II, § 221, 84 Stat. 1903 (1971), see also 42 U.S.C. §§ 4630, 4655.

⁶² Pub. L. No. 91-646, Title I, §§ 101-103 (codified as amended at 42 U.S.C. §§ 4601-4604).

⁶³ Pub. L. No. 91-646, Title II, §§ 201-218 (codified as amended at 42 U.S.C. §§ 4621-4638).

⁶⁴ Pub. L. No. 91-646, Title III, §§ 301-305 (codified as amended at 42 U.S.C. §§ 4651-4655).

⁶⁵ Pub. L. No. 91-646, Title III, § 301 (codified as amended at 42 U.S.C. § 4651). No rights

and improvements,⁶⁶ incidental expenses related to transfer of title,⁶⁷ and litigation expenses⁶⁸

The provision of the Uniform Act setting forth mandatory requirements relating to buildings, structures and improvements essentially adopted the New York rule, which had also been adopted by the United States Supreme Court in 1973 in the *Almota* case. That section, 42 U S C § 4652, provides⁶⁹

(a) Notwithstanding any other provision of law, if the head of a Federal agency acquires any interest in real property in any State, he shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which he requires to be removed from such real property or which he determines will be adversely affected by the use to which such real property will be put

(b)(1) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (a) of this section, such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at the expiration of his term

Many states have enacted statutes specifically implementing the language of this provision,⁷⁰ while others have simply passed legislation authorizing state

or liabilities are created by this subsection, nor does the failure to comply with the provisions of this subsection affect the validity of any property acquisitions by purchase or condemnation 42 U S C § 4602(a). Significantly, this limitation is not imposed on the provisions related to mandatory acquisition of buildings, structures and other improvements required by 42 U S C § 4652

⁶⁶ Pub L No 91-646, Title III, § 302 (codified as amended at 42 U S C § 4652)

⁶⁷ Pub L No 91-646, Title III, § 303 (codified as amended at 42 U S C § 4653)

⁶⁸ Pub L No 91-646, Title III, § 304 (codified as amended at 42 U S C § 4654)

⁶⁹ Pub L No 91-646, Title III, § 302 (codified as amended at 42 U S C § 4652). Although subsection (a) appears limited to acquisitions undertaken by the federal government or its agencies, it is applicable to states through 42 U S C § 4655. See, e.g., *Whitman v. State Highway Comm'n*, 400 F Supp 1050, 1067-1070 (W D Mo 1975). See also 42 U S C §§ 4604, 4627, 4628

⁷⁰ The following statutes impose the rule only with regard to federally funded acquisitions

Colorado Colo Rev Stat § 24-56-118. See *Regional Transportation Dist v. Outdoor Systems, Inc.*, 34 P 3d 408 (Colo 2001) (en banc) (the type of "acquisition" contemplated by the Uniform Act and this statute is one where federal funds have been committed prior to the time the government obtains title to the property at issue)

Georgia Ga Code Ann § 22-4-10

Iowa Iowa Code § 6B 55

Maine 23 Me Rev Stat Ann § 154-E

Montana Mont Code Ann § 70-31-305

The following statutes impose the rule without limitation

agencies and other governmental entities to comply with the Uniform Act to the greatest extent possible ⁷¹

Notwithstanding the provisions of the Uniform Act quoted above, several states have simply refused to acquire billboards in federally funded acquisition projects, asserting either that billboards are personal property, rather than "structures,"⁷² or that the sign owner is not a "tenant"⁷³ as defined by the Uniform Act Federal

Alabama Ala Code, 1975, §§ 18-1A-28, -29

Alaska Alaska Stat § 34 60 130

Arizona Ariz Rev Stat § 11-973

Delaware 29 Del Code Ann § 9506

Hawaii Haw Rev Stat § 113-5(10), -5(11)

Maryland Md Code Ann Real Prop § 12-208 *See* Rollins Outdoor Adver, Inc v State Roads Comm'n, 60 Md App 195, 481 A 2d 1149 (Ct Spec App 1984) (no holding, noting parties conceded billboards are structures), *Foster & Kleiser v Baltimore Co*, 57 Md App 531, 470 A 2d 1322 (Ct Spec App 1957) (qualified holding to the effect that compensation under this section is only required if signs are lawfully located on property at time government acquires an interest therein)

Mississippi Miss Code Ann § 43-37-11 *See* Lamar Corp v State Highway Comm'n of Mississippi, 684 So 2d 601 (Miss 1996) (billboard is a structure as contemplated by this section)

Ohio Ohio Rev Code Ann § 163 60

Tennessee Tenn Code Ann § 29-16-114 *See* State Comm'r, Dept of Transp v Teasley, 913 S W 2d 175 (Tenn Ct App 1995) (holding billboards are personal property, not structures as contemplated by this section)

Utah Utah Code Ann § 57-12-6

Virginia Va Code Ann § 25-235 *See* Lamar Corp v City of Richmond, 241 Va 346, 402 S E 2d 31 (1991) (holding that billboards are structures as contemplated by this section)

Washington Wash Rev Code § 8 26 190

Wyoming Wyo Stat Ann § 16-7-119

See also New Jersey N J Stat Ann § 27 7-44 3 (authorization to acquire other lands necessary to relocate "structures" situated on lands acquired that would otherwise impede construction)

⁷¹ *See e.g.*, Conn Gen Stat § 8-267a (authorization to comply with federal Uniform Act), *cf* Nev Rev Stat § 342 105 (mandating compliance with federal Uniform Act)

⁷² The Uniform Act does not define this term, nor do the federal regulations, however, the following provision is illustrative "[a]ny building, structure, or other improvement, which would be considered to be real property if owned by the owner of the real property on which it is located, shall be considered to be real property for purposes of this subpart" 49 C F R § 24 105(b) This is essentially the New York rule described *supra* in the text at n 45

Additionally, the FHWA's regulations implementing the Highway Beautification Act state that "Title III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U S C § 4651, *et seq*) applies" 23 C F R § 750 302(c)

⁷³ The Uniform Act does not define this term, although the federal regulations do "The term tenant means a person who has the temporary use and occupancy of real property owned by another" 49 C F R § 24 2(v), *see also* Whitman v State Highway Comm'n, 400 F Supp 1050, 1070 (W D Mo 1975) (tenants are those occupying real property with the consent of the owner)

courts that have addressed these issues say Congress' intent in using the phrase "structures, or other improvements located upon real property" was broad enough to generically include billboards, and that any lawful occupancy qualifies a sign owner as a "tenant" ⁷⁴ Although no state court has yet addressed whether billboards are "other improvements" as contemplated by the Uniform Act, the states are split on whether billboards are "structures," with a majority now holding that they are ⁷⁵

⁷⁴ *Federal* (Missouri) *United States v 40 00 Acres of Land, More or Less, in Henry Co*, 427 F Supp 434, 440, 441 (W D Mo 1976) *Whitman v State Highway Comm'n*, 400 F Supp 1050, 1070 (W D Mo 1975)

⁷⁵ The following cases have held that the term "structures," as used in statutes mandating acquisition of "buildings, structures, and other improvements" together with the acquisition of the land upon which they are located, includes billboards

Colorado *Regional Transportation Dist v Outdoor Systems, Inc*, 13 P 3d 806 (Colo Ct App 1999), *judgment rev'd on other grounds*, 34 P 3d 408 (Colo 2001)

Florida *Dept of Transp v Heathrow Land & Dev Corp*, 579 So 2d 183 (Fla Dist Ct App 1991)

Mississippi *Lamar Corp v State Highway Comm'n of Mississippi*, 684 So 2d 601 (Miss 1996) (holding that the owner of a billboard was entitled to compensation for the billboard ordered removed for purposes of eminent domain, notwithstanding that as between the owner of the billboard and the lessor of the underlying property, the billboard was a trade fixture and personal and not real property) In *Lamar*, the court, stated

We resolve this matter as one of elementary statutory construction This issue may be decided by referring to the clear language of the statutes involved Any structure which is adversely affected by an acquisition "shall be acquired" and is compensable "notwithstanding the right or obligation of the tenant, to remove such" structure or improvement. Miss Code Ann § 43-37-11 (1972) The sign is clearly a structure under any ordinary meaning of that term *Id.* at 604

Missouri *State ex rel State Highway Comm'n v Volk*, 611 S W 2d 255 (Mo Ct App 1980), *State ex rel Weatherby Adver Co v Conley*, 527 S W 2d 334 (Mo 1975) (en banc), *cf State ex rel Mo Highway and Transp Comm'n v Anderson*, 735 S W 2d 350 (Mo 1987) (en banc) (distinguishing *Weatherby* on other grounds)

New Hampshire *State v 3M National Adver Co*, 139 NH 360, 653 A 2d 1092 (1995)

Virginia *Lamar Corp v Commonwealth Transp Comm'r*, 262 Va 375, 552 S E 2d 61 (2001), *Lamar Corp v City of Richmond*, 241 Va 346, 402 S E 2d 31 (1991) (*citing* this chapter of *Nichols on Eminent Domain*)

See also Arizona *City of Scottsdale v Eller Outdoor Adver Co*, 119 Ariz 86, 579 P 2d 590 (Ct App 1978)

See also Maryland *Rollins Outdoor Adver, Inc v State Roads Comm'n*, 60 Md App 195, 481 A 2d 1149 (Ct Spec App 1984) (no holding, noting parties conceded billboards are structures), *Foster & Kleiser v Baltimore Co*, 57 Md App 531, 470 A 2d 1322 (Ct Spec App 1957) (accepting trial court's conclusion to this effect without so holding)

See also Texas *Alzo Advertising, Inc v Industrial Properties Corp*, 722 S W 2d 524 (Tex Ct App—Dallas 1987) (not a condemnation case)

The following cases have held that the term "structures," as used in statutes mandating acquisition

State courts holding that billboards are not “structures” typically assert that the Uniform Act was not intended to supercede established state law to the effect that a billboard is considered non-compensable personalty, and these courts consequently refuse to require acquisition of billboards.⁷⁶ This interpretation, however, renders Section 4652 of the Uniform Act a nullity, since the sole purpose of that section was to mandate acquisition of “structures” or “other improvements” located on the land acquired which must be removed because of the project. Obviously, if a “structure” or “other improvement” is already considered part of the real property under state law, this directive would be redundant.

The better rule, therefore, is to give the language its plain meaning and hold that billboards are “structures, or other improvements,” as contemplated by the Uniform Act and that they must, therefore, be acquired along with the land in federally funded projects.⁷⁷

of “buildings, structures, and other improvement” upon acquisition of the land upon which they are located, does not include billboards

Minnesota In re Minneapolis Community Dev Agency, 417 N W 2d 127 (Minn Ct App 1987) (following South Carolina’s decision in *Creative Displays*, *infra* this note), *cf* State, by Humphrey v Card, 413 N W 2d 577 (Minn Ct App 1987) (sign owner “entitled to receive relocation costs” even though lease was terminated by landlord prior to sale to state, but state not required to condemn signs)

North Carolina National Adver Co v North Carolina Dept of Transp, 124 N C App 620, 478 S E 2d 248 (1996) (following South Carolina’s decision in *Creative Displays*, *infra* this note) *Cf* N C Gen Stat § 40A-64(c) (“If the owner is to be allowed to remove any permanent improvement of fixtures from the property, the value thereof shall not be included in the compensation award, but the cost of removal shall be considered as an element to be compensated”)

South Carolina *Creative Displays, Inc v South Carolina Highway Dept*, 272 S C 68, 248 S E 2d 916 (1978), *but see* criticism of this case n 86 *infra*

Tennessee State Comm’r, Dept Of Transp v Teasley, 913 S W 2d 175 (Tenn Ct App 1995) (following South Carolina’s decision in *Creative Displays*, *supra* this note)

Cf Oregon Ackerley Communications, Inc v Mt Hood Community College, 51 Ore App 801, 627 P 2d 487 (1981) (state statute did not mandate acquisition of structures, merely incorporating 42 U S C § 4652 by reference, and head of acquiring agency made no determination that the structure would be adversely affected as required by that federal statute)

⁷⁶ See, e g, *Creative Displays Inc v South Carolina Highway Dept*, 272 S C 68, 248 S E 2d 916 (1978), *Matter of Minneapolis Community Dev Agency*, 417 N W 2d 127 (Minn Ct App 1987), *State Comm’r, Dept Of Transp v Teasley*, 913 S W 2d 175 (Tenn Ct App 1995)

⁷⁷ See, e g, *United States v 4000 Acres of Land, Moreor Less, in Henry Co*, 427 F Supp 434, 441, 442 (W D Mo 1975), *City of Scottsdale v Eller Outdoor Adver Co*, 119 Ariz 86, 579 P 2d 590, 595-597 (Ct App 1978) (Uniform Act does not re-designate property, it simply requires that it be acquired and then “deemed” part of the real property for purposes of determining just compensation), *Lamar Corp v State Highway Comm’n of Mississippi*, 684 So 2d 601 (Miss 1996) (billboards can be personalty and structures), *see also* *Creative Displays Inc v South Carolina Highway Dept*, 272 S C 68, 248 S E 2d 916, 922 (1978) (Lewis, C J, dissenting)

When a state refuses to acquire billboards as required by the Uniform Act, the question arises whether a sign owner can seek judicial relief to enforce compliance. In this regard, it has been held that Section 4652 of the Uniform Act has been enforced in condemnation proceedings and in cases brought for prohibitory injunction,⁷⁸ but in acquisition negotiations prior to condemnation, a sign owner cannot force acquisition by affirmative injunction and may only seek judicial review of a failure to negotiate through the administrative process.⁷⁹

In the event a particular sign can be relocated and rebuilt, sub-chapter II of the Uniform Act, Uniform Relocation Assistance, provides for payment of certain minimum relocation costs and related expenses of a "displaced person."⁸⁰

[5]—State Court Decisions: Applying the Law

At the outset, it is important to understand what makes up a sign owner's interest. There are three elements that must generally coexist:

- 1) an interest in the land, normally a lease, but occasionally a fee ownership,
- 2) an interest in the sign, which in every reported case has been full ownership, and

⁷⁸ See, e.g., *Dept. of Transp. v. Heathrow Land & Dev. Corp.*, 579 So. 2d 183 (Fla. Dist. Ct. App. 1991)), and cases cited in n 75 *supra*.

⁷⁹ *Federal Ackerley Comm. of Fla., Inc. v. Henderson*, 881 F.2d 990 (11th Cir. 1989), cf. *United States v. 4000 Acres of Land, More or Less, in Henry Co.*, 427 F. Supp. 434, 441 (W.D. Mo. 1975).

New York Whitmire & Ferris Co., Inc. v. City of Buffalo, 89 A.D.2d 447, 455 N.Y.S.2d 454 (4th Dept. 1982).

⁸⁰ Pursuit of relocation claims, rather than pursuit of compensation for the acquisition of the sign in condemnation, is at the election of the sign owner. See, e.g., *Whitman v. State Highway Comm'n.*, 400 F. Supp. 1050, 1078 n.55 (W.D. Mo. 1975). Relocation claims are supplemental to rights in condemnation, therefore, a sign owner may be able to pursue both claims, provided they are not duplicative. See, e.g., *Rollins Outdoor Adver., Inc. v. State Roads Comm'n.*, 60 Md. App. 195, 481 A.2d 1149, 1154-1155 (Md. Ct. Spec. App. 1957).

The following cases have defined the term "displaced person" in the context of billboards.

Oregon Ackerley Communications, Inc. v. Mt. Hood Community College, 51 Ore. App. 801, 627 P.2d 487 (1981) (sign owner held not to be a "displaced person" when allowed to remain on property until expiration of lease).

Pennsylvania Martin Media v. Commonwealth Dept. of Transp., 560 Pa. 214, 743 A.2d 448 (2000) (sign owner with no right to be on the property was neither a "condemnee" nor a "displaced person"), *Redevelopment Auth. of Union Co. v. Property Located in West Milton*, 101 Pa. Commw. 634, 517 A.2d 210 (1986) (sign owner held to be a "displaced person," although not a "condemnee" entitled to bring an inverse condemnation action).

See generally *Payne, Annot., Validity, Construction, and Application of State Relocation Assistance Laws*, 49 A.L.R. 4th 491 (1986).

- 3) an interest in the vested right or permit that makes the sign legal at its current location

Although it is the combination of these elements that its owner could sell in the private market—a leasehold lawfully improved with a billboard—several courts have engaged in the fiction that the elements are to be addressed separately

[a]—The Real Property-Personal Property Debate

Perhaps some courts have approached the problem in this manner, rather than in the aggregate fashion contemplated by the Court in *Almota*, because a sign owner is commonly held to have no entitlement to compensation if, at the time of the government's acquisition of the property, he either lacks an enforceable property interest in the land or fails to hold all necessary permits for the sign or to otherwise have a vested right to maintain the sign at its current location

It has consistently been held that if a permit is required in order to lawfully erect or maintain a sign at a particular location—as is the case on all interstate and federal-aid primary highways due to the Highway Beautification Act—but the permit is not obtained, compensation will be denied ⁸¹ The rationale is that

⁸¹ *Federal* (Iowa) *Outdoor Graphics, Inc v City of Burlington*, 103 F 3d 690 (8th Cir 1996) (without proof signs were lawfully constructed, attack on amortization ordinance could not be maintained)

Alabama *State Highway Dept v Morgan*, 584 So 2d 499 (Ala 1991)

Arizona *Gannett Outdoor Co v City of Mesa*, 159 Ariz 459, 768 P 2d 191 (Ct App 1989)

Georgia *Dept of Transp v Shiflett*, 251 Ga 873, 310 S E 2d 509 (1984), *National Adver Co v State Highway Dept*, 230 Ga 119, 195 S E 2d 895 (1973)

Iowa *Iowa Dept of Transp v Nebraska-Iowa Supply Co*, 272 N W 2d 6 (Iowa 1978)

Michigan *Gerrish Township v Esber*, 201 Mich App 532, 506 N W 2d 588 (1993)

Mississippi *Mississippi State Highway Comm'n v Robert's Enterprises, Inc*, 304 So 2d 637, 81 A L R 3d 557 (Miss 1974)

Missouri *State ex rel National Adver Co v State Highway and Transp Comm'n*, 703 S W 2d 514 (Mo Ct App), *National Adver Co v State Highway Comm'n*, 549 S W 2d 536 (Mo Ct App 1977)

Nebraska *State v Mayhew Products Corp*, 204 Neb 266, 281 N W 2d 783 (1979)

New Mexico *Stuckey's Stores, Inc v O'Chesky*, 93 N M 312, 600 P 2d 258 (1979), *National Adver Co v State*, 91 N M 191, 571 P 2d 1194 (1977)

Ohio *Lamar Corp v City of Cambridge*, 2004 Ohio App LEXIS 911 (Ohio Ct App Mar 4, 2004) (unpublished opinion, see local rules)

Oregon *Hoffman v Highway Div of Dept of Transp*, 23 Or App 497, 543 P 2d 50 (1975)

Pennsylvania *Park Outdoor Adver Co v Commonwealth of Pennsylvania, Dept of Transp*, 86 Pa Commw 506, 485 A 2d 864 (1984), *In re Condemnation of Two (2) Billboards*, 69 Pa Commw 609, 452 A 2d 83 (1982)

But see Florida *Walker v State Dept of Transp*, 366 So 2d 96 (Fla Dist Ct App 1979) (compensation due where state removed purportedly illegal signs without providing proper notice),

the sign is illegal and, therefore, not constitutionally protected property. The rule is no different when the sign owner has failed to obtain a lawful interest in the land because a trespasser's occupancy is illegal.⁸²

On the other hand, the leasehold itself is compensable even if no sign has been constructed, or, having been constructed, is removed.⁸³ The same may be said for a vested property right to maintain a nonconforming sign and any permits related thereto.⁸⁴

Brazil v. Div. of Admin., State Dept. of Transp., 347 So. 2d 755 (Fla. Dist. Ct. App. 1972) (ambiguity in statute resolved in favor of compensation),

Missouri State ex rel. Mo. Highway and Transp. Comm'n., 631 S.W.2d 73 (Mo. Ct. App. 1982) (claim by government on eve of trial in condemnation case that sign was illegal came too late)

⁸² *Pennsylvania Martin Media v. Commonwealth Dept. of Transp.*, 560 Pa. 214, 743 A.2d 448 (2000) (sign company had lease with stranger to title, not actual property owner), *In re Condemnation of Two (2) Billboards*, 69 Pa. Commw. 545, 452 A.2d 81 (1982) (signs illegally built in right-of-way)

See also text at § 23 03[5][b] and ns 91-93

Cf. Ohio Lamar Corp. v. City of Cambridge, 2004 Ohio App. LEXIS 911 (Ohio Ct. App. Mar. 4, 2004) (unpublished opinion, see local rules) (sign inadvertently built in right-of-way was not allowed to be rebuilt on originally permitted site)

But see Florida Hernando County v. Anderson, 737 So. 2d 569 (Fla. Dist. Ct. App. 1999) (government's physical destruction of billboard after lease ended, without notice or demand upon sign owner to remove sign, constituted a taking for which compensation was due)

⁸³ The following cases involved apportionment proceedings between sign owners and their landlords in cases where the sign was determined not to be compensable, nevertheless, compensation was allowed for the value of the leasehold interest

Kansas Urban Renewal Agency of Kansas City v. Lane, 208 Kan. 210, 491 P.2d 886 (1971)

Ohio City of Cleveland v. Zimmerman, 22 Ohio Misc. 19, 253 N.E.2d 327 (Prob. Ct. 1969), *cf. Ohio Valley Adver. Corp. v. Linzell*, 168 Ohio St. 259, 153 N.E.2d 773 (1958) (license is not a compensable interest in this state)

See also

Connecticut Commissioner, Dept. of Transp. v. Rocky Mountain, LLC, 2002 Conn. Super. LEXIS 2848 (Conn. Super. Ct. Aug. 27, 2002) (trial court slip op.) (owner of leasehold has standing in condemnation action, regardless of characterization of the billboard)

Michigan City of Norton Shores v. Whiteco Metrocom (In re Acquisition of Billboard Leases), 205 Mich. App. 659, 517 N.W.2d 872 (1994) (merely compensating for cost of relocating signs "is not just compensation for the leaseholds that have been taken from them, unless those leases were terminable at will")

⁸⁴ See, e.g., *Florida National Adver. Co. v. State Dept. of Transp.*, 611 So. 2d 566, 570 (Fla. Dist. Ct. App. 1992), in which it was said

Thus, this "grandfathered" nonconforming status was lost when the taking occurred and the sign was ultimately removed by DOT, in short, the sign could not be moved to a new location and National lost all by the taking. In that respect, it should be noted that the involuntary termination of a nonconforming "grandfathered" status by government compulsion has given rise to a compensable taking of private property.

But a few courts have gotten so caught up analyzing the legality and compensability of the sign as a separate item of property that they have overlooked the fact that it is the underlying interest in the land that entitles the sign owner to compensation in the first place, regardless of whether that interest is fee ownership of the land, a lease for years or shorter duration, or even a tenancy at will.⁸⁵ If a sign owner has an interest in the land, however minimal, compensation is due when the land is taken, even though it may turn out that compensation is only nominal, owing to the frailty of the interest held.

A few courts, failing to recognize that the only relevant analysis regarding compensability of a sign is its legitimacy, consider the determinative issue to be whether billboards are personal or real property. The rationale for this shift in focus is that personalty, supposedly, is not compensable in eminent domain. But this analysis misses the mark because it fails to recognize the sign owner's real property interest in his leasehold and the cases that follow this approach are quite convoluted as a result.⁸⁶ In this regard, it is significant to note that

⁸⁵ See generally 7A Nichols on Eminent Domain®, § 11.02[1] (Matthew Bender).

⁸⁶ A prime example is the decision of the Supreme Court of South Carolina, a court that has never been known for following the rest of the country in matters of constitutional protection of private property, in *Creative Displays, Inc. v. South Carolina Highway Dept.*, 272 S.C. 68, 248 S.E.2d 916 (1978). See 1 Nichols on Eminent Domain®, §§ 1.22[6], [14] (Matthew Bender) ("It will thus be seen that the power of eminent domain was exercised in the American colonies, and that the obligation to make consideration for land taken, although not treated as an absolute right, was recognized in all of the colonies except South Carolina as soon as property of that character had attained sufficient value to make the taking of it more than a nominal injury"), see also *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 404 S.E.2d 895 (1991), *rev'd*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed. 2d 798 (1992).

In *Creative Displays*, the court first noted that the purpose of the lease was "for the erection of an outdoor advertising double sign." *Creative Displays, Inc. v. South Carolina*, 272 S.C. 68, 248 S.E.2d 916, 917 (1978). As pointed out by the dissent, the sign in question was "a large double faced sign mounted on six steel beams which were anchored into the ground for a depth of approximately eight feet in concrete. In order to remove the sign it had to be dismantled and the steel beams had to be cut with a torch." 272 S.C. at 75-76, 248 S.E.2d at 919. The court began its analysis by noting that a fixture is generally personalty that "by being physically annexed to the realty by one having an interest in the soil becomes a part and parcel of it." 272 S.C. at 72, 248 S.E.2d at 917.

Next the court noted that personalty does not become a fixture "[b]y mere affixation," the criteria being "(1) mode of attachment, (2) character of the structure or article, (3) the intent of the parties making the annexation, and (4) the relationship of the parties." 272 S.C. at 72, 248 S.E.2d at 917, 918.

The court concluded by noting that compensation cannot be recovered for "personal property not annexed (at least constructively) to the freehold." 272 S.C. at 73, 248 S.E.2d at 918. Yet, completely ignoring the manner of annexation and, instead, basing its decision solely upon a provision in the lease that the lessee's "structures, equipment and materials" shall "always remain the personal property of, and may be removed by the Lessee," the court concluded that the billboard at issue was not a fixture. 272 S.C. at 72-73, 248 S.E.2d at 917, 918.

in no case was a sign owned by the owner of the land held to be removable personal property for which no compensation was due upon the taking of the land, and there would appear to be no justification for holding that compensation should be denied merely because diverse interests in the land exist

Nevertheless, in analyzing the cases that distinguish between realty and personalty for purposes of compensability, it must be noted that the determination of how a particular billboard is to be classified under state common law depends upon the facts established in each individual case. Because this determination is *ad hoc*, no absolute rule can be articulated for any state that billboards, generically, are either personalty, realty, or something in between, like trade fixtures which are treated as realty while in place, but as personalty upon removal by the tenant.⁸⁷

On the other hand, in dealing with apportionment claims made by sign owners, classification of a billboard is relevant because it may determine who receives the compensation paid for the sign. Consequently, cases can be found in which it has been held that a billboard is personal property for which no compensation is due the tenant *as against the landlord*.⁸⁸ But virtually all courts dealing with that assertion, when made by the condemnor in eminent domain proceedings, hold that, insofar as determining compensability of signs *as against the government*, compensation is due to the sign owner for the billboard, provided the lease

⁸⁷ See Cunningham, *Billboard Control Under the Highway Beautification Act of 1965*, 71 Mich. L. Rev. 1295, 1320-1323 (1973); Cunningham, *Valuation and Condemnation of Advertising Signs and Related Property Interests Under the Highway Beautification Act*, in 2 *Selected Studies in Highway Law* 577-578, 583-586, *et seq.* (J. Vance, ed., Transp. Research Bd. 1979).

Compare the situation involving the interpretation of the terms "structures" and "other improvements" as contemplated by 42 U.S.C. § 4652 and its state counterparts where generic rules can be adopted because the issue is one of statutory construction.

⁸⁸ *Kansas* Urban Renewal Agency of Kansas City v. Lane, 208 Kan. 210, 491 P.2d 886 (1971) (sign which tenant removed determined to be personal property in apportionment proceeding, precluding claim against landlord, however, compensation awarded for leasehold interest).

Ohio City of Cleveland v. Zimmerman, 22 Ohio Misc. 19, 253 N.E.2d 327 (Ohio Prob. Ct. 1969) (sign held to be personalty in apportionment claim against landlord, but compensation awarded for leasehold); City of Lakewood v. Rogolsky, 22 Ohio Misc. 93, 252 N.E.2d 872 (Ohio Prob. Ct. 1969) (sign held to be personalty in apportionment claim against landlord where condemnor allowed signs to remain for duration of lease).

Tennessee State Comm'r, Dept. of Transp. v. Teasley, 913 S.W.2d 175 (Tenn. Ct. App. 1995) (sign held to be personalty in apportionment claim and non-compensable against landlord, prior precedent in Tennessee held that a tenant is not entitled to compensation for "trade fixtures which are a part of the realty even though he placed them thereon").

Cf. Massachusetts AK Media/Mass v. Commonwealth, 2001 Mass. Super. LEXIS 167 (Mass. Super. Ct. Mar. 19, 2001) (trial court slip op.) (in absence of cross-claim, land owner lacks standing to attack sign owner's claim against condemnor).

Missouri State ex rel. State Highway Comm'n v. Volk, 611 S.W.2d 255 (Mo. Ct. App. 1980) (where landlord terminated lease in attempt to defeat apportionment claim, sign owner entitled to compensation for its "structures" which were taken with the land).

had not been terminated at the time the condemnor acquired the land.⁸⁹ This conclusion is ordinarily predicated upon the theory that it makes no difference

⁸⁹ See discussion *supra* §§ 23 03[1], 23 03[3][c], see also the following cases

Federal United States v Seagren, 50 F 2d 333, 75 A L R 1491 (D C Cir 1931) (tenant entitled to separate recovery for trade fixtures)

Arizona See, e g , *City of Scottsdale v Eller Outdoor Adver Co* , 119 Ariz 86, 579 P 2d 590 (Ct App 1978) (signs previously determined to be personal property, but compensation still due for “structures” under the Uniform Act)

Arkansas *Arkansas State Highway Comm’n v Humble Oil Co* , 248 Ark 685, 453 S W 2d 408 (1970) (lease provision that allowed tenant to remove signs did not convert non-removable sign foundation into personal property)

Florida *Department of Transp v Heathrow Land & Dev Corp* , 579 So 2d 183 (Fla Ct App 1991) (billboard is a “structure” that must be acquired under the Uniform Act when federal funding present), *Div of Admin , State Dept of Transp v Allen*, 447 So 2d 1383 (Fla Dist Ct App 1984) (although sign determined to be personal property, just compensation still must be paid under state Highway Beautification Act)

Illinois *Department of Transp v Drury Displays, Inc* , 327 Ill App 3d 881, 764 N E 2d 166 (Ct App), *appeal denied*, 201 Ill 2d 564, 786 N E 2d 182 (2002) (eminent domain code provision “might be rephrased colloquially as Billboard owners have a right to just compensation for any condemned sign”), cf *City of Chicago v Harris Trust and Savings Bank*, 346 Ill App 609, 804 N E 2d 724 (2004)

Indiana *State v Bishop*, 775 N E 2d 335 (Ind Ct App 2002), *rev’d on other grounds and opinion vacated*, 800 N E 2d 918 (Ind 2003) (signs treated as improvements to the land that were taken)

Louisiana See, e g , *State Dept of Transp and Dev v Chachere*, 574 So 2d 1306 (La Ct App 1991) (signs condemned when state acquired land, “together with all improvements and buildings thereon”)

Minnesota *State v Weber-Connelly, Naegle, Inc* , 448 N W 2d 380 (Minn Ct App 1989) (even if sign is personalty, it is compensable under state Highway Beautification statute), *but see Matter of Minneapolis Community Dev Agency*, 417 N W 2d 127 (Minn Ct App 1987) (no compensation for signs which were characterized in lease as personalty where state Highway Beautification statute did not apply), *State by Humphrey v Kouri*, 415 N W 2d 412 (Minn Ct App 1987) (personalty due to characterization in lease)

Mississippi *Lamar Corp v State Highway Comm’n of Mississippi*, 684 So 2d 601 (Miss 1996) (Uniform Act entitles owner of billboard to compensation in eminent domain proceeding for sign ordered to be removed, notwithstanding that billboard was a “trade fixture” which is personal, not real, property)

Nevada *National Advertising Co v State Dept of Transp* , 116 Nev 107, 993 P 2d 62 (2000) (characterization of billboards as realty or personalty is not determinative of compensability where signs cannot be relocated to comparable income-generating sites within the immediate market area, citing this chapter of *Nichols on Eminent Domain*®) The Nevada Supreme Court in this case expressly adopted the view reported in this chapter

Other courts conclude that the characterization of a billboard as either realty or personalty is an arbitrary distinction, and that advertising income generated from billboards that cannot be relocated should be considered in valuing leasehold interests so that owners will be justly compensated [footnote omitted] We conclude that this latter approach is the better means of awarding just compensation for condemned leasehold interests when billboards cannot be

whether the sign is classified as personalty, realty, fixture, trade fixture, improvement or structure, because the taking of the land includes all that is attached to it, and this appears to be the better rule ⁹⁰

relocated to comparable, income-generating sites This approach is espoused in 8A Nichols on Eminent Domain § 23 03[5][a], at 37-42 (3d ed 1997, 1998), which recognizes the importance of location in the ability of a billboard to generate advertising income and the difficulty in relocating billboards under restrictive regulations

116 Nev at 113-114, 933 P 2d at 66-67

New Hampshire State v 3M National Adver Co , 139 N H 360, 653 A 2d 1092 (1995) (upholding trial court's determination that sign was personal property, but awarding compensation for it as a "structure" under the Uniform Act)

New York Richards-Dowdle, Inc v State, 24 A D 2d 824, 264 N Y S 2d 179 (4th Dept 1965) (signs treated as real property if installation was permanent), *Whitmier & Ferris Co , Inc v State*, 12 A D 2d 165, 209 N Y S 2d 247 (4th Dept 1961) (appropriation of the land includes all that is annexed to it), *Richards-Dowdle, Inc v State*, 52 Misc 2d 416, 276 N Y S 2d 795 (Ct Cl 1966) (on remand) (sign was fixture as evidenced by sign owner's manifest intent), *Rochester Poster Adver Co v State*, 27 Misc 2d 99, 213 N Y S 2d 812 (Ct Cl), *aff'd*, 15 A D 2d 632, 222 N Y S 2d 688 (4th Dept 1961), *aff'd*, 11 N Y 2d 1036, 230 N Y S 2d 30 (1962) (although removable, sign was annexed to the land and therefore appropriated), *George F Stein Brewery, Inc v State*, 200 Misc 424, 103 N Y S 2d 946 (Ct Cl 1951) (signs were part of the real property)

Pennsylvania *In re Urban Redevelopment Auth of Pittsburgh*, 440 Pa 321, 272 A 2d 163 (1970) (billboards were compensable as either improvements to the leasehold or as removable fixtures)

Virginia *Lamar Corp v Commonwealth Transp Comm'r*, 262 Va 375, 552 S E 2d 61 (2001), *Lamar Corp v City of Richmond*, 241 Va 346, 402 S E 2d 31 (1991) (*citing* this chapter of Nichols on Eminent Domain®) (signs became part of the realty by being attached to it and title passed to condemnor as an incident of taking the land, regardless of tenant's right against landlord to remove them)

Accord Gelineau, *Valuation of Billboards in Condemnation*, *Prac Real Est Law* , Vol 19, No 4, 23, 26-27 (2003) ("Many arguments support the notion that billboards are real property") (*citing* this chapter of Nichols on Eminent Domain®)

⁹⁰ The following quote from the opinion of the Supreme Court of Virginia in *Lamar Corp v City of Richmond* 241 Va 346, 402 S E 2d 31 (1991), is worth considering

In a dispute between a condemnor and the owner of the fee we have developed a three-part test to determine whether structures annexed by the owner are personalty or realty That test examines (1) the degree of permanency with which the chattels are annexed to the realty, (2) the adaptation of the chattels to the use or purpose to which the realty is devoted, and (3) the intention of the owner of the chattels to make them a permanent accession to the freehold Of these three factors, the third—the intention of the party making the annexation—is paramount The foregoing test, however, is not applied to a dispute between the condemnor and a lessee of the fee when the lessee's structures are annexed to land taken under the power of eminent domain Under the modern law of [trade] fixtures and the terms of the leases here, structures attached by the lessee to the real estate may be removed by the lessee at any time during the term, provided such removal can be made without injury to the freehold To apply the three-prong test set out above would, therefore, inevitably result in a finding that the lessee's structures were personalty precluding their inclusion in the condemnation award and precluding any compensation to the lessee therefrom even though the structures were acquired or damaged by the

(Text continued on page 23-43)

condemnation Therefore, we have adopted the general rule that, as between the condemnor and lessee, structures attached to the condemned real estate but owned by the lessee are realty This is the case even though, as between the landlord and lessee, the structures may be personalty 241 Va at 351, 402 S E 2d at 34 (*citing Nichols on Eminent Domain*®, quotations omitted)

The court recognizes the tenant's Hobson's Choice If the tenant acquiesces in the sign becoming part of the real property by virtue of its annexation, the landlord will reap a windfall as the one compensated for the sign when the land is condemned, even though the landlord has no right to possess the sign during the tenant's lease term

On the other hand, if the tenant retains ownership of the sign in spite of its annexation to the real property, it is considered to be his personal property and, therefore, may be treated as non-compensable when the land is taken

It is to deal with this problem that the courts developed the Trade Fixture doctrine applied by the New York courts and the United States Supreme Court in *General Motors* and *Almota*, and discussed *supra* in §§ 23 03[1], 23 03[3][a] and 23 03[3][c] *United States v Seagren*, 50 F 2d 333, 75 A L R 1491 (D C Cir 1931) (*citing Nichols on Eminent Domain*®)

In *United States v Seagren*, 50 F 2d 333 (D C Cir 1931), the court said

the United States contends that the tenant here has lost nothing by the taking of the property He reserved [in the lease] the right to remove his structures whenever the landlord should terminate his tenancy, now that the United States has terminated his tenancy by taking the land, he may exercise his right and remove his structures Nothing has been taken from him Only his performance of an inevitable obligation has been accelerated But much the same argument could be made in support of murder, for all that any murderer ever did was to accelerate the debt that every mortal owes to nature If the structures here in question had been built by the landlord, they would have been taken and paid for by the government without question, as the government concedes they are now part of the realty Is the tenant's reversed power of removal as against the landlord's termination of the lease to work forfeiture in favor of the government? We think not The inherent character of these structures is real estate, no agreement can change that character, though the landlord may waive the right which might otherwise accrue to him from the character of the structures placed upon his land At the most, that is all that this [lease] agreement did

Id at 335

A few states have adopted statutes requiring compensation for "improvements pertaining to the realty"

California Cal Em Dom Code §§ 1263 205, 1263 210

Nevada Nev Rev Stat § 37 110(1) (first adopted in 1911)

Whereas, others have adopted statutes simply defining "real property" to include everything that is "affixed" to the land

Illinois 735 Ill Comp Stat § 5/7-101 *see Department of Transp v Drury Displays, Inc*, 327 Ill App 3d 881, 764 N E 2d 166 (Ct App), *appeal denied*, 201 Ill 2d 564, 786 N E 2d 182 (2002) (this statute "might be rephrased colloquially as Billboard owners have a right to just compensation for any condemned sign")

Idaho Idaho Code § 55-101 (Property)

Massachusetts Mass Gen Laws, ch 79 § 13 (first version adopted as English colony in 1693)

Pennsylvania 26 Pa Cons Stat § 1-603 ("Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration, [t]he machinery, equipment and fixtures forming part of the real estate taken"), *id* at 607 ("The

[b]—Refusal to Compensate Following Acquisition of the Land

Related to the property classification question addressed above are cases in which it is asserted that no compensation is due a sign owner whose lease has run its course or been terminated in connection with the taking of the property, because in either case the billboard converts into personal property which must be removed from the land

In this regard, there have been cases where the lease provided for termination upon condemnation or sale, commonly coupled with a waiver of compensation in that event, and these provisions have been given effect to deny compensation to the sign owner under the theory that no rights were taken from him by the government ⁹¹ This result has also been reached when the billboard owner's lease

condemnee may elect to remove said machinery, equipment or fixtures If the condemnee so elects, the damages shall be reduced by the fair market value thereof severed from the real estate")

Virginia Va Code Ann §§ 25-46 3, 25-238, 33 1-89 (revising definition of "owner" to same effect)

Wisconsin Wis Stat § 32 01(2) (eminent domain chapter) ("personal property directly connected with lands"), see *Vivid Inc v Friedler*, 174 Wis 2d 142, 497 N W 2d 153 (Ct App 1993), modified and aff'd on other grounds, 182 Wis 2d 71, 512 N W 2d 771 (1994)

⁹¹ The courts reaching this result characterize the sign owner's claim as a "mere expectancy of renewal" of the lease This should not be confused with consideration of the potential for renewal of a billboard lease in determining its value in a condemnation proceeding In that regard, the "expectancy" of renewal is allowed to be considered, just like consideration of the potential for premature termination pursuant to clauses that give the landlord that right

Tennessee City of Johnson City v Outdoor West, Inc , 947 S W 2d 855 (Tenn Ct App 1997)

The cases holding that following termination a sign owner's "mere expectancy of renewal" is not a property right upon which a claim for compensation may be based in inverse condemnation or eminent domain are

Federal (Utah) United States v Petty Motor Co , 327 U S 372, 66 S Ct 596, 90 L Ed 729 (1946) (not a billboard case, but frequently discussed in those cases)

Arizona Whiteco Industries, Inc v City of Tucson, 168 Ariz 257, 812 P 2d 1075 (Ct App 1990) (lease terminated by its own terms upon sale), cf *State v Gannett Outdoor Co* , 164 Ariz 578, 795 P 2d 221 (Ct App 1990) (sign owner's "expectancy of renewal" was not a compensable property interest)

Georgia Lamar Co , LLC v State, 256 Ga App 524, 568 S E 2d 752 (2002)

Maryland Foster & Kleiser v Baltimore Co , 57 Md App 531, 470 A 2d 1322 (Md Ct Spec App 1957)

Minnesota State, by Humphrey v Card, 413 N W 2d 577 (Minn Ct App 1987)

Cf *Ohio* Ohio Valley Adver Corp v Linzell, 168 Ohio St 259, 153 N E 2d 773 (1958) (license is not a compensable interest in this state)

Oklahoma Oklahoma Transp Auth v Tulsa Kampground, Inc 57 P 3d 141 (Okla Ct App 2002) (lease provided for termination upon condemnation, coupled with a waiver of all claims for compensation)

expired by its own terms after public acquisition before the agency had required the sign to be removed ⁹²

The rule appears to be to the contrary, however, when a public or quasi-public entity with the power of eminent domain acquires title to leased land and either requires the private landlord to exercise termination clauses in the lease as a condition of closing the sale, or if following acquisition the public entity attempts to terminate the lease itself, asserting it is entitled to do so as the “assignee” of the private landlord. In these cases, the rule seems to be that where the acquisition of the property is the “equivalent of condemnation,” that is, a sale in lieu of condemnation involving some element of compulsion, a taking will be deemed to have occurred and compensation will be due the sign owner, provided he is lawfully in possession at the time the “condemnor” acquires or becomes committed to acquiring the property ⁹³

⁹² *California* Patrick Media Group, Inc v City of Riverside, 2003 Cal App Unpub LEXIS 10387 (Cal Ct App Nov 4, 2003) (unpublished opinion, see local rules)

Connecticut Comm’r of Transp v Burkhart, 2003 Conn Super LEXIS 3166 (Conn Super Ct Nov 7, 2003) (trial court slip op.)

Illinois City of Chicago v Harris Trust and Savings Bank, 346 Ill App 3d 609, 804 N E 2d 724 (2004)

Maryland Rollins Outdoor Adver, Inc v State Roads Comm’n, 60 Md App 195, 481 A 2d 1149, 1154-1155 (Ct Spec App 1957) (compensation allowed under Uniform Act provisions relating to “displaced person”)

Massachusetts Rite Media, Inc v Secretary, Massachusetts Highway Dept, 429 Mass 814, 712 N E 2d 60 (1999)

North Carolina National Adver Co v North Carolina Dept of Transp, 50 N C App 150, 478 S E 2d 248 (1996) (lease was not enforceable against government, a good faith purchaser, because it was not recorded as required by state law), but see Schloss Outdoor Adver Co v City of Charlotte, 50 N C App 150, 272 S E 2d 920 (1980) (complaint alleging government removed sign before lease expired states a cause of action)

Oregon Ackerley Communications, Inc v Mt Hood Community College, 51 Ore App 801, 627 P 2d 487 (1981)

Pennsylvania Redevelopment Auth of Union Co v Property Located in West Milton, 101 Pa Commw 634, 517 A 2d 210 (1986) (sign owner deemed to have surrendered lease by prorating rent, however, compensation provided under Uniform Act provisions relating to “displaced person”)

Wisconsin City of Whitewater v Vivid, Inc, 140 Wis 2d 612, 412 N W 2d 519 (App Ct 1987), but see Vivid, Inc v Fiedler, 182 Wis 2d 71, 512 N W 2d 771 (1994) and French v Fiedler, 208 Wis 2d 372, 561 N W 2d 351 (App Ct 1997) (unpublished opinion, see local rules)

Cf Florida Hernando County v Anderson, 737 So 2d 569 (Fla Ct App 1999) (government’s physical destruction of billboard after lease expired, but without notice or demand upon sign owner to remove sign, constituted a taking for which compensation was due)

⁹³ Unless otherwise indicated, the following cases required compensation to be paid for the sign on the facts presented

Federal (Missouri) Whitman v State Highway Comm’n, 400 F Supp 1050 (W D Mo 1975), see also (Washington) Almota Farmers Elevator and Warehouse Co v United States, 409 U S

[c]—Regulations Effectively Constituting Forced Removal

A related topic is where a local zoning authority requires the landlord to remove all nonconforming billboards as a condition to obtaining a permit for any new construction on the site. It has been asserted that this constitutes a regulatory taking for which compensation is due. In the absence of statutory protection the courts have determined this type of regulation to be a legitimate exercise of the Police Power.⁹⁴ However, statutory protection may be found in a state's Highway

470, 477 n 5 (1973) (1973) (*citing* *Treatise*), (Kansas) *United States v. 12 1/2 Acres of Land in Jefferson Co., Kansas*, 623 F.2d 131 (10th Cir. 1980). Neither of the last two cases involved billboards, although they are typically discussed in cases that do.

California *Patrick Media Group, Inc. v. City of Riverside*, 2003 Cal. App. Unpub. LEXIS 10387 (Cal. Ct. App. Nov. 4, 2003) (unpublished opinion, see local rules) (not a compensable event), which discusses several other California cases on this topic, including *Langer v. Redevelopment Agency of City of Santa Cruz*, 71 Cal. App. 4th 998, 84 Cal. Rptr. 2d 19 (1999) ("open market transaction", not a billboard case, not a compensable event), *Lanning v. City of Monterey*, 181 Cal. App. 3d 352, 226 Cal. Rptr. 258 (1986) (sale was the substantial equivalent of condemnation, compensable taking, not a billboard case), *Pacific Outdoor Adver. Co. v. City of Burbank*, 86 Cal. App. 3d 5, 149 Cal. Rptr. 906 (1978) (not a compensable event).

Colorado *Regional Transp. Dist. v. Outdoor Systems, Inc.*, 34 P.3d 408 (Colo. 2001) (en banc) ("marketplace transaction", no coercion, not a compensable event).

Illinois *Patrick Media Group, Inc. v. DuPage Water Comm'n*, 258 Ill. App. 3d 1068, 630 N.E.2d 958 (1994) (denying compensation on the facts presented), *Kleinschmidt, Inc. v. County of Cook*, 287 Ill. App. 3d 312, 678 N.E.2d 1065 (1997) (denying compensation).

Missouri *State ex rel. Weatherby Adver. Co. v. Conley*, 527 S.W.2d 334, 335 (Mo. 1975), *State ex rel. State Highway Comm'n v. Volk*, 611 S.W.2d 255 (Mo. Ct. App. 1980).

New York *City of Buffalo v. Michael*, 16 N.Y.2d 88, 209 N.E.2d 776, 262 N.Y.S.2d 441 (1965).

North Carolina *Schloss Outdoor Adver. Co. v. City of Charlotte*, 50 N.C. App. 150, 272 S.E.2d 920 (1980) (complaint stated cause of action), *but see* *National Adver. Co. v. North Carolina Dept. of Transp.*, 50 N.C. App. 150, 478 S.E.2d 248 (1996) (compensation denied where sign owner had no valid property interest in the land at the time it was purchased, even if under threat of condemnation).

Wisconsin *See Vivid, Inc. v. Fiedler*, 182 Wis. 2d 71, 512 N.W.2d 771 (1994) (compensation required where government purchaser ordered sign removal, opinion does not indicate whether lease allowed termination).

Cf. Tennessee *Lamar Adver. v. Metropolitan Dev. Auth.*, 803 S.W.2d 686 (Tenn. App. Ct. 1990) (unresolved facts must be determined, although Development Authority may accede to landlord's rights).

But see Ohio *Northeast Ohio Reg. Sewer Dist. v. Foster & Kleiser*, 1987 Ohio App. LEXIS 8862 (Ohio Ct. App. Sept. 24, 1987) (unpublished opinion, see local rules).

South Carolina *Creative Displays, Inc. v. South Carolina Highway Dept.*, 272 S.C. 68, 248 S.E.2d 916 (1978) (compensation denied where lease terminated by condemnor after acquisition).

At least one state has passed legislation specifically prohibiting governmental entities from causing termination of billboard leases upon acquisition of the underlying land without compensation to the sign owner.

Florida Fla. Stat. § 70.20(7).

⁹⁴ *Federal* (*Arizona*) *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993) (applying federal and Arizona law and denying compensation).

Beautification Act if a regulation of this type constitutes a forced removal ⁹⁵ Similarly, zoning regulations that purport to require the “downsizing” of existing, nonconforming signs, or attempts to revoke vested rights status through regulatory action when a nonconforming sign sustains moderate storm damage, may constitute forced, uncompensated removal and be unenforceable or require payment of compensation when enforced ⁹⁶

It has also been argued that the planting of trees or the construction of sound walls along interstate highways gives rise to a claim for just compensation under a state’s Highway Beautification Act on the theory that such actions are the

Arizona Outdoor Systems, Inc v City of Mesa, 169 Ariz 301, 819 P 2d 44 (1991) (en banc) (advisory opinion)

Minnesota Naegele Outdoor Adver Co v City of Lakeville, 532 N W 2d 249 (Minn Ct App 1995)

But see Tennessee Fiser v Town of Farragut, 2001 Tenn App LEXIS 118 (Tenn Ct App Feb 27, 2001) (unpublished opinion, *see* local rules) (expressly declining to follow *Outdoor Systems v Mesa*, *supra* this note)

⁹⁵ *Federal* Lamar Adver Co v Charter Township of Clinton, 241 F Supp 2d 793 (E D Mich 2003)

California Patrick Media Group, Inc v California Coastal Comm’n, 9 Cal App 4th 592, 11 Cal Rptr 2d 824 (1992) (holding that Cal Bus & Prof Code, § 5412 would require compensation, but that the sign owner in that case failed to properly seek judicial review)

Minnesota *See* Naegele Outdoor Adver Co v City of Lakeville, 532 N W 2d 249, 253 (Minn Ct App 1995) (noting the possibility, but holding that the sign owner did not have a valid property interest upon which to base the claim)

The following statutes expressly prohibit local governments from requiring the uncompensated removal of lawfully erected signs as a condition to obtaining development approval

Arizona Ariz Rev Stat § 9-462 02B

California Cal Bus & Prof Code § 5412 6

Florida Fla Stat § 70 20(6)

Idaho Idaho Code § 40-1910A(4)

Nevada Nev Rev Stat § 278 0215(5)

Utah Utah Code Ann § 72 7-510

Virginia Va Code Ann § 31 1-370 1

⁹⁶ *Colorado* National Adver Co v Board of Adjustment of City and Co of Denver, 800 P 2d 1349 (remanded for determination as to whether downsizing constitutes uncompensated, forced removal)

Georgia State v Hartrampf, 273 Ga 522, 544 S E 2d 130 (2001) (enforcement of county sign ordinance requiring uncompensated removal of storm-damaged billboard would constitute forced removal without just compensation), *Outdoor Systems, Inc v Cobb County*, 274 Ga 606, 555 S E 2d 689 (2001) (storm damage)

Missouri Odegard Outdoor Adver, LLC v Board of Zoning Adjustment of Jackson County, 6 S W 3d 148 (Mo 1999) (new permitting procedure on nonconforming signs held unenforceable as forced removal)

equivalent of forced removal, although no court has yet been presented with facts sufficient to grant relief ⁹⁷

⁹⁷ *North Carolina* Adams Outdoor Adver of Charlotte v North Carolina Dept of Transp , 112 N C App 120, 434 S E 2d 666 (1993)

Pennsylvania *In re* Condemnation by Delaware River Port Auth , 667 A 2d 766 (Pa Commw Ct 1995), *appeal dismissed*, 684 A 2d 120 (Pa 1996)

Cf Georgia Moreton Rolleston, Jr , Living Trust v Department of Transp , 242 Ga App 835, 531 S E 2d 719 (2000) (alteration of road and traffic flow within existing right-of-way that incidentally impairs visibility of sign does not result in compensable damages)

Texas Oddo v State, 912 S W 2d 831 (Tex Ct App—Dallas 1995) (reduced visibility from realignment of highway and change of grade within pre-existing right-of-way is not a compensable damage)

But see Tennessee Outdoor Adver Ass'n of Tennessee, Inc v Shaw, 598 S W 2d 783, 21 A L R 4th 1296 (Tenn Ct App 1979) (complaint dismissed where there was no allegation the planting program was "designed and carried into effect a calculated plan for the unjust purpose of avoiding the necessity of paying for the removal of the billboards"), *see also* Annotation following this case

§ 23.04 Valuation

[1]—Defining the Valuation Problem

It is not unusual for the individual sign involved in a taking to be merely one of a number of signs owned by the condemnee. In fact, one of the ways billboards are rented (or “sold”) to advertisers is in a “showing” or “rotary” plan involving several sign locations, with the advertising copy being “rotated” from location to location in order to insure a particular coverage of the market.¹ Consequently, the loss of one sign may impact the value of the grouping of signs remaining (the “plant”), especially if the sign that is taken is well located. Nevertheless, in the absence of a statute that allows it,² this type of claim will be treated as a non-compensable business or severance damage claim and denied, not because it considers the income from the location involved in the taking, but because it compensates for the impact of the loss of that income on the intangible business and other assets that are not involved in the taking.³

¹ See Sutte, *The Appraisal of Outdoor Advertising Signs*, 17, 18, 25–27, 52–56, 89 (Appraisal Inst 1994), Sutte, *Appraisal of Roadside Advertising Signs*, Chs 2–4 (Am Inst of Real Estate Appraisers 1972) (developing an appraisal methodology for dealing with takings of multiple signs from a single owner)

² One state expressly excludes this type of claim from just compensation

Alabama Ala Code § 173 17(a)(2)

On the other hand, several states expressly include it, with qualification

Minnesota Minn Stat § 173 17(2) (expressly included in just compensation, provided federal participation is available)

South Dakota S D Codified Laws § 31–29–72 (“severance damage and damage to the remainder of the owner’s business” are expressly included in just compensation, provided federal participation is available)

Utah Utah Code Ann § 72–7–510(3)(b) (expressly included in just compensation, provided signs constitute an “economic unit”)

Wisconsin Wis Stat § 84 30(7)(a) (expressly included in just compensation, provided signs have a “unity of use and ownership” with the sign taken)

See also 23 C F R § 750 304(c)(4) (requirements for justifying and documenting federal participation in this type of “severance damage” claim)

³ *Arizona* City of Scottsdale v Eller Outdoor Adver Co, 119 Ariz 86, 579 P 2d 590, 595–597 (Ct App 1978)

Kentucky City of Newport Mun Hous Comm’n v Turner Adver, Inc, 334 S W 2d 767 (Ky 1960)

Cf Federal (North Carolina) City of Naegele Outdoor Adver, Inc, v City of Durham, 844 F 2d 172 (4th Cir 1988) This inverse condemnation case involved a claim that enforcement of an amortization ordinance constituted a taking of an “outdoor advertising business” because 85 of the company’s 131 signs in that market would be removed without compensation. The court considered the relevant “property” for purposes of determining whether a “taking” had occurred to be the entire grouping of signs. See also City of Georgia Outdoor Adver, Inc v City of Waynesville, 900 F 2d 783 (4th Cir 1990) (to same effect)

Regardless of the above rule, as a general proposition the owner of a lawfully erected and maintained billboard is entitled to be compensated for the fair market value of the property taken from him, that is, his leasehold as improved with the billboard. Fair market value, as in any other type of case, is ordinarily measured as the price that the aggregate asset—the lease, permit and sign—would bring in the marketplace in a voluntary sale to a knowledgeable buyer, considering all relevant factors.⁴

Nevertheless, there are occasions where courts are called upon to value, independently, either the lease or the sign.

[2]—Valuation of the Lease as a Separate Claim

One such situation is where it has been possible to relocate a particular sign, but the owner still seeks compensation in an apportionment proceeding for the taking of a lease that had allowed him to pay below-market rent. In determining the value of a bare leasehold interest, the courts have generally held, premised upon the rule enunciated in *Petty Motor*,⁵ that the value of a leasehold interest may be determined by calculating the difference between what the premises would rent for in the market and the rent the tenant is required by the lease contract to pay over the remaining term, including renewal options. The present value of this differential is typically referred to as the “bonus value” of the lease and it measures the benefit of the bargain made by the tenant with his landlord. But, as will be discussed below in connection with the “cost approach,” “bonus value” does not necessarily measure the market value of the leasehold. In recognition of this fact, many courts have held that the jury is to determine the fair market value of an improved leasehold by taking into account all factors that might affect its value, including the potential net income to be earned over

⁴ See generally *Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470, 93 S. Ct. 791, 35 L. Ed. 2d 1 (1973), see also 7A Nichols on Eminent Domain®, § 11.03 (Matthew Bender).

Florida See *National Adver. Co. v. State Dept. of Transp.*, 611 So. 2d 566 (Fla. Dist. Ct. App. 1992).

Illinois *Department of Transp. v. Drury Displays, Inc.*, 327 Ill. App. 3d 881, 764 N.E.2d 166 (Ct. App.), appeal denied, 201 Ill. 2d 564, 786 N.E.2d 182 (2002) (“We reject the Department’s interpretation that ‘just compensation’ means only bonus value.”)

Missouri *State ex rel. Missouri Highway & Transp. Comm’n v. Quiko*, 923 S.W.2d 489, 493–494 (Mo. Ct. App. 1996).

Tennessee *City of Johnson City v. Outdoor West, Inc.*, 947 S.W.2d 855 (Tenn. Ct. App. 1997).

Wisconsin *Vivid, Inc. v. Fiedler*, 219 Wis. 2d 764, 780, 787, 580 N.W.2d 644, 650, 653–654 (1998) (citing this chapter in Nichols on Eminent Domain®).

⁵ *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946), discussed *supra* at § 23 03[3][b].

its remaining term, as well as the potential for the lease to be extended or prematurely terminated ⁶

[3]—Valuation of the Sign Independent of the Location

In the absence of some interest in the land involved in a taking, a sign may be determined in some states to be removable personal property. In the absence of a statute to the contrary, it could reasonably be said in such cases that compensation for the taking of such a sign should be limited to its replacement (or reconstruction) cost since the sign derives no legitimate value from the location ⁷

⁶ *Missouri State ex rel Missouri Highway & Transp Comm'n v Quiko*, 923 S W 2d 489, 494 (Mo Ct App 1996) (apportionment case)

Michigan City of Norton Shores v Whiteco Metrocom (In re Acquisition of Billboard Leases), 205 Mich App 659, 517 N W 2d 872 (1994)

New Hampshire State v 3M National Adver Co, 139 N H 360, 653 A 2d 1092 (1995)

Ohio City of Cleveland v Zimmerman, 253 N E 2d 327, 330 (Ohio Prob Ct 1969) (apportionment case), *cf* *City of Lakewood v Rogolsky*, 252 N E 2d 872 (Ohio Prob Ct 1969) (apportionment case holding leasehold had no bonus value where contract rent was higher than market rent)

Tennessee City of Johnson City v Outdoor West, Inc, 947 S W 2d 855 (Tenn Ct App 1997)

Virginia Snyder Plaza Properties, Inc v Adams Outdoor Adver, Inc, 259 Va 635, 528 S E 2d 452 (2000)

Wisconsin Vivid, Inc v Fiedler, 219 Wis 2d 764, 787, 580 N W 2d 644, 653 (1998) (“questions such as the length of the leasehold interest are factors for the jury to consider”)

Cf Louisiana State Dept of Transp and Dev v Chachere, 574 So 2d 1306 (La. Ct App 1991) (limiting recovery to bonus value)

⁷ See cases cited *supra* § 23 03[4]n 75 for the proposition that billboards that are neither real property under state law nor “structures” under 42 U S C § 4652 may be treated as removable personal property

Similarly, when billboards are considered for purposes of assessing tangible personal property taxes, they are viewed as discrete property, separate from the associated leasehold interest and intangible rights relating to their “grandfathered” status. Although “fair market value” is the commonly used measure in both eminent domain proceedings and tax assessment, the property at issue differs between these two situations. In an eminent domain proceeding, the goal is to ascertain the fair market value of the leasehold improved with the billboard. In tax assessment, on the other hand, the goal is the determination of the fair market value of the billboard alone, the leasehold and intangible vested rights being assessed separately through *ad valorem* real estate taxes. See *Vivid, Inc v Fiedler*, 215 Wis 2d 321, 572 N W 2d 901 (table, text in 1997 Wisc App LEXIS 1130) (Ct App Oct 2, 1997), *aff'd in part, rev'd in part*, 219 Wis 2d 764, 580 N W 2d 644 (1998) (unpublished opinion, see local rules)

The valuation of billboards with regard to the assessment of tangible personal property taxes under state law is treated in the following reports

California California State Board of Equalization, Property and Special Taxes Dept, Guidelines for the Assessment of Billboard Properties, No 2002/078 (Dec 2002)

Florida Florida Office of Program Policy Analysis and Government Accountability, Special

The above rule typically does not apply, however, due to the mandate of the Uniform Act and its state statutory equivalents to the following effect ⁸

(b)(1) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (a) of this section, such building, structures, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at the expiration of his term, and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor

There are two primary ramifications of this language First, the valuation of the sign is not to take place in the abstract—it is “deemed” to be part of the realty and must, as a consequence, be considered in light of its location Second, when the Uniform Act applies, compensation for the sign is the *greater* of a) the increment of value the sign contributes to the land,⁹ or b) the fair market

Review Property Appraisers Use Cost Approach to Value Billboards, Report No 02-69 (Dec 2002)

See also O’Neill and Marsh, *Trends in the Property Tax Valuation of Commercial Outdoor Advertising Structures*, Journal of Property Tax Assessment and Administration, Vol 1, Issue 2, 5-13 (2004)

⁸ 42 U S C § 4652(b)

⁹ This is essentially the Undivided Fee Rule, sometimes mistakenly called the Unit Rule, adopted by statute or case law in some states The Undivided Fee Rule is a remnant of the early view that eminent domain proceedings are purely *in rem* in nature This rule, from which some states are receding, imposes the fiction that property is to be valued without regard to the varying interests therein In other words, the jury is to ignore the fact that leased property is, in fact, leased Many state statutes establishing eminent domain procedures expressly do not impose the Undivided Fee Rule and other states do not follow it as the result of court rulings Several commentators have criticized the Rule for failing to provide adequate constitutional and statutory protection to property owners, focusing instead on providing that protection to the property itself That is to say, the provision that “just compensation shall be paid” is intended to protect the property owner, not the property See 7A Nichols on Eminent Domain®, §§ 11 01[2][b], 11 03[4], 11 03[5][a] (Matthew Bender) The Uniform Act appears to have done away with both the Undivided Fee and Unit Rules in billboard cases since it mandates a determination of the value of the sign as a separate item of property and awards compensation in that amount to the tenant 42 U S C § 4652(b)(1) *Accord* Uniform Appraisal Standards for Federal Land Acquisitions 26-27 & n 72a (Interagency Land Acquisition Conf 1973)

Federal Boston Chamber of Commerce v City of Boston, 217 U S 189, 30 S Ct 459 (1910) (stating that the Constitution “does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole It merely requires that an owner of property taken should be paid for what is taken from him It deals with persons, not with tracts of land”),

value of the sign itself ¹⁰

The ultimate effect of these rules is that the fair market value of the sign is to be determined as if owned by the landowner, essentially the same rule adopted by the United States Supreme Court in *Almota* ¹¹ In those cases where both the land and the sign are in one ownership, billboards have been valued the same

accord United States v Seagren, 50 F2d 333, 75 A L R 1491 (D C Cir 1931) (tenant entitled to separate recovery for trade fixtures)

Florida State, Dept of Transp v Powell, 721 So 2d 795 (Fla Ct App 1998), *review denied*, 729 So 2d 917 (Fla 1999) (Unit Rule is not applicable to federally funded cases due to applicability of 42 U S C § 4652), *see also* National Adver Co v State Dept of Transp, 611 So 2d 566, 570 (Fla Dist Ct App 1992)

Illinois Department of Transp v Drury Displays, Inc, 327 Ill App 3d 881, 764 N E 2d 166 (Ct App), *appeal denied*, 201 Ill 2d 564, 786 N E 2d 182 (2002) (unpublished portion of this opinion approved valuation of improved leasehold as a separate compensable interest from the encumbered fee)

Cf Virginia cf Lamar Corp v Commonwealth Transp Comm'r, 262 Va 375, 552 S E 2d 61 (2001) (sign owner permitted to intervene in condemnation action to present evidence regarding the value of the property taken, including the contributory value of the billboard which, with respect to the condemnor, is treated as realty), *with* Lamar Corp v City of Richmond, 241 Va 346, 402 S E 2d 31 (1991) (in order to avoid a title defect associated with non-joinder of the tenant, the court held that a tenant has no "separate, condemnable interest")

¹⁰ The FHWA has interpreted the phrase, "fair market value of such building, structure, or improvement for removal from the real property," to mean "salvage value," that is, "the probable sale price of an item, if offered for sale on the condition that it will be removed from the property at the buyer's expense" 49 C F R § 24 105(c) (referring to 49 C F R § 24 2(s))

Nevertheless, the federal courts have not given that construction to the phrase, interpreting Congress' intent and defining the provision, instead, to mean "the value of the sign structure prior to removal" United States v 40 00 Acres of Land, More or Less, in Henry Co, 427 F Supp 434 (W D Mo 1976) The court's rationale was that

To limit compensation to the "salvage value" of the structure when it has been removed from the subject property would render useless the provisions of Section 302 [of the Uniform Act], for where, as here, the record indicates that the "salvage value" of the structure when removed from the subject property would be nominal or nonexistent, neither the constitutional mandate of *Almota Farmers Elevator and Warehouse Co v United States*, *supra*, nor the overriding intent of the URA to afford full and fair compensation would be met

Id at 442

This is in accord with the holding of the United States Supreme Court in *United States v General Motors Corp*, 323 U S 373, 65 S Ct 357, 89 L Ed 311 (1945), quoted at § 23 03[3][a] *supra*

Florida State Dept of Transp v Powell, 721 So 2d 795 (Dist Ct App 1998), *review denied*, 727 So 2d 917 (Fla 1999) (in its discretion, the trial court may grant the sign owner a separate trial, severed from the main valuation proceeding)

See also Missouri State ex rel State Highway Comm'n v Volk, 611 S W 2d 255, 258 (Mo Ct App 1980) (interpreting 42 U S C § 4652 to entitle the sign owner "to be paid the reasonable market value of its structures")

¹¹ *Almota Farmers Elevator and Warehouse Co v United States*, 409 U S 470, 93 S Ct 791, 35 L Ed 2d 1 (1973)

as any other improvement to the land and all recognized appraisal approaches have been allowed ¹² It would be expected that the situation would be no different in federally funded acquisitions due to the above-quoted provisions of the Uniform Act

Nevertheless, it is not uncommon for the condemnor to assert that compensation should not be allowed to exceed the cost to construct a new sign at a substitute location ¹³ Although this argument appears valid in the abstract, in

¹² See cases cited n 17 *infra*. Cf. Annot., Eminent Domain: Determination of Just Compensation for Condemnation of Billboards or Other Advertising Signs, 73 A L R 3d 1122, 1125 (1976). The author of this annotation makes the inaccurate statement that virtually every court has appeared to limit its consideration to evidence of the replacement or reproduction cost of the appropriated sign, less depreciation. He cites three cases from New York and one from Pennsylvania for this conclusion.

A review of the cited New York cases *Rochester Poster, Richard's "Of Course,"* and *Richards Dowdle*, all discussed at length above in § 23 03[1], fails to support this proposition. In each of those cases, the sign owner was claiming compensation measured as the depreciated reproduction cost of the sign involved. None of those cases involved a contest over the measure or method of valuation; the condemnor asserted, instead, that no compensation was due at all.

Likewise, the cited Pennsylvania case, simply confirmed an award based on reproduction cost, less depreciation, which the court noted was not contested. *In re Urban Redevelopment Auth. of Pittsburgh*, 440 Pa. 321, 272 A 2d 163, 164 n 1 (1970).

This annotation, written at a time when very few cases had been decided, is criticized for other reasons, at § 23 03 n 46 *supra*.

¹³ *Florida*: Division of Admin., State Dept. of Transp. v. Allen, 447 So. 2d 1383, 1388 (Fla. Ct. App. 1984) (compensation for signs deemed personalty is limited to "replacement value less depreciation"), cf. *Hernando County v. Anderson*, 737 So. 2d 569 (Fla. Ct. App. 1999) (inverse condemnation action where county destroyed sign without notice to owner after lease had expired, in *dicta*, the court stated that compensation for the destruction of the sign was replacement value, less depreciation, but the measure of compensation was not at issue at this stage of the proceeding), but see *Department of Transp. v. Heathrow Land & Dev. Corp.*, 579 So. 2d 183, 184 (Fla. Ct. App. 1991) (receding from *Allen* and holding that compensation is measured by "applying standard appraisal techniques" where 42 U.S.C. § 4652 is implicated), see also *National Adver. Co. v. State Dept. of Transp.*, 611 So. 2d 566, 570 (Fla. Ct. App. 1992) (noting that application of standard appraisal techniques means "the income approach may now be used"), see also *State, Dept. of Transp. v. Powell*, 721 So. 2d 795 (Fla. Ct. App. 1998), review denied, 729 So. 2d 917 (Fla. 1999) (all appraisal techniques may be used).

Indiana: *State v. Bishop*, 800 N.E.2d 918, 924 (Ind. 2003) ("The cost to move the billboards was evidence of the cost to reproduce the improvements situated on the condemned property and therefore should have been presented to the jury").

See also Cunningham, Valuation and Condemnation of Advertising Signs and Related Property Interests Under the Highway Beautification Act, in 2 Selected Studies in Highway Law 604-610, *et seq.* (J. Vance, ed., Transp. Research Bd. 1979). Although Professor Cunningham predicted the making of this argument in 1979, he failed to anticipate the effect of prohibitory billboard regulation resulting not only from the Highway Beautification Act, but also from local government amortization ordinances which would eventually result in the virtual elimination of all potential relocation sites.

practice it has proven unworkable because most communities now prohibit billboards. Consequently, the premise underlying this "theory of substitution"¹⁴ is absent and the rule cannot be equitably applied. This is particularly the case on interstate and federal primary highways because in the vast majority of cases no substitute or replacement site will be available.¹⁵

[4]—Valuation of the Billboard as an Improvement to the Leasehold or Land

Ordinarily, a sign owner's interest in the land will be in a leasehold,¹⁶ although there have been instances in which both the land and the sign were in common ownership.¹⁷ In recent years, a considerable body of reported opinions, law review notes and appraisal journal articles has developed dealing specifically with the valuation of billboard leaseholds and billboards on leased land, but it is important to remember the general principles applicable to all eminent domain cases before reviewing the valuation issues specific to billboards.¹⁸

¹⁴ See Cunningham, *Valuation and Condemnation of Advertising Signs and Related Property Interests Under the Highway Beautification Act*, in 2 *Selected Studies in Highway Law* 590-591, *et seq.* (J. Vance, ed., Transp. Research Bd. 1979).

¹⁵ See discussion of the regulatory ramifications of the Highway Beautification Act, § 23 03[2] *supra*.

¹⁶ The relative scarcity of condemnation cases involving land and billboards in common ownership is indicative of the lack of a dispute when such properties are condemned, rather than being an indication that billboards are always constructed on leased land. In point of fact, several of the cases discussed in connection with amortization, § 23 03 ns 37-41 *supra*, indicate that common ownership of land and billboard is not uncommon.

¹⁷ *Alabama State v. Waller*, 395 So. 2d 37 (Ala. 1981).

Arkansas State Highway Comm'n v. Cash, 267 Ark. 758, 590 S.W.2d 676 (Ct. App. 1979).

Kentucky City of Newport Mun. Hous. Comm'n v. Turner Adver., Inc., 334 S.W.2d 767 (Ky. 1960).

Ohio Wray v. Stvartak, 121 Ohio App. 3d 459, 700 N.E.2d 347 (1997).

Utah State v. Ouzounian, 26 Utah 2d 442, 491 P.2d 1093 (Utah 1971).

¹⁸ The first attempt to comprehensively address this topic, now obsolete, was written in 1976 at a time that the law had not developed beyond a handful of cases. See Anonymous, *Annot., Eminent Domain: Determination of Just Compensation for Condemnation of Billboards or Other Advertising Signs*, 73 A.L.R.3d 1122 (1976), see critique, *supra* at § 23 03[3]n 46 and § 23 04[3], n 12.

Law review articles on this topic are scarce, but include the following:

Cunningham, *Valuation and Condemnation of Advertising Signs and Related Property Interests Under the Highway Beautification Act*, in 2 *Selected Studies in Highway Law* 571 (J. Vance, ed., Transp. Research Bd. 1979),

Gelineau, *Valuation of Billboards in Condemnation*, *Prac. Real Est. Law*, Vol. 19, No. 4, 23-33 (2003) (citing extensively to this chapter in *Nichols on Eminent Domain*®),

Pollard, *Billboard Removal: What Amount of Compensation is Just?*, 6 Va. J. Nat. Resources L. 323 (1987).

(Text continued on page 23-56)

Several appraisal texts have been written on this topic

Berry, *Valuation of Outdoor Advertising Sites 1* (FHWA reprint 1971) (Urban Property Research Co 1969),

Claus, *2 Visual Communication Through Signage Sign Evaluation* (Sign of the Times Publ'g Co 1975),

Sutte, *Appraisal of Roadside Advertising Signs* (Am Inst of Real Estate Appraisers 1972),

Sutte, *The Appraisal of Outdoor Advertising Signs* (Appraisal Inst 1994),

Wright and Wright, *Billboard Appraisal The Valuation of Off-Premise Advertising Signs* (American Soc of Appraisers 2001)

Articles in the appraisal literature on this topic tend to focus on legal issues, rather than appraisal technique, they include the following

Aguilar, *The Appraisal of Off-Premise Outdoor Advertising Billboards*, *Right-of-Way Magazine*, Vol 47, No 5 12-19 (Sept/Oct 2000) (advocating a cost approach for conforming signs and the income approach and gross rent multiplier approach for nonconforming signs),

Baker and Wagner, *The Valuation of Outdoor Advertising Structures A Mass Appraisal Approach*, *Assessment Digest*, 2-11 (July/Aug 1991) (advocating a scheduled cost approach when preparing mass appraisals),

Cantwell *Billboard Valuation Without Distortion The Heathrow Decision*, Vol 67, No 3, 246-254 (July 1999) (analyzing Florida law),

Deakin, *Valuing Your Sign Plant What's it Worth?*, *Outdoor Advertising Magazine*, 4-10 (Nov/Dec 1995) (advocating a cash-flow multiplier approach to value an entire plant),

Deakin, *Valuing a Sign What's it Worth?*, *Outdoor Advertising Magazine*, 4-8 (Jan/Feb 1996) (advocating a cash-flow multiplier approach to value a single sign),

Floyd, *Issues in the Appraisal of Outdoor Advertising Signs*, *Appraisal Journal*, 422-434 (July 1983) (advocating for non-compensability, bonus value and a cost approach) [this author is neither an appraiser nor an attorney and his proffered testimony on the points stated in this article and the three articles that follow has been rejected by the court in *Department of Transp v Drury Displays, Inc*, 327 Ill App 3d 881, 764 N E 2d 166 (Ct App) *appeal denied*, 201 Ill 2d 564, 786 N E 2d 182 (2002) (unpublished portion of opinion)],

Floyd, *Outdoor Advertising Signs and Eminent Domain Proceedings*, *Real Estate Appraiser & Analyst*, Vol 56, No 2, 4-17 (Summer 1990) (advocating for non-compensability, bonus value and a cost approach),

Floyd, *Compensation for Billboard Removal in Eminent Domain Proceedings*, *Zoning and Plan L Rep*, Vol 17, No 2, 9-16 (Feb 1994) (advocating for non-compensability, bonus value and a cost approach),

Floyd, *Hodgdon and Johnson Appraising Outdoor Advertising Signs A Critical Analysis*, *Appraisal Journal*, Vol 66, No 3, 305-315 (July 1998) (advocating for non-compensability, bonus value and a cost approach),

Nation and Oehrich, *The Valuation of Billboard Structures*, *Appraisal Journal*, Vol 67, No 4, 412-421 (Oct 1999) (advocating the income approach and use of a gross rent multiplier),

Nation, *Demystifying the Appraisal Process in Evaluating Billboard Structures*, 14-21 (May/June 2000) (advocating the income approach and use of a gross rent multiplier),

Stoops, *Billboard Valuation Fundamental Asset Allocation Issues*, *Appraisal Journal*, Vol 71, No 3, 155-163 (Apr 2003) (apparently advocating an income approach or use of a gross income multiplier to value an entire plant, but a cost approach for individual signs)

Keeping in mind that the primary measure of just compensation will always be the fair market value of the property taken or destroyed, the parties to a billboard valuation controversy will ordinarily present their respective cases to the fact-finder, whether jury, judge or commission, through appraisal testimony. As a general proposition, it can be said that any professionally accepted appraisal methodology or technique that is adequately supported will be admissible in such cases with objections normally going to the weight, not the competency, of the testimony.¹⁹

[a]—The Cost Approach: The Sum of the Parts Method

As mentioned in the introduction to this chapter, in the early years of the Highway Beautification Act the federal government encouraged billboard acquisition through the use of schedules based on estimated reproduction costs for billboards, less depreciation. It is hardly surprising, therefore, to now find cases in which just compensation is asserted by condemnors to be properly measured by that approach.²⁰ In effect, some governmental agencies have institutionalized this approach.

Additionally, as previously mentioned, the very earliest cases involving the condemnation of lands improved with billboards awarded depreciated cost as just compensation, the exact remedy which the sign owner sought. This was apparently due to the fact that at that time the signs could be rebuilt on other lands and the sign owner agreed that he was, as a result, justly compensated.²¹

¹⁹ See, e.g., *Arizona City of Scottsdale v. Eller Outdoor Adver. Co.*, 119 Ariz. 86, 579 P.2d 590 (Ct. App. 1978).

Indiana State v. Bishop, 800 N.E.2d 918 (Ind. 2003).

Wisconsin Vivid, Inc. v. Fiedler, 219 Wis. 2d 764, 783-784, 799, 580 N.W.2d 644, 651, 657 (1998) (citing text).

The following cases excluded appraisal testimony for failure to properly consider the leasehold interest:

Arizona Whiteco Industries, Inc. v. City of Tucson, 168 Ariz. 257, 812 P.2d 1075, 1079 (Ct. App. 1990) (use of rent multiplier "without any regard for the existence, length or terms of the leases, was incompetent").

Florida National Adver. Co. v. State Dep't of Transp., 611 So. 2d 566, 570 (Fla. Dist. Ct. App. 1992) (use of depreciated cost approach which failed to value the sign owner's leasehold interest in the property was incompetent).

²⁰ The FHWA regulations implementing the Highway Beautification Act still call for valuation schedules for removal, although the regulations specifically acknowledge that such schedules "do not purport to be a basis for the determination of just compensation under eminent domain." 23 C.F.R. § 750.304(c). See, e.g., *City of Scottsdale v. Eller Outdoor Adver. Co.*, 119 Ariz. 86, 579 P.2d 590, 599, 600 (Ct. App. 1978) (appraiser's reliance on state schedule as a basis for expert opinion did not violate hearsay rule).

²¹ See, e.g., discussion of cases in §§ 23 02[1], 23 03[1] *supra*, see also *City of Lakewood v. Rogolsky*, 22 Ohio Misc. 93, 252 N.E.2d 872 (Prob. Ct. 1969).

Consequently, in the early cases the valuation dispute focused on what should properly be considered in connection with the cost approach. For example, the first three contested cases held that although a sign was removable, compensation was still due for the concrete foundation to which it had been bolted,²² that in determining reproduction costs, builder's overhead and profit should be included,²³ and, where it was necessary to double the size of a sign built to replace the one taken, the extra costs incurred in so doing were compensable.²⁴ Later cases dealing with the "cost approach" did so because the relevant statutes limited recovery to that amount.²⁵

In a few cases it has been concluded that the sign owner should be able to replace the sign that has been taken in condemnation. In these cases, the courts also conclude that the condemnor's obligation to pay just compensation is satisfied by awarding the sign owner the depreciated replacement or reconstruction cost of the sign, together with the bonus value of his lease. Since bonus

²² *Arkansas* Arkansas State Highway Comm'n v Humble Oil Co, 248 Ark 685, 453 S W 2d 408 (1970)

²³ *New York* Richards "Of Course," Inc v State, 36 A D 2d 572, 317 N Y S 2d 827 (4th Dept 1971)

But see Florida Ackerly [sic] Commun, Inc v City of West Palm Beach, 427 So 2d 245 (Fla Dist Ct App 1983)

²⁴ *Georgia* Dept of Transp v El Carlo Motel, Inc, 140 Ga App 779, 232 S E 2d 126 (1976)

²⁵ *Florida* Div of Admin, State Dept of Transp v Allen, 447 So 2d 1383, 1388 (Fla Dist Ct App 1984) (statute at the time provided that compensation "shall be limited to the actual replacement value of the materials in such sign", however the statute was amended shortly after the issuance of this opinion to delete the limiting language) See n 13 *supra*

Pennsylvania Morgan Signs, Inc v Commonwealth of Pennsylvania, Dep't of Transp, 723 A 2d 1096, 1099 (Pa Commw 1999) (referring to 26 Pa Cons Stat § 1-601A(b)(1)), *In re* Right of Way for State Route 0060 (Patrick Media Group), 720 A 2d 154, 157 (Pa Commw 1998) (same reference)

Other states have statutes limiting or expanding compensation besides those listed in n 2 *supra*

Colorado Colo Rev Stat § 43-1-414 (just compensation to be determined without consideration of modifications made to the sign with the state's consent, unless it reduces value)

Idaho Idaho Code §§ 40-1910A ("Fair market value of the off-premises outdoor advertising shall include consideration of the income derived from the same")

Louisiana La Rev Stat Ann § 48 461 6 ("cost of relocation may be considered a factor for purposes of determining just compensation")

Mississippi Miss Code Ann § 49-23-17 (just compensation shall be paid for "the cost of removal plus the fair market value of the sign removed")

Nebraska Neb Rev Stat § 69-1701(b) ("fair and reasonable market value shall be based upon the depreciated reproduction cost of such sign, using as a guideline the Nebraska Sign Schedule developed and used by the Department of Roads, except that, when feasible, [the sign may be relocated and the owner] paid the actual and necessary relocation cost therefor")

Oregon Or Rev Stat § 377 780(3) ("In determining value, the department shall use the accepted appraisal method customarily used in such cases or the method prescribed by federal regulations, if any, whichever results in the lowest valuation")

value is predicated on market rent, the sign owner is believed to have been made whole by such an award since he has been compensated sufficiently to lease substitute property in order to rebuild the sign ²⁶ This theory is valid when it works, that is, when it is established that substitute, permitable sites exist in the immediate market But this "cost approach" has been severely criticized when replacement sites do not exist, although, since it is an accepted appraisal methodology generally, it has been allowed in condemnation proceedings relating to billboards even where it is not established that such sites are available ²⁷

²⁶ *Indiana* State v Bishop, 800 NE 2d 918 (Ind 2003)

Louisiana State Dept of Transp and Dev v Chachere, 574 So 2d 1306, 1311 (La Ct App 1991) (affirming the verdict because "[u]nder the circumstances, the jury evidently felt that by awarding Lamar the cost of the physical signboard structures Lamar was in a position to shift to other locations and be made whole")

Pennsylvania Pittsburgh Outdoor Advertising Corp Appeal, 440 Pa 321, 272 A 2d 163 (1970) In this case, the parties agreed to the amount representing the reproduction cost of the sign, but the sign owner's lease was determined to have no bonus value, Pennsylvania's highest court noted

Thus, at least in theory and hopefully in practice, Outdoor could obtain a lease of a comparable location for the same amount of rent, construct its billboards at that location with the award for the replacement value of the billboards and realize an identical income flow

But see *Illinois* Department of Transp v Drury Displays, Inc, 327 Ill App 3d 881, 764 NE 2d 166 (Ct App), appeal denied, 201 Ill 2d 564, 786 NE 2d 182 (2002) ("We reject the Department's interpretation that 'just compensation' means only bonus value")

Nevada National Advertising Co v State Dept of Transp, 116 Nev 107, 113, 993 P 2d 62, 66 n 4 (2000) ("This method, however, is only valid 'when it is established that substitute, permitable sites exist in the immediate market' ") (citing this chapter of Nichols on Eminent Domain®)

Pennsylvania Morgan Signs, Inc v Commonwealth of Pennsylvania, Dep't of Transp, 723 A 2d 1069, 1099 (Pa Commw 1999), *In re* Right of Way for State Route 0060 (Patrick Media Group), 720 A 2d 154 (Pa Commw 1998) (affirming lower court's factual finding that the asserted inability to relocate the sign was "speculative")

²⁷ *Washington* State v Obie Outdoor Adver, Inc, 9 Wash App 943, 516 P 2d 233, 235, 73 A L R 3d 1114, 1116 (1973)

But see *Illinois* Department of Transp v Drury Displays, Inc, 327 Ill App 3d 881, 764 NE 2d 166 (Ct App), appeal denied, 201 Ill 2d 564, 786 NE 2d 182 (2002) ("We reject the Department's interpretation that 'just compensation' means only bonus value")

Nevada National Advertising Co v State Dept of Transp, 116 Nev 107, 113-114, 993 P 2d 62, 66-67 (2000) ("The bonus value approach does not sufficiently compensate the Advertising Companies for their leasehold interests", citing this chapter in Nichols on Eminent Domain®)

Beside the comments in the text *supra* at ns 13-15 regarding the failure of the "theory of substitution," the appraisal texts points out a number of additional deficiencies of the cost approach in connection with the appraisal of billboards

Sutte points out that 1) the cost approach does not reflect what buyers and sellers actually contemplate in market transactions, ie, they consider primarily income produced, 2) depreciation is difficult to quantify, and, 3) the cost approach ignores the "soft costs" of acquiring a location and permit, as well as a developer's margin Sutte, *The Appraisal of Outdoor Advertising Signs* 41 (Appraisal Inst 1994)

[b]—The Income Approach: Dealing with Business Damages

Very early on sign owners asserted that the value of leaseholds improved with billboards was a function of the income they produced, just like any other income-producing property.

The first reported case to address this issue, however, did not deal with the valuation of the signs that were taken—in fact, in that case, the sign owner had agreed with the condemnor on the value of those signs. Nevertheless, the sign owner asserted that the taking of those signs impacted the value of his remaining signs by reducing their value as a “showing.” Without characterizing this claim as such, he was actually making a claim for damage to his continuing business enterprise. The Kentucky court that heard the case held, in keeping with the vast weight of authority, that intangible business damages are not compensable in eminent domain proceedings and denied the claim.²⁸

With the exception of this case, it wasn't until 1969 that income-based claims were pursued in litigation. Of course, in the interim the Highway Beautification Act of 1965 had been passed and the ability to relocate billboards was severely limited as a result.

Unlike the Kentucky case, however, subsequent claims have been made only for consideration of the loss of income attributable to the signs and property involved in the condemnation. These claims have universally been allowed to go to the jury for its consideration.²⁹

Claus mentions that objections to the cost approach are that 1) it ignores the “site value,” that is, the value inherent in the sign, but attributable to the location, and, 2) it may not be possible to “reproduce” or “replace” the sign in compliance with applicable building codes, in other words, a wooden sign may have to be upgraded to a steel monopole. Claus, 2 *Visual Communication Through Signage: Sign Evaluation*, 46–48 (Sign of the Times Publ'g Co. 1975).

The American Institute of Real Estate Appraisers manual, *The Appraisal of Real Estate* (9th ed. 1987), mentions that 1) certain “externalities,” like scarcity or an imbalance between supply and demand (situations commonly found with regard to billboards due to the prohibition of new construction), may result in the cost approach being inapplicable, and, 2) the cost approach is primarily applicable to non-income producing properties where the improvements have been recently constructed (indicating the ability to permit and avoiding the problem of estimating depreciation). *Id.* at 346–347, 349–350, and 354.

Accord Gelineau, *Valuation of Billboards in Condemnation*, *Prac. Real Est. Law*, Vol. 19, No. 4, 23, 26–27 (2003) (“Because of these serious shortcomings, use the cost approach only in the rarest of circumstances”) (citing this chapter in Nichols on Eminent Domain®).

²⁸ *Kentucky City of Newport Mun. Hous. Comm'n v. Turner Adver., Inc.*, 334 S.W.2d 767 (Ky. 1960).

²⁹ *Ohio City of Cleveland v. Zimmerman*, 22 Ohio Misc. 19, 253 N.E.2d 327, 330 (Prob. Ct. 1969) (characterizing the claim as one for the value of the leasehold, the court in this apportionment proceeding awarded the anticipated income from rental of the advertising faces, less anticipated expenses for ground rent, maintenance and management, for the duration of the lease term).

Utah State v. Ouzounian, 26 Utah 2d 442, 491 P.2d 1093 (1971).

See also cases cited ns 31–32 *infra*.

This rule is no different than the rule regarding the valuation of income-producing property in condemnation proceedings generally. The income approach has long been recognized as a valid and acceptable appraisal methodology, provided that the anticipated net income (also referred to in the industry as "cash flow" or "EBITDA," earnings before interest, taxes, depreciation or amortization) is adjusted to present value, a process normally referred to as "capitalization" of the income.³⁰

It has, however, been asserted that income from the rental of billboard "faces" is "business" income not attributable to the property and that the income approach is, therefore, a veiled attempt to recover non-compensable business damages. Nevertheless, nearly every court that has been confronted with this argument has held to the contrary and allowed the jury, in assessing just compensation, to consider the income generated by the rental of the sign faces to the advertisers.³¹

³⁰ See generally 4 Nichols on Eminent Domain®, §§ 12B 08, 12B 10 (Matthew Bender). The phrase "net income" refers to gross revenues from the sign, less operating expenses, with the exception of expenses for interest, depreciation and income tax, in the outdoor advertising industry, this figure is referred to alternatively, as "cash flow" or EBITDA (Earnings Before Interest, Taxes, Depreciation, Amortization). See Wright and Wright, *Billboard Appraisal: The Valuation of Off-Premise Advertising Signs*, 135-139 (American Soc. of Appraisers 2001), see also Deakin, *Valuing a Sign: What's it Worth?*, *Outdoor Advertising Magazine*, 4-8 (Jan/Feb 1996), and Deakin, *Valuing Your Sign Plant: What's it Worth?*, *Outdoor Advertising Magazine*, 4-10 (Nov/Dec 1995).

³¹ *Alabama State v. Waller*, 395 So. 2d 37, 41-42 (Ala. 1981).

Arkansas State Highway Comm'n v. Cash, 267 Ark. 758, 590 S.W.2d 676 (Ct. App. 1979). In rejecting the government's argument that income from the advertiser constituted income from a business, the court said:

Here we are dealing with net income from the property, something that would be the prime consideration of any prospective purchaser of income producing land. The evidence does not support the [state's] contention that the income in this case is of the type derived from a business located on the land.

267 Ark. at 759, 590 S.W.2d at 678.

Arizona City of Scottsdale v. Eller Outdoor Adver. Co., 119 Ariz. 86, 579 P.2d 590, 597-98 (Ct. App. 1978) (question of fact for the jury).

Connecticut cf. Pine Street Assoc., Inc. v. Commissioner of Transp., 1999 Conn. Super. LEXIS 406 (Conn. Super. Ct. Feb. 23, 1999) (trial court slip op.) (income approach used by both sides), with *Commissioner of Transp. v. Tuck-It-Away, Bridgeport, Inc.*, 2001 Conn. Super. LEXIS 2555 (Conn. Super. Ct. Sept. 6, 2001) (trial court slip op.) (income approach rejected for failure to introduce actual revenue and expense data).

Florida State Dept. of Transp. v. Powell, 721 So. 2d 795, 797 (Dist. Ct. App. 1998), review denied, 727 So. 2d 917 (Fla. 1999), *National Adver. Co. v. State Dept. of Transp.*, 611 So. 2d 566 (Fla. Dist. Ct. App. 1992), *Dept. of Transp. v. Heathrow Land & Dev. Corp.*, 579 So. 2d 183 (Fla. Dist. Ct. App. 1991), but see *Div. of Admin. v. State Dept. of Transp. v. Allen*, 447 So. 2d 1383 (Fla. Dist. Ct. App. 1984).

Illinois Department of Transp. v. Drury Displays, Inc., 327 Ill. App. 3d 881, 764 N.E.2d 166 (Ct. App.), appeal denied, 201 Ill. 2d 564, 786 N.E.2d 182 (2002) (unpublished portion of this opinion clarifies rejection of condemnor's argument that income from sign was "business income").

Michigan City of Norton Shores v. Whiteco Metrocom (In re Acquisition of Billboard Leases), 205 Mich. App. 659, 517 N.W.2d 872 (1994) (question of fact for the jury).

Additionally, nearly every court to consider the use of the “capitalized” income approach in the context of leaseholds improved with billboards has allowed it, some courts considering it to be in the nature of a method used in determining the “bonus value” of the lease ³²

Minnesota State v Weber-Connelly, Naegele, Inc, 448 N W 2d 380, 384–84 (Minn Ct App 1989) (“The evidence supports the trial court’s determination that the rental income [derived from advertisers] is generated by the billboards and thus is compensable”)

Nevada National Advertising Co v State Dept of Transp, 116 Nev 107, 114, 993 P 2d 62, 67 (2000) (citing this chapter in *Nichols on Eminent Domain*) (“The income generated from the billboards should have been considered in determining the value of the Advertising Companies’ leasehold interests”)

Virginia Lamar Corp v Commonwealth Transp Comm’r, 262 Va 375, 386, 552 S E 2d 61, 66 (2001) (advertising income derives from “the intrinsic nature and value of the billboard” and not from operation of a business)

Wisconsin Vivid, Inc v Fiedler, 219 Wis 2d 764, 789–794 580 N W 2d 644, 653–655 (1998) (citing this chapter in *Nichols on Eminent Domain*)

Cf Indiana State v Bishop, 800 N E 2d 918 924–925 (Ind 2003) (“Evidence of the rental income that the appropriated sign could be expected to produce ‘has been deemed admissible only where it was shown that the condemnee was unable to relocate a sign within the same market area’ ”)

Cf Ohio Wray v Stvartak, 121 Ohio App 3d 459, 700 N E 2d 347 (Ct App 1997)

³² See *Alabama State v Waller*, 395 So 2d 37, 41–42 (Ala 1981) (use of income approach upheld where condemnor injected the issue into the proceedings by having its witness explain why he did not use it, although court declined to rule on its admissibility generally)

Arkansas Arkansas State Highway Comm’n v Cash, 267 Ark 758, 590 S W 2d 676 (Ct App 1979) (approving use of capitalization of income, as well as its reciprocal, a net income multiplier)

Arizona City of Scottsdale v Eller Outdoor Adver Co, 119 Ariz 86, 579 P 2d 590, 591 (Ct App 1978) (question of fact), see also 119 Ariz at 97, 579 P 2d at 601 (Eubank, J, specially concurring) (in the nature of bonus value)

Illinois Department of Transp v Drury Displays, Inc, 327 Ill App 3d 881, 764 N E 2d 166 (Ct App), appeal denied, 201 Ill 2d 564, 786 N E 2d 182 (2002) (unpublished portion of this opinion clarifies that admission was within trial court’s discretion)

Michigan City of Norton Shores v Whiteco Metrocom (In re Acquisition of Billboard Leases), 205 Mich App 659, 517 N W 2d 872 (1994) (question of fact for the jury) (in the nature of bonus value)

Nevada National Advertising Co v State Dept of Transp, 116 Nev 107, 114, 993 P 2d 62, 67 (2000) (“The income generated from the billboards should have been considered in determining the value of the Advertising Companies’ leasehold interests”) (citing this chapter in *Nichols on Eminent Domain*)

New Hampshire State v 3M National Adver Co, 139 N H 360 653 A 2d 1092, 1094 (1995) (“actual net income to be received” over remainder of lease term was an appropriate method of valuing the leasehold, in the nature of bonus value)

Virginia Lamar Corp v Commonwealth Transp Comm’r, 262 Va 375, 552 S E 2d 61 (2001), *Snyder Plaza Properties, Inc v Adams Outdoor Adver, Inc*, 259 Va 635, 528 S E 2d 452 (2000)

Wisconsin Vivid, Inc v Fiedler, 219 Wis 2d 764, 793, 580 N W 2d 644, 655 (1998) (citing this chapter in *Nichols on Eminent Domain*)

As mentioned above, the standard income approach involves “capitalization” of the income, that is, the conversion of a projected, future income stream to present value by dividing the periodic income by a capitalization rate that would represent a return to the owner. The same calculation can be made, however, by converting the divisor into a multiplier.

Example If annual rental income is \$10,000 and the appropriate capitalization rate is 20%, that is $1/5$, then the capitalized value of the income stream is calculated as $\$10,000 \div 1/5$ or \$50,000. The cash flow or EBITDA multiplier would be calculated as the reciprocal of $1/5$, that is, a multiplier of 5. To prove this calculation, the same \$10,000 annual income, multiplied by 5, is \$50,000. Algebraically, $I \div 1/5 = 5 \times I$.

Both the capitalization rate and the multiplier are typically determined through the analysis of market data, primarily comparable sales. If the sales price of an income producing property and its net income are known, the capitalization rate and the cash flow or EBITDA multiplier can be determined.

[c]—The Market Approach: Gross Rent Multiplier Method

As previously mentioned, billboards are commonly erected on leased land, consequently, when billboards sell, they are transferred by assignment of lease or bill of sale, rather than by warranty deed recorded in the public record. Many appraisers, therefore, are not aware of billboard transfers nor do they have ready access to sales data for billboard transactions, so they are unable to apply the comparable sales approach. This shortcoming, however, lies more with the appraiser than with the appraisal methodology, as evidenced by the fact that other appraisers have been able to research and analyze sales of individual signs as well as sales of groups of signs in order to apply the market appraisal approach to billboards.

The “market” or “comparable sales” appraisal approach can be accomplished in at least two ways, either by a direct whole-to-whole comparison, or by determining a “unit of comparison” from the sales data and then applying that conclusion to the property being appraised. For example, vacant land may be valued through the market approach by directly comparing a tract that has been sold with a tract that is being appraised, or by deriving a “price per acre” from

Cf. Indiana State v. Bishop, 800 N.E.2d 918, 925 (Ind. 2003) (“Capitalization of income evidence is allowed only in limited circumstances”).

Louisiana State Dept. Of Transp. and Dev. v. Chachere, 574 So. 2d 1306, 1310 (La. Ct. App. 1991) (Louisiana jurisprudence rarely allows consideration of income approach based on “mathematical factors”).

But see Pennsylvania Morgan Signs, Inc. v. Commonwealth of Pennsylvania, Dept. of Transp., 723 A.2d 1096, 1099 (Pa. Commw. 1999) (“[t]he law in this Commonwealth is well settled that income flow evidence is inadmissible in determining the just compensation for property subject to condemnation”).

the sales data and then applying that unit of comparison to the property being appraised

With appropriate adjustments, the whole-to-whole comparison appears to be the easiest approach to employ and while there would be no legal impediment to using such a methodology in a billboard appraisal, no cases have been reported where this approach was used and the result litigated

Instead, the sales comparison approach in the appraisal of billboards has developed to use a "unit of comparison" based on income production. Of course, the determination of the appropriate unit of comparison is a question of fact, nevertheless, it appears from the reported cases that, in the market for the purchase and sale of billboards, buyers and sellers negotiate price as a function of the income the signs produce, much like in the apartment or hotel market

The goal of appraising is to determine what price a willing, knowledgeable buyer and a willing, knowledgeable seller, neither being under compulsion, would agree upon as the selling price of the property being appraised. To mimic the market, appraisers have developed an income-based unit of comparison called the Gross Rent (Income) Multiplier

Example Ten billboards generating \$100,000 gross annual rental income are sold for \$400,000. The Gross Rent Multiplier, sales price divided by gross rental income, is four ($\$400,000 \div \$100,000 = 4$). If the billboard being appraised generates \$12,000 gross rental income per year, its value is \$48,000, four times income ($4 \times \$12,000 = \$48,000$)

The alternate units of comparison, "price per sign face" and "price per structure" do not appear to find support in any reported opinion or in the underlying negotiations of buyers and sellers of groupings of billboards

The Gross Rent Multiplier approach has been admitted over the objection of the condemnor on a number of occasions and the majority of courts having considered it now approve of its unqualified use in billboard condemnation cases ³³

³³ The following cases have addressed the application of the Gross Rent Multiplier appraisal methodology in billboard condemnation cases

Arizona City of Scottsdale v. Eller Outdoor Adver. Co., 119 Ariz. 86, 579 P.2d 590 (Ct. App. 1978) (admitted and adopted with qualification, characterized as a "net income multiplier"), cf. *Whiteco Industries, Inc. v. City of Tucson*, 168 Ariz. 257, 812 P.2d 1075 (Ct. App. 1990) (refusal to adopt as utilized)

Arkansas Arkansas State Highway Comm'n v. Cash, 267 Ark. 758, 590 S.W.2d 676 (Ct. App. 1979) (admitted and adopted, characterized as a "net income multiplier")

Florida Dept. of Transp. v. Powell, 721 So. 2d 795 (Fla. Ct. App. 1998) *review denied*, 729 So. 2d 917 (Fla. 1999) (admitted and adopted), *National Adver. Co. v. State Dept. of Transp.*, 611 So. 2d 566 (Fla. Ct. App. 1992) (admitted and adopted in this case, no general rule adopted), see also *State of Fla. Dept. of Transp. v. K-Mart Corp.*, 47 Fla. Supp. 2d 107 (Cir. Ct. 1989)

The Gross Rent Multiplier approach appears particularly appropriate where the evidence establishes that the sign involved in the condemnation cannot be relocated onto the remaining property or elsewhere in the immediate area. This approach best measures the value of the location inherent in the value of the aggregate asset of the lease, permit and billboard because it is predicated on income produced by the sign at that location, avoiding the shortcoming of the cost approach which ignores the location altogether ³⁴

(trial court slip op) (admitted and adopted), *State of Fla, Dept of Transp v National Adver Co*, 43 Fla Supp 2d 156 (Cir Ct 1989) (trial court slip op) (admitted and adopted)

Illinois *Department of Transp v Drury Displays, Inc*, 327 Ill App 3d 881, 764 NE 2d 166 (Ct App), *appeal denied*, 201 Ill 2d 564, 786 NE 2d 182 (2002) (admitted in this case) (unpublished portion of this opinion clarifies that admission was within trial court's discretion)

Louisiana *State Dept of Transp and Dev v Chachere*, 574 So 2d 1306, 1311 (La Ct App 1991) (admitted, but refusal to adopt)

Minnesota *State v Weber-Connelly, Naegel, Inc*, 448 N W 2d 380 (Minn Ct App 1989) (admitted and adopted on facts presented)

Missouri *State ex rel Missouri Highway & Transp Comm'n v Quiko*, 923 S W 2d 489 (Mo Ct App 1996) (admitted, but refusal to adopt as utilized in this case)

Nevada *National Advertising Co v State Dept of Transp*, 116 Nev 107, 993 P 2d 62 (2000) (admitted and adopted upon showing that sign could not be relocated in immediate area)

New Hampshire *State v 3M National Adver Co*, 139 N H 360, 653 A 2d 1092, 1094 (1995) (admitted, but refusal to adopt as utilized in this case)

Pennsylvania *Morgan Signs, Inc v Commonwealth of Pennsylvania, Dept of Transp*, 723 A 2d 1096, 1099 (Pa Commw 1999) (rejected, stating that the law in Pennsylvania "is well settled that income flow evidence is inadmissible in determining the just compensation for property subject to condemnation")

Virginia *Lamar Corp v Commonwealth Transp Comm'r*, 262 Va 375, 552 S E 2d 61 (2001) (admitted and adopted), *Snyder Plaza Properties, Inc v Adams Outdoor Adver, Inc*, 259 Va 635, 528 S E 2d 452 (2000) (admitted in this case)

Washington *State v Obie Outdoor Adver, Inc*, 9 Wash App 943, 516 P 2d 233, 235, 73 A L R 3d 1114, 1116 (1973) (admitted and adopted on facts presented, characterized as an income approach)

Wisconsin *Vivid, Inc v Fiedler*, 219 Wis 2d 764, 784-791, 580 N W 2d 644, 652-654 (1998) (admitted and adopted) (citing this chapter in *Nichols on Eminent Domain*)

Accord *Gelineau, Valuation of Billboards in Condemnation*, *Prac Real Est Law*, Vol 19, No 4, 23, 26-27 (2003) ("The best choice for billboard appraisers is the effective gross income multiplier method of appraisal") (citing this chapter of *Nichols on Eminent Domain*)

³⁴ *Arizona* *City of Scottsdale v Eller Outdoor Adver Co*, 119 Ariz 86, 579 P 2d 590, 598 (Ct App 1978)

Washington *State v Obie Outdoor Adver, Inc*, 9 Wash App 943, 516 P 2d 233, 73 A L R 3d 1114 (1973)

Wisconsin *Vivid, Inc v Fiedler*, 219 Wis 2d 764, 783-784, 580 N W 2d 644, 651 (1998)

In recent years, local governments have found themselves embroiled in litigation defending their prohibitory sign codes against the charge that they violate the First Amendment to the United States Constitution and are, therefore, unenforceable. Some of these lawsuits have been resolved by final

adjudication or settlement resulting in the issuance of new permits for the construction of a small number of signs in jurisdictions that previously prohibited all such new construction. Some of these prevailing litigants, rather than constructing billboards themselves, have then sold their undeveloped leases and rights. *See, e.g., SMD, L L P v City of Roswell*, 252 Ga App 438, 555 S E 2d 813 (2001), *see also Coral Springs Street Systems, Inc v City of Sunrise*, 287 F Supp 2d 1313 (S D Fla 2003), *Florida Outdoor Advertising, LLC v City of Boynton Beach*, 182 F Supp 2d 1201 (S D Fla 2001). These new transactions may give rise to a new appraisal approach being employed that would have elements of both the Market and Cost Approaches. The value of the permitted leasehold may be derived through the use of a projected Gross Rent Multiplier using these “unbuilt” sales and to that number would be added the depreciated cost value of the sign being condemned. This approach would appear to negate the short-comings of the Cost Approach (using the “bonus value” calculation) as it has been used by many condemnors.