NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM REPORT **119**

CONTROL OF HIGHWAY ADVERTISING SIGNS

SOME LEGAL PROBLEMS

HIGHWAY RESEARCH BOARD
NATIONAL RESEARCH COUNCIL
NATIONAL ACADEMY OF SCIENCES—NATIONAL ACADEMY OF ENGINEERING

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SOME LEGAL PROBLEMS

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AREAS OF INTEREST:
- LAND ACQUISITION
- ROADSIDE DEVELOPMENT
- MAINTENANCE, GENERAL
- LEGAL STUDIES

HIGHWAY RESEARCH BOARD
DIVISION OF ENGINEERING   NATIONAL RESEARCH COUNCIL
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NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

Systematic, well-designed research provides the most effective approach to the solution of many problems facing highway administrators and engineers. Often, highway problems are of local interest and can best be studied by highway departments individually or in cooperation with their state universities and others. However, the accelerating growth of highway transportation develops increasingly complex problems of wide interest to highway authorities. These problems are best studied through a coordinated program of cooperative research.

In recognition of these needs, the highway administrators of the American Association of State Highway Officials initiated in 1962 an objective national highway research program employing modern scientific techniques. This program is supported on a continuing basis by funds from participating member states of the Association and it receives the full cooperation and support of the Federal Highway Administration, United States Department of Transportation.

The Highway Research Board of the National Academy of Sciences-National Research Council was requested by the Association to administer the research program because of the Board's recognized objectivity and understanding of modern research practices. The Board is uniquely suited for this purpose as: it maintains an extensive committee structure from which authorities on any highway transportation subject may be drawn; it possesses avenues of communications and cooperation with federal, state, and local governmental agencies, universities, and industry; its relationship to its parent organization, the National Academy of Sciences, a private, nonprofit institution, is an insurance of objectivity; it maintains a full-time research correlation staff of specialists in highway transportation matters to bring the findings of research directly to those who are in a position to use them.

The program is developed on the basis of research needs identified by chief administrators of the highway departments and by committees of AASHO. Each year, specific areas of research needs to be included in the program are proposed to the Academy and the Board by the American Association of State Highway Officials. Research projects to fulfill these needs are defined by the Board, and qualified research agencies are selected from those that have submitted proposals. Administration and surveillance of research contracts are responsibilities of the Academy and its Highway Research Board.

The needs for highway research are many, and the National Cooperative Highway Research Program can make significant contributions to the solution of highway transportation problems of mutual concern to many responsible groups. The program, however, is intended to complement rather than to substitute for or duplicate other highway research programs.

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This report was prepared by the contracting research agency. It has been reviewed by the appropriate Advisory Panel for clarity, documentation, and fulfillment of the contract. It has been accepted by the Highway Research Board and published in the interest of effective dissemination of findings and their application in the formulation of policies, procedures, and practices in the subject problem area.

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FOREWORD

By Staff

Highway Research Board

The Highway Beautification Act made several major changes in Federal policy regarding control of roadside advertising. These changes are affecting State and local highway programs. This report discusses legal and valuation problems likely to arise in connection with carrying out the provisions of Title I of the Act and alternative roadside advertising control programs based on the use of the police power or the power of eminent domain. Right-of-way engineers and agents, attorneys, appraisers, and other personnel engaged in the highway beautification program and acquisition of property for highway purposes will find much of interest in the problems of controlling outdoor advertising that are discussed in this report.

Legal research has been needed to review all the decided cases discussing all the various elements of compensation and, in particular, the taking from the owner of the sign, all rights in such sign, and the taking from the owner of the real property on which the sign is located and the right to erect and thereafter maintain such signs. In addition, valuation research has been needed to discuss applicable valuation principles and concepts considering the special-purpose nature of outdoor advertising signs.

The research was conducted in two separate areas, by two separate researchers. The valuation research was performed by Donald T. Sutte, Jr. and Associates of Hinsdale, Illinois. The draft report includes a description of the signboard industry, a glossary of terms used in the industry, a description of signboard construction components, and a description of past and current appraisal practices and the appraisal process for signboards. The draft report is available on a loan basis from the offices of the National Cooperative Highway Research Program.

The legal research portion was performed by Professor Roger A. Cunningham of the University of Michigan Law School. The full text of the legal research is included in this report, which first summarizes the provisions of the Highway Beautification Act of 1965 as amended in 1968 and then gives a brief analysis of current State roadside advertising control legislation. The application of the police power to prohibit the erection and compel removal of existing nonconforming signs without compensation is thoroughly discussed. The report also treats legal problems that may arise in connection with acquisition by the States of the property rights of sign owners and landowners upon removal of nonconforming signs.

References and citations are given to all legal literature, including both published and known unpublished material, on the subject. Legal practitioners, right-of-way engineers, appraisers, and others will find this document of practical use.

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The research reported herein was performed under NCHRP Project 11-3(1) by Donald T. Sutte, Jr., and Associates, of Hinsdale, Ill., with Donald T. Sutte, Jr., and Professor Roger A. Cunningham, University of Michigan Law School, as co-principal investigators.

The author especially acknowledges the assistance given by Mr. Sutte, who provided much valuable information about the way in which the highway advertising industry operates and who also made valuable suggestions with respect to the valuation problems discussed in Chapter Four.

CONTROL OF HIGHWAY ADVERTISING SIGNS

SOME LEGAL PROBLEMS

SUMMARY

This report presents the results of a study of legal and valuation problems that are likely to arise in connection with any serious effort to control roadside advertising pursuant to Title I of the Highway Beautification Act of 1965, or any alternative roadside advertising control program based on use of the police power or the power of eminent domain. The report summarizes these provisions and then deals with several constructional problems in the language of Title I. The report's conclusions on these points are as follows:

1. Subsections (b) and (c) of Title I require the States to provide for "effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices" that are within 660 ft of the right-of-way and visible from the main traveled way of the system by limiting such signs to official signs and on-premises advertising signs, to avoid a 10 percent penalty in apportionment of Federal-aid highway funds. But subsection (k) makes it clear that "there is no attempt by the Federal Government to preempt the field to the extent that only Federal regulation may be used to control advertising along the highways." Consequently, a State may, if it chooses, prohibit or limit on-premises advertising signs and it may prohibit or limit advertising signs located more than 660 ft from the right-of-way line. Subsections (b) and (c) merely specify the minimum regulations a State must impose so as to avoid the 10 percent penalty.

2. The language of subsection (d) of Title I is clearly permissive and does not require any State to allow off-premises advertising signs in zoned or unzoned commercial or industrial areas. This is made even clearer by the disclaimer in subsection (k). Thus, any state may, but need not, provide a blanket exemption for off-premises advertising signs in commercial and industrial areas. If a State does wish to provide such an exemption, the Secretary of Transportation must accept the determination of the State or any duly authorized local authority in zoning an area "commercial" or "industrial," and must accept its determination of what constitutes "customary use" for off-premises advertising signs in such areas. The Secretary and the State must agree also on what constitutes an "unzoned commercial or industrial area" and what constitutes customary use of off-premises advertising in these areas. The Secretary will apparently insist on only one absolute requirement, the existence of at least one commercial or industrial activity in any such area. It is not clear whether the Secretary has any residual power to reject a State or local zoning decision that zones an area commercial or industrial solely to allow location of off-premises advertising signs within 660 ft of the right-of-way.

3. Although the language of subsection (e) of Title I is far from clear, it appears to require removal of nonconforming off-premises advertising signs either (1) by July 1, 1970, or (2) by the end of the fifth year after they became non-

conforming. A State may require removal at an earlier date, but clearly no State will be subject to the 10 percent penalty if it meets the subsection (e) deadlines for removal. The new subsection (n), added by amendment in 1968, authorizes a further indefinite delay by providing that no advertising sign will be required to be removed if the Federal share of the just compensation to be paid upon that removal is not available for payment.

4. The conclusions of this report regarding subsection (g), probably the most ambiguous of all the subsections in Title I, are that: First, under Title I the States may not be granted the option of using their police power to accomplish the removal of outdoor advertising signs without payment of compensation and without incurring the 10 percent penalty for failure to provide for effective control of outdoor advertising. Second, subsection (g) was not intended to create for the affected sign owners and landowners an absolute Federal right to compensation—a State may prefer to use its police power to bring about removal of highway advertising signs and to run the risk of incurring the 10 percent penalty—and furthermore, a State need not provide for compensation if it is willing to assume that risk of the 10 percent penalty. Third, if it wishes to comply with Title I, the State must pay for a lawfully erected nonconforming advertising sign that it eliminates, whether it is deemed real or personal property, or is the sign owner's leasehold interest (if the sign is erected on the land of another pursuant to an advertising lease); and the State must pay for the landowner's right to erect advertising signs. (It is not clear whether Congress intended the landowner to receive compensation for the taking of his advertising right in perpetuity, or for only the taking of his right to maintain an existing sign or to receive rents under an existing advertising lease. The tentative conclusion of this report is that Congress intended the former.)

This report concludes that Title I is clearly constitutional.

Of the 50 States, 7 have advertising control legislation in force. Of these, 32 now have legislation enacted in response to the Highway Beautification Act of 1965, although only 18 have statutes that clearly comply with the Act. Five others have compliance laws that are doubtful as to their actual compliance with the Act, and nine have compliance laws that clearly do not comply with the Act. One State has a statute enacted in response to the Act for the purpose of prohibiting erection of any new advertising signs that would become nonconforming, but the statute was not intended to comply with the Act in full.

Fourteen States have advertising control legislation that is not responsive to the Highway Beautification Act at all. In 10 of these States the legislation was designed (in whole or in part) to comply with the bonus provision of the Federal-Aid Highway Act of 1958. Only 5 of these 14 States make any provision for elimination of nonconforming uses by purchase or condemnation. The rest rely entirely on the police power for that purpose.

Eighteen States have executed agreements with the Secretary of Transportation defining "unzoned commercial and industrial areas" and setting standards for size, spacing, and lighting of signs in such areas. Of these States, 12 have compliance laws that clearly do comply with the Highway Beautification Act; 5 have no complying legislation, so the agreements will be without legal effect unless and until they adopt compliance laws; and 1 has recently enacted legislation that may require renegotiation. None of the States with clearly noncomplying compliance laws has entered into an agreement with the Secretary.

Some of the State compliance laws raise a serious "equal protection" problem by omitting required payment of just compensation upon removal of nonconforming signs lawfully erected between October 22, 1965, and the date of enactment of the advertising control statute. Moreover, most of the State compliance laws do not clarify the question whether a landowner must be compensated on the basis of a taking of his advertising rights in perpetuity, or only on the basis of a taking of the right to maintain existing signs or to receive rentals under existing advertising leases.

Compliance laws of some States contain provisions defining in greater detail the just compensation to be paid upon removal of nonconforming signs—e.g., "severance damage and damage to the remainder of the outdoor advertising plant," in addition to the value of the property interests taken. Where a compliance law does not include such a provision, it is impossible to say whether or not a State court may allow severance damage.

All of the current State advertising control laws rely on the police power to prohibit at least the erection of new signs in the control areas adjacent to highways of specified types. In most jurisdictions the police power is adequate to prohibit erection of new advertising signs in specified areas. There is now substantial authority that the regulation of advertising signs (including prohibition in specified areas) is justifiable under the police power, on the grounds that it is reasonably calculated to protect the public safety and general welfare—with aesthetic considerations now recognized as a legitimate component of the general welfare in most States. Moreover, recent cases emphasize that use of land adjacent to highways for advertising purposes is really a private use of public highways constructed with public funds, and that such a use is therefore subordinate to the public interest in traffic safety and scenic amenity. Five recent cases upholding State laws that use the police power to control highway advertising leave little doubt that most States today have ample constitutional power to prohibit erection of new signs without providing for compensation. Although certain "equal protection" arguments can be leveled against some of the compliance laws stimulated by the Highway Beautification Act of 1965, none of these arguments seems likely to prove successful.

The adequacy of the police power to compel removal of lawfully erected nonconforming advertising signs is a problem that will not arise under the State laws passed to comply with the Highway Beautification Act because they all require payment of just compensation upon removal of such signs. But the problem is one that either has or may come up in the 10 States that provide for control of highway advertising by means of the police power without providing for payment of compensation upon removal of nonconforming signs. On the basis of the current judicial attitude toward the elimination of nonconforming uses by zoning regulations, most State courts appear likely to sustain statutes that require removal of nonconforming signs without compensation, at least where a reasonable amortization period is allowed. Indeed, the five recent cases referred to in the preceding paragraph sustained statutory provisions requiring removal of nonconforming highway advertising signs without compensation; the statute allowed a substantial amortization period in two of these cases but not in the other three. Four of the cases upheld advertising control laws that applied to Interstate highways (laws that had been enacted to take advantage of the bonus provision of the Federal-Aid Highway Act of 1958), and one upheld the advertising control law applicable to the New York State Thruway.

The provision for payment of just compensation in the State laws enacted to comply with the Highway Beautification Act may raise serious "equal protection" problems in some States. For example, the statute does not provide for payment of compensation when signs lawfully erected between October 22, 1965, and the date of passage of the statute are required to be removed, although compensation must be paid upon removal of signs lawfully erected before October 22, 1965, and after the date of enactment of the statute. This discrimination is hard to justify. Moreover, other "equal protection" problems may arise in those States that, prior to October 22, 1965, enacted legislation requiring removal of most outdoor advertising signs along the Interstate highways without compensation (although usually with a substantial amortization period). In such States, the subsequent enactment of a statute designed to comply with the Highway Beautification Act and designed to provide for payment of compensation upon removal of nonconforming signs may be held to result in unconstitutional discrimination against those whose signs along the Interstate highways were previously removed (or were subject to removal at the end of an amortization period) without compensation. The argument would be that if compensation is to be paid upon removal of signs along the Federal-aid primary system pursuant to the post-1965 compliance law, then "equal protection of the laws" requires compensation of those whose signs were (or will be) removed from areas adjacent to the Interstate highways. In any case, once a compliance law is enacted in a given State, with a provision for compensation of sign owners and landowners when nonconforming signs are required to be removed from areas adjacent to the Interstate and Federal-aid primary systems, it will become almost impossible to justify future State police power legislation requiring removal of outdoor advertising signs along secondary and other State and local highways without compensation.

A variety of legal problems may arise in connection with acquisition by the States of property rights upon removal of nonconforming highway advertising signs. Conclusions on several preliminary questions are that:

1. States wishing to comply with the Highway Beautification Act cannot avoid compensating sign owners by simply allowing current advertising leases to expire and prohibiting new advertising leases on land adjacent to the Interstate and Federal-aid primary highways.

2. Elimination of nonconforming highway advertising signs will almost certainly be held to satisfy the "public use" and "public purpose" requirements for exercise of the eminent domain power and for the use of public funds to pay just compensation.

3. The States are not likely to have serious difficulty in establishing the necessity for taking when nonconforming signs are condemned.

4. The requirement of bona fide purchase negotiations before resort to condemnation may cause difficulty where the separate interests of a sign owner-lessee and a landowner-lessor must be acquired.

In the matter of definition of the property interests to be acquired by the State when nonconforming highway advertising signs are required to be removed—in most States the signs themselves will be classified as fixtures and will therefore be treated as realty in condemnation proceedings. This is true whether the sign is owned by the landowner or is owned by a lessee who erects it pursuant to an advertising lease. Under an advertising lease, the interest of the sign owner in the land is not really a leasehold estate, however—it is an "easement in gross for a term of years." And the interest of the landowner that must be acquired by the State is also an easement—a "negative easement against advertising." This will give the State no affirmative right to use the land for advertising purposes, but will give the State the right to prevent use of the land for advertising. The landowner's advertising rights are really being extinguished, rather than being transferred to the State. This assumes, of course, that the State advertising control laws will be construed to require the acquisition of a permanent or perpetual negative easement against advertising. If the statutes are construed to require only that the landowner's rights under existing advertising leases or his rights in connection with existing advertising signs on his land be extinguished, the interest acquired by the State is impossible to describe in terms of traditional property classifications. In either case, however, the landowner will have to be compensated.

General principles of valuation in eminent domain proceedings that have been sanctioned by judicial decision include (1) the market data or sales approach; (2) the income approach; and (3) the cost approach. These are applied to the problem of valuing the property interests acquired or extinguished according to the State advertising control laws.

Where the sign and the land are under common ownership, and the owner deals directly with advertisers who rent signboard space from him, the value of the owner's interest can best be valued as a unit by the income approach—i.e., by capitalizing the rental income at an appropriate rate. If the sign and the land are under common ownership and the sign is used to advertise a business that the owner operates at a different location—e.g., a motel, restaurant, or service station—the income approach will be difficult to apply, however, because it will be difficult to impute rental income to the owner with any accuracy. Presumably the only way to do so will be to ascertain what the owner would have had to pay an outdoor advertising company for rental of advertising space on a similar signboard and to treat this amount as imputed rental income that may be capitalized to determine the value of the sign and the advertising rights to be acquired. But it probably will be hard to find similar signs because the actual sign to be valued will usually be a nonstandard sign that varies considerably in size, design, and construction from the signs erected by the standardized outdoor advertising industry. Use of the cost approach to valuation of the sign itself is feasible, but this will not solve the difficult problem of valuing the landowner's advertising rights.

When a nonconforming advertising sign is constructed by one who does not own the land and according to an advertising lease, the interests of the lessor and lessee should be separately valued. Where the sign is owned by one of the standardized outdoor advertising companies, the company's entire property interest should be valued as a unit, and here the best approach to valuation is the income approach, at least in the initial years of any sign removal program. At present it is impossible to establish the value of a sign company's interest on the basis of comparable sales, although this might become feasible later on as data on negotiated purchases of sign company interests accumulate. For the time being, however, the recommendation is a Gross Rent Multiplier approach. Subsequently, it may be possible to apply the net income capitalization approach. In most States it is clear that the courts will permit use of either the Gross Rent Multiplier or the net income capitalization approach when comparable sales data are not available.

A special problem is presented when a substantial part of the total number of signs and leaseholds constituting a particular outdoor advertising plant are taken. In these cases the loss of so large a part of the plant may result in a disproportionate reduction in the total income of the plant, so that the remainder of the plant may have less value after the taking than before. There is also something like severance damage to the remainder of the advertising plant, although according to traditional views the advertising plant is not an entity to which the partial taking and severance damage doctrines are applicable. However, at least four States have advertising control laws expressly providing that compensation for the taking of nonconforming signs shall include severance damage or damage to the remainder of the outdoor advertising plant, or both. If each nonconforming sign and its associated leasehold must be separately taken under such laws, it would seem that the proper way to value the sign company's interest in each case is to determine the difference between the value of the entire advertising plant before and after each taking. But the simplest and least expensive way to determine compensation is to ascertain the value of an entire advertising plant before and after all takings and allow the difference between them as the value of all property interests taken. This would be feasible if the State highway agencies could arrange to take at the same time all nonconforming signs and associated leaseholds comprising parts of a particular advertising plant. In those States where the advertising control laws do not require payment of severance damage or damage to the remainder of the outdoor advertising plant, it is hard to predict whether courts will treat an advertising plant as an entity and allow severance damage, as in cases of partial takings.

Nonstandard outdoor advertising signs vary greatly in size, shape, and construction. In valuing those maintained according to advertising leases, the income approach can generally be used. In many rural areas, however, most of the nonconforming signs are nonstandard signs erected pursuant to leases given directly to advertisers rather than to advertising companies, and they generally advertise roadside businesses. Because the advertiser has no actual rental income from the sign, it appears that the income approach to valuation is not feasible and that it will be necessary to resort to the cost approach. That is, the reproduction cost of the sign must be determined, the estimated depreciation deducted, and the difference added to the value of the advertiser's leasehold interest. The value of the leasehold is the difference between the economic rent and the contract rent for the balance of the lease term, plus any periods for which the lessee has the option to renew. In many cases, of course, it will be impossible to prove that the economic rent exceeds the contract rent and the leasehold will be found to have no value.

In any case where the nonconforming sign is erected on the land of another in accordance with an advertising lease, the value of the landowner's advertising rights may be separately determined by the income approach. If the State acquires a permanent negative easement against advertising, the value of the landowner's rights will generally be the present value of the anticipated rental income that would be realized by the landowner from the leasing of his land for advertising purposes if he were not prohibited from leasing it for such purposes. If the use of the land for advertising purposes will not in the future interfere with the highest and best use of the land, capitalization of current rental income by means of annuity mathematics seems appropriate. If use of the land for advertising purposes will not be consistent with future devotion of the land to its highest and best use, capitalization on an annuity basis is not appropriate. And if a State's advertising control law is construed as authorizing only the acquisition of the landowner's advertising rights under the current lease, the value of the rights taken will be only the present value of the lease rental for the rest of the current lease term.

In all cases where a substantial number of nonconforming signs and associated leaseholds owned by a single advertising company must be acquired pursuant to a State advertising control law, serious consideration should be given to the so-called Snarr plan, which calls for acquisition of all the nonconforming signs and associated leaseholds of a given company within a given State on the basis of a single negotiated contract. Although the Snarr plan was developed to deal with acquisition of nonconforming sign properties in Utah, it is clearly adapted for use in cases where negotiated purchase turns out to be impossible and there is no alternative to condemnation.

CHAPTER ONE

THE ADVERTISING CONTROL PROVISIONS OF THE HIGHWAY BEAUTIFICATION ACT OF 1965, AS AMENDED

A. SUMMARY OF TITLE I, AS AMENDED

Title I of the Highway Beautification Act of 1965,[1] which amended and practically rewrote Section 131 of Title 23 of the United States Code, supplied the impetus for adoption of a majority of the current State statutes dealing with control of outdoor advertising along the Interstate and primary Federal-aid highways. Consequently, this study begins with a description of Title I of the 1965 Act, as amended to date.

Title I, Section 101, subsection (a),[2] states the Congressional finding and declaration that "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty."

Subsection (b) states that if a State has not acted by January 1, 1968, to make provision for effective control of the erection and maintenance, along the Interstate and primary systems, of outdoor advertising signs within 660 ft of the nearest edge of the right-of-way and visible from the main traveled way of the system, that State's annual apportionments of highway construction funds under Section 104 of Title 23 of the United States Code shall be reduced by an amount equal to 10 percent of the amounts that would otherwise be apportioned to that State, until that State provides for effective control of such outdoor advertising signs. The 10 percent penalty applies to the entire apportionment of funds to the State, not only for the Interstate and primary systems but also for the secondary system and the urban extensions thereof. Any amount that is withheld from apportionment to any State under subsection (b) is to be reapportioned to the other States. The Secretary of Transportation [3] is to determine whether a State has made provision for effective control of outdoor advertising. Whenever he determines it to be in the public interest, he may suspend for such periods as he deems necessary the application of the 10 percent penalty to a State.

Subsection (l) provides for judicial review in the United States district courts of any final determination by the Secretary of Transportation to withhold funds from a State under subsection (b) because of its failure to provide for effective control of outdoor advertising along the Interstate and primary highway system.

"Effective control" of advertising, as defined in subsection (c), means that outdoor advertising signs within 660 ft of the right-of-way on the Interstate and primary systems will be limited to (1) directional and other official signs and notices required or authorized by law, (2) signs advertising the sale or lease of the property on which they are located, and (3) signs advertising activities conducted on the property on which they are located.[4] Subsection (d) provides additional exceptions; it allows advertising signs within 660 ft of the right-of-way in areas that are zoned industrial or commercial under authority of State law, and in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The size, lighting, and spacing of advertising signs "consistent with customary use" in zoned or unzoned commercial areas are to be determined by agreement between the several States and the Secretary; but, by virtue of a 1968 amendment,[5] whenever a bona fide State, county, or local zoning authority has made a determination of "customary use," such determination must be accepted by the Secretary "in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority." The States are also given full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard are to be accepted for purposes of the Act.[6]

Subsection (e) provides that no advertising sign lawfully in existence along the Interstate or primary systems on September 1, 1965, that does not conform to the requirements of Title I will be required to be removed until July 1, 1970; and that no other sign that is lawfully erected will be required to be removed until the end of the fifth year after it becomes nonconforming.

Subsection (g) requires that just compensation will be paid upon the removal of outdoor advertising signs lawfully in existence on the date of enactment of the Highway Beautification Act, those lawfully on any highway made a part of the Interstate or primary system after the date of

[1] Pub. L. No. 89-285, effective October 22, 1965. This statute is referred to hereinafter as the Highway Beautification Act.

[2] Section 101 of Title I of the Highway Beautification Act completely changed the substance of Section 131 of Title 23 of the U.S. Code; Section 102 simply provided that the table of sections of chapter 1 of Title 23 of the U.S. Code should be amended by striking out the old section heading, "131. Areas adjacent to the Interstate System," and inserting in lieu thereof, "131. Control of outdoor advertising." Although technically all the lettered paragraphs in Title I of the Highway Beautification Act are subsections of section 101 thereof, for convenience they are referred to in this report as subsections of Title I. As indicated *supra,* all the substantive provisions of Title I are in section 101; section 102 contains no subsections.

[3] All statutory references to "the Secretary" originally meant "the Secretary of Commerce." Now, of course, they mean "the Secretary of Transportation."

[4] Signs in classes (2) and (3) are referred to hereafter as on-premises advertising signs.

[5] Pub. L. No. 90-495, § 6(a) (Aug. 23, 1968); 23 U.S.C.A. § 131(d) (Supp. 1969).

[6] Title I, subsection (d), begins with the following explanatory phrase: "In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section . . ."—a phrase that has caused much difficulty because it can be construed as stating a second Congressional purpose for enactment of Title I, in addition to that stated in subsection (a).

enactment and before January 1, 1968, and those lawfully erected on or after January 1, 1968. Compensation is to 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.

In all cases the Federal share of such compensation is to be 75 percent. But by virtue of a new subsection (n), added by amendment in 1968,[7] no advertising sign will be required to be removed if the Federal share of the just compensation to be paid upon removal of the sign is not available to make such payment.

The Secretary is expressly authorized by subsection (j) to continue the bonus payments provided for by the Federal-Aid Highway Act of 1958 [8] to any State highway department that, prior to July 1, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs in areas adjacent to the Interstate System,[9] provided such State highway department maintains the control required under such agreement. But this provision "shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in" Title I. So a state might continue to qualify for bonus payments of 1½ percent under the 1958 Act and at the same time be subject to the 10 percent penalty for failure to comply with the requirements of Title I of the Highway Beautification Act of 1965.

Subsection (k) provides that nothing in Title I "shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under" Title I.

Although the advertising control provisions of the Highway Beautification Act of 1965 have been the subject of unremitting controversy from the date of enactment until the present time, only three substantive amendments of Title I have been adopted in the intervening years.

As previously pointed out, subsection (d) was amended in 1968 by the addition of the following provision: "Whenever a bona fide State, county or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority." [5] The adoption of this amendment was the culmination of a long battle over the way in which "customary use" with regard to size, spacing, and lighting of advertising signs should be determined. All of the outdoor advertisers objected strongly to the standards on customary use proposed by the Bureau of Public Roads in its report to Congress on January 10, 1967,[10] "as a basis on which to establish agreements between the several States and the Secretary." [11] The 1968 amendment represented a substantial victory for the standardized outdoor advertising industry, which has a majority of its signs in urban areas zoned for commercial or industrial use. The amendment of subsection (d) did not, however, meet the demands of those roadside business advertisers whose signs are located primarily in unzoned rural areas. As a result of the amendment, it is now possible that the definition of "customary use" with regard to size, spacing, and lighting of outdoor advertising signs may differ within a given State (as between zoned and unzoned commercial and industrial areas) despite the fact that the

[7] Pub. L. No. 90-495, § 6(d) (Aug. 23, 1968); 23 U.S.C.A. § 131(n) (Supp. 1969).

[8] Pub. L. No. 85-767 (Aug. 27, 1958); 72 Stat. 904. For discussion of the 1958 law and the national standards promulgated thereunder, see Enfield, *Control of Outdoor Advertising: Federal Law and Standards*, HRB 1961 Report of Committee on Roadside Development (1961) pp. 54-58; Black, *National Policy and Standards Relating to Control of Roadside Advertising Along the Interstate System*, HRB Bull. 337 (1962) pp. 3-6. Netherton and Markham, Roadside Development and Beautification—Legal Authority and Methods, Part II, HRB (1966) pp. 48-50. The national standards, as promulgated by the Secretary of Commerce, were published in 23 Fed. Reg. 6679 (1958), and may now be found in 23 C.F.R. § 20.1-20.10 (1969). Pertinent administrative directives were issued by the Bureau of Public Roads of the Commerce Department in *Policy and Procedure Memorandum 21-4.S* (Jan. 22, 1963), relating to acquisition of advertising rights, and *PPM 30-8* (Jan. 22, 1963), dealing with incentive payments for controlling outdoor advertising on the Interstate System.

[9] A total of 25 States ultimately enacted legislation designed to take advantage of the bonus payments available under the 1958 Federal-Aid Highway Act. These States were California, Colorado, Connecticut, Delaware, Georgia, Illinois, Iowa, Hawaii, Kentucky, Maine, Maryland, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, West Virginia, and Wisconsin. For a detailed analysis of the advertising-control legislation of these States, see Netherton and Markham, *supra* note 8, at 142-145. Of the 25 States listed above, 19 entered into the required agreements with the Secretary of Commerce. States which did not do so were Hawaii, Maine, North Dakota, Ohio, and Pennsylvania. For a table listing States with and without agreements, see Netherton and Markham, *supra* note 8, at 145.

See also: Price, *Billboard Regulations Along the Interstate Highway System*, 8 Kan. L. Rev. 81 (1959); Powers, *Control of Outdoor Advertising: State Implementation of Federal Law and Standards*, 38 Neb. L. Rev. 541 (1959); Johnson, *The Structure and Content of State Roadside Advertising Control Laws*, HRB Bull. 337 (1962) pp. 6-14; Gilliam, *The Case for Billboard Control: Precedent and Prediction*, 36 Dicta 461 (1959); Little, *Colorado Needs a Constitutional and Effective Roadside Sign Law*, 36 Dicta 475 (1959); Comment, *Outdoor Advertising Control Along the Interstate Highway System*, 46 Calif. L. Rev. 796 (1958); Buscher, *Structure and Content of Administrative Regulations for Roadside Advertising Control*, HRB Bull. 337 (1962) pp. 15-23; Arizona Highway Dep't. Roadside Development Division, *National Billboard Legislation Review, January 1963*.

[10] S. Doc. No. 6, 90th Cong., 1st Sess. (1967).

[11] *Id.* at 45. In his letter of transmittal, Mr. Boyd, then Under Secretary of Commerce for Transportation, said: "These standards represent the Department's position on which discussions will be based in reaching agreement with the individual States for control of outdoor advertising in zoned and unzoned commercial and industrial areas." [*Id.* at V.]

In a letter to Under Secretary Boyd subsequent to submission of the Report, Senator Randolph, Chairman of the Senate Committee on Public Works, said:

> It is my understanding that these standards are the point from which negotiations with the States will be started. . . . It is my further understanding that these standards and criteria are not to be used as a statement of the Department's final position to which the States must agree if they are to avoid the imposition of the 10-per cent penalty. . . . In this light, it is clear that it would not be in accord with the act for you to determine to withhold funds from a State on the sole ground that the State has made a proposal differing from your standards or that good-faith negotiations have not been concluded by January 1, 1968. I feel that neither of such grounds would constitute the "failing to agree" that is specified in the act. I would appreciate your confirmation of these points of understanding and any additional comments you may have on the procedure for reaching agreements with the several States. [*Id.* at III.]

In his reply to Senator Randolph's letter, Acting Under Secretary Bridwell said:

> The proposed standards represent the Secretary's position from which negotiations will be started to reach agreement on the regulations that will apply in the individual State. The proposed standards were developed after hearings had been held in all States, and represent the national findings. Each State had representatives at its hearing and has been furnished a complete copy of the proceedings. The opportunity is available to the individual State to show any differences between the State and National "customary use" and other aspects. Each State will have full opportunity to discuss its position before any consideration is given to the withholding of funds. [*Id.* at IV.]

Secretary of Commerce prior to adoption of the Highway Beautification Act of 1965 stated that "in order to avoid an obvious inequity, those areas which are actually used for commercial or industrial purposes should be treated as if they were zoned for such purposes." [12]

Another significant 1968 amendment of Title I, as previously indicated, added a new subsection (n), which provides that no advertising signs "shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign . . . is not available to make such payment." [7] This amendment represented a great victory for the advertising industry as a whole, and for those States concerned about the possibility that they might be required to pay for advertising signs removed pursuant to Title I whether or not any Federal funds are available to pay the 75 percent Federal share of the required just compensation. Because the total amount of Federal funds authorized for the purpose of implementing Title I since the fiscal year ending June 30, 1967, has been only $2 million, the practical effect of the new subsection (n) has been to guarantee that little or no sign removal would actually take place pursuant to the Highway Beautification Act during the period 1966-1970.

Title I was also subject to a third, somewhat less significant amendment in 1968. Subsection (j) originally provided for continuation of bonus payments to any State that had entered into an agreement with the Secretary of Commerce under the Federal-Aid Highway Act of 1958 (which expired June 30, 1965), provided "the State maintains the control required under such agreement or the control required by this section, whichever control is stricter." The 1968 amendment to subsection (j) [13] eliminated the requirement that a State must meet the stricter of the two standards, thus assuring that bonus payments will be continued so long as a State "maintains the control required under such agreement."

At the time of this writing, the January 1, 1968, deadline for the States to provide for "effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices" has long since passed. Less than one-half the States are in full compliance with Federal requirements for effective control,[14] but the Secretary of Transportation has not yet imposed upon any State the 10 percent penalty provided by Title I, subsection (b) of the Highway Beautification Act. To date, the Secretary has informally exercised his discretion to suspend the application of the 10 percent penalty to any State.

In 1969 abortive attempts were made to amend Title I. The Senate bill [15] would have authorized the Secretary to enter into agreements with one or more States for the purpose of carrying out pilot programs to determine the best means of accomplishing the objectives of Title I, and would have appropriated $15 million for such pilot programs. The legislative history of the Senate bill clearly indicates that it was designed to allow Utah to proceed with removal of nonconforming billboards pursuant to the Snarr plan, which is discussed later in this study. The 1969 House bill [16] would have: (1) changed the deadline for compliance with subsection (b) of Title I from January 1, 1968, to January 1, 1971; (2) appropriated a mere $1.5 million for highway beautification programs in fiscal 1971; and (3) required the Secretary, in cooperation with the State highway departments, to "make a full and complete investigation and study of how such programs should be carried out to effectively provide the desired public and private benefits and submit to Congress a report based on such investigation and study, including his recommendations, not later than April 15, 1970." Neither bill became law, but the Department of Transportation nevertheless restudied the problems arising under Title I and issued a report thereon in June 1970. A bill encompassing the restudy recommendations was introduced in the Senate on July 1, 1970,[17] and another bill with the same provisions as the abortive 1969 Senate bill was introduced on August 18, 1970.[18] Neither of these bills was enacted by Congress, however.

Ultimately, Congress included in the Federal-Aid Highway Act of 1970 [19] a provision creating an 11-member Commission on Highway Beautification, to be composed of two majority and two minority members from each of the two Congressional Public Works Committees and three members to be appointed by the President "from among persons who are not officers or employees of the United States." [20]

The Commission on Highway Beautification is charged to

> study existing statutes and regulations governing the control of outdoor advertising and junkyards in areas adjacent to the Federal-aid highway system; (2) review the policies and practices of the Federal and State agencies charged with administrative jurisdiction over such highways insofar as such policies and practices relate to governing the control of outdoor advertising and junkyards; (3) compile data necessary to understand and determine the requirements for such control which may now exist or are likely to exist within the foreseeable future; (4) study problems relating to the control of on-premise outdoor advertising signs, promotional signs, directional signs, and signs providing information that is essential to the motoring public; (5) study methods of financing and possible sources of Federal funds, including use of the Highway Trust Fund, to carry out a highway beautification program; and (6) recommend such modifications or additions to existing laws, regulations, policies, practices, and demonstration programs as will, in the judgment of the Commission, achieve a workable and effective highway beautification program and best serve the public interest.

[12] Letter from John T. Connor, Secretary of Commerce, to Rep. John C. Kluczynski, Chairman, Subcommittee on Roads, House Committee on Public Works, September 14, 1965, reprinted in H.R. REP. No. 1084, 89th Cong., 1st Sess. 4 (1965).

[13] Pub. L. No. 90-495, § 6(b) (Aug. 23, 1968); 23 U.S.C.A. § 131(j) (Supp. 1969).

[14] As indicated in Chapter Two, *infra*, a total of 32 States have enacted highway advertising control legislation for the purpose of complying with Title I of the Highway Beautification Act, but of these 32 States only 18 have statutes that clearly comply with Title I. As of July 1, 1970, 12 of these 18 States have agreements with the Secretary of Transportation defining unzoned commercial and industrial areas and setting out standards for size, lighting, and spacing of signs in unzoned commercial and industrial areas. *See* 1969 S. REP., *infra* note 132, at 4.

[15] S. 1442, 91st Cong., 1st Sess. (1969).

[16] H.R. 14741, 91st Cong., 1st Sess. (1969).

[17] S. 4055, 91st Cong., 2nd Sess. (1970). See § 108, "Control of Outdoor Advertising."

[18] S. 4260, 91st Cong., 2nd Sess. (1970). See § 113, "Control of Outdoor Advertising."

[19] Pub. L. No. 91-605 (enacted Dec. 31, 1970); derived from S. 4418 and H.R. 19504.

[20] See *id.* § 123.

The Commission is to report to the President and to Congress within one year from the time its work is funded.[21] The funding authorization for the Commission's work is only $200,000, but the 1970 Act also authorizes the appropriation of $27 million, $20.5 million, and $50 million, respectively, for the fiscal years ending June 30, 1971, June 30, 1972, and June 30, 1973, to carry out the provisions of Title I of the Highway Beautification Act.[22]

B. TITLE I: SOME PROBLEMS OF CONSTRUCTION

The main thrust of Title I is reasonably clear. Unless it is willing to accept a 10 percent cut in the apportionment of Federal funds for construction of highways within the State, each State must establish effective control of outdoor advertising along the Interstate and primary Federal-aid highways within its boundaries. "Effective control" means that no signs other than "directional and other official signs and notices" and so-called on-premises advertising signs shall be permitted within 660 ft of the highway right-of-way (unless they are invisible from the main traveled way), except in zoned or unzoned commercial or industrial areas. Thus, all off-premises advertising signs are prohibited, and existing off-premises signs must be removed in areas that are neither zoned for commercial or industrial use nor determined to be commercial or industrial in character although not so zoned. In practice, this means that almost all off-premises advertising signs in rural areas will have to be removed,[23] inasmuch as most rural areas are not zoned at all or are zoned for agricultural use and they contain few areas developed for commercial or industrial use. In urban areas, where most of the existing off-premises advertising signs are located in areas zoned for commercial or industrial use, such signs will not be subject to removal under Title I unless they fail to conform to certain standards as to size, lighting, and spacing,[24] and new off-premises advertising signs may be established so long as they conform to such standards, which must be consistent with customary use.

In areas zoned for commercial or industrial use by "a bona fide State, county or local zoning authority," what is customary use with respect to size, lighting, and spacing of off-premises advertising signs may be determined either by such zoning authority or by "agreement between the several States and the Secretary." [25] What constitutes an unzoned commercial or industrial area, and what standards as to size, lighting, and spacing of off-premises advertising signs are to apply therein, "consistent with customary use," are to be determined "by agreement between the several States and the Secretary." [25]

Prohibition of future erection of off-premises advertising signs in areas or at locations not permitted under Title I of the Highway Beautification Act is to be accomplished through use of each State's police power, to the extent this is constitutionally possible. Off-premises advertising signs erected in such areas or at such locations are to be removed whether they were erected before or after enactment of Title I and whether they were lawfully or unlawfully erected. The States are expected to use their police power to remove any signs that were unlawfully erected either before or after the enactment of Title I. But, as a general rule, just compensation is to be paid upon removal of off-premises advertising signs that were lawfully erected, and the Federal government will pay 75 percent of the required just compensation.[26]

Unfortunately, Title I is not well drafted. This is partly a result of the obvious fact that Title I represents an uneasy compromise between those members of Congress who wanted little, if any, control of outdoor advertising along the highways and those members who wanted very stringent controls. This poor draftsmanship that reflects a lack of adequate consideration characterizing the passage of Title I in the Congress has resulted in frequent use of language that is either unclear or ambiguous. Title I thus raises a number of difficult problems of statutory construction, none of which has been authoritatively resolved by the Supreme Court of the United States. The writer proposes here to deal with the following constructional problems:

1. What does effective control of outdoor advertising mean under subsections (b) and (c), in light of subsection (k)?
2. What is the meaning and effect of subsection (d), with its provisions for off-premises advertising in commercial and industrial areas?
3. What is the meaning and effect of subsections (e) and (n) in light of subsection (k)?
4. What is the meaning and effect of the provisions in subsection (g) with respect to payment of just compensation upon removal of nonconforming outdoor advertising signs?

1. Effective Control of Outdoor Advertising Under Subsections (b) and (c), in Light of Subsection (k)

Subsection (b) of Title I [27] requires the States to provide 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" in order to avoid a 10 percent penalty in apportionment of Federal-aid highway funds. Subsection (c)[28] defines "effective control" to mean that signs within the

[21] Pub. L. No. 91-605, § 123 (j), expressly provides for appointment, by the head of each Federal department or independent agency "which has an interest in or responsibility with respect to the control of outdoor advertising and of junkyards" of "a liaison officer who shall work closely with the Commission and its staff." The Commission is also expressly directed to "seek the advice of various groups interested in the problems relating to the control of outdoor advertising and junkyards including, but not limited to, State and local governments, public and private organizations working in the fields of environmental protection and conservation, communications media, commercial advertising interests, industry, education, and labor." (*Id.* § 123 (k).)

[22] Pub. L. No. 91-605, § 122 (a).

[23] *See* Exhibit 2, *Hearings on S. 1442 Before the Subcomm. on Roads of the Senate Comm. on Public Works,* 91st Cong., 1st Sess., at 86 (1969) [hereinafter cited as *1969 Senate Hearings*], indicating that approximately 839,000 signs (some 94 percent of the total) in rural areas would have to be removed.

[24] See *ibid.*, indicating that, by means of the Federal-State agreements entered into by the Bureau of Public Roads, existing signs that are nonconforming only because of violation of size, lighting, or spacing regulations will be allowed to remain.

[25] 23 U.S.C.A. § 131(d) (Supp. 1969), *as amended* by Pub. L. No. 90-495 (Aug. 23, 1968).

[26] 23 U.S.C.A. § 131(g) and (n) (Supp. 1969), *as amended* by Pub. L. No. 90-495, § 6(d) (Aug. 23, 1968).

[27] 23 U.S.C.A. § 131(b) (1966).

[28] *Id.* § 131(c).

660-ft strips adjacent to the Interstate and primary highways shall be limited to official signs and on-premises advertising signs. But subsection (k)[29] provides that nothing in Title I "shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under" Title I. The legislative history indicates that this provision was included "to make it clear that there is no attempt by the Federal government to preempt the field to the extent that only Federal regulation may be used to control advertising along the highways." [30] But it is not clear what Congress had in mind in using the terms "standards" and "limitations."

After a careful perusal of all the committee hearings,[31] committee reports,[32] and floor debates [33] that preceded enactment of the Highway Beautification Act, the author has concluded that subsection (k) was designed to make it clear that the States might impose stricter limitations (by means of standards embodied either in State statutes or in local ordinances enacted pursuant to State enabling legislation) than the limitations *required* by subsection (b) and (c) of Title I itself. Thus, subsection (k) makes it clear that none of the provisions of subsections (b) and (c) is intended to give commercial sign owners any Federal right to maintain advertising signs *more* than 660 ft from the highway right-of-way, or to maintain on-premises advertising signs within the 660-ft strip adjacent to Interstate and primary highways. All subsections (b) and (c) do, with respect to the required setback from the right-of-way and with respect to on-premises advertising signs, is to specify the *minimum* limitations a State must impose on outdoor advertising in order to avoid the 10 percent penalty provided by subsection (b). It follows that a State statute or local ordinance may, without being deemed inconsistent with Title I, impose controls on outdoor advertising within an area wider than the 660-ft strip on either side of the highway right-of-way, which is the minimum required by subsection (b). Similarly, a State statute or local ordinance may impose controls on the on-premises signs that are exempted from mandatory control by subsection (c).

2. Subsection (d): The Commercial Area and Industrial Area Exceptions

No part of Title I has generated more controversy than subsection (d),[34] which permits outdoor advertising signs

> whose size, lighting and spacing, consistent with customary use, is to be determined by agreement between the several States and the Secretary, . . . within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary . . . [and which further provides that the States] shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes and the actions of the States in this regard will be accepted for the purposes of this Act.

The language of subsection (d) with respect to off-premises advertising signs is clearly permissive rather than mandatory. Thus, even without subsection (k), the conclusion would be reached that a State statute or local ordinance dealing with control of outdoor advertising need not include the blanket exemption permitted by subsection (d) for off-premises signs in zoned and unzoned commercial and industrial areas. This conclusion is strengthened when subsection (k) is taken into account. The net result is that a State statute or local ordinance may, for example, prohibit all off-premises advertising signs in all zoned retail business districts, or in certain kinds of zoned retail business districts such as shopping centers, or in certain zoned industrial districts such as industrial parks. In all such cases, the stricter limitations imposed by the State or local ordinance would be fully consistent with the effective control requirement of subsection (b), and would preclude imposition of the 10 percent penalty thereunder.[35]

Unfortunately, however, subsection (d) presents more difficult problems with respect to construction of the language relating to "customary use," to "agreement between the several States and the Secretary," and to the authority of the States under their own zoning laws to zone areas for commercial and industrial use.

On January 10, 1967, after holding 52 public hearings throughout the United States, the Bureau of Public Roads reported to Congress a set of "proposed standards and criteria for size, lighting and spacing of signs permitted in commercial or industrial zones and areas, including the definition of an unzoned commercial or industrial area for outdoor advertising control." [36] These proposed standards and criteria were expressly stated to be merely "a basis on which to establish agreements between the several States and the Secretary." [37] But they were subject to massive objection and criticism from the advertising industry during the 1967 hearings of the Subcommittee on Roads of the House Public Works Committee,[38] principally on the grounds that (1) the proposed standards and criteria were too restrictive and (2) the Bureau was seeking to force the States to accept the proposed standards and criteria instead of trying to work out standards and criteria through a true process of negotiation. The attitude of the House Subcommittee during the hearings was markedly hostile toward the whole highway beautification program in general and Title I in particular. As a consequence, Secretary Boyd on

[29] *Id.* § 131(k).

[30] H.R. REP No. 1084, 89th Cong., 1st Sess. 9 (1965). *See also* S. REP. No. 709, 89th Cong., 1st Sess. 6 (1965): "The committee emphasizes that where State or local law imposes more stringent controls than S. 2084 over outdoor advertising signs, displays, or devices—both on and off premise—the intent is that State or local law shall prevail. It is not the intent of the committee that the provisions of this section shall preempt or weaken State or local laws imposing more rigid requirements."

[31] *See, e.g., Hearings on S. 2084 Before the Subcomm. on Roads of the Senate Comm. on Public Works,* 89th Cong., 1st Sess., at 48, 72-73, 102-103, 107-110, 114, 391 (1965) [hereinafter cited as *1965 Senate Hearings*]; *Hearings on H.R. 8487 Before the Subcomm. on Roads of the House Comm. on Public Works,* 89th Cong., 1st Sess., at 69-70, 128-131, 247-250 (1965) [hereinafter cited as *1965 House Hearings*].

[32] *Supra* note 30.

[33] *See, e.g.,* 111 CONG. REC. 23878-79 (remarks of Sen. Fong), 26164 (answer by Under Secretary Boyd to question re "pre-emption" by Federal law), 26263-65 (colloquy between Reps. Meeds, Edmondson, and Adams), and 26279 (remarks of Rep. McVicker) (1965).

[34] 23 U.S.C. § 131(d) (Supp. 1969), *as amended* by Pub. L. No. 90-495, § 6(a) (Aug. 23, 1968).

[35] See *supra* notes 30, 31, and 33.

[36] S. Doc. No. 6, 90th Cong., 1st Sess. (1967).

[37] See *supra* note 11.

[38] *Hearings on H.R. 7797 Before the Subcomm. on Roads of the House Comm. on Public Works,* 90th Cong., 1st Sess. (1967) [hereinafter cited as *1967 House Hearings*].

May 24, 1967, shortly after conclusion of the House Subcommittee hearings, sent Chairman Kluczynski a letter in which he made the following concessions on behalf of the Department of Transportation: [39]

> 1. As the law directs, we are fully prepared to accept State determinations with respect to zoned commercial and industrial areas.
>
> 2. Concerning unzoned commercial and industrial areas, we shall be happy to request the guidance and suggestions of the several States with respect to designating these areas. The only absolute requirement upon which we would insist would be the existence of at least one commercial activity in any such area. Surely this could not be considered unreasonable.
>
> 3. With regard to the determination of what constitutes "customary use" in the zoned commercial and industrial areas, we shall be glad to look to the States for certification that either the State authority or a bona fide local zoning authority has made such a determination. With respect to unzoned areas, we will recognize local practice on customary use as mutually agreed to by State and Federal agencies. It will be our policy to assume the good faith of the several States in this regard.
>
> The only exception to the above would be a situation in which a State or local authority might attempt to circumvent the law by zoning an area as "commercial" for billboard purposes only. We think you will agree that this is a reasonable position, since we know that the Congress does not wish for the law to be deliberately evaded by subterfuge.
>
> 4. What is determined in good faith by a bona fide local or State zoning authority as "customary use" will be an acceptable basis for standards as to size, spacing, and lighting in the commercial and industrial areas within the geographical jurisdiction of that State or local authority.

The concessions contained in Secretary Boyd's letter marked a substantial retreat from the positions previously taken by the Bureau of Public Roads, but opponents of Title I (both in and out of Congress) were not satisfied. The House version of the 1968 Federal-Aid Highway Act [40] would practically have killed Title I by eliminating the 10 percent penalty provided by subsection (b) and making the control of outdoor advertising entirely voluntary so far as the States are concerned. In addition, the House version would have vested in the States or their political subdivisions the power to define "unzoned commercial and industrial areas" and to determine "customary use" with respect to the size, lighting, and spacing of off-premises advertising signs in both zoned and unzoned commercial and industrial areas. However, the bill that emerged from the Conference Committee and was finally enacted [41] left subsection (b) of Title I without change and amended subsection (d) only by adding the following provision: [42] "Whenever a bona fide State, county or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority."

As subsection (d) now stands, regulation of off-premises advertising in areas zoned for commercial or industrial use would seem to be entirely within the discretion of the State or local zoning agency that has jurisdiction of the area. Presumably the State or local zoning agency may either include regulations with respect to the size, lighting, and spacing of off-premises advertising signs in the text of its general regulations dealing with commercial and industrial districts, or adopt a special set of regulations defining "customary use" with respect to the size, lighting, and spacing of off-premises advertising signs in commercial and industrial districts. The only possible limitation on State or local zoning agency powers would seem to be the exception noted in Secretary Boyd's letter of May 24, 1967,[43] that the Department would not accept the State or local action where "a State or local authority might attempt to circumvent the law by zoning an area as 'commercial' for billboard purposes only."

Whether the Department of Transportation may ignore State or local action which zones an area as commercial or industrial solely to allow location of off-premises advertising signs within 660 ft of an Interstate or primary Federal-aid highway is a difficult question. The original subsection (d) grant of authority to the States to zone areas for commercial or industrial purposes concludes with an express stipulation that "the actions of the States in this regard will be accepted for the purposes of this Act." And the sentence authorizing State or local zoning authorities to determine customary use, added by the 1968 amendment,[44] contains no limitation on the discretion of such authorities. But the first sentence of subsection (d), which contains the basic grant of permission for off-premises advertising signs in zoned or unzoned commercial and industrial areas, does impose a significant limitation by means of the phrase "consistent with the purposes of this section." The Congressional purposes are generally set forth in subsection (a), which states that outdoor advertising signs in areas adjacent to the Interstate and primary systems "should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." Thus, it can be argued that State or local action that zones an area as "commercial" or "industrial" solely to allow location of off-premises advertising signs within 660 ft of an Interstate or primary Federal-aid highway is *not* consistent with the purposes stated in subsection (a), and that the Department of Transportation therefore need not accept such State or local action as complying with the effective control requirement laid down in subsection (b). Presumably this is what Secretary Boyd had in mind when he said, in his letter of May 24, 1967,[45] "[W]e know that the Congress does not wish for the law to be deliberately evaded by subterfuge."

Inasmuch as the Wyoming statute [46] enacted for the purpose of complying with Title I of the Highway Beautification Act actually zones as "commercial" all agricultural

[39] *See Hearings on S. 1467 Before the Subcomm. on Roads of the Senate Comm. on Public Works*, 90th Cong., 1st Sess., at 5-6 (1967) [hereinafter cited as *1967 Senate Hearings*]; 114 CONG. REC. 23700 (1968).

[40] *See* 114 CONG. REC. 19945-46 (1968).

[41] *See* 114 CONG. REC. 23692-99 (1968), for text of bill. As enacted, it was Pub. L. No. 90-495 (Aug. 23, 1968).

[42] 23 U.S.C.A. § 131(d) (Supp. 1969), *as amended* by Pub. L. No. 90-495, § 6(a) (Aug. 23, 1968).

[43] *Supra* in text at note 39.

[44] *Supra* in text at note 42.

[45] *Supra* in text at note 39.

[46] WYO. STAT. §§ 24-96 to 24-109 (1967), added by Laws 1967, c. 242 ("Outdoor Advertising Act").

lands outside of municipalities and lying within 660 ft of the nearest edge of any highway that is a part of the Interstate or primary system and makes them subject to rezoning by the several boards of county commissioners,[47] it is understandable that the Federal Highway Administration does not consider the Wyoming statute to be consistent with Title I. It would have been possible to obtain a judicial decision on the issue if the Federal Highway Administration had formally determined to impose the 10 percent penalty provided by subsection (b) of Title I, so that Wyoming could have invoked the judicial review provisions of subsection (l).[48] But the Administration, to date, has not made the determination to withhold funds, which is the necessary basis for invocation of judicial review. As a result there has not yet been an authoritative judicial determination of the question whether the authority of State and local agencies to zone areas adjacent to Interstate and primary Federal-aid highways is subject to the policy limitation asserted by Secretary Boyd in his letter of May 24, 1967.

Moreover, there is still bitter controversy with regard to definition of the "unzoned commercial and industrial areas" within which off-premises advertising signs may be permitted. Subsection (d) of Title I states that such definition is to be made "by agreement between the several States and the Secretary." The proposed standards and criteria for defining "unzoned commercial and industrial areas" transmitted to Congress by the Bureau of Public Roads on January 10, 1967,[49] were, in effect, abandoned when Secretary Boyd sent his letter of May 24, 1967, to Chairman Kluczynski of the House Subcommittee on Roads. That letter (*inter alia*) said: "Concerning unzoned commercial and industrial areas, we shall be happy to request the guidance and suggestions of the several States with respect to designating these areas. The only absolute requirement upon which we would insist would be the existence of at least one commercial activity in any such area." As far as can be ascertained, this is still the position of the Federal Highway Administration. But it is a position that does not satisfy the Roadside Business Association, nor does it satisfy some of the States that have so far failed to reach agreement with the Secretary on a definition of "unzoned commercial and industrial areas."

Opposition to this "absolute requirement" that any area to be defined as an "unzoned commercial or industrial area" must have "at least one commercial [or industrial] activity" already in existence in the area has been based primarily on two separate but closely related arguments.[50] First, it is argued that such a requirement would result in the elimination of about 90 percent of the existing off-premises advertising signs in the rural areas, and that Congress could not have intended any such drastic result in view of the introductory clause of subsection (d): "In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section." Second, it is argued that such a drastic elimination of off-premises advertising signs in rural areas is not necessary to achieve the stated scenic purpose of Title I—to preserve natural beauty—for there are many rural areas with no existing commercial or industrial uses that are not naturally beautiful. Hence, it is argued, it would be more consistent with Congressional intent for the Secretary of Transportation to accept proposals from the States for defining as "unzoned commercial and industrial areas" certain rural areas that are not naturally beautiful and that would be appropriate locations for commercial or industrial uses, although no such uses are presently in existence there.

By the time of the 1969 hearings of the Senate and House Subcommittees on Roads,[51] the Roadside Business Association, representing the major commercial interests opposed to the Secretary's absolute requirement of at least one commercial activity as a basis for defining "unzoned commercial and industrial areas," was advocating a major revision of Title I under which off-premises advertising signs would be excluded only from scenic areas, areas zoned residential, or other locations prohibited to them by any State statute or local ordinance. The principal effect of such a revision, of course would be to open up all nonscenic rural areas for off-premises advertising. It is conceivable that, as a result of restudy of Title I of the Highway Beautification Act, the Federal Highway Administration may decide to recommend to Congress the "scenic areas" approach. In the meantime, the Administration's requirement that there be at least one commercial activity in each unzoned commercial or industrial area will presumably remain an obstacle to negotiation of agreements with some States that define "unzoned commercial and industrial areas."[52] The propriety of such a requirement seemingly cannot be tested unless the Administration decides to make a formal determination that the 10 percent penalty provided by subsection (b) shall be imposed on a State. At the present time, it appears most unlikely that the Administration will make such a determination in the near future.

3. Subsections (e) and (n): Time for Removal of Nonconforming Signs

Subsection (e) of Title I[53] states flatly that (1) any advertising sign "lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965," or (2) any other advertising sign, "which does not conform to" Title I, "shall not be required to be removed until July 1, 1970," or "until the end of the fifth year after

47 WYO. STAT. § 24-100 (1967).
48 23 U.S.C.A. § 131(*l*) (1966).
49 S. Doc. No. 6, 90th Cong., 1st Sess. 45-49 (1967).
50 See Statement by R. D. Hetrick, President, Roadside Business Association, *1967 Senate Hearings, supra* note 39, at 102-131, and *1967 House Hearings, supra* note 38, at 213-229; statement by Donald S. Barbour, member of the Executive Committee, Roadside Business Association, *Hearings on S. 3418 Before the Subcomm. on Roads of the Senate Comm. on Public Works*, 90th Cong., 2nd Sess., at 322-330, 342-345 (1968) [hereinafter cited as *1968 Senate Hearings*], and *Hearings on H.R. 17134 Before the Subcomm. on Roads of the House Comm. on Public Works*, 90th Cong., 2nd Sess., at 593-598, 610-613 (1968) [hereinafter cited as *1968 House Hearings*]; statement by Paul Spooner, Jr., General Counsel, Roadside Business Association, *1969 Senate Hearings, supra* note 23, at 61-67, 71-89, and in *Hearings on Highway Beautification Before the Subcomm. on Roads of the House Comm. on Public Works*, 91st Cong., 1st Sess., 146-161 (1969) [hereinafter cited as *1969 House Hearings*].

51 *Supra* note 50.
52 This is clearly the case in those States having firm definitions of "unzoned commercial and industrial areas" written into their compliance laws—e.g., Georgia, Indiana, Kansas, Michigan, and Oklahoma. For further discussion of the State compliance laws, see Chapter Two *infra*.
53 23 U.S.C.A. § 131(e) (1966).

it becomes nonconforming," as the case may be. The House Report [54] explains that the purpose of this subsection "is to allow the advertising business to amortize, insofar as possible, its existing investment in the signboards before they are removed." The Report also states that the subsection provides a "5-year period before existing signs [made nonconforming by Title I] actually will have to come down"; [55] and that the further language of subsection (e) is designed primarily to take care of two types of cases: (1) those where lawfully existing signs become nonconforming in the future as a result of incorporation of a part of the secondary system into the primary system, and (2) those where regulations issued at the outset of the advertising control program are later revised, making lawfully erected signs nonconforming.[56]

Next to consider is whether a State *must* allow the full five-year amortization period in order to be in compliance with Title I. Careful reading of the entire legislative history of Title I leads to the conclusion that subsection (e) was *not* intended to give sign owners a Federal right to maintain nonconforming signs for the period specified in subsection (e), and that the States and their political subdivisions remain free, under subsection (k), to impose stricter limitations on nonconforming signs—i.e., to require removal of nonconforming signs within a *shorter* period of time than that specified in subsection (e). Subsection (e) was designed only to make it clear that no State need require removal of nonconforming signs prior to the expiration of the period prescribed in it to avoid imposition of the 10 percent penalty provided by subsection (b).[57]

Addition of the new subsection (n) to Title I in 1968 [58] raised a similar problem when the new subsection is juxtaposed with subsection (k): did Congress intend by enactment of subsection (n) to create a Federal right to maintain nonconforming signs until "the Federal share of the just compensation to be paid upon removal of such sign, display or device" is made available to the States, or did Congress simply intend to assure the States that they need not require removal of nonconforming signs, thus incurring liability for just compensation, until the Federal share of such compensation is made available? In light of the legislative history of the 1968 amendments,[59] the writer concludes that the latter construction is correct. Therefore, no State will be deemed guilty of noncompliance with Title I and thus subject to the 10 percent penalty unless and until (1) the Federal share of the required just compensation is made available to the State, and (2) the State fails to require removal of nonconforming signs within the period required by Title I. But a State that is willing to bear the entire cost of paying just compensation *may* require removal of nonconforming signs at any time, whether or not the Federal share of such compensation is available.

In view of the shortage of State funds for highway construction, it seems unlikely that many States will in fact proceed to require removal of nonconforming advertising signs so long as funds to pay the Federal share of the cost thereof are not available and the 10 percent penalty is not imposed for failure to require removal. And because Federal funding of the Title I advertising control program has remained at a token level for the past three years, it may be academic to raise the further question: if Federal funds in adequate amounts should become available to implement Title I, how soon *must* the States undertake programs to eliminate nonconforming advertising signs in order to avoid the 10 percent penalty? This question seems to merit some discussion.

Strange as it may seem, nothing in Title I of the Highway Beautification Act expressly states a deadline for removal of nonconforming signs. Subsection (e) states only that a nonconforming sign need *not* be removed until July 1, 1970, or five years after it becomes nonconforming, whichever is later. But the negative implication is very strong that nonconforming signs "lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965," *shall* be required to be removed no later than July 1, 1970, and that any other nonconforming signs *shall* be required to be removed no later than five years after they become nonconforming. This interpretation of the language of subsection (e) is confirmed by reexamination of subsection (c), which states that "effective control means that after January 1, 1968," outdoor advertising within 660 ft of the highway right-of-way *"shall, pursuant to this section, be limited to"* [60] designated types of signs. It thus appears that the amortization period allowed under subsection (e) is really an exception to the January 1, 1968, deadline for effective control, which includes the removal of existing nonconforming signs as well as prohibition of the erection of new nonconforming signs within 660 ft of the highway right-of-way. Of course, lack of Federal funds for payment of just compensation will make the July 1, 1970, deadline inoperative with respect to nonconforming signs that were lawfully in existence on September 1, 1965, in view of the new subsection (n) added in 1968. And if Congress continues to omit funding for the Title I advertising control program, the five-year deadline with re-

[54] H.R. Rep. No. 1084, 89th Cong., 1st Sess. 5 (1965).

[55] *Ibid. Cf.* remarks of Senator Muskie, 111 Cong. Rec. 23872 (1965): "[A]ll that can be compensated for is whatever remains of the leaseholds or the unamortized values, so that if, in fact, the billboard has been completely amortized or the leasehold has expired, no compensation will be paid under the bill." *Cf.* also remarks of Senators Cooper and Neuberger, *ibid.*

[56] H.R. Rep. No. 1084, 89th Cong., 1st Sess. 5-6 (1965).

[57] This interpretation was clearly adopted by the Bureau of Public Roads in its Policy and Procedure Memorandum 80-9, Mar. 31, 1967 [hereinafter cited as *Policy and Procedure Memorandum 80-9*]. *See, e.g.,* PPM 80-9, at p. 5, where the Bureau said: "Signs lawfully in existence on September 1, 1965, and which must be removed by requirement of the act are not required to be removed until July 1, 1970. Any other sign lawfully erected which becomes nonconforming shall not be required to be removed until the end of the fifth year after it becomes nonconforming, *except as a State may provide for earlier removal.*" (Emphasis supplied.) It seems clear that the italic language is applicable to signs lawfully in existence on September 1, 1965, as well as to those lawfully erected which thereafter become nonconforming.

[58] Pub. L. No. 90-495, § 6(d) (Aug. 23, 1968).

[59] *See 1968 Senate Hearings, supra* note 50, at 220-222 (colloquy between Rep. McEwen, Rep. Cramer, and Secretary Boyd). In response to repeated questioning, former Secretary Boyd finally stated flatly that States not enacting compliance laws and beginning a program of advertising sign removal by July 1, 1970, would be subject to the 10 percent penalty provided by Title I, subsection (b), whether or not Congress should appropriate any money to pay the 75 percent Federal share of the required compensation. It was apparently the concern of Congress over this possibility that led to addition of the new subsection (n) to Title I of the Highway Beautification Act. The new subsection (n) was included in both the House and Senate bills as enacted in 1968—*see* 114 Cong. Rev. 19945, 23693 (1968)—and was carried over into the bill as reported by the Conference Committee, but there is no discussion of subsection (n) either in the House or Senate Committee Report or in the Conference Report.

[60] 23 U.S.C.A. § 131(c) (1966) (emphasis supplied).

spect to other nonconforming signs may also become inoperative.

Whatever the deadline for removal of nonconforming signs may eventually prove to be, it should be noted that, under subsection (e), a nonconforming sign is one that does not conform to Title I. Such a sign is nonconforming whether or not the State in which it is located has enacted an advertising control statute that requires its removal. Prior to enactment of the new subsection (n) of Title I in 1968, a State advertising control statute would not have complied with Title I if it allowed an amortization period extending beyond July 1, 1970, for nonconforming signs lawfully in existence along Interstate or Federal-aid primary highways on September 1, 1965,[61] even if the statute were not enacted—e.g., until early 1970. Since the addition of the new subsection (n), however, a State advertising control statute will comply with Title I if it requires removal of such signs by July 1, 1970, or as soon thereafter as the Federal share of the compensation to be paid upon removal of such signs is made available. And any other lawfully erected sign is entitled to only a five-year amortization period from the date it became nonconforming under Title I [62]—regardless of the date when the State compliance law was passed—plus any additional period that may elapse before the Federal share of the required compensation is made available.

4. Subsection (g): Just Compensation Upon Removal of Advertising Signs

It seems reasonably clear that a State must provide for payment of just compensation upon removal of outdoor advertising signs in order to avoid the 10 percent penalty under Title I, although this point will not be conclusively established until it has been determined by the Supreme Court of the United States. The point was sufficiently troublesome to cause the Secretary of Commerce to seek an opinion from the Acting Attorney General of the United States with respect to two closely related questions: (1) Whether Title I may be read as granting to the States the option of using their police power to accomplish the removal of outdoor advertising signs without payment of compensation, and without incurring the 10 percent penalty provided under Title I for failure to provide for effective control of outdoor advertising; and (2) Whether, if Title I is construed as foreclosing such an option, the statutory requirement that just compensation must be paid upon removal of outdoor advertising signs is invalid, as applied to a State where the police power is adequate for the purpose, because Congress cannot constitutionally impose the requirement.

The Acting Attorney General, in an opinion issued November 16, 1966,[63] answered both questions in the negative. That is, he concluded: (1) that Title I must be read as requiring each State to afford just compensation upon removal of outdoor advertising signs as a condition of avoiding the 10 percent penalty, and (2) that there is no basis for concluding that this requirement is unconstitutional as to any State.

The Acting Attorney General's opinion points out that, with respect to the first question, Title I does not by express language either require or forbid the application of the 10 percent penalty in the event of an election by a State to rely on its police power in effecting removal of outdoor advertising signs. But the intent of Congress that the penalty should be applied in such a case is reasonably inferable from the language used in Title I and from the legislative history of Title I. Subsection (c)[64] defines "effective control" to mean that, after January 1, 1968, advertising signs "shall, *pursuant to this section,* be limited to" specified types. The italic words may reasonably be interpreted to require that where the limitation of signs must be achieved by removals, the standard of effective control has not been met unless just compensation has been paid in accordance with subsection (g).[65] Moreover, Title IV of the Highway Beautification Act includes the following section:

> Sec. 401. Nothing in this Act or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act.

This section, which applies both to the advertising control provisions of Title I and the junkyard control provisions of Title II of the Act, is poorly drafted. But it clearly indicates the intent of the Congress to assure, so far as possible, that just compensation should be paid whenever lawfully existing advertising signs are taken or an existing and reasonable use of land for advertising purposes is restricted.[66]

Even if the language in the Highway Beautification Act referred to in the preceding paragraphs is not deemed sufficiently clear to establish the Congressional intent, the legislative history of the Act removes all reasonable doubt. Title I of the Act originated in an Administration-sponsored bill, S. 2084, which, as introduced, did not raise the issue now under consideration; this bill originally contained the following subsection: [67]

> (g) Whenever a State shall submit evidence satisfactory to the Secretary that it is unable to secure effective control, as herein provided, under its police powers, Federal-aid funds may be used to pay the Federal pro rata share of the costs of providing effective control by purchase or condemnation.

It is apparent from the hearings in both the House and the

[61] Such signs became nonconforming on October 22, 1965, the date of enactment of the Highway Beautification Act.

[62] Signs not lawfully in existence along Interstate or Federal-aid primary highways on September 1, 1965, may be brought within the removal requirement in various ways: A sign lawfully in existence along a Federal-aid secondary highway, or any other State or county road, would become nonconforming if, at any time after October 22, 1965, the road should become a Federal-aid primary highway, or a new Interstate highway should be built within 660 ft of the sign. A sign lawfully in existence along an Interstate or Federal-aid primary highway but located more than 660 ft from the right-of-way would become nonconforming if, at any time after October 22, 1965, the highway should be widened or relocated so that the sign was within 660 ft of the right-of-way. And a sign lawfully erected in an exempted commercial or industrial area (zoned or unzoned) would become nonconforming if, at any time after October 22, 1965, the area should be rezoned to prohibit commercial or industrial uses, or the regulations as to size, lighting, or spacing should be changed so as to make the sign unlawful.

[63] 42 OP. ATT'Y GEN. 26 (1965).

[64] 23 U.S.C.A. § 131(c) (1966).

[65] *Id.* § 131(g) (1966).

[66] See *infra* note 73.

[67] *1965 Senate Hearings, supra* note 31, 2.

Senate that this provision was quite unsatisfactory to the members of the House and Senate Committees.[68] The Senate Committee on Public Works, which rewrote the foregoing provision to include a flat provision for the payment of just compensation upon removal of outdoor advertising signs, explained this action as follows: [69]

> This section, as originally proposed, would have required the States, wherever the authority exists, to exercise their police power in acquiring advertising rights. The committee unanimously rejects the use of police power in acquiring these rights, and has provided for the use of Federal funds for paying the Federal pro rata share of the acquisition costs of such rights through purchase or condemnation. Such payment is mandatory, not permissive, on the States.

It is apparent from this explanation that the revision of Title I to provide for payment of just compensation was intended to leave no room for a penalty-free election of noncompliance, with the directive that the States should provide for, and bear part of the expense of, just compensation.

Similar remarks appear in the report of the House Committee on Public Works: [70]

> . . . From the testimony the committee received during the hearings held on the bill, it is quite obvious that there will be instances where small outdoor advertising companies will suffer economic distress as a result of the control this legislation imposes. As a result, the committee feels strongly that in all equity and fairness, compensation must be paid to those individuals who will lose their signs. This includes not only the owner of the sign, but the owner of the real property on which the sign is located.

It is thus clear that, of the members of the House and Senate Committees that considered the bill, a majority intended, insofar as possible, to require payment of just compensation to those who suffered loss as a result of removal of outdoor advertising signs pursuant to Title I of the Highway Beautification Act.

It is also clear from the floor debates that the mandatory character of the just compensation provision was understood by the Members of Congress. Thus, for example, in response to a question as to what would happen if a State decided not to pay its 25 percent share of the just compensation required when it compelled the removal of outdoor advertising signs, Senator Randolph, Chairman of the Senate Committee on Public Works and floor manager of S. 2084, stated [71] that there would be a 10 percent withholding of Federal-aid highway funds until the State complied.[72] And section 401 of the Highway Beautification Act, given previously, was added to the Act on the floor of the Senate at the insistence of the late Senator Dirksen, for the express purpose of making it absolutely clear that it was the Congressional policy to encourage the payment of compensation rather than to authorize the States to rely on their police power to implement Titles I and II of the Act.[73]

Even if the only clues to Congressional intent in enacting subsection (g) of Title I were the subcommittee hearings, the committee reports, and the floor debates, the writer would conclude that the Attorney General's opinion is correct in stating that, "in order to receive a full allocation of highway funds, a State must provide compensation in accordance with section 131(g) even though it is in a position to accomplish the required removals of billboards by other means." [74] But Title I of the Highway Beautification Act has been the subject of subcommittee consideration every year from 1967 through 1970, and there were extensive floor debates in both the Senate and House before enactment of the 1968 amendments to Title I. Without exception, these hearings and floor debates reinforce the conclusion that Congress intended to require the payment of compensation upon removal of advertising signs, as a condition of avoiding the application of the 10 percent penalty provided by subsection (b).[75]

It should be emphasized that, in placing the just compensation requirement in subsection (g) of Title I, Congress intended to do more than simply affirm the State and Federal constitutional guaranties of just compensation when private property is taken for public use. If that were all that Congress intended, any State that could constitutionally use its police power to effect the removal of highway advertising signs would be free of any Federal compensation requirement because, in such a case, there would be no taking of private property. But Congress clearly intended to rule out use of State police power and to require the States, when removing highway advertising signs, either to pay to the sign owners and landowners affected by the removal just compensation determined by mutual agreement or to use their power of eminent domain.[76] If a State uses its power of eminent domain, just compensation must, of course, be determined by the State courts in

[68] *See, e.g., 1965 Senate Hearings, supra* note 31, at 43, 69-72, 98, 226, 278-280, and 286-287; *1965 House Hearings, supra* note 31, at 22-24, 39-41, 43-51, 107-108, 207-208, 250-252, 391.

[69] S. REP. No. 709, 89th Cong., 1st Sess. 7 (1965).

[70] H.R. REP. No. 1084, 89th Cong., 1st Sess. 7 (1965).

[71] 111 CONG. REC. 23874 (1965).

[72] See also discussion of "compensation" in 111 CONG. REC. 23869 (Sen. Randolph), 23872 (Sen. Cooper and Sen. Muskie), 23875 (Sen. Randolph), 23880 (Sen. Randolph), 23883 (Sen. Cooper and Sen. Randolph), 23887-88 (Sen. Fong), 24126 (Sen. Dirksen and Sen. Randolph), 23134 (Sen. Allott), 26259 (Rep. Karth: "[I]f the States do not pay the 25 percent they will be subject to a loss of money"), 26261 (Rep. Kluczynski), 26262 (Rep. Edmondson), 26272 (Rep. Wright), 26274 (Rep. Blatnik), 26281-82 (Rep. Pelly), and 26318 (colloquy on "compensation") (1965).

[73] When Senator Dirksen originally proposed the amendment, which became section 401, he said: "[T]his is a restatement of the principles laid down in article V of the Bill of Rights in the Constitution." In response, Senator Randolph said: "I believe that the just compensation features of the Senate bill 2084 are clear and conclusive on this point; but it is a restatement, and I agree, and join the Senator from Illinois in accepting the amendment." 111 CONG. REC. 24126 (1965). Before final passage, the amendment as offered by Senator Dirksen was slightly altered by a substitute proposed by Senator Randolph. 111 CONG. REC. 24139 (1965).

[74] 42 OP. ATT'Y GEN. 26, at 4-5 (1965). It must be conceded, however, that the opinion came as a surprise to many persons who had interpreted Title I merely to make compensation available if a State either desired to pay for removal of billboards or was forced, on constitutional grounds, to do so.

[75] *See e.g.,* colloquy between Mr. Paul Spooner and Rep. Cramer, *1969 House Hearings, supra* note 50, 155. Mr. Spooner stated he had been informed that the Federal Highway Administration had informed at least one State "that the just compensation provisions of the Federal act are not really binding and that there are ways to avoid it." In response, Rep. Cramer said: "We very clearly stated . . . that when signs are removed there is to be just compensation. . . . I do not think there is any doubt in the mind of any member of this committee that that was the intention and purpose and the only fair way to require the removal of signs."

[76] Section 401 of the Highway Beautification Act, set out in the text *supra* at note 65, is not very helpful, but on the whole the author believes that Section 401 supports the position stated in the text. It is clear that Section 401 was added during consideration of the Act on the floor of the Senate simply to satisfy the late Senator Dirksen. The author does not believe much weight should be given to Senator Dirksen's statement that "this is a restatement of the principles laid down in article V of the Bill

accordance with their usual rules in eminent domain cases.

The legislative history of Title I includes many instances in which proponents of the legislation stated that subsection (g) makes the payment of just compensation upon removal of highway advertising signs mandatory.[77] So it is necessary to determine whether subsection (g) was intended to create an absolute Federal right to compensation on the part of the affected sign owners and landowners, even though a State prefers to use its police power to bring about removal of highway advertising signs and to run the risk of incurring the 10 percent penalty provided by subsection (b).

This issue was in fact raised and decided in *Markham Advertising Co. v. State,*[78] although in a strict sense what the court said with respect to this issue was only a dictum. In the *Markham* case a large group of outdoor advertising companies challenged the constitutionality of the Washington Highway Advertising Control Act of 1961 [79] on various grounds. The Washington statute provides for regulation of outdoor advertising in line with the Federal-Aid Highway Act of 1958,[80] which provided a bonus of one-half of one percent of the Federal funds otherwise available to any State for Interstate highway construction as an incentive to enter into agreements for the control of outdoor advertising within 660 ft of the Interstate highway right-of-way. The Washington statute, *inter alia,* prohibits all off-premises advertising signs within designated scenic areas, and in other areas permits off-premises advertising signs only within 12 miles of the activity advertised.[81] The statute specifically declares it unlawful to maintain after March 11, 1964, or, when located in areas zoned for commercial or industrial use, after March 11, 1965, any signs erected prior to March 11, 1961, that do not comply with the statute and regulations issued thereunder.[82]

All the nonconforming signs owned by the plaintiffs in the *Markham* case were lawfully erected prior to March 11, 1961,[83] and therefore became unlawful under the Washington statute on March 11, 1964.[84] Thus, the just compensation requirement of subsection (g) of Title I of the Highway Beautification Act was clearly inapplicable, because the signs in question were not lawfully in existence on the date of enactment of the Highway Beautification Act. Notwithstanding this obvious fact,[85] however, the plaintiffs in the *Markham* case argued that the just compensation requirement under subsection (g) is absolutely mandatory—that Congress intended thereby "to displace contrary or inconsistent provisions in the laws of this state [Washington], and in that respect has preempted, under the supremacy clause of the federal constitution, this field of legislation"—and hence that the signs in question could not be removed under the Washington statute without payment of just compensation therefor.[86] Both the trial court and the Supreme Court of Washington dealt with this argument on the merits, apparently overlooking the fact that, even if the argument were accepted, subsection (g) had no possible application to the signs of the plaintiffs.

The trial court in *Markham* rejected the argument that Congress had preempted the field and had imposed an absolutely mandatory requirement of just compensation upon removal of advertising signs: [87] "In passing the Highway Beautification Act of 1965 . . . Congress did not intend to preempt the subject of highway advertising control. Rather, Congress intended to encourage the states to control highway advertising by making it financially advantageous for a state to do so." When the plaintiffs urged the same argument on appeal, the Washington Supreme Court also rejected it: [88]

> The basic question is simply, what did Congress intend? We must read Congressional intent from the language and effect of the statute here under consideration, 23 U.S.C. § 131 (Supp. II, 1967). Statutory intent cannot be ascertained from one sentence, or even one paragraph, read in isolation.
>
> "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." (HORACK, 2 SUTHERLAND STATUTORY CONSTRUCTION 336, § 4703 (3d ed. 1943)). The 1965 Federal statute must be considered as a whole.
>
> Our examination of § 131 . . . leads us to conclude that its essential operation is to condition payment of 10 percent of a state's share of federal-aid highway funds upon the state's exercise of its powers to regulate outdoor advertising in a manner consistent with federal standards. We think that the purpose of the federal statute is obviously to induce the states to act, not to require them to do so. The statute allows the state to choose between foregoing 10 percent of its allotment of federal-aid highway funds and compliance. If Congress had intended the provisions of 23 U.S.C. § 131 (Supp. II, 1967) to be mandatory on the states, there would

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of Rights in the Constitution." See *supra* note 73. But certainly it does not indicate that Senator Dirksen favored the use of the police power in any State where State and Federal constitutions would permit the removal of nonconforming signs without compensation. Indeed, it is likely that, under Senator Dirksen's interpretation of the United States Constitution, due process would require payment of compensation upon removal of *any* nonconforming sign that was lawfully erected.

[77] *See, e.g.,* 1965 S. REP. 7, excerpt set out in text *supra* at note 69; 1965 H.R. REP. 7, excerpt set out in text *supra* at note 70; 111 CONG. REC. 24131 (1965) (Sen. Muskie: "The present law is mandatory.") *See also* S. REP. No. 542, 90th Cong., 1st Sess. 10 (1967) (Senate Committee "reaffirmed its belief that mandatory compensation was necessary as a matter of simple justice."); H.R. REP. No. 713, 90th Cong., 1st Sess. 5 (1967) ("The committee believes that a clear statement of Congressional intent, as expressed in the law is called for. . . . Section 131(g) and 136(j) . . . clearly and unequivocally require that just compensation shall be paid. . . . Other alternative methods of handling the compensation requirement . . . were considered and rejected. . . . The language is explicit and is not really susceptible of misinterpretation. 'Just compensation shall be paid . . .' is what the law says, and that is what it means.")

[78] 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed,* 393 U.S. 316 (1969).

[79] WASH. REV. CODE §§ 47.42.010-47.42.910 (1961; Supp. 1967), added by Acts 1961, c. 96, and amended by Acts 1963, c. 3, §§ 55, 56.

[80] Pub. L. No. 85-767 (Aug. 27, 1958) 72 Stat. 904.

[81] WASH. REV. CODE § 47.42.040 (1961).

[82] WASH. REV. CODE § 47.42.100 (1) (1961), as originally enacted, simply required removal by March 11, 1964. The 1963 amendment extended the grace period to March 11, 1965, for nonconforming signs located in areas zoned for commercial or industrial use. WASH. REV. CODE § 47.42.100 (1) (Supp. 1967).

[83] 73 Wash. 2d at 414, 439 P.2d at 254.

[84] WASH. REV. CODE § 47.42.080 (1961) expressly declares that "Any sign erected or maintained contrary to the provisions of this chapter or regulations promulgated hereunder shall be a public nuisance" subject to removal on 15 days notice to the "permittee" or the owner of the land on which the sign is located.

[85] This point was completely missed by counsel for the advertising companies, who asserted in their brief that "Virtually all of appellants' signs involved in this case were 'lawfully in existence' on October 22, 1965, by virtue of permits from the State Highway Commission." (Appellants' Brief 21-22.) In fact, the Highway Commission had ordered appellants to remove their nonconforming signs because their amortization periods of either three or four years had all expired. If the use of the police power to require removal was otherwise valid, it is clear that none of appellants' signs involved in the suit was "lawfully in existence" on October 22, 1965.

[86] Appellants' Brief 22-25; Appellants' Petition for Rehearing 2-8 and Appendices A, B, and C.

[87] 73 Wash. 2d at 417, 439 P.2d at 256.

[88] 73 Wash. 2d at 419, 439 P.2d at 257.

> have been no need to attach a monetary penalty to noncompliance. . . . We hold that Congress has not invoked the supremacy clause by preempting the field of regulation covered by the state Act; that 23 U.S.C. § 131 (Supp. II, 1967) is directory, and does not interfere with the application of the Act as written.

After the Washington Supreme Court's decision in *Markham,* the appellants sought a rehearing. In ther petition for rehearing, they repeated their argument that Title I of the Highway Beautification Act makes compensation absolutely mandatory when advertising signs are removed, and that the Act is controlling, as against any inconsistent provisions in the Washington Highway Advertising Control Act of 1961, by virtue of the supremacy clause of the United States Constitution.[89] The petition for rehearing was denied.[90] When the plaintiffs filed an appeal in the United States Supreme Court, the appeal was dismissed per curiam "for want of a substantial federal question," [91] and a subsequent petition for rehearing was also denied.

Unfortunately a per curiam dismissal of an appeal "for want of a substantial federal question" is not the equivalent of a Supreme Court decision upholding a challenged State statute on the merits. We can only speculate as to the reasons for the per curiam dismissal in *Markham.* But even though the issue now under discussion cannot yet be considered to have been conclusively decided, it is reasonably clear that the Washington Supreme Court's interpretation of subsection (g) of Title I of the Highway Beautification Act is correct.

Subsection (g) of Title I must, of course, be read in context, as part of the Highway Beautification Act as a whole, and as part of Chapter 1 of Title 23 of the United States Code. All of the provisions of Chapter 1 of Title 23 of the United States Code define the position of the Federal government as passive, except to specify conditions for the use of and to supply funds for the States to use for highway purposes. Under this chapter the Federal government builds no highways; that has historically been a responsibility of the States. All the provisions of Chapter 1 of Title 23, including section 131 as a whole (Title I of the Highway Beautification Act) and subsection (g) thereof, are a part of that web of specifications and conditions in which the only inducement for the States to comply is the availability of Federal funds. The Highway Beautification Act is clearly based on the same premise as the earlier provisions of Chapter 1, Title 23, of the United States Code, and utilizes both the whip and the carrot to induce the States to build and maintain Interstate and primary highways in accordance with certain Federal conditions. Both Title I of the Highway Beautification Act and Title II (dealing with control of highway junkyards) use the whip—a 10 percent penalty—whereas Title III (dealing with landscaping and scenic enhancement) uses the carrot —a 3 percent bonus. To single out subsection (g) of Title I and argue that it proceeds on an entirely different premise is absurd.

Title I of the Highway Beautification Act deals in its entirety with one aspect of the Federal program of grants-in-aid for highway construction, and imposes certain conditions with respect to effective control of outdoor advertising along the Interstate and primary systems as a prerequisite to a State's receiving its full allocation of Federal funds. There is no suggestion anywhere in the language of Title I that Congress intended to impose any absolutely mandatory requirements with respect to highway beautification by virtue of its power to regulate interstate commerce. The use of the word "shall" in subsection (g) certainly cannot be read as imposing an absolutely mandatory compensation requirement. The word "shall" occurs throughout Chapter 1 of Title 23 of the United States Code, but provisions containing the word "shall" are mandatory only if the State wants to obtain Federal-aid highway funds. That has been the universal interpretation and uniform theory of administrative practice under the Federal-aid highway laws since their inception in 1916. And, as has already been seen, the phrase "shall not be required to be removed" in subsection (e) of Title I of the Highway Beautification Act does not prohibit removal of nonconforming signs by the States in less than the stated period of time, but merely indicates that no State need remove such signs in less than such period in order to avoid the 10 percent penalty under subsection (b).

All of the subcommittee hearings in 1965 proceeded on the assumption that Title I deals with requirements that were mandatory on the States only in the sense that the States must comply with such requirements in order to avoid the 10 percent penalty under subsection (b). There is nothing in the subcommittee hearings to indicate that the subcommittee members intended to forbid absolutely the use of any State's police power to eliminate highway advertising signs, although it was clearly assumed that few, if any, States would be willing to suffer the 10 percent penalty to avoid payment of just compensation to sign owners and landowners upon the removal of nonconforming signs. Consequently, the statement in the Senate Committee Report that "such payment is mandatory, not permissive, on the States," [92] and the statement in the House Committee Report that "compensation must be paid to those individuals who will lose their signs" [93] must both be read as meaning that payment of just compensation is mandatory if, and only if, a State wishes to avoid the 10 percent penalty.

The floor debates in Congress proceeded on the same assumption as the subcommittee hearings.[94] The floor amendment that added Section 401 to the Highway Beautification Act [95] can be considered as an admonition to the States not to take property unconstitutionally in implementing the Act, but it cannot reasonably be read as imposing on the States an absolute duty to compensate in the absence of a constitutional requirement.

As previously suggested in the discussion of *Markham Advertising Co. v. State,*[96] subsection (g)[97] does not require the States to pay just compensation upon removal of ad-

[89] Petition for Rehearing 2-8 and Appendices A, B, and C.
[90] *Denied,* July 19, 1968. 73 Wash. 2d 433.
[91] 393 U.S. 316 (1969).

[92] See text *supra* at note 69.
[93] See text *supra* at note 70.
[94] See text *supra* between notes 71 and 72.
[95] See text *supra* between notes 65 and 66, and between notes 72 and 73.
[96] See text *supra* between notes 83 and 85.
[97] 23 U.S.C.A. § 131(g) (1966).

vertising signs that were already unlawful on the date of enactment of Title I, whether the signs are unlawful because erected in violation of an existing State law or local ordinance or because they were maintained after the date set for removal by a valid State law or local ordinance based on the State's police power. Subsection (g) only directs that "just compensation shall be paid upon the removal of" advertising signs either (1) lawfully in existence on October 22, 1965,[98] or (2) lawfully on any highway made a part of the Interstate or primary system between October 22, 1965, and January 1, 1968, or (3) lawfully erected on or after January 1, 1968. Category (1) is designed to include signs lawfully in existence along Interstate or primary highways on October 22, 1965, that became nonconforming as a result of the enactment of Title I. Category (2) is designed to include signs lawfully erected along Federal-aid secondary or other highways that became nonconforming because the highways along which they are located were incorporated into the Interstate or primary systems between October 22, 1965, and January 1, 1968. Category (3) includes all signs lawfully erected on or after January 1, 1968, that later became nonconforming for whatever reason.

It should be noted that the just compensation directive of subsection (g) does *not* apply to signs lawfully erected along existing Interstate and primary highways between October 22, 1965, and January 1, 1968. Apparently this omission was intentional, inasmuch as the lack of any Federal participation in the payment of compensation for removal of signs erected between October 22, 1965, and January 1, 1968, might be expected to induce the States to move rapidly in enacting legislation implementing Title I of the Highway Beautification Act. But the omission is likely to create serious problems—many states did not enact implementing legislation until 1967 or 1968; some states still have not done so. Although advertising companies and others in the advertising business were put on notice by subsection (g) that there would be no Federal funds available to pay compensation for new signs erected along the Interstate and primary highways between October 22, 1965, and January 1, 1968, many such new signs were erected. It will be very hard for any State to deny compensation to sign owners and landowners if and when these lawfully erected, nonconforming signs are removed,[99] particularly because each State will have to pay compensation upon removal of any sign lawfully erected on or after January 1, 1968, even though no advertising-control statute was in force in that State when the sign was erected.[100] The equal protection problem will certainly be substantial if a State refuses compensation for signs erected between October 22, 1965, and January 1, 1968, and pays compensation for signs erected on or after the later date.[101] Moreover, it is illogical that there should be Federal participation in the compensation paid upon removal of signs lawfully erected on or after January 1, 1968 (at a time when the State in question had no advertising-control statute in force) but no Federal participation in compensation paid upon removal of signs lawfully erected between October 22, 1965, and January 1, 1968. And it is grossly unfair to deny Federal participation in the payment of compensation for removal of signs erected between October 22, 1965, and the date when a particular State enacted an advertising control statute[102]—especially in a State whose legislature did not meet until 1967 and hence had no opportunity to adopt an advertising control statute for more than a year after the enactment of Title I.

Even assuming existence of a clear case where just compensation is required by subsection (g) upon removal of a nonconforming advertising sign, how is the amount of compensation to be determined? Subsection (g) provides that 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.

This provision, unfortunately, is perhaps the most ambiguous of many ambiguous provisions in Title I of the Highway Beautification Act. The only thing really clear is that Congress intended that some compensation should be paid to both the sign owner and the landowner upon removal of certain advertising signs, in the usual case where the sign itself is not owned by the owner of the land on which it is located; and that Congress intended that all the compensation should be paid to the single owner, where the sign is owned by the owner of the land on which it is located.

With respect to the interests of both the sign owner and the landowner, it seems clear that any amount of compensation agreed on and accepted will satisfy the subsection (g) requirement of just compensation.[103] But the agreed compensation will normally approximate what the parties believe the sign owner and the landowner would receive in an eminent domain proceeding; and eminent domain will probably have to be used in at least some cases, because the State will be unable to reach an agreement on compensation with the sign owner, the landowner, or both. So it will be necessary to try to ascertain what property interests are to be paid for under subsection (g).

Subsection (g) says first that the sign owner is to be compensated for the taking of "all right, title, leasehold, and interest in" signs that are required to be removed. The reference to the sign owner's leasehold in the sign is confusing, because ownership implies an absolute property interest rather than simply a leasehold. Apparently, however, the draftsman intended to require compensation for

[98] Note the discrepancy between subsection (e) with its cut-off date of September 1, 1965, and subsection (g) with its cut-off date of October 22, 1965. This discrepancy appears to be inadvertent rather than intended.

[99] Many of the State compliance laws do, in fact, provide for payment of compensation upon removal of any nonconforming sign that was lawfully in existence at the date of enactment of the statute. See *infra* Chapter Two at note 228 and statutes cited.

[100] This is required under subsection (g) if the State is to comply with Title I and avoid the 10 percent penalty provided by subsection (b).

[101] See discussion *infra* in Chapter Two between notes 227 and 228.

[102] As indicated *infra* in Chapter Two at note 229, Georgia and Michigan have adopted compliance laws expressly providing that no sign shall be acquired that is not eligible for Federal participation in payment of compensation, "except for signs erected after September 1, 1965, and before the effective date of this Act."

[103] The criteria of the Bureau of Public Roads for Federal participation may not, of course, allow full payment of 75 percent of the amount agreed upon. See *Policy and Procedure Memorandum 80-9, supra* note 57, at p. 6 (1967).

the taking of the sign owner's leasehold *in the land,* in those cases where the sign is erected pursuant to a lease, on land not owned by the owner of the sign. Presumably the reference to "leasehold" will be so construed, despite the defective draftsmanship.[104] But the subsection (g) provision for compensating the sign owner presents more difficult problems of construction. Basically, these problems arise because it is not clear whether subsection (g) limits a State in determining what the basis for just compensation should be.

Suppose, for example, that in a particular State it is determined that an advertising sign is a chattel rather than a realty,[105] and hence that, after the State has taken the sign owner's leasehold in the land on which the sign is located, he may be required to remove the sign at his own expense by virtue of the State's police power. Would such a determination be inconsistent with the just compensation requirement of subsection (g) on the ground that subsection (g) requires either (1) that the title of the sign owner must be taken before the sign may be removed, or (2) that, if the sign owner retains his title to the sign, he must be compensated for the cost of removal if he is required to remove the sign himself? The language of subsection (g) provides no clear answer to this problem, but the writer thinks it is likely that subsection (g) will be held to require compensation of the sign owner on one basis or the other, even though it would be both constitutional and in accord with State law to require removal of the sign without further compensation once the sign owner's leasehold has been taken.[106] The Bureau of Public Roads implicitly adopted this construction of subsection (g) in its *Policy and Procedure Memorandum 80-9,* providing (*inter alia*) as follows: [107]

> Federal funds may participate in payments made to a sign owner for (1) his right, title, leasehold and interest in a sign or (2) removal or (3) relocation of a sign. Removal or relocation payments shall be made to a sign owner only in mitigation of costs on a cost-to-cure basis and shall not exceed the cost to acquire the right, title, leasehold and interest in the said sign, less salvage value. Each sign shall be treated as a separate entity without regard to the effect its removal will have on the business operation of the owner.

The final sentence in the provision just quoted raises another difficult problem of construction in connection with subsection (g). Presumably the limitation stated in that sentence would not be applicable to a State where, prior to passage of the Highway Beautification Act, it had been determined that an "advertising plant" was an "entity" and that, upon the taking of part of the plant the owner of the plant was entitled to severance damages, which would necessarily take into account the effect of the removal of one or more signs "on the business operation of the owner." But suppose that a State should adopt, in response to the just compensation requirement in subsection (g), a new advertising control law that expressly provides for payment of severance damages based on the effect of the removal of one or more signs "on the business operation of the owner"? Several States have in fact done this.[108] Or suppose that State courts, in response to the argument that existing judicial limitations on severance damages are unfair as applied to advertising signs, adopt a new rule that would produce the same results as statutes of the sort just referred to? The language of subsection (g) is no help at all. It remains uncertain whether subsection (g) will be construed as allowing a State thus to enlarge the prior definition of just compensation to include severance damages, so that the 75 percent Federal share will be payable with respect to severance damages as well as to more traditional compensable items.

That portion of subsection (g) defining the compensation payable to the owner of the land on which an advertising sign is located when the sign is removed is also ambiguous. It is clear that the landowner must be compensated for the loss of his rights under the existing advertising lease or other rental agreement with the sign owner. But what about the landowner's right to erect and maintain, or to authorize others to erect and maintain, advertising signs in the future? The use of the plural in the final phrase of subsection (g)[109] suggests that Congress intended to require payment of just compensation for the taking of what would amount to a *permanent* negative easement in the land—i.e., a perpetual restriction against erection and

[104] The California compliance law uses language based on the suggested construction. See *infra* Chapter Two between notes 229 and 230.

[105] It should be noted that, as adopted in the Senate, subsection (g) provided for payment of compensation for "(1) The taking from the owner of such signs, display, or device of all right, title, leasehold, and interest in the *fixture*. . . ." (Emphasis supplied.) *See* S. 2084 as adopted, 111 CONG. REC. 24141-42 (1965). The wording was changed in the House before final enactment.

[106] This conclusion is based mainly on the repeated statements during the Senate and House hearings and debates, by proponents of compensation, that equity or fairness required payment of compensation even if the Federal or State constitutions did not. *See, e.g., 1965 Senate Hearings, supra* note 31, at 43 (Sen. Randolph: "Perhaps it [use of police power without compensation] is legal, we would say, but is it equitable?"); *1965 House Hearings, supra* note 31, at 46 (Rep. Edmondson: "The problem that I have may not be so much constitutional as moral . . . .")

[107] *Policy and Procedure Memorandum 80-9, supra* note 57, at p. 6 (1967).

[108] *See* statutes cited *infra* in note 241. *See also* discussion *infra* in text in Chapter II between notes 240 and 243.

[109] 23 U.S.C.A. § 131(g) (1966). In para. (A), dealing with the sign-owner's interest, the singular is used: "all right, title, leasehold, and interest in such *sign, display, or device*." (Emphasis supplied.) But in para. (B), dealing with the landowner's interest, the plural is used: "the right to erect and maintain such *signs, displays, and devices thereon*." (Emphasis supplied.)

[110] The colloquy between Senators Holland and Randolph, 111 CONG. REC. 23879 (1965) is inconclusive. Senator Holland said: "The Senator realizes that when it comes to condemnation along the primary roads, it involves buying up easements of 660 feet on each side of the roadway; does he not?" Senator Randolph replied: "Yes, where advertising structures are now maintained under agreements in effect on date of enactment of the pending measure." Shortly thereafter, Senator Randolph said: "It is estimated that we shall need approximately $180 million for the advertising rights for the interstate and the primary systems. This means that signs, as well as easements, where the areas have been used for advertising, would be involved. We do not contemplate the payment for easements over all systems, but only where the rights-of-way [*sic*] have been exercised." 111 CONG. REC. 23880 (1965). Later in the Senate debate, Senator Allott said:

> Mr. President, it is fairly easy to ascertain the cost of a sign. There is an invoice somewhere; there is a check somewhere which will show how much the sign cost. In addition to the sign, there is also the cost that the sign owner pays to the landowner for the use of the land for the erection of the sign.
>
> But I point out also that included here—and it cannot possibly be avoided—is payment to the landowner for the leasehold he has lost. No one can possibly begin to estimate the cost to this country, when these particular items are capitalized—capitalized and paid for—and capitalization is the only way that these values can be ascertained.
>
> For example, if an owner rents a space for the sum of $250 a year, the only possible way that the owner can be compensated for the loss of his lease to the sign owner is by the capitalization of that $250 or $500, or whatever it may be. . . .

This statement by Senator Allott, 111 CONG. REC. 24134 (1965), clearly indicates that he, at least, thought that the interest taken from the land-maintenance of "such signs, displays and devices thereon." The writer thinks this was in fact the intent of Congress, but the Congressional intent is not clear from the language of subsection (g) and the legislative history is of little assistance on this point.[110] It would be more consistent with the traditional zoning law approach to nonconforming uses, perhaps, to construe subsection (g) as requiring compensation only for the loss of the landowner's rights under the *existing* lease or other rental agreement with the sign owner, thus permitting the State to prohibit *future* erection of signs within the control area through police power regulation. The Bureau of Public Roads appeared to have adopted the latter construction, with one minor qualification.[111] If subsection (g) is construed as requiring the State to take a permanent negative easement, the State will be entitled to receive the Federal share of 75 percent of the amount required to compensate the landowner for the taking of such an easement. But if subsection (g) is construed as requiring the State to take only the landowner's rights under the existing advertising lease, the Federal share will be payable only with respect to such rights.

C. CONSTITUTIONALITY OF TITLE I

The constitutionality of Federal grants-in-aid to the States, including grants-in-aid for highway purposes, is so well settled as not to require discussion. However, the provision as to just compensation in subsection (g) of Title I of the Highway Beautification Act might be deemed to raise a constitutional issue insofar as it directs the States to pay compensation upon removal of nonconforming advertising signs, even though such removal could be effected by use of the police power without payment of compensation.[112] If subsection (g) were construed as making payment of compensation absolutely mandatory upon the States, the constitutional issue would be a difficult one indeed. However, that construction of subsection (g) has been rejected in favor of the construction that subsection (g) makes payment of compensation mandatory upon the States only to the extent they wish to obtain a full allocation of Federal-aid highway funds and avoid the 10 percent penalty provided by subsection (b). But the question can still be raised whether subsection (g), as so construed, may violate the United States Constitution in any respect. As the Acting Attorney General's opinion of November 16, 1966,[113] points out, the issue here considered concerns "an aspect of Federal-State relations that the courts have had little occasion to explore." In the discussion that follows, the author has relied heavily on the Attorney General's opinion.

The earliest Federal statutes providing Federal aid to the states were those that authorized the use of money derived from the disposition of public lands for the purpose of promoting public education and internal improvements. These statutes, based on the power of Congress to dispose of territory and other property,[114] were generally deemed to be free of any constitutional objection that might be made to the appropriation of other Federal revenues to such purposes.[115] In later years statutes were enacted to provide land grants for higher public education,[116] the reclamation of arid lands,[117] and other purposes. Although none of these laws was ever challenged on constitutional grounds, the Supreme Court in several cases gave its approval to the conditions they imposed on the States.[118]

Most of the current grant-in-aid legislation, of which the Federal-aid highway legislation is an example, authorizes Federal payments of appropriated funds. In *Massachusetts v. Mellon*,[119] Massachusetts attacked the constitutionality of a Federal statute providing for matching money grants to the States for Federally approved programs designed to improve maternal and child health. The State argued, *inter alia*, that the statute was invalid because it usurped the power of self-government reserved to the States. The Supreme Court did not consider this argument on its merits because it decided that Massachusetts had presented a political question over which the Court had no jurisdiction. However, the Court did make the following statements by way of dicta: [120]

> Probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject.
>
> . . . .
>
> . . . Nothing is added . . . by the further incidental allegation . . . that there is imposed upon the States an illegal and unconstitutional option either to yield to the Federal Government a part of their reserved rights or lose their share of the moneys appropriated. . . . [T]he statute [does not] require the States to do or yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple purpose of not yielding.

The principal cases involving Federal grants-in-aid for local public works projects during the depression of the 1930's are not helpful inasmuch as they were disposed of on the ground that the private parties attacking the grants-in-aid had not suffered an invasion of any enforceable right.[121]

Oklahoma v. United States Civil Service Commission [122] is the case most nearly in point on the question now under consideration. In that case, which stemmed from a Federal grant of highway aid, Oklahoma objected to the enforcement of section 12 of the Hatch Act [123] against a member

owner would be a perpetual negative easement. Otherwise, there would be no need to capitalize the annual sign rental to determine the landowner's compensation.

[111] *Policy and Procedure Memorandum 80-9, supra* note 57, p. 6 (1967) includes the following provision: "Federal funds may participate in payments made to landowners where existing signs are removed. While this payment is for *the right to erect and maintain the existing signs*, it may, insofar as Federal reimbursement is concerned, include purchase of the right to erect *future signs in the control area under a single ownership until such time as the State control law is effective and an agreement with Public Roads is executed or January 1, 1968, whichever is earlier.* It is expected that payment, if any, for this additional acquisition will be nominal." (Emphasis supplied.) This seems clearly to exclude payment for a perpetual negative easement against future signs.

[112] This is the second point discussed in the opinion of Acting Attorney General Clark, issued in response to a request from the Secretary of Commerce. See 42 OP. ATT'Y GEN. 26, at 5-9 (1965).

[113] 42 OP. ATT'Y GEN. 26, at 5 (1965).

[114] U.S. CONST. art. IV, § 3, para. 2.

[115] 2 STORY, COMMENTARIES ON THE CONSTITUTION § 1327 (2d ed. 1851).

[116] Morrill Acts of 1862 and 1890, 12 Stat. 503 and 26 Stat. 417.

[117] Reclamation Act of 1902, 32 Stat. 388.

[118] *See, e.g.*, Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 295 (1958); Ervien v. United States, 251 U.S. 41 (1919); McGee v. Mathis, 71 U.S. (4 Wall.) 143, 155 (1866).

[119] 262 U.S. 447 (1923).

[120] *Id.* at 480, 481.

[121] Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Duke Power Co. v. Greenwood County, 302 U.S. 485 (1938).

[122] 330 U.S. 127 (1947).

[123] 53 Stat. 1147, as amended, 54 Stat. 767; formerly 5 U.S.C.A. § 118k; recently recodified as 5 U.S.C.A. §§ 1501-1508 (1967).

of its Highway Commission. The State chose not to remove him from office and began a suit for judicial review of the penalty provisions of the Hatch Act, contending the Act was unconstitutional because "the so-called penalty provisions invade the sovereignty of a state in such a way as to violate the Tenth Amendment by providing for 'possible forfeiture of state office or alternative [financial] penalties against the state.' " [124] The Supreme Court, after concluding that the case presented a justiciable controversy, went on to say: [125]

> . . . While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have the power to fix the terms upon which its money allotments to states shall be disbursed.[126]
>
> The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case. As pointed out in *United States v. Darby,* 312 U.S. 100, 124, the Tenth Amendment has been consistently construed "as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. *So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid.*

No statute providing for grants-in-aid to the States, or imposing conditions upon such grants, has ever been ruled unconstitutional by the Supreme Court, and none of the cases dealing with such grants supports the conclusion that the requirement of payment of just compensation in Title I, subsection (g) of the Highway Beautification Act as a prerequisite to a full allocation of highway funds is unconstitutional as to any State. In the language of the Court in the *Oklahoma* and *Darby* cases,[127] the "permitted end" sought by Title I is the elimination of objectionable outdoor advertising along the Federal-aid Interstate and primary highway systems, and the means—the grant of money conditioned on the use by a State of its powers to eliminate billboards and to pay just compensation to the billboard owners and landowners concerned—are appropriate and well adapted to that end. There is no basis for arguing that a State's sovereign powers are being invaded by means of an unconstitutional bargaining process merely because it could, through use of its police power alone, achieve the statutory objective of highway beautification without paying anything to the billboard owners and landowners concerned. In the *Oklahoma* case, the receipt of an undiminished grant of Federal funds was conditioned on the exercise of the State's power to remove a State official. Under Title I of the Highway Beautification Act it is conditioned on a State's refraining from an exercise of its police power in order to save the State's money. There seems to be no distinction in principle. The writer finds unpersuasive the argument that *Oklahoma* is distinguishable because there the withholding of Federal-aid highway funds from the State resulted from the State's refusal to remove a State highway official, whereas under Title I a State that refuses to participate in the billboard removal program in accord with the Federal statute not only forfeits Federal funds for billboard removal—i.e., a 75 percent share of required compensation payments—but also sustains a 10 percent loss of its Federal funds for highway construction.[128]

It should be noted, however, that although both the *Massachusetts* and *Oklahoma* cases contain language suggesting that the United States has a virtually free hand in setting the conditions on which the States may obtain grants-in-aid, the conditions imposed must not be arbitrary. *Steward Machine Co. v. Davis* [129] makes this clear. The Supreme Court there considered the validity of the Federal unemployment compensation tax on employers, against which is granted as much as a 90 percent credit for contributions to an unemployment fund established by a State law meeting Federal standards. The Court held that the tax is not void as violating the Tenth Amendment, but went on to say: [130]

> In ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. . . . It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national. . . . It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. . . .

Whatever may be the "outermost line" in relation to the Federally subsidized highway program, the inducement in Title I to a State to provide for and join in the compensation of persons who are adversely affected by compliance with Title I seems to be well within it. The action of the States sought by the Federal government pursuant to subsection (g) of Title I will not be unduly burdensome and, as to each State, constitutes a reasonable means of effectuating the removal of outdoor advertising along Interstate and primary system highways, which is one of the objectives of the Highway Beautification Act.

[124] 330 U.S. at 142.

[125] *Id.* at 143.

[126] The court in Palmer v. U.S. Civil Service Comm., 191 F. Supp. 495, 520 (S.D. Ill. 1961), complained that the Supreme Court did not cite any constitutional authority to support this proposition. It went on to overturn a Civil Service Commission determination under section 12 of the Hatch Act that Congress lacked the authority to make conditions that intruded on a State's power to appoint and remove its officers and control its own finances. The Court of Appeals reversed. Palmer v. U.S. Civil Service Comm., 297 F.2d 450 (7th Cir. 1962), *cert. denied sub nom.* Illinois v. U.S. Civil Service Comm., 369 U.S. 849 (1962).

[127] 312 U.S. 100, 124 (1941), cited and quoted in the *Oklahoma* case, *supra* in text following note 126.

[128] *Cf.* Lamm and Yasinow, *The Highway Beautification Act of 1965: A Case Study in Legislative Frustration,* 46 DENVER L. J. 437, 446-47 (1969).

[129] 301 U.S. 548 (1937).

[130] *Id.* at 590-591.

CHAPTER TWO

STATE LEGISLATION TO CONTROL ROADSIDE ADVERTISING

Thirty-two States had enacted highway advertising control legislation specifically for the purpose of complying with Title I of the Highway Beautification Act by July 1, 1970. Of these 32 States, however, only 18 had statutes that, as of that date, were deemed by the Secretary of Transportation to be in full compliance with Title I and to provide the designated State agency adequate authority upon which the States could enter into the agreements called for by Title I.[131] These 18 States are Alaska,[132] Arkansas,[133] California,[134] Connecticut,[135] Hawaii,[136] Idaho,[137] Kentucky,[138] Louisiana,[139] Maine,[140] Maryland,[141] New Mexico,[142] New York,[143] North Carolina,[144] Rhode Island,[145] Utah,[146] Vermont,[147] Virginia,[148] and West Virginia.[149] As of July 1, 1970, 12 of these 18 States had actually executed agreements with the Secretary of Transportation.[150]

Of the remaining 14 States [151] in which so-called compliance laws have been enacted, at least five have statutes that may actually comply with Title I of the Highway Beautification Act; however, there is substantial doubt

[131] *See Hearings on H.R. 16788 and Related Bills Before the Subcommittee on Roads of the House Comm. on Public Works,* 91st Cong., 2nd Sess., at 984 (1970) [hereinafter referred to as *1970 House Hearings*].

[132] ALASKA STAT. §§ 19.25.080-19.25.180 (perm. ed.), as amended by Sess. Laws 1968, c. 233. It should be noted that § 19.25.080 prohibits all outdoor advertising along highways except as permitted by § 19.25.100. § 19.25.100 allows "identical signs [designed by the State highway department] for highway use by rural business" to be installed under a permit, "where practicable, . . . within one mile from and on the right side of all highway approaches to the establishment." Inasmuch as this provision does not restrict signs to those advertising on-premise businesses and does not limit off-premise signs to zoned or unzoned commercial and industrial areas, it might seem that § 19.25.100 is not consistent with Title I of the Highway Beautification Act. But § 19.25.170 empowers the State highway department to "enter into agreements in conformity with the provisions of this title with the United States Secretary of Transportation as provided by Title 23, United States Code, relating to the control of outdoor advertising signs, displays and devices in areas adjacent to interstate and primary systems and to take action in the name of the state to comply with the terms of the agreements, and to promulgate required regulations." Apparently the Federal Highway Administration considers that § 19.25.100 gives the Alaska highway department sufficient authority to enter into an agreement with the Secretary that will comply with Title I of the Highway Beautification Act. Such an agreement was actually executed on March 29, 1968, defining "unzoned commercial or industrial areas" and setting standards for size and spacing of signs in such areas. *See* S. REP. 91-520, 91st Cong., 1st Sess. 4 (1969) [hereinafter referred to as 1969 S. REP.]. Inasmuch as the Federal Highway Administration made $1,000 available to Alaska for control of outdoor advertising for the fiscal year 1970, it seems clear that the Administration regards the Alaska statute as in compliance with Title I of the Highway Beautification Act. *See 1969 House Hearings, supra* note 50, at 150; *1970 House Hearings, supra* note 131, at 1110.

[133] ARK. STAT. ANN. §§ 76-2502 to 76-2512 (Supp. 1969), added by Acts 1967, No. 640, art. 1, which is part of the Arkansas Highway Beautification Act. *Id.* § 76-2505 provides (in part) that "the definition of an unzoned commercial or industrial area shall be determined by agreement between the [State Highway] Commission and the Secretary of Transportation but shall be no more restrictive than that required by Title 23 of the United States Code," and that "the Commission shall then adopt and promulgate regulations governing the issuance of permits for the erection and maintenance of outdoor advertising . . . . consistent with the safety and welfare of the traveling public, and as may be necessary to carry out the policy of the State declared in this Act consistent with customary usage, the purposes of this Act, and in agreement with the Secretary of Transportation." This provision is clearly open-ended enough to comply with Title I of the Highway Beautification Act and to permit the execution of a Federal-State agreement; but as of June 10, 1970, no such agreement had yet been executed—*see 1970 House Hearings, supra* note 131, at 1108—and the Federal Highway Administration, consequently, made no funds available to Arkansas for control of outdoor advertising for the fiscal year 1970. *See 1969 House Hearings, supra* note 50, at 150; *1970 House Hearings, supra* note 131, at 1110.

[134] CAL. BUS. & PROF. CODE §§ 5200-5326, as amended (Deering Supp. 1971). The provisions designed to bring the California legislation into compliance with Title I of the Highway Beautification Act will be found in *id.* §§ 5206-5207.9, 5213-5214.1, 5226, 5239, and 5286-5288.7 (Deering Supp. 1971), amended or added by Stats. 1967, c. 1408. Stat. 1968, c. 128, made some additional amendments to the legislation.

CAL. BUS. & PROF. CODE §§ 5213 provides firm definitions of an "unzoned commercial or industrial area" and a "business area" (which includes both zoned and unzoned commercial and industrial areas). *Id.* § 5288.5c provides that the Director of the California Department of Public Works may make an agreement with the United States Secretary of Transportation for effective control of outdoor advertising which "can vary and change the definition of 'unzoned commercial or industrial area' as set forth in Section 5213 and the definition of 'business area' as set forth in Section 5214, or other sections related thereto, . . . provided further that if such agreement does vary from such sections it shall not be effective until the Legislature by statute amends the sections to conform with the terms of the agreement." It can certainly be argued that these provisions of the California legislation do not comply with Title I, subsection (d), of the Highway Beautification Act, for any agreement between the Director and the Secretary which varies the firm definitions of an "unzoned commercial or industrial area" and a "business" area can be nullified by the Legislature's refusal to amend the statute to conform with the agreement. The Federal-State agreement with California executed Feb. 15, 1968, dodges the issue, providing as follows:

> Since existing State law has encouraged the zoning of all areas of the State of California, there eventually will be no unzoned areas in the State. There is, therefore, no need to define "unzoned industrial or commercial area" as part of this Agreement . . . . As to the portions of the State which currently are still unzoned, the State and the Secretary of Transportation shall enter into a temporary agreement concerning signs placed within those few remote areas of the State which are not yet zoned.

(*1968 Senate Hearings, supra* note 50, at 332.) The Federal Highway Administration made $77,987 available to California for control of outdoor advertising for the fiscal year 1970—*see 1969 House Hearings, supra* note 50, at 150; *1970 House Hearings, supra* note 131, at 1110; consequently, it seems clear that the Administration regards the California legislation as in compliance with Title I of the Highway Beautification Act.

[135] CONN. GEN. STAT. ANN. §§ 13a-123 to 13a-123b (Supp. 1970), as amended by Pub. Acts 1967, No. 632. *Id.* § 13a-123 provides that the State highway commissioner "may enter into agreements with the secretary of commerce on behalf of the state . . . to comply with Title I of the Highway Beautification Act of 1965"; that the commissioner "may promulgate regulations for the control of outdoor advertising structures, signs, displays and devices along the interstate highways, the primary system of federal-aid highways and other limited access highways" which "shall be as, but not more, restrictive than the controls required by Title I of the Highway Beautification Act of 1965 and any amendments thereto with respect to the interstate and primary systems of federal-aid highways"; that "subject to regulations promulgated by the highway commissioner and except as prohibited by state statute, local ordinance or zoning regulation signs, displays and devices may be erected and maintained within six hundred and sixty feet of primary and other limited access highways in areas which are zoned for industrial or commercial use under authority of law or located in unzoned commercial or industrial areas which areas shall be determined from actual land uses and defined by regulations of the highway commissioner"; and that "the regulations of the highway commissioner in regard to size, spacing and lighting shall apply to any segments of the interstate system which traverse commercial or industrial zones where the use of real property adjacent to the interstate system is subject to municipal regulation or control, or which traverse other areas where the land use, as of September 21, 1959, was clearly established under state law as industrial or commercial." These provisions were deemed sufficiently open-ended to enable Connecticut to conclude a Federal-State agreement on September 11, 1967, defining "unzoned commercial or industrial areas" and determining size and spacing standards for signs permitted therein. *See* 1969 S. REP. 4, *supra* note 132. The Federal Highway Administration made $3,440 available for control of advertising for the fiscal year 1970. *See 1969 House Hearings, supra* note 50, at 150; *1970 House Hearings, supra* note 131, at 1110.

[136] HAWAII REV. LAWS §§ 111-60 to 111-69 (1955), as amended by Acts 1966, No. 45. Because *id.* § 111-62 prohibits all off-premises advertising, there seems to be no need for any Federal-State agreement in regard to the definition of "unzoned commercial or industrial areas" or the standards as to size, lighting, and spacing to be applied therein. $1,000 was made available for control of advertising for the fiscal year 1970. *See 1969 House Hearings, supra* note 50, at 150; *1970 House Hearings, supra* note 131, at 1110.

about these five States, which are Arizona, Delaware, Mississippi, North Dakota, and South Dakota.

The Arizona statute [152] was enacted only in May 1970, and as of July 1, 1970, had not yet been submitted to the Bureau of Public Roads for evaluation. Inasmuch as the July 1, 1970, deadline for removal of nonconforming signs has passed and the Federal share of the just compensation to be paid upon removal of nonconforming signs is not yet

[137] IDAHO CODE ANN. §§ 40-2811 to 40-2838 (Supp. 1969), added by Laws 1966, c. 396. Because the Idaho statute purports to invest the State highway agency with full power, through its own regulations, to define "unzoned commercial or industrial areas" and to determine the permissible size, lighting, and spacing of off-premises signs in unzoned areas, it can be argued that the statute does not conform to the Title I, subsection (d), provision that these matters shall be determined by agreement between the State and the Secretary of Transportation. But the Idaho statute was apparently deemed to comply with Title I because it contains a section—§ 40-2833 (Supp. 1969)—which requires the State highway agency's regulations to be "consistent with the national policy set forth in section 131 of title 23 of the United States Code and the national standards promulgated thereunder by the secretary of transportation." It would seem that this section has been construed to require the State highway agency's regulations to comply with standards determined by agreement with the Secretary. *See 1970 House Hearings, supra* note 131, at 984. But no agreement had yet been reached as of June 10, 1970. *See 1970 House Hearings, supra* note 131, at 1108.

[138] KY. REV. STAT. ANN. §§ 177.830-177.890 (Bald. 4th ed. 1969), as amended by Acts 1966, c. 76, and Acts 1968, S. 367. A Federal-State agreement was executed on Dec. 11, 1967 (*see* 1969 S. REP. 4, *supra* note 132), although it is not clear that the Kentucky legislation then in force complied with Title I of the Highway Beautification Act. Inasmuch as the Federal Highway Administration made $11,236 available to Kentucky for control of outdoor advertising for the fiscal year 1970 (*see 1969 House Hearings, supra* note 50, at 150; *1970 House Hearings, supra* note 131, at 1110), it seems clear that the Administration regards the current Kentucky legislation as in compliance with Title I.

[139] LA. REV. STAT. §§ 48.461-48.461.8 (Supp. 1966), added by Acts 1966, No. 474. The statute initially provides a firm definition of "unzoned commercial or industrial areas" and then authorizes a State court to define as such unzoned areas "all other unzoned lands appropriate for outdoor advertising." Although the initial firm definition is reasonable and complies with the Federal policy that each such area must have at least one actual commercial or industrial activity located within it, the further authorization to a court to add to the definition "all other unzoned lands appropriate for outdoor advertising" seems clearly to violate the Federal policy, for it permits designation of an area as "unzoned commercial or industrial" without regard to the existence in the area of any actual commercial or industrial use. It is surprising, therefore, to find the Secretary of Transportation stating that Louisiana has a statute which would appear "to carry out all of the provisions of Title I of the Highway Beautification Act of 1965 and . . . to provide the designated State agency adequate authority upon which the State could enter into the agreements called for by that Act." *See 1970 House Hearings, supra* note 131, at 984.

[140] ME. REV. STAT. ANN. tit. 32, §§ 2711-2723 (Supp. 1970), added by Acts 1969, c. 257. The Maine statute lays down a firm definition of "unzoned commercial or industrial areas" and firm standards for size, lighting, and spacing of off-premises signs in unzoned areas, which seem inconsistent with Title I, subsection (d), provision that these matters are to be determined by agreement between the States and the Secretary of Transportation. However, the firm definition of "unzoned commercial or industrial areas" was apparently considered to comply with Title I because it requires "at least one commercial or industrial activity in any such area"; and the firm standards as to size, lighting, and spacing of off-premises signs were apparently deemed to comply with Title I because they were determined in good faith in accordance with customary use. Indeed, the Maine statute's provisions defining "unzoned commercial or industrial areas" and determining the size, lighting, and spacing of off-premises signs seem substantially to ratify the agreement on these matters executed by the State highway agency and the Secretary before the statute was enacted. In at least one respect, however, the Maine statute sets a different standard. The agreement of Dec. 27, 1967, provided that an "unzoned commercial or industrial area" should extend 500 feet along the highway from the edge of an existing commercial or industrial activity. (*See* 1969 S. REP. 4, *supra* note 132.) But ME. REV. STAT. ANN. tit. 32, § 2712 (19) (Supp. 1970), provides that the distance shall be 750 ft. Thus, an amended agreement with the Secretary will have to be executed before Maine will be fully in compliance with Title I. The Maine statute also authorizes payment of compensation when the immediate removal of nonconforming signs is required, but "when immediate removal of nonconforming advertising signs is not required but removal via regulation over an extended period of time is satisfactory, the [State highway] commission is authorized to use the police power of the State to establish a reasonable amortization period which will be long enough to allow recoupment of the capital investment which these nonconforming signs represent but which contemplates that at the end of this period the nonconforming sign will be removed by the owner without compensation." ME. REV. STAT. ANN. tit. 32, § 2719 (7) (Supp. 1970). Apparently the Secretary has not construed this provision to mean that a nonconforming sign may be fully amortized so that no compensation is payable to the owner even though the sign in fact still has value, although such a construction would appear reasonable in light of the additional amortization provisions in § 2719 (7).

[141] MD. CODE ANN., art. 89B, § 7A, §§ 226-235 (1964), and §§ 250-262 (Supp. 1970) (added by Acts 1968, c. 589). *Id.* § 251(c) provides in part as follows: "Unzoned commercial or industrial areas mean those areas which are not zoned and on which there is located one or more permanent structures devoted to a business or industrial activity or on which a commercial or industrial activity is actually conducted, whether or not a permanent structure is located thereon, and the area along the highway extending outward 660 feet from and beyond the edge of such activity. Each side of the highway will be considered separately in applying this definition." *Id.* § 252(b) (i) sets maximum size for advertising signs of 1,000 sq ft. Both the 660-ft radius provision in § 251(c) and the 1,000-sq ft size provision in § 252(b) (i) are inconsistent with the Federal-State agreement executed on Feb. 15, 1968—*see* 1969 S. REP. 4, *supra* note 132—which provided for a radius of 500 ft in unzoned commercial or industrial area and provided for a maximum size of 800 sq ft. Moreover, the agreement provided that activities not visible from the traveled way or more than 660 ft from the right-of-way could not be counted as business or industrial activities from which to measure an unzoned commercial or industrial area. This limitation was not included in the 1968 Maryland compliance law. It would thus appear that the Maryland agreement will have to be renegotiated. However, because the Federal Highway Administration made $2,914 available to Maryland for control of outdoor advertising for the fiscal year 1970—see *1969 House Hearings, supra* note 50, at 150; *1970 House Hearings, supra* note 131, at 1110—it seems clear that the Administration regards the current Maryland legislation as in compliance with Title I of the Highway Beautification Act.

[142] N.M. STAT. ANN. §§ 55-11-1 to 55-11-7.1 and 55-11-11 (Supp. 1969), added by Laws 1966, c. 65. *Id.* §§ 55-11-4 and 55-11-5 provide, *inter alia*, that the State highway commission may define "unzoned industrial or commercial areas" and set the standards for outdoor advertising therein by regulations that will, however, be consistent with "the national standards promulgated by the secretary of commerce pursuant to Title 23, United States Code." Because § 55-11-11 also authorizes the State highway commission to "enter into agreements with the secretary of commerce pursuant to Title 23, United States Code, relating to the control of outdoor advertising . . . in areas adjacent to the Interstate and primary systems, and to take action in the name of the state to comply with the terms of the agreements," it would seem that the New Mexico compliance law really does comply with Title I of the Highway Beautification Act. However, as of June 10, 1970, no Federal-State agreement had been executed—*see 1970 House Hearings, supra* note 131, at 1108—and the Federal Highway Administration did not make any funds available to New Mexico for control of outdoor advertising for the fiscal year 1970. *See 1969 House Hearings, supra* note 50, at 150; *1970 House Hearings, supra* note 131, at 1110.

[143] N.Y. HIGHWAY LAW § 88 (McKinney Supp. 1970), added by Laws 1968, c. 581, and amended by Laws 1969, c. 508. This statute ratified the Federal-State agreement executed on May 13, 1968—*see* 1969 S. REP. 4, *supra* note 132,—and clearly complies with Title I of the Highway Beautification Act. *See 1969 House Hearings, supra* note 50, at 150 and *1970 House Hearings, supra* note 131, at 1110, indicating that the Federal Highway Administration made $32,313 available to New York for control of outdoor advertising for the fiscal year 1970.

[144] N.C. GEN. STAT. §§ 136-126 to 136-140 (Supp. 1969), added by Laws 1967, c. 1248. The North Carolina statute purports to invest the State highway agency with full power, through its own regulations, to define "unzoned commercial or industrial areas" and to determine standards for size, lighting, and spacing of off-premises signs in unzoned areas. As in the case of Idaho, *supra* note 137, it can be argued that this is inconsistent with Title I, subsection (d), of the Highway Beautification Act. But the Secretary has apparently decided that the North Carolina statute complies with Title I because § 136-138 of the statute authorizes the State highway agency to "enter into agreements with other governmental authorities relating to the control of outdoor advertising in areas adjacent to the Interstate and primary highway systems . . . and to take action in the name of the State to comply with the terms of the agreements." However, North Carolina had no agreement with the Secretary as of June 10, 1970. *See 1970 House Hearings, supra* note 131, at 1108.

[145] R.I. GEN. LAWS §§ 24-10.1-3 to 24-10.1-6 (Supp. 1970), as amended by Pub. Laws 1968, c. 268. This statute is similar to the New Mexico statute, *supra* note 12, with respect to definition of "unzoned commercial or industrial areas" and determination of standards for signs permitted therein. A Federal-State agreement was executed on June 28, 1967—*see* 1969 S. REP. 4, *supra* note 132—and the Federal Highway Administration made $1,000 available to Rhode Island for control of outdoor advertising for the fiscal year 1970. *See 1969 House Hearings supra* note 50, at 150; *1970 House Hearings supra* note 131, at 1110.

[146] UTAH CODE ANN. §§ 27-12-136.1 to 27-12-136.13 (1969), added by Laws 1967, c. 51 (Utah Outdoor Advertising Act). *Id.* § 27-12-136.5 begins with the following paragraph:

> The minimum standards and criteria for the size, lighting and spacing of outdoor advertising, and the criteria for unzoned commercial or industrial zones or areas within the controlled area along the interstate and primary systems designated in section 27-12-136.4 shall conform to those promulgated and submitted by the secretary of commerce to the Congress of the United States on or about January 10, 1967, and any amendments of same, and the governor in behalf of this state shall make an agreement with the secretary embodying such standards and criteria. This agreement shall incorporate to the extent possible the following exceptions to such federal standards by reason that these exceptions constitute "customary usage" in this state as contemplated by the Highway Beautification Act of 1965.

available, it is not clear whether there is any conflict between Title I of the Highway Beautification Act and that section of the Arizona statute [153] providing that "outdoor advertising lawfully in existence along the interstate or federal-aid secondary or primary systems on September 1, 1965 which does not conform to the provisions of this article, shall not be required to be removed until July 1, 1975." There may also be some doubt as to compliance with Title I in view of the section of the Arizona statute [154] that authorizes the State highway commission to enter into the agreement provided for by Title I but qualifies the authorization by a declaration that "if the standards and definitions contained in the agreement do not agree substantially with the provisions of this article, the agreement shall not become effective until the legislature by statute amends this article to conform with the terms of the agreement." It is at least arguable that Arizona is not in compliance with Title I unless and until an agreement with the Secretary has been concluded and—if this agreement is not in substantial accord with the definition of "unzoned commercial or industrial area" and the standards as to size, lighting, and spacing contained in the present Arizona statute—the statute is brought into compliance with such agreement.

Delaware passed a compliance law in 1969,[155] after having previously entered into an agreement with the Secretary that was more restrictive than its new compliance law.[156] Even if the new law is construed by the Secretary as complying with Title I (as of July 1, 1970, the Secretary had not so construed it),[156] the prestatutory agreement will presumably have to be renegotiated.

Both Delaware and Mississippi fall in the "doubtful" category because their compliance laws [157] lay down firm definitions of "unzoned commercial or industrial areas" and firm standards for size, lighting, and spacing of off-premises signs in unzoned areas. This seems to be inconsistent with the Title I, subsection (d), provision of the Highway Beautification Act requiring that these matters be determined by agreement between the States and the Secretary of Trans-

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Then follow various proposed exceptions which would, *inter alia*, define as "unzoned commercial or industrial areas" all "those areas located within the approaches to incorporated and unincorporated cities and towns which are zoned or unzoned and are determined by the appropriate local zoning authority to be reasonably suited for outdoor advertising. . . ." This proposed "approaches" definition is similar to that embodied in the Georgia, Indiana, Kansas, Michigan, Montana, Oklahoma, and Montana compliance laws, but the definition in the Utah statute is not firm and does not preclude a Federal-State agreement that would define "unzoned commercial or industrial areas" more narrowly. In fact, the Federal-State agreement signed on Jan. 18, 1968, narrowly defines such unzoned areas as lands within 600 ft of a commercial or industrial activity (other than outdoor advertising), plus lands on the other side of the highway from the activity if (1) the highway is a two-lane noncontrolled access road; (2) land on the same side is not usable; and (3) land on the opposite side is not deemed scenic by the Utah Road Commission. *See 1968 Senate Hearings, supra* note 50, at 336; 1969 S. Rep. 4, *supra* note 132. The Federal Highway Administration made $25,307 available to Utah for control of outdoor advertising for the fiscal year 1970. *See 1969 House Hearings, supra* note 50, at 150; *1970 House Hearings, supra* note 131, at 1110.

[147] Vt. Stat. Ann. tit. 9, §§ 3683a, 3688 (Supp. 1970), and tit. 10, §§ 321-345 (Supp. 1970) (created by Acts 1967, No. 333, amended by Acts 1969, No. 92). Pursuant to former tit. 9, §§ 3681-3688, adopted in 1966 and almost completely repealed in 1967, a Federal-State agreement was executed on June 28, 1967—*see* 1969 S. Rep. 4, *supra* note 132—which contained a definition of "unzoned commercial or industrial areas" and a set of standards for off-premises signs allowed therein. But under the new §§ 321-345 of tit. 10, the only off-premises advertising signs permitted within sight of any highway are official business directional signs licensed by a travel information council and furnished, erected, and maintained by the State highway department at locations determined by the travel information council, which "shall take into consideration such factors as the effect upon highway safety, the convenience of the travelling public, and the preservation of scenic beauty." All official business directional signs are subject not only to the provisions of the statute and to "rules and regulations promulgated by the travel information council," but also to "any federal law, rule or regulation affecting the allocation of federal highway funds." It would seem that Vermont's adoption in 1967 of the new §§ 321-345 of tit. 10 would make it necessary for Vermont to negotiate a new Federal-State agreement, but no such new agreement had been executed as of July 1, 1969. The Federal Highway Administration made $2,038 available to Vermont for control of highway advertising in the fiscal year 1970. *See 1969 House Hearings, supra* note 50, at 150; *1970 House Hearings, supra* note 131, at 1110.

[148] Va. Code Ann. §§ 33.1-351 to 33.1-381 (1970), as amended by Acts. 1966, c. 663, and Acts 1968, c. 519 and c. 230. *Id.* § 33.1-370 (b) provides that unzoned commercial or industrial areas shall be "determined by the State Highway Commission from actual land uses" and that the Commission shall also "determine the size, lighting and spacing of [off-premise] signs . . ., provided that such determination shall be no more restrictive than valid federal requirements on the same subject." *Id.* § 33.1-371 provides: "The State Highway Commission may issue regulations and is authorized to enter into agreements with the Secretary of Commerce of the United States as provided in 23 U.S.C. § 131, with respect to the regulation and control of signs, advertisements and advertising structures in conformity with § 33.1-370. . . ." These provisions are sufficiently open-ended so that a Federal-State agreement was executed on July 13, 1967. See 1969 S. Rep. 4, *supra* note 132. The Federal Highway Administration made $36,604 available to Virginia for control of outdoor advertising for the fiscal year 1970. *See 1969 House Hearings, supra* note 50, at 150; *1970 House Hearings, supra* note 131, at 1110.

[149] W.Va. Code §§ 17-22-1 to 17-22-25 (Supp. 1970), added by Acts 1967, c. 177. *Id.* § 17-22-8 provides that off-premises advertising signs

> . . . whose size, lighting and spacing shall be determined by agreement between the State road commissioner of West Virginia and the secretary of transportation of the United States, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way of federal-aid interstate or primary roads, within areas zoned industrial or commercial, or in unzoned commercial or industrial areas, as may be determined by agreement between the State road commissioner and the secretary of transportation of the United States: Provided, that any such agreement shall contain a definition of unzoned commercial or industrial areas which reflects existing conditions in this State, such as, without limiting the foregoing, existing land use, availability of land for urban development, topography, and accepted zoning practices now prevailing in this State. Any agreement between the State road commissioner and the secretary of transportation relating to size, lighting and spacing shall reflect customary usage in this State. Any agreement between the State road commissioner and the secretary of transportation defining unzoned commercial or industrial areas, or relating to size, lighting and spacing, shall be no more restrictive than necessary to secure to this State any federal aid contingent upon compliance with federal laws, or federal rules and regulations relating to outdoor advertising, and shall be subject to amendment or rejection by the legislature of West Virginia: Provided, however, that the terms of any such agreement shall be no more restrictive than those included in any other similar agreement made by the secretary of transportation and other states: Provided, further, that such agreement shall provide for its modification and amendment in the event and to the extent that the secretary of transportation and any other state shall thereafter agree to any provisions which shall be less restrictive.

A Federal-State agreement was executed on Jan. 6, 1969. In spite of the second proviso in § 17-22-8, *supra*, it appears that some of the provisions defining "unzoned commercial or industrial areas" and some of the provisions as to size and spacing of signs in such areas are in fact more restrictive than some provisions included in other similar Federal-State agreements. *See* 1969 S. Rep. 4, *supra* note 132. The Federal Highway Administration made $12,623 available to West Virginia for control of outdoor advertising for the fiscal year 1970. *See 1969 House Hearings, supra* note 50, at 150; *1970 House Hearings, supra* note 131, at 1110.

[150] These States are Alaska, California, Connecticut, Kentucky, Maine, Maryland, New York, Rhode Island, Utah, Vermont, Virginia, and West Virginia. *See* 1969 S. Rep. 4, *supra* note 132, *cf. 1970 House Hearings, supra* note 131, at 1108.

[151] These states are Arizona, Delaware, Georgia, Indiana, Kansas, Michigan, Mississippi, Missouri, Montana, New Hampshire, North Dakota, Oklahoma, South Dakota, and Wyoming.

[152] Ariz. Rev. Stat. Ann. §§ 18-711 to 18-720 (Supp. 1970), added by Laws 1970, c. 214.

[153] *Id.* § 18-715.

[154] *Id.* § 18-716.

[155] Del. Code Ann. tit. 17, §§ 1101-1125 (Supp. 1970), enacted by 57 Del. Laws, c. 276 (1969), and amended by 57 Del. Laws, c. 633 (1970).

[156] *See 1970 House Hearings, supra* note 131, at 1109.

[157] Del. Code Ann. tit. 17, §§ 1101-1125 (Supp. 1970); Miss. Code Ann. §§ 8059.5-01 to 8059.5-17 (Supp. 1970), added by Acts 1966, c. 497.

portation. The Delaware and Mississippi statutes could, however, be deemed to comply with Title I because their firm definitions of "unzoned commercial or industrial areas" require "at least one commercial or industrial activity in any such area," and their firm standards as to size, lighting, and spacing appear to have been determined in good faith and in accordance with customary use, as required by the policy guidelines contained in former Secretary Boyd's letter of May 24, 1967. Moreover, the Delaware statute expressly authorizes the State Highway Department to "enter into agreements with the Secretary of Transportation of the United States relating to the control of outdoor advertising in controlled areas, consistent with the provisions of this chapter, and take action in the name of the State to comply with the terms of such agreements." [158]

The North Dakota compliance law [159] falls in the doubtful category because its provisions with respect to compensation may not comply with the mandate of Title I, subsection (g), of the Highway Beautification Act. Sections 4 and 5 of the North Dakota statute [160] are poorly drafted, and can be read as authorizing a five-year amortization period for all nonconforming signs, with compensation to be paid only if a nonconforming sign is required to be removed *before* the end of the five-year period—and only "for the reasonable damages, if any, suffered by reason of such removal before the end of the fifth year after such displays become nonconforming." [161] If the statute is thus construed, with no compensation payable when signs are not removed until five years after they become nonconforming, even though the signs still have value, it is clearly inconsistent with subsection (g) of Title I. But the Secretary of Transportation has recently indicated that the North Dakota statute "appears reasonably susceptible to several methods of implementation," and has concluded that "the adequacy of this law to fully comply with the Federal Act will continue to be contingent upon the State's interpretation and implementation of its provisions." [162]

South Dakota has a compliance law [163] that is rather similar to those of Mississippi [164] and New Hampshire [165] with respect to the definition of "unzoned commercial or industrial areas" and the determination of standards for size, lighting, and spacing of off-premises advertising in zoned and unzoned areas. However, the South Dakota statute, instead of laying down a firm definition of "unzoned commercial or industrial areas," lays down a definition clearly intended to be only a guideline which the State highway agency "shall consider and advocate as the position of the state in negotiating" an agreement with the Secretary.[166] The standards as to size, lighting, and spacing are firm,[166] but may well be deemed to comply with Title I because they are apparently based on a good faith determination of customary usage.[167] It should also be noted that the South Dakota statute adopts the "urban approaches" concept by zoning as commercial "all lands lying outside of municipalities [but within a designated distance thereof] and within 660 feet of the nearest edge of the rights-of-way of" Interstate and primary highways, subject to the power of the State Planning Commission to "designate all or any part of such commercially zoned areas as a strip of land necessary for the restoration, preservation or enhancement of scenic beauty adjacent to such highways." [168] Such legislative zoning is supposed to be conclusive upon the Secretary under Title I, subsection (d), of the Highway Beautification Act, and it does not violate the policy against evasion of the Congressional intent by zoning an area as commercial for billboard purposes only.[169] Moreover, the legislative zoning of urban approaches for commercial use probably limits substantially the importance of the statutory provisions for defining "unzoned commercial or industrial areas."

Nine States have enacted compliance laws which, in the writer's view, clearly do *not* comply with Title I of the Highway Beautification Act, although the Secretary of Transportation has taken the position that "final determination as to whether these laws are in need of amendment in order to comply with the 1965 Act rests upon the States' interpretation of their provisions and the authority of the State agencies designated in these laws to negotiate satisfactory agreements with the Secretary in accordance with the Highway Beautification Act of 1965." These nine states are Georgia, Indiana, Kansas, Michigan, Missouri, Montana, New Hampshire, Oklahoma, and Wyoming.[170]

Five of these States—Georgia, Indiana, Kansas, Michigan, and Oklahoma—have statutes [171] that define "unzoned

[158] DEL. CODE ANN. tit. 17, § 1125 (Supp. 1970). But see *1970 House Hearings, supra* note 131, at 985, listing Delaware as a state where specific standards and provisions written into the law raise "serious questions concerning the State's authority to fully comply with the Highway Beautification Act."

[159] N.D. CENT. CODE §§ 24-17-01 to 24-17-15 (1970), added by Laws 1967, c. 291.

[160] *Id.* §§ 24-17-04 and 24-17-05 (1970).

[161] *Id.* § 24-17-05 (1970).

[162] Statement of Secretary of Transportation Volpe, *1970 House Hearings, supra* note 131, at 985.

[163] S.D. COMP. LAWS ANN. §§ 31-29-17 to 31-29-60 (1967 and Supp. 1970).

[164] *Supra* note 157.

[165] N.H. REV. STAT. ANN. c. 2849-A (Supp. 1970), added by Acts 1969, § 429:1.

[166] S.D. COMP. LAWS ANN. § 31-29-39 (1967).

[167] Policy statement in former Secretary Boyd's letter of May 24, 1967, *supra* Chapter One in text after note 49.

[168] S.D. COMP. LAWS ANN. §§ 31-29-20 and 31-29-21 (1967).

[169] In his letter of May 24, 1967, former Secretary Boyd said, *inter alia:*

> 1. As the law directs, we are fully prepared to accept State determinations with respect to zoned commercial and industrial areas.
> . . . .
> 3. With regard to the determination of what constitutes "customary use" in the zoned commercial and industrial areas, we shall be glad to look to the States for certification that either the State authority or a bona fide local zoning authority has made such a determination.
> . . . .
> The only exception to the above would be a situation in which a State or local authority might attempt to circumvent the law by zoning an area "commercial" for billboard purposes only. We think you will agree that this is a reasonable position, since we know that the Congress does not wish for the law to be deliberately evaded by subterfuge.

S.D. COMP. LAWS ANN. § 31-29-25 (1967) allows the following land uses and related activities in the commercial zones established by the statute on the approaches to municipalities:

> (1) Hotels and motels; (2) Gasoline stations; (3) Automotive service establishments; (4) Restaurants, cafes, and other establishments offering food service; (5) Grocery stores; (6) Sporting goods stores; (7) Golf clubs and courses; (8) Resorts and recreational facilities reasonably related to the topography and nature of the land; (9) All off-premise advertising; (10) Agriculture and related business activities, including the sale of implements; and, (11) Such other land uses and activities as the Planning Commission, in its discretion, may deem suitable desirable therein.

[170] *Cf.* listings in *1970 House Hearings, supra* note 131, at 984, 1108.

[171] GA. CODE ANN. §§ 95-2001a to 95-2015a (Supp. 1970), added by Acts 1967, No. 271, 423-433; IND. ANN. STAT. §§ 36-3501 to 36-3517 (Supp.

commercial or industrial areas" so as to include all land adjacent to Interstate and primary highways within specified distances of municipalities of various classes,[172] without any provision for modification by agreement with the Secretary. This application of the approaches concept to the definition of "unzoned commercial or industrial areas" is clearly inconsistent with the Title I, subsection (d), provision that such areas shall be defined by "agreement between the States and the Secretary." Moreover, because municipal approaches are included in unzoned commercial or industrial areas without regard to whether there are any existing commercial or industrial activities within the area, and because the areas are quite large, it is clear that this use of the approaches concept violates the policy laid down in former Secretary Boyd's letter of May 24, 1967—i.e., that each unzoned commercial or industrial area should contain at least one actual commercial or industrial activity.[173]

Three States—Missouri, Montana, and Wyoming—have statutes [174] that initially provide a firm definition of "unzoned commercial or industrial areas" and then authorize either a State court (as in Missouri)[175] or the board of county commissioners (as in Montana and Wyoming)[176] to define as "unzoned commercial or industrial areas" "all other unzoned lands appropriate for outdoor advertising." Although the initial firm definition in these three statutes may arguably be deemed reasonable, and although they comply with the policy that each such area should have at least one actual commercial or industrial activity within it,[177] the further authorization to a court or executive body to define as "unzoned commercial or industrial areas" "all other unzoned lands appropriate for outdoor advertising" clearly violates the previously stated policy, because it permits designation of an area as unzoned commercial or industrial without regard to the existence in the area of any actual commercial or industrial activity. Because Title I, subsection (d), of the Highway Beautification Act provides for definition of "unzoned commercial or industrial areas" by agreement between the States and the Secretary of Transportation, and because the Secretary will presumably follow this already-stated policy, it seems clear that the Missouri, Montana, and Wyoming compliance laws do *not* comply with Title I.

Both the Montana and the Wyoming compliance laws also present other problems. The Montana statute itself zones the approaches to all municipalities as commercial, subject to rezoning by the several boards of county commissioners.[178] Inasmuch as the approach areas zoned commercial range from three miles to ten miles, it can be argued that the Montana statute attempts to evade the manifest policy of Title I of the Highway Beautification Act. The Wyoming statute itself zones all agricultural lands adjacent to Interstate and primary highways and outside the limits of municipalities as commercial, subject to rezoning by the several boards of county commissioners.[179] It can be argued even more strongly, therefore, that the Wyoming statute attempts to evade the manifest policy of Title I. But under both statutes a variety of commercial land uses other than outdoor advertising are permitted in highway commercial zones.[180] Thus, neither statute clearly violates the express policy laid down in former Secretary Boyd's letter of May 24, 1967,[181] by zoning areas commercial for billboard purposes only, and the legislative zoning decision embodied in the Montana and Wyoming statutes would appear to be binding on the Secretary under Title I, subsection (d), of the Highway Beautification Act. The Montana statute will become "automatically null and void" on January 1, 1972, if Congress by that date has not funded the billboard removal program.[182]

It should perhaps be noted that, inasmuch as the Wyoming statute zones as commercial all agricultural lands adjacent to Interstate and primary highways and outside municipal limits, the Wyoming statutory provision authorizing the boards of county commissioners to define as "unzoned commercial or industrial areas" all other unzoned lands appropriate for outdoor advertising [183] will probably have little effect. Practically all land along the highways outside the limits of municipalities will either be actually devoted to commercial use or be legislatively zoned commercial, and the authority of the county boards to define "all other unzoned lands appropriate for outdoor advertising" as unzoned commercial will apparently be limited in practice to areas within municipal limits that are not zoned by the municipality. Yet it is this authority given to the county boards that clearly prevents the Wyoming statute from complying with Title I of the Highway Beautification Act. One wonders why the Wyoming legislature did not simply *zone* as commercial all previously unzoned lands appropriate for outdoor advertising or authorize the county boards to do so, for this would have put Wyoming in a position to argue that the Secretary, under Title I, subsection (d), must accept its action in this regard.

The New Hampshire statute [184] provides that, "in calculating just compensation to be paid to the owner of an advertising device to be removed by reason of nonconformity . . . after January 1, 1975, it is intended that the

1969), added by Acts 1967, c. 293 (Highway Advertising Control Act of 1967); KAN. STAT. ANN. §§ 68-2216 to 68-2230 (Supp. 1970), added by Laws 1968, c. 346 (Highway Advertising Control Act of 1968); MICH. COMP. LAWS ANN. §§ 252.251-252.262 (1967), added by Pub. Acts 1966, No. 333; OKLA. STAT. ANN. §§ 1271-1285 (1969 and Supp. 1970), added by Laws 1968, c. 191 (Highway Advertising Control Act of 1968).

172 GA. CODE ANN. §§ 95-2002a (i), 95-2003a (f) (Supp. 1970); IND. ANN. STAT. § 36-3504 (Supp. 1969); KAN. STAT. ANN. § 68-2217 (j) (Supp. 1970); MICH. COMP. LAWS ANN. § 252.251 (i) (1967); OKLA. STAT. ANN. tit. 69, § 1273 (d) (Supp. 1970).

173 See *supra* Chapter One in text after note 49.

174 MO. ANN. STAT. §§ 226.500-226.600 (Supp. 1970), added by Laws 1965, 900-905, §§ 1-12; MONT. REV. CODES §§ 32-4701 to 32-4714 (Supp. 1969), added by Laws 1967, c. 287, as amended by Laws 1969; WYO. STAT. §§ 24-96 to 24-109 (1967), added by Laws 1967, c. 242 (Outdoor Advertising Act).

175 MO. ANN. STAT. § 226.540 (D) (Supp. 1969).

176 MONT. REV. CODE: § 32-4705 (Supp. 1969); WYO. STAT. § 24-101 (1967).

177 See *supra* Chapter One in text after note 49.

178 MONT. REV. CODES § 32-4704 (a), (b), and (e) (Supp. 1969).

179 WYO. STAT. § 24-100 (1967).

180 MONT. REV. CODES § 32-4704 (c) (Supp. 1969); WYO. STAT. § 24-100 (b) (1967).

181 See *supra* note 169.

182 MONT. REV. CODES § 32-4714 (Supp. 1969) provides in part as follows: "In the event that the Congress should fail prior to January 1, 1972 to make an appropriation for compensation purposes in such an amount that this state's share thereof will be sufficient to pay seventy-five percent (75%) of the compensation provided for in section 9 [§ 32-4709], to the extent payable under the Highway Beautification Act of 1965, and as estimated by the state highway commission, this act shall on January 1, 1972, become automatically null and void."

183 WYO. STAT. § 24-101 (a), (v) (1967).

184 N.H. REV. STAT. ANN. c. 249-A (Supp. 1970), added by Acts 1969, § 429:1.

five-year period of nonconforming use shall be considered as whole or partial compensation to said owner for his loss."[185] If this means simply that depreciation is to be taken into account in determining the value of a nonconforming sign at the time of removal, there is no problem. But if it means that the five-year amortization period may be considered as the whole compensation to which the owner of the sign is entitled, even though the sign still has value at the time of removal, it is clearly inconsistent with the mandate of Title I, subsection (g). This latter interpretation is apparently the ground for the conclusion of the Secretary of Transportation that the New Hampshire statute is not in full compliance with Federal requirements. It should be noted, however, that the Secretary has been advised that "appropriate corrective amendments have been prepared and will be introduced at the next session of the [New Hampshire] State Legislature."

None of the nine States with a noncomplying compliance law had signed an agreement with the Secretary of Transportation as of July 1, 1969.[186] All of these noncomplying statutes contain provisions for compensating sign owners and landowners upon removal of nonconforming signs.[187] Six of these nine noncomplying statutes provide for a permit system.[188]

Fourteen States now have highway advertising control legislation that is not responsive to the Highway Beautification Act and is not intended to comply with it. These States are Florida,[189] Illinois,[190] Iowa,[191] Massachusetts,[192] Minnesota,[193] Nebraska,[194] Nevada,[195] New Jersey,[196] Ohio,[197] Oregon,[198] Pennsylvania,[199] Tennessee,[200] Washington,[201] and Wisconsin.[202] Of these 14 States, 10 have legislation [203] designed (in whole or in part) to comply with the bonus provision of the Federal-Aid Highway Act of 1958. In 7 of these 14 States, the highway advertising control statutes [204] apply only to the Interstate System and are wholly designed to qualify the States for bonuses under the 1958 Federal-Aid Act; in 7 States, the statutes [205] apply both to Interstate highways and to other highways. In 9 of these 14 States, the advertising control statutes [206] set up a "permit" system. Only five of these 14 States make any provision for elimination of nonconforming signs by purchase and condemnation.[207] In four of these States compensation is authorized only when nonconforming signs adjacent to Interstate highways are removed.[208] In one State there is authorization to acquire all interests in nonconforming signs, but not the interests of owners of the land on which the signs are located; [209] in another there is authority to acquire interests in the land on which the signs are located, but not in the signs themselves.[210] Five of the 14 States [211] executed agreements with the Secretary of Transportation, pursuant to Title I, subsection (d), of the Highway Beautification Act, despite the fact that no legislation has been enacted to comply with the Act.

Colorado adopted a new highway advertising control statute based on the scenic area concept early in 1965,[212] prior to enactment of the Highway Beautification Act; this statute, of course, did not comply with Title I of the Highway Beautification Act. In 1966 the Colorado Legislature enacted additional, temporary, legislation,[213] and this, as section 1 of the 1966 statute [214] declared, was designed to place Colorado "in a position to receive its full share of funds to be appropriated by the Congress of the United States for expenditures on federal-aid highways in this state . . . and to afford the general assembly the opportunity to consider legislation to control advertising devices at its next regular session which will comply with national standards to be adopted by the United States department of commerce, without incurring additional and unnecessary expense to this state, by prohibiting the erection of new advertising devices in the interim, since compensation may have to be paid for the removal of such advertising devices in order to comply with such national standards." This temporary legislation was extended with minor changes, in 1967,[215] 1968,[216] and 1969; [217] in 1970 [218] it was extended indefinitely, with some major changes.

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185 *Id.* § 249-A:11 (VI).
186 See table of State Highway Agreements, 1969 S. REP. 4, *supra* note 132.
187 GA. CODE ANN. § 95-2008 (Supp. 1970); IND. ANN. STAT. §§ 36-3507 to 36-3509 (Supp. 1969); KAN. STAT. §§ 68-2223, 68-2224 (Supp. 1970); MICH. COMP. LAWS ANN. § 252.259 (1967); MO. ANN. STAT. § 226.570 (Supp. 1970); MONT. REV. CODES § 32-4709 (Supp. 1969); N.H. REV. STAT. ANN. § 249-A:11 (Supp. 1969); OKLA. STAT. ANN. tit. 69, § 1279 (1969); WYO. STAT. § 24-105 (1967).
188 GA. CODE ANN. § 95-2006 (Supp. 1970); KAN. STAT. § 68-2221 (Supp. 1970); MO. ANN. STAT. § 226.530 (Supp. 1970); MONT. REV. CODES § 32-4707 (Supp. 1969); OKLA. STAT. ANN. tit. 69, § 1277 (1969); WYO. STAT. § 24-103 (1967).
189 FLA. STAT. ANN. § 335.13 (1968); and §§ 479.01-479.22 (1965), as amended (Supp. 1969).
190 ILL. ANN. STAT. tit. 121, §§ 451-459 (Supp. 1970).
191 IOWA CODE ANN. §§ 306B.1-306B.8 (Supp. 1969).
192 MASS. ANN. LAW;, c. 93, §§ 29-33 (1967).
193 MINN. STAT. ANN. §§ 173.01-173.24, 173.31-173.54 (Supp. 1970).
194 NEB. REV. STAT. §§ 39-1304 to 39-1305, 39-1320 to 39-1320.03 (1968).
195 NEV. REV. STAT. §§ 405.020-405.110 (perm. ed.).
196 N.J. STAT. ANN. §§ 27:7A-11 to 27:7A-24 (1966).
197 OHIO REV. CODE ANN. §§ 5516.01-5516.99 (Page 1970).
198 ORE. REV. STAT. §§ 377.115-377.545 (1967).
199 PA. STAT. ANN. tit. 36, §§ 2718.1 to 2718.10 (Supp. 1970).
200 TENN. CODE ANN. §§ 62-1114 to 62-1132 (Supp. 1970).
201 WASH. REV. CODE §§ 47.42.010-47.42.910 (1961), as amended (Supp. 1970).
202 WIS. STAT. ANN. § 84.30 (Supp. 1970).
203 See the Illinois, Iowa, Minnesota, Nebraska, New Jersey, Ohio, Oregon, Pennsylvania, Washington, and Wisconsin legislation, *supra* notes 190, 191, 193, 194, 196, 197, 198, 199, 201, and 202.
204 See the Illinois, Iowa, Nebraska, New Jersey, Ohio, Pennsylvania, and Wisconsin legislation, *supra* notes 190, 191, 194, 196, 197, 199, and 202.
205 See the Florida, Massachusetts, Minnesota, Nevada, Oregon, Tennessee, and Washington legislation, *supra* notes 189, 192, 193, 195, 198, 200, and 201.
206 FLA. STAT. ANN. §§ 479.07-479.10 (1965); MASS. ANN. LAWS, c. 93, §§ 29-30A (1967); MINN. STAT. ANN. §§ 173.03, 173.06-173.08, 173.13-173.14, 173.17, 173.33, 173.36-173.38, 173.43-173.44, 173.47 (Supp. 1970); NEV. REV. STAT. §§ 405.040-405.080 (perm. ed.); N.J. STAT. ANN. §§ 27:7A-14 to 27:7A-17 (1966); ORE. REV. STAT. §§ 377.235-377.275 (1967); TENN. CODE ANN. §§ 62-1121 to 62-1122 (Supp. 1970); WASH. REV. CODE §§ 47.42.120-47.42.130 (1961); WIS. STAT. ANN. § 84.30 (5) (Supp. 1970).
207 See IOWA CODE ANN. § 306B.4 (Supp. 1969); MINN. STAT. ANN. §§ 173.05, 173.35 (Supp. 1970); NEB. REV. STAT. § 39-1320.01 (1968); N.J. STAT. ANN. § 27:7A-21 (1966); PA. STAT. ANN. tit. 36, § 2718.4 (Supp. 1970).
208 See Iowa, Nebraska, New Jersey, and Pennsylvania statutes, *supra* note 207. The Minnesota statutes, *supra* note 207, provide for acquisition of "all rights in property, personal or real, necessary to carry out the purposes of" the sections dealing with scenic areas along both Interstate and trunk highways.
209 See Iowa statute, *supra* note 207.
210 See Nebraska statutes, *supra* note 207.
211 Iowa, Minnesota, Nebraska. Ohio, and Pennsylvania all executed agreements prior to July 1, 1969. See 1969 S. REP. 4, *supra* note 132.
212 COLO. REV. STAT. ANN. §§ 120-5-1 to 120-5-10 (Supp. 1965), created by Sess. Laws 1965, c. 249, approved May 17, 1965.
213 COLO. REV. STAT. ANN. §§ 120-5-11 to 120-5-16 (Supp. 1967), created by Sess. Laws 1966, c. 14.
214 COLO. REV. STAT. ANN. § 120-5-11 (Supp. 1967).
215 Colo. Sess. Laws 1967, c. 299, § 1, added a paragraph to COLO. REV. STAT. ANN. § 120-5-12 (1) permitting erection of advertising devices advertising a business or profession that commenced operation subsequent to January 1, 1966; permission was only temporary and was subject to a pro-

Section 1 of the new Colorado statute,[219] as amended in 1970, prohibits the erection or maintenance of any advertising device "which is designed, intended, or used to advertise or to give information in the nature of advertising to the public traveling on the main-traveled way of any Colorado interstate or primary highway," and further provides that "any such advertising device which is visible to motorists traveling on the main-traveled way of any such Colorado interstate or primary highway shall be presumed to be of the type herein prohibited." An exemption from this prohibition is provided for directional and other official signs, on-premises signs, signs "in areas which are zoned industrial or commercial under authority of state law." But the Colorado statute still makes no provision for removal of signs lawfully in existence on January 1, 1966, nor does it provide for compensation when either such signs or those lawfully erected after January 1, 1966, are required to be removed. It thus seems clear that the Colorado statute does not comply with Title I of the Highway Beautification Act, although the Colorado Legislature has indicated its intent to enact additional legislation for the purpose of compliance if Congress should provide funding for the Title I program and if payment of compensation should become necessary in order for Colorado to avoid the 10 percent penalty under Title I.[220]

At the present time three States have no highway advertising control legislation at all. These States are Alabama, South Carolina, and Texas. The only one of these States to take cognizance of the Highway Beautification Act of 1965 is Texas, where the Legislature adopted a resolution in 1967 [221] which, after reciting facts concerning the Highway Beautification Act's provisions for control of outdoor advertising and junkyards, concluded as follows:

> RESOLVED . . . That due to the uncertainty and indecision on the federal level relative to this matter and due to the fact that the federal decision will not be forthcoming until after this session of the Texas Legislature shall have adjourned, the Texas State Highway Commission is hereby authorized and directed to negotiate at the proper time with the Secretary of Transportation relative to the features of this Act that may be finally agreed upon to the end that a full and complete report of such negotiations may be furnished to the Texas Legislature prior to the start of the 61st Session of said Legislature to permit a careful review leading to legislation concerning the control of outdoor advertising and junkyards at the Regular Session of the 61st Legislature; and, be it further
>
> RESOLVED, That nothing in this Resolution shall be construed to mean that the Legislature of the State of Texas has approved or disapproved provisions of the Highway Beautification Act; nor that the Legislature agrees or disagrees to participate in the federal program as set forth in the Highway Beautification Act.

To date, the Texas Legislature has taken no action with respect to implementation of the Highway Beautification Act's provisions for control of outdoor advertising.

Thirty-seven States have statutes that provide for payment of compensation upon removal of nonconforming highway advertising signs; [222] 10 States provide for control of highway advertising without making any provision for payment of compensation.[223] Of the current advertising control statutes that were adopted to qualify for the bonus under the 1958 Federal-Aid Highway Act rather than to comply with Title I of the Highway Beautification Act of 1965, the Iowa statute contains a fairly typical compensation provision: [224]

> The state highway commission shall acquire by purchase, gift or condemnation all advertising devices existing on May 21, 1965 which violate the provisions of this chapter or which fail to conform to rules and regulations promulgated by the state highway commission under this Act and all rights and interests of all persons in and to such devices . . . .

The compensation provisions in the statutes passed for the purpose of complying with Title I of the Highway Beautification Act tend to incorporate some or all of the language of Title I, subsection (g), in defining the signs for which compensation shall be paid and the property interests which shall be paid for. For example, the New York statute contains the following provision: [225]

> The commissioner of transportation is hereby authorized to acquire the necessary rights in and to property and is directed to pay compensation therefor, in the same manner as other property is acquired for state highway purposes pursuant to this chapter, with respect to the following outdoor advertising signs, displays and devices which are not permitted or authorized pursuant to this section or with [sic] the terms of the agreement ratified and approved by this section: (a) those lawfully in existence on October twenty-second, nineteen hundred sixty-five, (b) those lawfully along any highway made a part of the interstate or primary highway systems on or after October twenty-second, nineteen hundred sixty-five, and (c) those lawfully erected on or after January first, nineteen hundred sixty-eight. Such compensation is authorized to be paid only 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

vision that "if it is subsequently determined that such device is nonconforming to the national or state standards governing roadside advertising, promulgated pursuant to federal or state law, then such device shall be removed at the expense of the owner thereof." This paragraph was repealed by Colo. Sess. Laws 1968, c. 59, § 2.

[216] Colo. Sess. Laws 1968, c. 59.

[217] Colo. Sess. Laws 1969, c. 282.

[218] Colo. Sess. Laws 1970, c. 78, amending COLO. REV. STAT. §§ 120-5-2, 120-5-12 (1) (a) and 120-5-16; repealing *id.* §§ 120-5-5 to 120-5-7; and adding new §§ 120-5-17 to 120-5-25.

[219] COLO. REV. STAT. § 120-5-12 (1) (a) (Supp. 1967), as amended.

[220] Id. § 120-5-11 (Supp. 1967).

[221] Tex. Gen. and Spec. Laws, 60th Leg., Reg. Sess., H.C.R. No. 101 (1967).

[222] In addition to the statutes listed *supra* note 187, the following statutes provide for compensation: ALASKA STAT. § 19.25.140 (perm. ed.); ARIZ. REV. STAT. ANN. § 18-715 (Supp. 1970); ARK. STAT. ANN. § 76-2508 (Supp. 1969); CAL. BUS. & PROF. CODE §§ 5288.3 to 5288.3c, 5288.5a and 5288.5b (Deering Supp. 1971); CONN. GEN. STAT. ANN. § 13a-123 (f) (Supp. 1970); DEL. CODE ANN. tit. 17, § 1122 (Supp. 1970); HAWAII REV. LAWS § 111-65 (1955), as amended by Acts 1966, No. 45; IDAHO CODE ANN. § 40-2831 (Supp. 1969); IND. ANN. STAT. § 36-3507 to 3509 (Supp. 1969); IOWA CODE ANN. § 306B.4 (Supp. 1969); KY. REV. STAT. ANN. § 177.867 (Bald. 4th ed. 1969); ME. REV. STAT. ANN. tit. 32, § 2719 (4)-(6) (Supp. 1970); MD. CODE ANN. art. 89B, §§ 233, 254 (1964 and Supp. 1970); MINN. STAT. ANN. §§ 173.05, 173.35 (Supp. 1970); MISS. CODE ANN. § 8059.5-09 (Supp. 1968); NEB. REV. STAT. §§ 39-1320 (m), 39-1320.01 (1968); N.H. REV. STAT. ANN. § 249-A:11 (Supp. 1970); N.J. STAT. ANN. § 27:7A-21 (1966); N.M. STAT. ANN. § 55-11-6 (Supp. 1969); N.Y. HIGHWAY LAW § 88 (7) (McKinney Supp. 1970); N.C. GEN. STAT. § 136.131 (Supp. 1969); N.D. CENT. CODE § 24-17-05 (1970); PA. STAT. ANN. tit. 36, § 2718.4 (Supp. 1970); R.I. GEN. LAWS § 24-10.1-6 (Supp. 1970); S.D. COMP. LAWS ANN. § 31-29-51 (1969); UTAH CODE ANN. § 27-12-136.11 (1969); VT. STAT. ANN. tit. 10, § 336 (Supp. 1969); VA. CODE ANN. § 33-317.1 (e) (Supp. 1970); W.VA. CODE §§ 17-22-5, 17-22-6, and 17-22-23 (Supp. 1970).

[223] These States are Colorado, Florida, Illinois, Massachusetts, Nevada, Ohio, Oregon, Tennessee, Washington, and Wisconsin.

[224] IOWA CODE ANN. § 306B.4 (Supp. 1969).

[225] N.Y. HIGHWAY LAW § 88 (7) (McKinney Supp. 1970).

> the real property on which such sign, display or device is located, of the right to erect and maintain such signs, displays and devices thereon. . . .

It should be noted that this New York statutory language reproduces the language of Title I, subsection (g), literally, with the result that no compensation is payable upon removal of outdoor advertising signs lawfully erected along Interstate and primary highways between October 22, 1965, and January 1, 1968, although compensation is payable upon removal of signs lawfully erected along such highways before October 22, 1965, and those lawfully erected along such highways after January 1, 1968 [226]—including those erected between January 1, 1968, and the effective date of the New York statute, which was June 6, 1968. As previously indicated,[227] this kind of discrimination in payment of compensation upon removal of nonconforming advertising signs raises a serious "equal protection" problem.

Cognizant of the equal protection problem raised by statutes like that of New York, many of the State compliance laws provide for payment of compensation upon removal of any nonconforming sign that was lawfully in existence at the date of enactment of the statute,[228] although it appears that the Federal Highway Administration will not pay the "federal share" with respect to compensation for removal of signs lawfully erected between October 22, 1965 and January 1, 1968. At least two States—Georgia and Michigan—indirectly recognize the latter fact by a statutory provision that, "except for signs erected after September 1, 1965, and before the effective date of this Act, no sign shall be acquired, the cost of which shall not be eligible for seventy-five percent (75%) Federal Participation" or reimbursement.[229]

Many of the State compliance laws, like the New York statute set out above, simply repeat the Title I language with respect to the sign owner's interest for which compensation is to be paid: "all right, title, leasehold, and interest in such sign." But a few of the statutes spell out more precisely what Congress must really have intended by this language. Thus, the California statute says: "all right, title, and interest, including any leasehold interest, of the owner of the advertising display." [230] Some of the State statutes—e.g., the New York statute set out above—also simply repeat the Title I language with respect to the landowner's interest for which compensation is to be paid: "the right to erect and maintain *such signs, displays, and devices.*" This sounds as if the legislature intended payment to be made for all future rights to erect and maintain such signs. But other statutes, like the California statute quoted, use the singular in referring to the landowner's interest: "the right of the owner of the real property on which the advertising display is located to erect and maintain *such advertising display* thereon," and this sounds as if the legislature intended to provide compensation only for the taking of the right to maintain the existing advertising sign on the land in question. As previously indicated,[231] one of the difficult and still unsolved questions arising under Title I, subsection (g), of the Highway Beautification Act is whether the States must pay compensation for the taking of all present and future rights of the landowner to maintain highway advertising signs on his land, or whether he need be compensated only for the taking of the present right to maintain the existing advertising sign under the existing lease. Because the Federal Highway Administration regards both the California and the New York statutes as in compliance with Title I, it appears that the Administration does not consider that the difference in statutory language is significant.

A number of the State compliance laws [232] state categorically that any removal of a nonconforming advertising sign shall be deemed a taking of the interests of the sign owner and the owner of the land on which the sign is located. This language surely is not intended to prohibit the State from negotiating agreements with the owners of nonconforming signs providing for purchase of the interests of the parties,[233] or providing for removal of such signs without acquisition of title thereto and for compensation on some basis other than acquisition of title—e.g., the cost of relocating the sign. Rather, the statutory language in question seems designed to require the State to exercise the power of eminent domain in all cases where a purchase or removal agreement cannot be negotiated, and to take and pay for all the property interests specified in the statute, including the sign owner's interest in the sign itself. Thus, the State highway agency will be precluded from simply acquiring the advertising rights of the landowner and the sign owner in the land and then ordering the sign owner to remove his "trespassing" sign without receiving compensation. Such a construction of the State compliance laws would be in accordance with the previously suggested construction of Title I, subsection (g), of the Highway Beautification Act.[234]

Some of the State compliance laws [235] expressly provide

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[226] Similar to the New York statute in this respect are the statutes of California, Connecticut, Indiana, Kentucky, Mississippi, Missouri, North Carolina, Virginia, and Wyoming, cited *supra* in notes 187 and 222. And although the statutory wording is quite different, it would appear that the legal effect of the New Mexico and Vermont statutes cited *supra* in note 222 is the same.

[227] See text in Chapter One *supra* at note 101.

[228] *See, e.g.,* the statutes of Alaska, Arkansas, Delaware, Georgia, Hawaii, Idaho, Kansas, Louisiana, Maine, Maryland, Michigan, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, and West Virginia, cited *supra* in notes 187 and 222.

[229] GA. CODE ANN. § 95-2008 (Supp. 1970); MICH. COMP. LAWS ANN. § 252.259 (e) (1967).

[230] CAL. BUS. & PROF. CODE § 5288.3a (Deering Supp. 1971).

[231] See text in Chapter One *supra* at notes 109-111.

[232] *See, e.g.,* CAL. BUS. & PROF. CODE § 5288a (Deering Supp. 1971); IND. ANN. STAT. § 36-3507 (Supp. 1969); MICH. COMP. LAW: ANN. § 252.259 (d) (1967); and MONT. REV. CODES § 32-4709 (a) (Supp. 1969).

[233] Indeed, most of the statutes expressly provide for either purchase or condemnation of signs and advertising rights. *See* ALASKA STAT. § 19-25.140 (a) (perm. ed.); CONN. GEN. STAT. § 13a-123 (f) (2) (Supp. 1970); GA. CODE ANN. § 95-2008 (Supp. 1970); HAWAII REV. LAWS § 111-65 (1955), as amended by Acts 1966, No. 45; IDAHO CODE ANN. § 40-2831 (1) (Supp. 1969); IND. ANN. STAT. § 36-3507 (Supp. 1969); KAN. STAT. ANN. § 68-2224 (Supp. 1970); KY. REV. STAT. ANN. § 177.867 (1) (Bald. 4th ed. 1969); LA. REV. STAT. § 48.461.6 (Supp. 1969); ME. REV. STAT. ANN. tit. 32, § 2719 (1), (2), and (3) (Supp. 1970); MD. CODE ANN. art. 89B, § 254 (Supp. 1970); MISS. CODE ANN. § 8059.5-09 (1) (Supp. 1968); MO. ANN. STAT. § 226.570 (Supp. 1970); MONT. REV. CODES § 32-4709 (Supp. 1969); N.M. STAT. ANN. § 55-11-6 (Supp. 1969); N.C. Gen. Stat. § 136-131 (Supp. 1969); N.D. CENT. CODE § 24-17-05 (1970); OKLA. STAT. ANN. § 1279 (1969); PA. STAT. ANN. tit. 36, § 2718.4 (a) (Supp. 1970); S.D. COMP. LAWS ANN. § 31-29-50 (1967); UTAH CODE ANN. § 27-12-136.11 (1) (1969); VA. CODE ANN. § 33.1-370 (e) (1970); W. VA. CODE § 17-22-6 (Supp. 1970); WYO. STAT. § 24-105 (1967).

[234] See text in Chapter One *supra* at notes 106-107.

[235] *See, e.g.,* IDAHO CODE ANN. § 40-2831 (2) (Supp. 1969). DEL. CODE ANN. tit. 17, § 1122 (Supp. 1970) ("pay compensation therefor in the same manner as with other property acquired for State highway purposes").

that the State "shall pay compensation under existing eminent domain law"; other statutes [236] provide that compensation or damages "shall be ascertained in the manner presently provided by law, or in such manner as the legislature may hereafter provide." Under both types of statute, it would seem that the legislature intended to prevent the courts from subsequently holding that the compensation payable upon removal of nonconforming advertising signs shall include items of damage not compensable under the law of the State as it existed prior to enactment of the statute. It is far from clear, however, how far the legislature can effectively restrict the exercise of the judicial power to modify or extend the existing case law in regard to compensation in eminent domain. In the second type of statute, the express recognition of the legislature's power to make new rules as to compensation in eminent domain really adds nothing, for a legislature always has the power (subject to constitutional limitations) to change existing rules of law and cannot bind itself not to exercise such power in the future.

Several of the State compliance laws [237] expressly provide that nonconforming advertising signs shall be deemed to be trade fixtures and that the sign owner shall be compensated for the fair market value thereof when they are removed. These statutory provisions are apparently designed—like others discussed earlier [238]—to assure that the valuation of the sign owner's interest in eminent domain shall include the value of the sign itself, "as part of the realty," and that the State shall not merely acquire the advertising rights of the landowner and the sign owner in the land and then order the sign owner to remove the sign, as mere personal property, without receiving compensation for the sign itself. Presumably the statutory provisions that signs are to be treated as trade fixtures are intended to settle an issue left unsettled by the State's existing case law.

West Virginia has a compliance law [239] that expressly provides for determination of "the compensation to which the owner of the sign and leasehold interest is entitled, separate and apart from the compensation to which the owner of the real property is entitled." This provision was apparently included for the purpose of preventing application of the unit rule and assuring the separate valuation of the interests of the landowner and of the sign owner (as lessee) in the land on which the sign is located. New Mexico has a similar provision.[240]

Perhaps the most interesting State statutory variant from the language of Title I, subsection (g), of the Highway Beautification Act is the provision for payment of severance damage that is to be found in at least four compliance laws.[241] The statutes of Indiana,[241] Kansas,[241] and Wyoming [241] are the most explicit in this regard. The Indiana statute [241] repeats the Title I, subsection (g), language with respect to payment of compensation upon removal of nonconforming advertising signs, and then adds the following provision: "such compensation, including severance damage and damage to the remainder of the outdoor advertising plant, shall be included in the amounts paid to the respective owners." The separate reference to severance damage and damage to the remainder of the outdoor advertising plant is rather ambiguous, suggesting that these two things are not the same. But there is really no other item of damage involved in the taking of the property interests of the landowner and of the sign owner that can properly be termed "severance damage." Hence, it would seem that severance damage and damage to the remainder of the outdoor advertising plant are intended to be synonymous, and that the latter phrase merely defines what is meant by "severance damage."

The Wyoming statute [241] uses substantially the same language about severance damage and damage to the remainder of the outdoor advertising plant as does the Indiana statute. The Kansas statute [241] says that full compensation shall include "damage to the remainder of the outdoor advertising plant, if any." The Utah statute,[241] on the other hand, merely says that "full compensation shall be deemed to include . . . severance damage, taking into consideration the unique nature of outdoor advertising as affected by this act." Despite the difference in wording, it seems reasonably clear that the Kansas and Utah provisions are intended to have the same meaning and effect as the Indiana and Wyoming provisions as to severance damage and damage to the remainder of the outdoor advertising plant.

There is no prior law in Indiana, Kansas, Utah, or Wyoming either holding or suggesting that an advertising plant is an entity for eminent domain purposes, so that the taking of one or more signs could give rise to severance damage, which would consist of the damage to the remainder of the outdoor advertising plant. Thus, the question may fairly be raised whether Federal funds can be made available under Title I, subsection (g), of the Highway Beautification Act for payment of 75 percent of the severance damage determined in accordance with the mandate of the Indiana, Kansas, Utah, and Wyoming statutes. The position of the Bureau of Public Roads was made clear in its *Policy and Procedure Memorandum 80-9,* issued on March 31, 1967, which stated: "Each sign shall be treated as a separate entity without regard to the effect its removal will have on the business operation of the owner." [242] However, Federal Highway Administrator Bridwell apparently moderated the Bureau's position during his testimony at the 1967 Senate Hearings, in the course of which he said there was "no policy against" the payment of severance damages, and that the Department's policy was to "pay for what a court determines to be just compensation." [243] He was less certain, however, as to the effect of a State statute mandating payment of severance damages.[244]

A complicating factor in Indiana, Kansas, Utah, and Wyoming is that all four States have compliance laws that would appear to prohibit removal of any nonconforming

[236] *See, e.g.,* MISS. CODE ANN. § 8059.5-09 (2) (Supp. 1968).
[237] *See, e.g.,* N.M. STAT. ANN. § 55-11-6 (C) (1) (Supp. 1969); OKLA. STAT. ANN. tit. 69, § 1280 (b) (1969).
[238] See text *supra* between notes 232 and 234.
[239] W. VA. CODE § 17-22-6 (Supp. 1970).
[240] N.M. STAT. ANN. § 55-11-6 (B) (Supp. 1969).
[241] IND. ANN. STAT. § 36-3507 (Supp. 1969); KAN. STAT. ANN. § 68-2223 (Supp. 1970); UTAH CODE ANN. § 27-12-136.11 (2) (a) (1969); WYO. STAT. § 24-105 (e) (1967).

[242] *Policy and Procedure Memorandum 80-9, supra* note 57, at 6.
[243] *1967 Senate Hearings, supra* note 39, at 33.
[244] *Ibid.* See also *Id.* at 457.

sign unless Federal participation in payment of the required compensation is assured. This is quite clear under the Indiana statute, which provides:[245]

> No sign or area shall be acquired pursuant to this act unless the costs therefor are eligible for 75% federal participation, and unless there are sufficient funds, from whatever source, appropriated and immediately available to the state of Indiana, and unless the funds are apportioned by the federal government and notification thereof has been received by the state of Indiana.

The Utah and Wyoming statutes, which are identical on this point (and substantially the same as the Kansas statute), include the following provision:[246]

> Despite any contrary provision in this act, no sign shall be required to be removed unless at the time of removal there are sufficient funds, from whatever source, appropriated and immediately available to this state with which to pay the just compensation required under this section, and unless at such time the federal funds required to be contributed to this state under section 131 of Title 23, United States Code, have been appropriated and are immediately available to this state.

It is not entirely clear whether this language means the same thing as the Indiana statutory language previously quoted. If it does, refusal of the Bureau of Public Roads to participate in the payment of severance damage based on damage to the remainder of the advertising plant would seem to preclude removal of any signs belonging to outdoor advertising companies in Kansas, Utah, and Wyoming, as well as in Indiana, and would thus preclude these States from complying with Title I of the Highway Beautification Act.

It should be noted that several other states have statutory provisions that preclude removal of nonconforming advertising signs unless and until Federal matching funds are available under Title I, subsection (g), of the Highway Beautification Act.[247] And the California and Vermont statutes[248] both provide, in substance, that no compensation is to be paid upon removal of nonconforming signs unless, and to the extent that, such payment is required by Federal law as a condition for payment to the State of a full share of Federal highway funds.

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[245] IND. ANN. STAT. § 36-3513 (Supp. 1969).

[246] UTAH CODE ANN. § 27-12-136.11 (2) (b) (1969); WYO. STAT. § 24-105 (e) (1967).

[247] *See, e.g.,* CAL. BUS. & PROF. CODE § 5288.5a (Deering Supp. 1971); DEL. CODE ANN. tit. 17, § 1122 (Supp. 1970); MD. CODE ANN. art. 89B, § 253 (Supp. 1970); N.Y. HIGHWAY LAW § 88 (7) (McKinney Supp. 1970); N.D. CENT. CODE § 24-17-05 (1970); OKLA. STAT. ANN. tit. 69 § 1283 (1969); VT. STAT. ANN. tit. 9, § 336 (Supp. 1970); VA. CODE ANN. § 33.1-370 (1970). The Maine and South Dakota statutes are less restrictive. ME. REV. STAT. ANN. tit. 32, § 2719 (6) (Supp. 1970) provides: "The [State highway] commission may acquire by the power of eminent domain all right, title, leasehold or any interest in nonconforming signs, and the property right to maintain signs not in conformity with this chapter when and only when the federal share of just compensation prescribed in the Highway Beautification Act of 1965 and the Federal-Aid Highway Act of 1968 is available to the State of Maine *or the Maine Legislature makes a specific appropriation. . . .*" (Emphasis added.) S.D. LAWS 1967, c. 118, § 12 provides: "Despite any provision in this Act to the contrary, no sign display or device shall be required to be removed unless at the time of removal there are sufficient funds appropriated and available to pay the affected parties the just compensation required by this Act, *after due allowance for any contribution which may be available from the federal government, provided that the latter contribution is available for immediate payment.*" (Emphasis added.) On the other hand, as previously indicated in the text *supra* at note 229, the Georgia and Michigan statutes provide that, "*except* for signs erected after September 1, 1965, and before the effective date of this Act, no sign shall be acquired, the cost of which shall not be eligible for seventy-five percent (75%) Federal participation." (Emphasis supplied.)

[248] CAL. BUS. & PROF. CODE § 5288.3a (Deering Supp. 1971); VT. STAT. ANN. tit. 10, § 336 (Supp. 1970).

CHAPTER THREE

CONTROL OF OUTDOOR ADVERTISING BY MEANS OF THE POLICE POWER

A. INTRODUCTION: THE POLICE POWER

All of the current State outdoor advertising control laws rely on the police power in some measure, at least, to control the erection and maintenance of signs within specified areas adjacent to highways of various types. The police power with which we are here concerned is the inherent sovereign power of the States to regulate the use of private property in order to protect or promote the public health, safety, morals, or general welfare. When economic losses fall on property owners as a result of valid police power regulations, there is no State or Federal constitutional requirement that the property owners shall be compensated for their losses. A determination that a given regulation is a valid police power measure ipso facto establishes that it is not a taking of private property for public use that gives rise to a constitutional right of just compensation.

However, as Chief Justice Shaw remarked in one of the earliest and most celebrated discussions of the police power,[249] "It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise." The difficulty, of course, arises in large measure because, as Justice Holmes observed,[250] "the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The principal constitutional limitations on the police power of the States are those imposed by the Fourteenth Amendment to the United States Constitution and similar provisions in the various State constitutions. Judicial interpretation of these constitutional limitations on the police power of the States—chiefly the guaranties of due process of law and equal protection of the law [251]—has stressed that they are intended to prevent arbitrary and unreasonable actions by State governments and their agencies and political subdivisions. Arbitrariness and unreasonableness are tested by reference to the objective of the regulatory measure and the means selected to achieve the objective. The objective must be one that the court deems to be embraced within the traditional police power purpose of protecting or promoting the "public health, safety, morals, or general welfare." The means selected (1) must be appropriately and suitably related to the achievement of the objective—i.e., must contribute to achievement of the stated objective to a substantial degree and must not go too far beyond the necessities of the case; and (2) must not be discriminatory—i.e., must apply equally to all persons who are similarly situated. All classifications created to justify different treatment of different classes of persons must be appropriate in light of the legislative objective.

In addition to determining whether a particular regulation of the use of private property is reasonable with respect to objective and method, most courts also look at the economic loss (if any) inflicted upon the property owner by the regulation, and attempt to weigh this loss against the public benefit that may be expected to result from the regulation. If the objective of the regulation is within the police power but the tendency of the regulation to advance that objective is slight, the court may hold the regulation to be unreasonable, even though the economic impact on the property owner is not very great. A fortiori, a court is likely to reach this result if the economic loss to the property owner is substantial. But a regulatory measure that imposes a severe economic loss on the property owner may be upheld if it is found substantially to advance a public interest that is comfortably within the police power. This attempt to accommodate, or balance, public and private interests is implicit in many judicial decisions, and some courts have articulated it quite clearly.[252] But judicial discussions of the problem are frequently complicated by statements that a regulation that is found to have an economic impact on the property owner not justified by any concomitant public benefit really constitutes a taking of private property for public use.

It is true, of course, that the Fifth Amendment to the United States Constitution prohibits the Federal government from taking private property for public use without just compensation [253] and that the "due process" clause of the Fourteenth Amendment makes this prohibition applicable to the States.[254] Almost all the State constitutions, moreover, contain provisions similar to the "just compensation" provision of the Fifth Amendment. But it is probably more confusing than enlightening for courts to say, as they sometimes do, that a taking has occurred, when all the courts really mean is that, on balance, they believe a particular regulation of the use of private property is unreasonable because the economic impact on the property owner is disproportionate to the public benefit that may be expected to accrue. In any case, it is not very helpful to be told that, "while property may be regulated to a certain degree, if regulation goes too far it will be recognized as a taking," [255] and that "there is no set formula to determine where regulation ends and taking begins." [256]

Drawing the line between a valid regulation of the use of private property and an invalid taking is difficult enough within a single jurisdiction. Moreover, the courts of different jurisdictions often draw the line in different places. As already indicated, some courts seem to regard as a taking any regulation that, on balance, is found unreasonable because the economic impact on the property owner is disproportionate to the public benefit.[257] Other courts seem to regard a regulation as a taking only if it substantially destroys the value of the property in question by prohibiting any profitable use of it.[258] And some courts tend to

[249] Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85 (1852).

[250] Noble State Bank v. Heiskell, 219 U.S. 104, 31 S. Ct. 186, 55 L. Ed. 112 (1911).

[251] The 14th Amendment provides (*inter alia*): "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[252] Many zoning cases articulate the "balancing" test, e.g., Langguth v. Mt. Prospect, 5 Ill. 2d 49, 124 N.E.2d 879 (1955), where the court said: "If the gain to the public is slight and the loss to the individual property owner is substantial, the regulation is not a proper exercise of the police power and is consequently invalid."

[253] The Fifth Amendment, which is in form only a limitation on the power of the Federal government, provides: "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

[254] Missouri Pacific Ry. v. Nebraska, 164 U.S. 403, 17 S. Ct. 130, 41 L. Ed. 489 (1896).

[255] The quotation is from the opinion by Holmes, J., in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922). In his opinion for the court, Holmes also said:

> Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power.

[256] The quotation is from the opinion in Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962). The full passage from which the quotation is taken is as follows:

> If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. . . .
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> This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, . . . it is by no means conclusive. . . . How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question. Indulging in the usual presumption of constitutionality, we find no indication that the prohibitory effect of Ordinance No. 16 is sufficient to render it an unconstitutional taking if it is otherwise a valid police power regulation.

[257] *See, e.g.,* Pere Marquette R.R. v. Muskegon Township, 298 Mich. 31, 36, 298 N.W. 393, 397 (1941).

keep the questions of economic impact and taking separate, holding that there is no taking unless the purported regulation is designed to produce positive community benefits rather than to prohibit a use of property that would cause harm to the community by burdening it with external costs.[259] Under the view last stated, even a confiscatory reduction in property value as a result of regulation is not necessarily a taking,[260] although it may be deemed to violate due process because it is unreasonable; but there may be a taking even though the reduction in property value is not substantial. Dunham believes that the line between regulation and taking should be drawn in accordance with the view last stated,[261] and Sax has taken a somewhat similar position.[262]

When regulatory measures have been challenged as unconstitutional, courts have tended to limit the scope of their decisions to the facts and issues before them, declaring that it is impossible to draw up a definitive list of legitimate police power applications. Thus, prediction of what courts will decide as to the validity of a proposed application of the police power is often more reliably based on an understanding of the basic nature of the power than on any box score of the courts' handling of prior regulatory laws. But the case law dealing with the regulation of outdoor advertising is extensive enough to justify the conclusion that at least those State laws prohibiting the erection of *new* advertising signs within specified areas adjacent to public highways are constitutionally valid although they make no provision for compensation.

B. PROHIBITION AGAINST ERECTION OF NEW ADVERTISING SIGNS

The business of outdoor advertising on a commercial basis dates from the 1880's. Under the common law, advertising posters that for any reason were regarded as offensive or dangerous were dealt with under the doctrine of nuisance. From the 1890's onward, however, large-scale commercial promotion of billboard advertising became so aggressive and its methods so crude as to provoke a reaction in the form of prohibitory legislation, usually in the form of municipal ordinances.[263]

The early cases testing the validity of these prohibitory ordinances found the courts generally hostile, and numerous billboard ordinances were declared unconstitutional. The courts said that billboards were not nuisances in fact and could not be made so by legislative fiat. Aesthetic considerations were held insufficient to support use of the police power to impose rather modest restrictions on the location of billboards.[264] Even ordinances with the limited purpose of protecting the appearance of public parks and boulevards by restricting the placing of billboards near such places were disapproved.[265] The rationale of many of these early court decisions was stated by a conservative New Jersey court as follows:[266]

> Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.

Even in the early 1900's, however, cases may be found upholding the validity of municipal billboard regulation on the dual grounds of safety and amenity. In *In re Wilshire,* for example, a Federal court said:[267]

> It is a matter of common knowledge, and therefore within the notice of the court, that these [billboards] are usually, if not invariably, cheap and flimsy affairs, constructed of wood, and erected on vacant lots of land along or near to streets, in order to catch the eye of the passers-by. Such structures, if of sufficient height, may be very readily blown over by wind, or shaken down by an earthquake, and in such event (depending upon their height and proximity to the public thoroughfare) may very easily cause injury to persons standing or passing thereon. Moreover, the views in and about the city, if beautiful and unobstructed, constitute one of its chief attractions, and in that way add to the comfort and well-being of its people. Billboards for advertising purposes, erected to any height, would undoubtedly be subject to all of these, as well as other, objections, and such structures are therefore plainly within the regulatory power of the governing body of the city.

However, the decision generally credited with the greatest influence in changing judicial attitudes toward billboard regulation is *St. Louis Gunning Advertisement Co. v. St. Louis.*[268] In an opinion covering 125 pages, the Missouri court discussed the evolution of the law up to that time and upheld a municipal ordinance regulating the size, height, and location of billboards. In an oft-quoted passage, the Missouri court said:[269]

> . . . [T]here is but one virtue connected with this entire [advertising] business, and that is the advertising business itself. This is a legitimate and honorable business, if honorably and legitimately conducted, but every other feature and incident thereto have evil tendencies, and should for that reason be strictly regulated and controlled. The signboards upon which this class of advertisements are displayed are constant menaces to the pub-

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258 E.g., Tidewater Oil Co. v. Carteret, 84 N.J. Super. 525, 202 A.2d 865 (App. Div. 1964), *aff'd,* 44 N.J. 338, 209 A.2d 105 (1965). *See* Morris County Land Co. v. Parsippany-Troy Hills Township, 40 N.J. 539, 193 A.2d 232 (1963); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938). *Contra,* Consolidated Rock Products Co. v. Los Angeles, 57 Cal. 2d 515, 370 P.2d 342 (1962), *appeal dismissed,* 371 U.S. 36 (1962).

259 *See* Dunham, *A Legal and Economic Basis for City Planning,* 58 COLUM. L. REV. 650, 664-667 (1958), and cases cited.

260 E.g., Consolidated Rock Products Co. v. Los Angeles, *supra* note 258.

261 Dunham, *supra* note 259. *See also* FREUND, THE POLICE POWER § 511, at 546-47 (1904).

262 Sax, *Takings and the Police Power,* 74 YALE L.J. 36, 61-76 (1964). For a critique of other theories, see *id.* 36-60.

263 *See generally,* Profitt, *Public Esthetics and the Billboard,* 16 CORNELL L.Q. 151 (1931); Baker, *Aesthetic Zoning Regulations,* 25 MICH. L. REV. 124 (1926).

264 E.g., Anderson v. Shackleford, 74 Fla. 36, 76 So. 343, L.R.A. 1918A 139 (1917), *overruled* in part on other grounds, Sunad, Inc., v. Sarasota, 122 So. 2d 611 (Fla. 1963); Commonwealth v. Boston Adv. Co., 188 Mass. 348, 74 N.E. 601, 69 L.R.A. 817 (1905), *overruled* by General Outdoor Advertising Co. v. Dep't. of Public Works, 289 Mass. 149, 193 N.E. 799 (1935); St. Louis Gunning Adv. Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911); Kansas City Gunning Adv. Co. v. Kansas City, 240 Mo. 659, 144 S.W. 1099 (1912); Bill Posting Sign Co. v. Atlantic City, 71 N.J.L. 72, 58 A. 342 (Sup. Ct. 1904); Passaic v. Paterson Bill Posting Co., 72 N.J.L. 285, 62 A. 267 (Err. & App. 1905); State v. Whitlock, 149 N.C. 542, 63 S.E. 123 (1908); Bryan v. Chester, 212 Pa. 259, 61 A. 894 (1905).

265 Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N.E. 920, 34 L.R.A. (N.S.) 998 (1911); Commonwealth v. Boston Adv. Co., *supra* note 264.

266 Passaic v. Paterson Bill Posting Co., *supra* note 264, 72 N.J.L. at 287, 62 A. at 268.

267 103 F. 620, 623-624 (Cir. Ct. S.D. Cal. 1900).

268 235 Mo. 99, 137 S.W. 929 (1911), *error dismissed,* 231 U.S. 761, 34 S. Ct. 325, 58 L. Ed. 470 (1913). *See also* the related case of St. Louis Poster Adv. Co. v. St. Louis, 249 U.S. 269, 39 S. Ct. 274, 63 L. Ed. 599 (1919).

269 235 Mo. at 144-145, 137 S.W. at 942.

lic safety and welfare of the city; they endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants. They are also inartistic and unsightly.

In cases of fire they often cause their spread and constitute barriers against their extinction; and in cases of high wind, their temporary character, frail structure and broad surface, render them liable to be blown down and to fall upon and injure those who may happen to be in their vicinity. The evidence shows and common observation teaches us that the ground in the rear thereof is being constantly used as privies and the dumping ground for all kinds of waste and deleterious matters, and thereby creating public nuisances and jeopardizing public health; the evidence also shows that behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying in wait for his victim; and last, but not least, they obstruct the light, sunshine and air, which are so conducive to health and comfort.

Although the Missouri court, in the passage just set out, expressly mentioned the fact that signboards are "inartistic and insightly," the court at a later point in its opinion made it clear that aesthetic considerations alone were insufficient in its view to sustain the regulatory ordinance:[270]

As to the third class of cases, . . . which hold such ordinances invalid because they show upon their faces that they were enacted solely for aesthetic considerations and not for the good of the public, they are unquestionably sound; and no court should uphold an ordinance which has no better reason than that to commend it to the lawmaker and the courts. If the necessity or reasonableness of such an ordinance should be tested by such a standard, then the standard itself would be hard to establish, for the reason that all do not have the same tastes or ideas of beauty; what would please one might not please another. . . . A statute or ordinance conforming to the tastes and ideas of beauty passed [*sic*] by the body of lawmakers who enacted it might and probably would in most instances be distasteful to a majority of the people of the city; and especially is that true as regards this class of legislation. . . . Property rights should never be subjected to such fickle standards of regulation, especially when they are devoid of all substantial benefit to the citizens.

That the record of the *St. Louis Gunning* case and similar billboard cases supplied little evidence to support the health, safety, and morals justifications for regulatory legislation has been conclusively demonstrated by other writers.[271] But many courts followed the lead of the Missouri court in upholding, on health, safety, and morals grounds, billboard regulations that were in fact primarily based on aesthetic grounds.[272] The health, safety, and morals rationale was widely employed in judicial decisions that upheld billboard control ordinances under circumstances that rendered its factual basis even less convincing than it was in the *St. Louis Gunning* case.[273] And it was not discarded in later cases that exposed and gave substantial weight to the aesthetic considerations that largely motivated such regulatory legislation.[274]

Growing appreciation of the close relationship between the value of property and the amenity of its surroundings had a significant practical effect on judicial views as to the scope of the police power. This relationship was noted when the United States Supreme Court, in *Euclid v. Ambler Realty Co.*,[275] provided a solid constitutional footing for comprehensive zoning and thus made available a natural framework for including outdoor advertising regulations in ordinances that also regulated land use in other respects. The past sixty years have witnessed a gradual acceptance by the courts of a broader definition of general welfare than prevailed at the time of the *St. Louis Gunning* case. One aspect of this change in judicial attitude is the increasing number of opinions sustaining outdoor advertising controls which frankly expose their primary aesthetic purpose.[276] Recent cases sustaining aesthetic controls tend to rely, at least in part, on the ground that such controls promote the general welfare by preserving property values or the valuable tourist attractions of the community.[277] A recent New Jersey Supreme Court opinion epitomized the aesthetic-property value rationale as follows:[278]

There are areas in which aesthetic and economics coalesce, areas in which a discordant sight is as hard an economic fact as an annoying odor or sound. We refer

[270] 235 Mo. at 202, 137 S.W. at 961.

[271] Horton v. Old Colony Bill Posting Co., 36 R.I. 507, 90 A. 823 (1914); State v. Staples, 167 N.C. 637, 73 S.E. 112 37 L.R.A. (N.S.) 696 (1911); Cusack v. Chicago, 267 Ill. 344, 108 N.E. 340 (1914), *aff'd*, 242 U.S. 526, 37 S.Ct. 190, 61 L.Ed. 472 (1916); People *ex rel.* Publicity Leasing Co. v. Ludwig, 218 N.Y. 540, 113 N.E. 532 (1916); Cream City Bill Posting Co. v. Milwaukee, 158 Wis. 86, 147 N.W. 25 (1914).

[272] Profitt, *Public Esthetics and the Billboard*, 16 CORNELL L.Q. 151 (1931); Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955).

[273] E.g., Whitmier & F. Co. v. Buffalo, 118 F. 773 (Cir. Ct. N.Y. 1902); Murphy v. Westport, 131 Conn. 292, 40 A.2d 177, 156 A.L.R. 568 (1944); Hav-A-Tampa Cigar Co. v. Johnson, 149 Fla. 148, 5 So. 2d 433 (1941); General Outdoor Adv. Co. v. Dep't. of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935), *appeal dismissed*, 297 U.S. 725 (1936); State v. Staples, *supra* note 271; Landau Adv. Co. v. Zoning Bd. of Adjustment, 387 Pa. 552, 128 A. 2d 559 (1957); Liggett's Petition, 291 Pa. 109, 139 A. 619 (1927).

[274] E.g., Nat. Adv. Co. v. County of Monterey, 211 Cal. App. 2d 375, 27 Cal. Reptr. 136 (1962); Murphy v. Westport, *supra* note 273; General Outdoor Adv. Co. v. Dep't. of Pub. Works, *supra* note 273.

[275] 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). The Supreme Court had previously held that billboards may be excluded from residence zones. Cusack v. Chicago, 242 U.S. 526, 37 S. Ct. 190, 61 L. Ed. 472 (1916); St. Louis Adv. Co. v. St. Louis, *supra* note 268.

[276] The rationale for basing billboard regulations on a broader concept of the general welfare which would include aesthetic factors was first stated in Churchill and Tait v. Rafferty, 32 Philippines 580 (1915), *appeal dismissed*, 248 U.S. 591 (1918). Other important cases include Murphy v. Westport, *supra* note 273; Merritt v. Peters, 65 So. 2d 861 (Fla. 1953); State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967); Outdoor Adv. Co. v. Indianapolis, 202 Ind. 35, 172 N.E. 309 (1930); State *ex rel.* Civello v. New Orleans, 154 La. 271, 97 So. 440 (1923); General Outdoor Adv. Co. v. Dep't. of Pub. Works, *supra* note 273; People v. Sterling, 128 Misc. 650, 220 N.Y.S. 315 (Sup. Ct. 1927); Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5 (1932); Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749 (1967); State *ex rel.* Carter v. Harper, 182 Wis. 148, 196, N.W. 451 (1923); *See also* Ohio v. Buckley, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968) (junkyard); Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1967) (auto wrecking yard). The broadest "general welfare" rationale for "aesthetic" regulation is provided by Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

[277] Murphy v. Westport, *supra* note 273 (billboards—property values); Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941) (exclusive hotel and apartment zone—aesthetic appeal—tourism); Sunad, Inc., v. City of Sarasota, 122 So. 2d 611 (Fla. 1960) (advertising signs—tourism); State *ex rel.* Civello v. New Orleans, 154 La. 271, 97 So. 440, 33 A.L.R. 260 (1923) (architectural control—property values); General Outdoor Adv. Co. v. Dep't. of Pub. Works, *supra* note 273 (billboards—property values); Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955) (historic district—architectural control—tourism); Opinion of the Justices to the Senate, 333 Mass. 783, 128 N.E.2d 663 (1955) (same); United Adv. Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447 (1964) (outdoor advertising—property values); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, *appeal dismissed*, 375 U.S. 42 (1963) (clotheslines in front yards); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 712 (1955), *cert. denied*, 350 U.S. 841 (1955) (architectural controls—property values).

[278] United Adv. Corp. v. Metuchen, *supra* note 277, 42 N.J. at 5, 198 A.2d at 449.

> not to some sensitive preference but to concepts of congruity held so widely that they are inseparable from the enjoyment and hence the value of property.

The aesthetic-property value rationale just stated is probably most persuasive when it is used to sustain municipal land use regulation (usually zoning regulations) that apply to urban areas.[279] It is less persuasive when applied to highway advertising in largely rural areas. But it is now clear that conservation of scenic beauty along the highways, both to protect the right of the traveling public to aesthetic enjoyment and to preserve the tourist business as an economic asset of the State, is a legitimate police power objective.[280] And closely linked with the idea that the police power may properly be used to protect scenic beauty in order to protect the traveling public's right to aesthetic enjoyment is the idea that travelers on a public highway, constructed with public funds, have a right to be free from the intrusion of unwelcome advertising that derives its value to the advertiser entirely from the public investment in the highway.[281]

Judicial recognition that the highway advertiser is essentially "seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways" [282] and that "the regulation of billboards is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares" [283] led ultimately—in *Kelbro, Inc., v. Myrick* [284]—to a holding that "the right of view [from the highway] of the owner or occupant of the abutting property is limited to such right as is appurtenant to that property and includes the right to display only goods or advertising matter pertaining to business conducted thereon." [285] In addition, the growth in the number of automobiles on the highways and the increase in normal highway driving speeds has led to the development of a new public safety rationale for the regulation of outdoor advertising—i.e., the courts have increasingly accepted the view that regulation of highway advertising may reasonably be deemed to promote traffic safety, which is clearly a legitimate objective of police power regulations.

All of the grounds mentioned in the preceding two paragraphs have been relied on by the courts in decisions upholding the regulation of outdoor advertising along the highways. These include a number of important recent decisions upholding the prohibition of off-premises advertising along the Interstate highways and other limited-access highways.

The first of these recent cases is *Opinion of the Justices*,[286] an advisory opinion of the New Hampshire Supreme Court upholding the constitutionality of a highway advertising control bill subsequently enacted in 1961.[287] The purpose of the bill, as stated in its preamble, was "to provide for maximum visibility along the interstate system and connecting roads or highways, to prevent unreasonable distraction of operators of motor vehicles, to prevent confusion with regard to traffic lights, signs or signals or otherwise interfere with the effectiveness of traffic regulations [*sic*], to promote maximum safety, comfort and well-being of users of the interstate highway system and to preserve and enhance the natural scenic beauty or the aesthetic features of the interstate highway system and adjacent areas." [288] In dealing with the argument that the bill was not a valid exercise of the police power, the New Hampshire court said that, although the purposes stated in the preamble are not determinative, "they are nevertheless entitled to weight in determining the constitutionality of the proposed law." [289]

The New Hampshire court then went on to point out that "interstate highways are built with taxpayers' money to promote the general welfare and safety of the public by affording means of swift, safe and pleasurable travel for all, and not to secure commercial advantages for a limited number of advertisers"; [289] and that "whatever value billboards along such highways possess is due to the presence of the public whose tax money has constructed the highways." [289] Because the court cited *Kelbro, Inc., v. Myrick* [290] it can be assumed that it approved the rationale of the *Kelbro* case, although that rationale was not fully spelled out in the New Hampshire court's opinion.[291]

The New Hampshire court next adduced the traffic safety rationale, using the following language: [291]

> . . . 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 the 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.

Finally, in dealing with the police power, the New Hampshire court adverted to the preservation of scenic beauty as a legitimate objective of the proposed law. First, said the court,[291] it is clear 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" New Hampshire's 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.

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[279] E.g., Murphy v. Westport, United Adv. Corp. v. Metuchen, and State *ex rel* Saveland Park Holding Corp. v. Wieland, *supra* note 277.

[280] E.g., General Outdoor Adv. Co. v. Dep't. of Pub. Works, *supra* note 273, 184 Mass. at 184-188, 193 N.E. at 815-817.

[281] *Id.* at 167-169, 193 N.E. at 808.

[282] *Id.* at 169, 193 N.E. at 808.

[283] Churchill and Tait v. Rafferty, *supra* note 276, at 609.

[284] 113 Vt. 64, 30 A.2d 527 (1943).

[285] *Id.* at 70, 30 A.2d at 530. See Wilson, ***Billboards and the Right to be Seen from the Highway***, 30 GEO. L.J. 723 (1942), for an exhaustive discussion of this property rights approach to outdoor advertising regulation. *Kelbro* was reaffirmed in Micalite Sign Corp. v. State Highway Dep't., 126 Vt. 498, 236 A.2d 680 (1967).

[286] 103 N.H. 268, 169 A.2d 762 (1961).

[287] N.H. ACTS 1961, c. 269; N.H. REV. STAT. ANN. c. 249-A. This statute was amended by N.H. ACTS 1969, c. 429, to bring it into conformity with Title I of the Highway Beautification Act.

[288] N.H. REV. STAT. ANN. § 249-A:1, as it stood before the 1969 amendment, *supra* note 287.

[289] 103 N.H. at 269, 169 A.2d at 763.

[290] *Supra* note 284.

[291] See discussion in 103 N.H. at 269-270, 169 A.2d at 764.

And secondly, said the court,[291] although it was "unnecessary to decide . . . whether aesthetic considerations alone furnish ground for the exercise of the police power as is increasingly stated by modern authorities . . ., we do not believe that such can entirely be ignored and without stating that they are decisive, we hold that the maintenance of the natural beauty of areas along interstate highways is to be taken into account in determining whether the police power is properly exercised."

The New Hampshire court thus held, on a combination of grounds, that "the regulation of outdoor advertising along interstate highways is a valid exercise of the police power." [291] In addition, the court sustained the distinction drawn in the proposed law between on-premises and off-premises advertising, as against attack on the ground that this distinction is "arbitrary, discriminatory and without any sound basis." In dealing with this point, the court said: [291]

> It appears to us that a valid distinction exists between signs which advertise businesses conducted on the premises including the offering for sale of the property upon which these signs are located, and those benefiting in the main national producers whose solicitude is for their own welfare and not that of the community.

In conclusion the New Hampshire court gave short shrift to the argument that the proposed law was unconstitutional "because one of its purposes is to secure funds offered by the Federal government." As the court pointed out: [292]

> The fact that valid legislation may be induced in part by the consideration that such funds will assist in furthering the policies of the legislation violates no provisions of our Constitution. Unquestionably our legislature cannot delegate its sovereign police power . . ., but the provisions of the bill require no such delegation.

The second of the recent cases on regulation of outdoor highway advertising is *New York State Thruway Authority v. Ashley Motor Court.*[293] In this case the Thruway Authority brought an action to enjoin the defendant motel owner and defendant landowner from maintaining a motel advertising sign within 500 ft of the Thruway and to compel removal. The action was brought under N.Y. Highway Law § 361-a, which prohibits the erection of any billboard or other advertising device within a specified distance of the nearest edge of the Thruway without a written permit from the Thruway Authority. At the time the suit was begun the prohibited distance was 500 ft; it was later increased to 660 ft.[294] The sign in question, for which no permit was ever sought by anyone, was originally erected on defendant landowner's property in 1937. In 1958, when that property was condemned for use in connection with the widening of Route 17, it was moved to another location on adjacent land within 500 ft of the Thruway.

In the *New York State Thruway* case the defendants argued that section 361-a of the N.Y. Highway Law was invalid because it was not reasonably related to the public health, morals, or safety and because it constituted a taking of property rights without compensation. In sustaining the statute, the New York Court of Appeals relied primarily on the traffic safety rationale and the aesthetic rationale, in combination. The core of the opinion is in the following language: [295]

> There can be no doubt that the statute is reasonably related to a legitimate legislative purpose. As both the Legislature's finding and the statute's listed objectives make clear, the legislation is aimed at rendering the Thruway safe for the traveling public—by providing for maximum visibility and by preventing unreasonable distractions. There are some, perhaps, who may dispute whether billboards or other advertising devices interfere with safe driving and constitute a traffic hazard . . ., but mere disagreement may not cast doubt on the statute's validity. Matters such as these are reserved for legislative judgment and the legislative determination, here expressly announced, will not be disturbed unless manifestly unreasonable. . . .
>
> It has been said that billboards can be as destructive of the beauties of the countryside as a plague of locusts and that consequently aesthetic considerations alone are enough to sustain enactments restricting and regulating the erection of advertising devices. We need not, however, concern ourselves with the question whether the preservation of "the natural scenic beauty" . . . would in and of itself be a sufficient basis for the legislation under consideration. The fact is that the statute before us refers to the aesthetic element as but one of the "objectives and standards" which the Authority should have in mind in adopting regulations for the issuance of permits. The other factors to be considered by the agency—such as the promotion of "maximum safety" and the prevention of "unreasonable distraction" and "confusion" . . .—undoubtedly justify the exercise of the police power. . . . As Chief Judge Pound put it in the Perlmutter case . . ., "Beauty may not be queen but she is not an outcast beyond the pale of protection of respect. She may at least shelter herself under the wing of safety, morality or decency."

With respect to the defendants' argument that removal of the sign in the *New York Thruway* case would be a taking of property rights without compensation, the court said [296] it was enough to point out that, although the sign existed at another location at a prior time, it was relocated and placed in the position from which the Thruway Authority sought to remove it in 1958, some years after the effective date of the statute, and that this constituted the erection of a new sign.

The third of the recent cases on regulation of outdoor highway advertising is *Moore v. Ward,*[297] a suit brought to test the constitutionality of the Kentucky Billboard Act of 1960.[298] In substance, that Act prohibited the erection of any advertising device on private property within 660 ft of the right-of-way line of any Interstate highway, limited-access highway, or turnpike, with an exception for on-premises advertising signs. Signs existing on March 1, 1960,

[292] 108 N.H. at 272, 169 A.2d at 765. The court also dealt with the retrospective operation of the statute to compel removal of nonconforming signs. This is discussed *infra* in the text at notes 373 and 374.

[293] 10 N.Y.2d 151 176 N.E.2d 566 (1961).

[294] N.Y. Laws 1960, c. 904, adopted to bring the statute into compliance with the bonus provision of Federal-Aid Highway Act of 1958. This extension was held to be a valid exercise of the police power in Whitmier & Ferris Co. v. State, 20 N.Y.2d 413, 230 N.E.2d 904 (1967).

[295] 10 N.Y.2d at 156, 176 N.E.2d at 568-569.

[296] *Id.* at 157, 176 N.E.2d at 569. In addition, the court said that it would have been constitutional to require removal of an existing nonconforming sign without compensation. This point is discussed in the text *infra* at notes 375-377.

[297] 377 S.W.2d 881 (Ky. 1964).

[298] KY. REV. STAT. ANN. §§ 177.830-177.890. This statute was subsequently amended in both 1966 and 1968 to bring it into conformity with Title I of the Highway Beautification Act.

were to be allowed to remain until March 1, 1965. Most of the issues raised in *Opinion of the Justices* [299] and *New York Thruway Authority v. Ashley Motor Court* [300] were also raised in *Moore v. Ward,* and they were dealt with in substantially the same manner as in the earlier cases. On the traffic safety point, for example, the court said: [301]

> Even assuming appellants could produce substantial evidence that billboard signs do not adversely affect traffic safety, this record indicates, and our common knowledge suggests, that the question involves so many intangible factors as to make debatable the issue of what the facts establish. Where this is so, it is not within the province of courts to hold a statute invalid by reaching a conclusion contrary to that of the legislature.

Moreover, as the court pointed out, appellants' position on this point was unavailing because the traffic safety problem was only one of many significant public welfare considerations that doubtless influenced the legislature to act. The statute itself recited that [301] there were such matters as "convenience and enjoyment of public travel," "the free flow of interstate commerce," "the protection of the public investment in the system of interstate and defense highways within the Commonwealth," the elimination of "distracting influences," and the "enhancement of natural scenic beauty." As the court said: [302]

> . . . Obviously a billboard sign is a distracting device. It diverts, and is designed to divert, the motorist's attention from the highway. In the public interest the legislature could weigh the right of the motorist to be free of such distracting signs. It could determine they impair the motorist's enjoyment of the highway.
>
> Closely allied to the enjoyment factor is the promotion of the scenic beauty surrounding the highways. Aesthetic considerations are of sufficient potency for the legislature to find a public necessity for this type of legislation. We have recently considered that question and have accepted aesthetic considerations as justifying the exercise of police power.
>
> Another consideration is one of cooperating with the federal government to obtain financial assistance and promote the uniformity of high speed highways. The fact that the Federal Congress and federal authorities have deemed this type of regulation as beneficial to the public is also a factor in determining public necessity.

The Kentucky court apparently gave some weight to the rationale stated in the *Kelbro* case, although it expressly said that characterization of the property rights of highway advertisers as servitudes imposed on the public highways did not give the State any special authority to destroy them. Rather, "their nature is such the legislature may reasonably find that public rights of travel in the highways outweigh this private manner of use." [303] In addition, the court rejected appellants' argument that, although a public purpose is served by some plan for the regulation of outdoor advertising, "total prohibition is unreasonable because unnecessary." In answer to this argument the court said: [304]

> . . . We are not passing upon the wisdom of the law. We are not appraising it to determine if it is the best of its kind. We are not weighing the factors which could reasonably have been taken into consideration by the legislature, one against the other. We are simply recognizing that the determination of method is strictly a legislative matter with which we cannot interfere if it has a reasonable relationship to a legitimate public purpose. . . .
>
> Automobile traffic and highways play a bigger role in public life every day. The extent and method of their regulation must be left to the legislature if the means bear a reasonable relationship to a legitimate end.

[299] *Supra* note 286.
[300] *Supra* note 293.
[301] 377 S.W.2d at 884.
[302] *Id.* at 886-887.
[303] See discussion *id.* at 887.
[304] *Id.* at 887.

Moore v. Ward was soon followed by *Ghaster Properties, Inc., v. Preston,*[305] in which the Ohio Supreme Court sustained the Ohio highway advertising control [306] statute against constitutional attack. The Ohio statute was generally similar to the New Hampshire and Kentucky statutes held valid in *Opinion of the Justices* [307] and *Moore v. Ward,*[308] respectively, and the Ohio court relied on and quoted from both of these cases, as well as *Kelbro, Inc., v. Myrick* [309] and *New York Thruway Authority v. Ashley Motor Court.*[310] In its syllabus, the Ohio court made the following points with respect to the police power as a basis for outdoor advertising control: [311]

> 5. The general welfare of the public as a basis for the exercise of the police power encompasses more than the public health, safety and morals.
>
> 6. In considering whether a proposed statute prohibiting billboards adjacent to a highway bears a real and substantial relation to the public welfare, the General Assembly may properly give weight not only to its effect in promoting public safety but also to its effect in promoting the comfort, convenience and peace of mind of those who use the highway by removing annoying intrusions upon that use.
>
> 7. The determination by the General Assembly that Sections 5516.01 to 5516.05 and 5516.99, Revised Code, bear a real and substantial relationship to the public safety and general welfare is not clearly erroneous and will not be disturbed.
>
> 8. A statute is neither unreasonable nor arbitrary because it prohibits signs which advertise a product not sold on the property but permits signs advertising products sold on the property.
>
> . . . .
>
> 10. The relation between the public welfare and the prohibition of billboards adjacent to the interstate highway system is at least as real and substantial where such billboards are visible only on access roads at an interchange with an interstate highway as where they are visible at other points on the interstate highway system.

In its opinion proper,[312] the Ohio court also rejected the arguments that the statutes in question were unconstitutional because (1) they infringed the right of free speech and (2) because they contracted away a part of the State's legislative power.[313] The court also pointed out [314] that the

[305] 176 Ohio St. 425, 200 N.E.2d 328 (1964).
[306] OHIO REV. CODE ANN. c. 5516 (Page 1970).
[307] *Supra* note 286.
[308] *Supra* note 297.
[309] *Supra* note 284.
[310] *Supra* note 293.
[311] 176 Ohio St. at 425-426, 200 N.E.2d at 330.
[312] It should be noted that only the syllabus of Ohio court opinions is binding under the doctrine of precedent.
[313] 176 Ohio St. at 439, 200 N.E.2d at 338.
[314] *Id.* at 435, 200 N.E.2d at 335. The court also held that a statutory prohibition against maintenance of billboards may be applied against signs in existence at the time of the enactment of the statute. This matter is discussed in the text *infra* at notes 382-384.

two scientific studies on which the sign owner relied to establish that there is no relationship between advertising signs and accidents—the so-called Michigan and Iowa studies—were both based on data obtained before the advent of the Interstate highway system.

The most recent, and probably the most important of the decisions sustaining the regulation of outdoor advertising adjacent to highways is *Markham Advertising Co. v. State*.[315] On the traffic safety issue, the Washington Supreme Court upheld the finding of the trial court, which was as follows: [316]

> 1. The defendant introduced sufficient evidence to permit reasonable men to find that a reasonable relationship exists between outdoor advertising and traffic safety. The evidence indicates that (a) outdoor advertising structures along the highways are intended to, and do, cause inattention to the driving task which, in turn, results in increased stopping distances and driver reaction times. Such factors contribute to traffic accidents; (b) plaintiffs' advertising structures are sometimes serviced from highway shoulders and rights-of-way, in violation of highway access limitations imposed to promote traffic safety; (c) advertising signs compete with official highway signs for driver attention, and decrease the effectiveness of cautionary and directional messages essential for the safety of the traveling public; (d) highway billboards which cause driver inattention, are contrary to the principles of modern interstate highway design, since highways are being built to permit higher speeds and increased traffic loads, thus placing greater demands on motorists' attention and alertness; (e) intersections on interstate highways are particularly dangerous areas due to the frequency and nature of traffic movements. Also, official signs in such areas, directing safe travel of motorists, are more numerous, than in other locations along the highways. Driver inattention in intersection areas is more seriously dangerous than in other areas.
>
> 2. Signs located more than 660 feet from the highway are less obtrusive and are less likely to constitute a traffic safety hazard than signs located closer to the right-of-way.

The supreme court was satisfied that "the trial court's implicit finding, that there is a substantial relation between traffic safety and the regulation of outdoor advertising" was amply supported by the record, and the Court held that the expressed purpose of the statute to promote traffic safety is clearly a proper purpose for the exercise of the police power.[317]

The Washington Supreme Court also held that it is no objection to a police power law that one of its purposes is to promote aesthetic values. Referring to the stated purposes of the statute to promote the "convenience and enjoyment of public highways," "to attract visitors to this State," and to conserve "the natural beauty of areas" adjacent to Washington highways, the court said that such purposes are properly included within the scope of the public welfare.[318] And the Washington Supreme Court rejected the appellants' arguments (1) that the legislature may not declare a legitimate business a nuisance under the police power; [319] (2) that various classifications established by the statute and regulations issued thereunder were "invidiously arbitrary and discriminatory," and thus contrary to the "equal protection" clause of the Fourteenth Amendment; [320] (3) that the statute violated First Amendment guarantees of freedom of speech; [321] and (4) that the statute did not provide adequate standards for the highway commission to follow in issuing regulations.[322]

In light of the decisions in the cases just discussed—*Opinion of the Justices, New York State Thruway Authority v. Ashley Motor Court, Inc., Moore v. Ward, Ghaster Properties, Inc., v. Preston,* and *Markham Advertising Co. v. State*—it seems unlikely that any state court will hold statutes enacted for the purpose of compliance with the Highway Beautification Act to be unconstitutional insofar as these statutes rely on the police power to prohibit the erection of new advertising signs in areas adjacent to the Interstate and primary highway systems. If the police power provides an adequate basis for removal of existing advertising signs without compensation, a fortiori it provides an adequate basis for prohibition of the erection of new signs in the future. All of these recent cases have found the purposes of legislation very similar to the current compliance laws to be well within the police power, and all of them have sustained the statutes before the court as against attack on the equal protection and free speech grounds. The distinction between off-premises and on-premises signs was expressly held to be valid in *Opinion of the Justices* [323] and *Ghaster Properties, Inc., v. Preston,*[324] as against attack on equal protection grounds, and this distinction has almost uniformly been sustained as reasonable in other cases.[325] By implication, the distinction between Interstate highways (and, in some cases, certain other limited access highways) and other highways was upheld in all the recent highway advertising cases. Similarly, the distinction between land within 660 ft of the Interstate highways (and other controlled highways) and land located farther from such highways has been sustained either by implication or, in one case,[326] by express language in the court's opinion.

Some equal protection arguments can be leveled against compliance laws stimulated by the Highway Beautification Act that could not be leveled against the earlier state advertising control legislation sustained in the recent cases discussed previously. For example, it can be argued that the compliance laws discriminate arbitrarily between rural and urban signs—and hence between roadside business advertising and standardized outdoor advertising—by virtue of the allowance of off-premises advertising in zoned and unzoned commercial and business areas.[327] It can also be

[315] 73 Wash. 2d 405, 439 P.2d 248 (1968), *app. dismissed,* 393 U.S. 316 (1969).
[316] 73 Wash. 2d at 416-417, 439 P.2d at 255.
[317] *Id.* at 421, 439 P.2d at 258.
[318] *See* discussion in *id.* at 421-424, 439 P.2d at 259-260.

[319] *Id.* at 425, 439 P.2d at 260.
[320] *See* discussion in *id.* at 427-428, 439 P.2d at 261-262.
[321] *Id.* at 428-429, 439 P.2d at 262-263.
[322] *Id.* at 429-430, 439 P.2d at 263.
[323] *Supra* note 286.
[324] *Supra* note 305.
[325] E.g., Kelbro, Inc., v. Myrick, 113 Vt. 64, 30 A.2d 537 (1943); United Adv. Corp. v. Raritan, 11 N.J. 14, 93 A.2d 362 (1952); United Adv. Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447 (1964). *Cf.* Railway Express Co. v. New York, 336 U.S. 106, 69 S. Ct. 463, 93 L. Ed. 533 (1948). *Contra,* Sunad, Inc., v. City of Sarasota, 122 So. 2d 611 (Fla. 1963).
[326] Moore v. Ward, 377 S.W.2d 881, 886 (Ky. 1964).
[327] *See, e.g.,* Statement of R.D. Hetrick, President, Roadside Business Association, Minneapolis, Minn., in *1967 House Hearings, supra* note 38, at 215.

argued that the regulation of advertising signs in areas adjacent to Interstate and Federal-aid primary highways, but not in areas adjacent to Federal-aid secondary highways or other highways, involves an arbitrary discrimination. The writer believes it is very unlikely, however, that State laws enacted to comply with the Highway Beautification Act will be held invalid on the basis of such equal protection arguments.

As the United States Supreme Court has held, equal protection of the laws "only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary." [328] There would appear to be a reasonable basis for separate classification of zoned and unzoned commercial or industrial areas, on the one hand, and of all other areas, on the other, at least to the extent that aesthetic considerations are deemed a proper basis for regulation of highway advertising.[329] It is obvious that, in general, few aesthetic features will be found in zoned or unzoned commercial or industrial areas, and rural and residential areas are likely to include places of scenic beauty and historic interest.[330] Similarly, there would seem to be a reasonable basis for classifying Interstate and Federal-aid primary highways differently from Federal-aid secondary highways and other highways. It is clear that Interstate highways, as a class, carry more high-speed traffic than any other class of highways, and that the traffic safety rationale for regulation of outdoor advertising along the Interstate highways is particularly persuasive. And it also seems clear that the Federal-aid primary system, which by statute "shall consist of an adequate system of connected main highways, selected or designated by each State," can reasonably be given a separate classification—as against all highways other than the Interstate highways—on the ground that they are more heavily traveled and that they carry more high-speed traffic than Federal-aid secondary highways or other State highways.[331]

Another possible equal protection problem should be mentioned here. The State compliance laws enacted in response to Title I of the Highway Beautification Act all provide, broadly, for prohibition of future advertising signs by means of the police power, without compensation to owners of land adjacent to Interstate and Federal-aid primary highways for loss of their right to erect signs in the future; but landowners are to be compensated for loss of present rights under existing advertising leases when existing signs are removed pursuant to statutory requirements. In many (perhaps most) States, it is not clear whether the statutory compensation provisions will be construed also to require payment of compensation to the landowner for loss of the right to erect future signs when an existing sign is removed.[332] In any case, it can be argued that these compliance laws deny the equal protection of the laws insofar as they provide that some landowners will be compensated for the loss of a property right whereas other landowners will not be compensated.

Although there seem to be no judicial authorities directly in point, several early zoning cases raised essentially the problem that is now under discussion. In these cases, zoning ordinances were attacked as unconstitutionally discriminatory because they permitted existing nonconforming uses to continue but prohibited establishment of the same uses in the future by landowners whose situation was essentially similar to those whose nonconforming uses were allowed to continue. As early as 1925, however, a California decision, which was affirmed by the United States Supreme Court, upheld a zoning ordinance that permitted existing uses to continue although they did not conform to the use restrictions of the district in which they were located.[333] The court said that the ordinance was not invalid because it was not retroactive and permitted the continuance of existing nonconforming uses. In 1927 the Tennessee Supreme Court also held that zoning ordinance provisions allowing continuance of existing nonconforming uses did not discriminate unfairly in favor of the nonconforming user.[334] Within the next decade, the courts of nearly a dozen States reached the same conclusion.[335] In general, the courts have said that the distinction between existing and future uses of land was not arbitrary or unreasonable, had a rational basis,[336] and affected in a similar manner all persons similarly situated.[337] In short, it was reasonable to place in separate classes those landowners with existing nonconforming uses on their land and those without such uses. In addition, it was said that a municipality could protect existing uses in order to avoid making the zoning ordinance unnecessarily harsh and burdensome,[338] and that it "would seem almost, if not quite, necessary," to include in zoning ordinances provisions allowing continuance of nonconforming uses.[339]

The early zoning cases just discussed would seem, at least by analogy, to provide adequate authority to sustain the different treatment, under State compliance laws, of landowners who have advertising signs on their land under existing leases and those who do not. Moreover, where

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[328] Walters v. St. Louis, 347 U.S. 231, 237, 74 S. Ct. 505, 98 L. Ed. 660 (1954).

[329] Most of the comprehensive zoning ordinances allow outdoor advertising signs only in commercial and industrial districts.

[330] *See, e.g.,* colloquy between Rep. Cramer and Mr. Rogers, *1967 House Hearings, supra* note 38, at 146-147.

[331] For the distinction between Federal-aid primary and secondary systems, see 23 U.S.C. § 103 (1966).

[332] If State compliance laws are so construed, the problem presented will be similar to the one discussed in SUTTE AND CUNNINGHAM, SCENIC EASEMENTS: LEGAL, ADMINISTRATIVE, AND VALUATION PROBLEMS AND PROCEDURES, *NCHRP Report 56* (1968), at 45-46 [hereinafter cited as SUTTE AND CUNNINGHAM].

[333] Zahn v. Bd. of Pub. Works, 195 Cal. 497, 234 P. 388 (1925), *aff'd* 274 U.S. 325, 47 S. Ct. 594, 71 L. Ed. 1074 (1927).

[334] Spencer-Sturla Co. v. Memphis, 155 Tenn. 70, 290 S.W. 608 (1927).

[335] Marquis v. Waterloo, 210 Iowa 439, 228 N.W. 870 (1930); Norton v. Hutson, 142 Kan. 305, 46 P.2d 630 (1935); Sampere v. New Orleans, 166 La. 766, 117 S. 827 (1928), *aff'd,* 279 U.S. 812, 49 S. Ct. 262, 73 L. Ed. 971 (1928); Stone v. Cray, 89 N.H. 483, 200 A. 517 (1938); Elizabeth City v. Aydlett, 201 N.C. 602, 161 S.E. 78 (1931); Baxley v. Frederick, 133 Okla. 84, 271 P. 257 (1928); Huebner v. Philadelphia Sav. Fund Soc., 127 Pa. Super. 28, 192 A. 139 (1937); Lombardo v. Dallas, 47 S.W.2d 495 (Tex. Civ. App. 1932), *aff'd,* 124 Tex. 1, 73 S.W. 475 (1934).

[336] Vendley v. Berkeley, 21 Ill. 2d 563, 173 N.E.2d 506 (1961); Kinney v. Sutton, 230 N.C. 404, 53 S.E.2d 306 (1949).

[337] Sampere v. New Orleans, *supra* note 335.

[338] State *ex rel.* Manhein v. Harrison, 164 La. 564, 114 So. 159 (1927).

[339] Momeier v. John McAlister, Inc., 203 S.C. 353, 27 S.E.2d 504 (1943). A number of cases hold that attempts to eliminate nonconforming uses by means of the police power is unconstitutional; e.g., Jones v. Los Angeles, 211 Cal. 304, 295 P. 14 (1930). See text *infra,* Section C.

advertising signs have already been erected when the compliance law becomes effective, the value of the landowner's right to use his land for outdoor advertising has been factually demonstrated; where advertising signs have not been erected when the compliance law becomes effective, the value of the landowner's right has not been factually demonstrated. This difference seems clearly sufficient to justify different classifications for land on which lawful advertising signs have been already erected when the compliance law becomes effective, and for land on which no such signs have been erected at that date.[340]

C. REMOVAL OF LAWFULLY ERECTED NONCONFORMING SIGNS

As indicated in Chapter Two, some 37 States have advertising control statutes that provide for payment of compensation upon removal of lawfully erected nonconforming highway advertising signs; 10 States provide for control of highway advertising without making any provision for payment of compensation upon removal of nonconforming signs. In these 10 States, the question either has been or may be raised whether the police power may constitutionally be used to eliminate nonconforming advertising signs without payment of compensation either to the owners of such signs or to the owners of the land on which such signs are located.

Before the advent of comprehensive zoning regulation in the United States, the United States Supreme Court examined and approved a number of municipal ordinances that imposed specific land-use restrictions without making any exceptions for existing uses. In *Reinman v. Little Rock*,[341] the Court sustained an ordinance prohibiting livery stables in a business district, as applied to a stable that antedated the ordinance. In *Hadacheck v. Sebastian*,[342] the Court sustained a municipal ordinance that outlawed the manufacture of brick in prescribed residential areas, although its application to an existing brick factory was alleged to have deprived the factory owner of more than 90 percent of the value of the bed of clay on the property where the factory was located. In neither case did the Supreme Court indicate that a preexisting use created any vested right that was entitled to constitutional protection, and in neither case did the Court seem to attach much weight to the severity of the financial loss alleged to flow from retroactive application of the ordinance. In the *Reinman* case the Court said, granting that the livery stable business was not a nuisance per se, that it was clearly within the police power of the State to regulate it, "and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law." [343] The Court also said that the only limitation on the State's police power was that the power could not be exerted arbitrarily or with unjust discrimination. In the *Hadacheck* case, the Court said: [344]

> It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. . . . To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community.

It should be noted that the ordinances upheld in the *Reinman* and *Hadacheck* cases prohibited uses that were noxious in character. They were not comprehensive zoning ordinances in the usual sense but were single restrictions on limited areas and were, in effect, legislative determinations that particular uses at specific locations were nuisances. It did not necessarily follow that the courts would approve the summary elimination of preexisting uses less obviously related to public health or safety. Hence the early proponents of comprehensive zoning avoided any frontal assault on existing nonconforming uses and sought merely to contain rather than to abolish them. So widespread was the practice in early zoning ordinances of preserving nonconforming uses that the courts for many years were seldom confronted with cases that required a square holding on the validity of summary elimination. Sporadic attempts to zone out existing nonconforming uses were generally not well received by the courts, however. For example, when Los Angeles excluded sanitariums from certain districts and made no provision for continuance of existing sanitariums, the California Supreme Court said: [345]

> Our conclusion is that where, as here, a retroactive ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable and unjustifiable exercise of the police power. . . . It follows that the present ordinance is valid in so far as it prohibits the further establishment of businesses of this type in the restricted districts; and is invalid in its application to these plaintiffs [who operated an existing sanitarium].

After issuing memorandum opinions [346] in two early cases that affirmed the power of a municipality to enforce a new zoning restriction against an existing nonconforming use, the New York Court of Appeals finally held in 1952 [347] that an ordinance prohibiting continuance of an existing use will be sustained where the resulting loss to the property owner is "relatively slight and insubstantial," but that a property owner who would suffer substantial loss if required to terminate a nonconforming use has a vested right, which is entitled to constitutional protection against the municipal zoning power. Most of the zoning cases are in accord where the zoning ordinance has sought to terminate a substantial nonconforming use in a summary manner.[348] But ordi-

[340] See discussion of analogous problem in SUTTE AND CUNNINGHAM *supra* note 332, at 46.
[341] 237 U.S. 171, 35 S. Ct. 511, 59 L. Ed. 900 (1915).
[342] 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915).
[343] 237 U.S. at 176, 35 S. Ct. at 513, 59 L. Ed at 903.
[344] 239 U.S. at 410, 36 S. Ct. at 145, 60 L. Ed. at 356.

[345] Jones v. Los Angeles, 211 Cal. 304, 321, 295 P. 14, 22 (1930).
[346] People v. Kesbec, Inc., 281 N.Y. 785, 24 N.E.2d 476 (1939), *rehearing denied,* 282 N.Y. 676, 26 N.E.2d 808 (1940); People v. Wolfe, 272 N.Y. 608, 5 N.E.2d 355 (1936).
[347] People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952), noted in 19 BROOKLYN L. REV. 149 (1952).
[348] 244 Ky. 362, 50 S.W.2d 960, 86 A.L.R. 648 (1932); Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953); Kessler v. Smith, 104 Ohio App. 213, 142 N.E.2d 231 (1957), *appeal dismissed sub nom.* Smith v. Glenwillow, 167 Ohio St. 91, 146 N.E.2d 308 (1957); Omaha v. Glissmann, 151 Neb. 895, 39 N.W.2d 828 (1949), *appeal dismissed,* 339 U.S. 960 (1950), *rehearing denied,* 340 U.S. 847 (1950); State *ex rel.* Warner v. Hayes Inv. Corp., 13 Wash. 2d 306, 125 P.2d 262 (1942).

nances using the amortization technique instead of requiring summary termination of nonconforming uses have fared somewhat better.

Municipalities that provide for termination of nonconforming uses through amortization proceed on the assumption that the public welfare requires elimination of such uses, but that summary elimination is illegal, unfair, or politically infeasible. They find a middle ground by adopting regulations that permit nonconforming uses to continue for specified periods but require termination of the nonconforming uses upon the expiration of those periods. The term "amortization" is derived from the idea that the owner of the nonconforming use can amortize his investment during the period of permitted nonconformity. Although most zoning ordinance amortization provisions are simple and allow relatively short periods of continued nonconformity—usually 5 to 10 years—a few prescribe a complex system of amortization, with periods of grace of up to 60 years for certain nonconforming uses after issuance of a permit.

The amortization technique is not really new. As early as 1929 the Louisiana Supreme Court upheld a zoning ordinance that required nonconforming business uses in residential districts to be terminated in one year.[349] However, judicial approval of the technique did not immediately result in wide use of the amortization technique, and substantial resort to the technique was delayed until after World War II.[350] In the years since World War II, amortization has won a mixed but substantial measure of judicial approval. The rationale of the courts approving use of the amortization technique to eliminate nonconforming uses is exemplified in the opinion of a California court in *Los Angeles v. Gage*.[351] Gage, the owner of a wholesale and retail plumbing supply business, challenged the constitutionality of a zoning ordinance that required termination of nonconforming uses within five years where (*inter alia*) such uses were maintained in connection with a conforming building. Gage's business grossed between $125,000 and $350,000. Removal of the business to a new site involved the cost of the new site less the value of the old site (a net cost of about $2,500), moving expenses (about $2,500), the cost of advertising the new location, and the loss of business during the moving period. The California court described the aspects of Gage's business that made it incompatible with its residential neighborhood, noted that it is a purpose of zoning ultimately to eliminate such incompatible uses, and then concluded: [352]

> The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss. Zoning as it affects every piece of property is to some extent retroactive in that it applies to property already owned at the time of the effective date of the ordinance. The elimination of existing uses within a reasonable period of time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose. Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. As a method of eliminating existing nonconforming uses it allows the owner of the nonconforming use, by affording an opportunity to make new plans, at least partially to offset any loss he might suffer. The loss he suffers, if any, is spread out over a period of years, and he enjoys a monopolistic position by virtue of the zoning ordinance as long as he remains. If the amortization period is reasonable the loss to the owner may be small when compared with the benefit to the public. . . . A legislative body may well conclude that the beneficial effect on the community of the eventual elimination of all nonconforming uses by a reasonable amortization plan more than offsets individual losses.
>
> We have no doubt that Ordinance 90,500, in compelling the discontinuance of the use of defendants' property for a wholesale and retail plumbing . . . supply business . . . within five years after its passage, is a valid exercise of the police power. . . . The ordinance does not prevent the operation of defendants' business; it merely restricts its location. Discontinuance of the nonconforming use requires only that Gage move his plumbing business to property that is zoned for it. Such property can be found within a half mile of Gage's property. The cost of moving is $5,000, or less than 1% of Gage's minimum gross business for five years, or less than half of 1% of the mean of his gross business for five years. He has had eight years within which to move. The property is usable for residential purpose. . . . All of the land within 500 feet of Gage's property is now improved and used for such purposes. . . .
>
> We think it apparent that none of the agreed facts and none of the ultimate facts found by the court justify the conclusion that Ordinance 90,500, as applied to Gage's property, is clearly arbitrary or unreasonable, or has no substantial relation to the public's health, safety, morals, or general welfare, or that it is an unconstitutional impairment of his property rights.

Most of the courts that have upheld amortization provisions in municipal zoning ordinances have done so for reasons similar to those stated in the *Gage* case. In addition to California, favorable decisions on amortization have been handed down in Connecticut,[353] Florida,[354] Kansas,[355] Maryland,[356] Nebraska,[357] New Hampshire,[358] New York,[359] and Washington.[360] Unfavorable decisions have been handed down in Illinois,[361] Michigan,[362] Missouri,[363]

[349] State *ex rel.* Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929); State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), *cert. denied,* 280 U.S. 556 (1929).

[350] As late as 1941, a scholarly writer expressed doubt that the courts would approve zoning regulations that sought to eliminate nonconforming uses, except those that fell into the category of common law nuisances. Noel, *Retroactive Zoning and Nuisances,* 41 COLUM. L. REV. 457, 468-469 (1941).

[351] 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

[352] 127 Cal. App. 2d at 460-461, 274 P.2d at 44.

[353] Murphy, Inc., v. Bd. of Zoning Appeals, 147 Conn. 358, 161 A.2d 185 (1960) (approved required removal of all nonconforming uses in two years as applied to sign).

[354] Standard Oil Co. v. Tallahassee, 183 F.2d 410 (5th Cir. 1950), *cert. denied,* 340 U.S. 892 (1950), noted 27 N.D. L. REV. 65 (1951), (approved 10-year amortization period for gas station).

[355] Spurgeon v. Bd. of Commissioners, 181 Kan. 1008, 317 P.2d 798 (1957) (approved two-year amortization period for auto-wrecking business).

[356] Grant v. Baltimore, 212 Md. 301, 129 A.2d 363 (1957) (aproved five-year amortization period for billboards); Eutaw Enterprises, Inc., v. Baltimore, 241 Md. 686, 217 A.2d 348 (1966) (approved 18-month amortization period for check-cashing agencies).

[357] Wolf v. Omaha, 177 Neb. 545, 129 N.W.2d 501 (1964) (approved seven-year amortization period for dog kennels).

[358] McKinney v. Riley, 105 N.H. 249, 197 A.2d 218 (1964) (approved one-year amortization period for junkyard).

[359] Harbison v. Buffalo, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42 (1958), noted in 23 ALBANY L. REV. 181 (1959) and 27 FORDHAM L.

New Jersey,[364] Ohio,[365] South Carolina,[366] and Texas;[367] but in several of these cases[368] the decision was based on the court's conclusion that the municipality lacked power under the State zoning enabling act to adopt the amortization provision in question.

If State courts should generally follow the nuisance approach adopted by the United States Supreme Court in the *Reinman*[369] and *Hadacheck*[370] cases, they might be expected to approve use of the State's police power to eliminate nonconforming highway advertising signs without compensation, and even without an amortization period, provided the courts are persuaded that highway advertising is a sufficiently noxious land use to justify classification as a nuisance. If a State court accepts the *Kelbro*[371] doctrine that the landowner's appurtenant easement of view from the highway does not include the right to display advertising matter foreign to a business conducted on the property, it is clear that elimination of off-premises advertising without compensation is constitutionally permissible, inasmuch as the landowner could not convey to an advertising company "a right that he did not himself possess." But even if a State court does not accept the view that highway advertising is sufficiently noxious to be declared a nuisance, the court might well sustain legislation that requires elimination of nonconforming highway advertising signs only after a reasonable period for amortization. The rationale of the *Gage* case[372] and other zoning cases approving the amortization technique would clearly be applicable to the elimination of nonconforming highway advertising signs, where the public safety objective is considerably more obvious than in most of the zoning cases involving nonconforming uses other than highway advertising.

Reference to the recent cases that have passed directly on the question shows that the great majority of them have sustained the use of the State's police power to eliminate nonconforming highway advertising signs without payment of compensation. Moreover, most of them have relied on the nuisance theory or the *Kelbro* property rights doctrine, rather than the amortization rationale of the zoning cases.

Although *Opinion of the Justices*[373] was an advisory opinion, and did not decide an actual case or controversy, the New Hampshire court expressly upheld the statutory provision that declared nonconforming signs to be public nuisances and required them to be removed within six months of the giving of notice "to owners of the lands on which such non-conforming uses are located that the non-conforming uses must be discontinued and removed." The court said:[374]

> The argument that the proposed law would deprive owners of property without compensation and would operate retroactively does not require extended consideration. The opponents agree in accord with the settled rule that billboards which are nuisances may be removed without compensation to the owners. We believe that the legislative finding, which is entitled to great weight . . . that billboards in proximity to the highway, such as are forbidden by the proposed law, are nuisances, is sustainable as a general proposition and the objection to the bill upon this ground cannot prevail. If in a specific situation a sign which is in fact not a nuisance is forbidden by the bill its removal should be required only upon payment of compensation.

In *New York State Thruway Authority v. Ashley Motor Court*,[375] the court actually held that, although defendants' sign previously existed at another location, "it was relocated and placed in its present location in 1958, some years after the effective date of the statute, and that this constituted the erection of a new sign."[376] By way of dictum, however, the court said that even if the defendants had possessed "valid and subsisting property rights which the legislation here in issue abrogated, this would not provide sufficient basis for declaring the statute unconstitutional."[376] The rationale of this dictum was stated as follows:[377]

> . . . [I]t is to be borne in mind that it was the very construction of the Thruway which created the element of value in the land abutting the road. Billboards and other advertising signs are obviously of no use unless there is a highway to bring the traveler within view of them. What was taken by the regulation, therefore, was the value which the Thruway itself had added to the land and of this the defendant cannot be heard to complain. The police power is "the least limitable of the powers of government and . . . extends to all the great public needs," . . . and if the end desired be within the power of the State and the means used are reasonably suited to that end, it is no objection that "the rights of private property are thereby curtailed."

From the foregoing, it is not clear whether the New York court intended to invoke the *Kelbro* property rights doctrine or not. Apparently it did, but it seems also to have invoked (without using the term) the rule that the legislature may declare noxious uses to be nuisances and abate them as such by virtue of its police power.

In *Moore v. Ward*,[378] the Kentucky court was dealing with a statute that allowed a five-year amortization period for existing nonconforming advertising signs; that declared unlawful signs to be public nuisances which could be

REV. 653 (1959). *But cf.* Somers v. Camarco Contractors, Inc., 24 Misc. 2d 673, 205 N.Y.S.2d 724 (Sup. Ct. 1960), *aff'd*, 12 App. Div. 2d 977, 214 N.Y.S.2d 650 (1961), *amended*, 13 App. Div. 2d 531, 215 N.Y.S.2d 745 (1961) (disapproved five-year amortization period for "natural product uses," as applied to quarrying operation).

360 Seattle v. Martin, 54 Wash. 2d 541, 342 P.2d 602 (1959), noted 35 WASH. L. REV. 213 (1960) (approved one-year amortization for open land use).

361 Oak Park v. Gordon, 32 Ill. 2d 295, 205 N.E.2d 464 (1965).

362 DeMull v. Lowell, 368 Mich. 242, 118 N.W.2d 232 (1962).

363 Hoffmann v. Kinealy, 389 S.W.2d 745 (Mo. 1965).

364 United Adv. Corp. v. Raritan, 11 N.J. 144, 93 A.2d 362 (1952).

365 Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953) (disapproved ordinance that authorized council to decide when reasonable amortization period has elapsed).

366 James v. Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955) (disapproved one-year amortization period for trailer court).

367 Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953) (disapproved two-year amortization period for auto-wrecking business).

368 See DeMull v. Lowell, *supra* note 362; United Adv. Corp. v. Raritan, *supra* note 364.

369 237 U.S. 171, 35 S. Ct. 511, 59 L. Ed. 900 (1915).

370 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915).

371 113 Vt. 64, 30 A.2d 537 (1943).

372 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

373 103 N.H. 268, 169 A.2d 762 (1961).

374 103 N.H. at 271, 169 A.2d at 765.

375 10 N.Y.2d 151, 176 N.E.2d 566 (1961).

376 10 N.Y.2d at 157, 176 N.E.2d at 569.

377 *Ibid.* On the authority of *Ashley Motor Courts*, the removal of lawfully erected signs made nonconforming by N.Y. LAWS 1960, c. 904, without compensation, was held to be a valid exercise of the police power in Whitmier v. Fevviss Co., 20 N.Y.2d 413, 230 N.E.2d 904 (1967).

378 377 S.W.2d 881 (Ky. 1964).

summarily abated; and that imposed criminal penalties for violation of the statute. Although the court did not deal separately with the validity of the provision for removal of nonconforming signs, the following language [379] from the opinion seems to have been directed at least partly to this issue:

> Another ghost must be laid. It is contended this is an "ex post facto" law destroying vested property rights. The simple answer is that this Act does not impose a criminal penalty upon any person for any prior act, which is the essence of "ex post facto." . . . If appellants are complaining of retrospective or retroactive operation of the law, their position is likewise untenable. The Act does not affect or impair rights existing prior to the date of its enactment. To insist that private rights are immutable and once vested can never be changed is to ignore the precept that private right is always subordinate to public right asserted by the proper exercise of the police power.

It is far from clear what the court meant by this statement. It seems to have had in mind the nuisance approach adopted in *Hadacheck,* where the United States Supreme Court said, "A vested interest cannot be asserted against it [the police power] because of conditions once obtaining." [380] But it should be noted that the court later referred to the nature of the property rights impaired by the statute—i.e., that they had value only "in the exploitation of publicly constructed highways" and that "billboards make use of the highways and the property right imposes a servitude on them." [381] Hence, said the court, although the nature of these rights did not give the State "any special authority to destroy them," the legislature might "reasonably find that public rights of travel in the highways outweigh this private manner of use." [381] This sounds like a modification of the *Kelbro* property rights doctrine, and the Kentucky court did cite *Kelbro.*

In *Ghaster Properties, Inc., v. Preston,*[382] the Ohio court sustained a statute that, in substance, declares any off-premises advertising sign outside "commercial or industrial zones traversed by segments of the interstate system within the boundaries of incorporated municipalities" to be a "public and private nuisance" which may be summarily removed upon 30 days notice to the owner or lessee of the land on which the sign is located.[383] In dealing with the argument that existing nonconforming uses cannot be abated without payment of compensation, the court said:[384]

> Each of these signs [owned by plaintiff] was in existence before enactment of these statutes. However, there is no evidence disclosing what loss Ghaster will suffer if compelled to remove them. There is nothing to indicate that they ever became fixtures so as to be a part of the real estate. They can apparently be used in other locations where their use will be lawful. . . . There is nothing to indicate what expense would be involved in moving them to such locations. There is not even any evidence tending to prove what, if any, dollar loss Ghaster will suffer if these statutes are enforced against these seven signs. . . .
>
> It may be that a zoning regulation may not interfere with an existing use of property. . . . However, a general police regulation may. . . .
>
> The reason given for decisions protecting the continuation of nonconforming uses is that, except for its location in a particular zone, the nonconforming use would be lawful and not a nuisance. However, the statutes involved in the instant case make the use of land for billboard purposes within 660 feet of an interstate highway unlawful and a nuisance. Unlike in the zoning cases, their continued use for such purposes will not merely be a lawful use that does not conform with a zoning restriction but a use that is unlawful and a nuisance either in or out of any zoning district, except as specified in Section 5516.02 (D), Revised Code.
>
> . . . .
>
> Furthermore, . . . the use prohibited by these statutes is in substance and effect a use of the public highway for advertising purposes. To hold that such a nonconforming use should be protected would in effect lead to the absurd result of recognizing such use, before its statutory prohibition, as creating a vested private property interest in the highway.
>
> For the foregoing reasons, we are of the opinion that the prohibition against maintenance of billboards, provided by the statutes involved in the instant case, may be applied against signs in existence at the time of the enactment of those statutes.

Here, again, there is a blending of the nuisance approach and the *Kelbro* property rights doctrine.

In *Markham Advertising Co. v. State,*[385] the Washington court upheld a statute that, in general, allows a four-year amortization period for off-premises advertising signs located in areas zoned for industrial or commercial uses, and a three-year amortization period for off-premises signs located in other areas.[386] In dealing with the nonconforming use problem, the court said: [387]

> The plaintiffs, however, assert that the legislature may not declare a "legitimate" business a nuisance under the police power, and that in any event such a declaration may not apply to an existing "legitimate" business. Neither of these objections has merit. It is within the police power to declare a previously unregulated business a nuisance in fact and law. . . . The legislature may also apply such legislation to existing businesses. . . .
>
> Plaintiffs also claim that the Act is unreasonable because it does not afford a sufficiently long amortization period for their "vested property rights." The court in *Ghaster Properties, Inc., v. Preston,* . . . answered this argument by pointing to the distinction between the type of measure represented by RCW 47.42 and a zoning regulation. . . . This court has said that it is within the legislature's power to forbid a use altogether without making any provision for an amortization period. . . . Under all the circumstances, we are satisfied that the amortization period provided in the Act is reasonable.

The California Supreme Court recently gave the amortization doctrine an unexpected twist in a case involving the validity of the provisions of a county zoning ordinance that required removal of all billboards in certain districts within one year from the date when the situs of a billboard was

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379 377 S.W.2d at 885-886.
380 239 U.S. at 410, 36 S. Ct. at 145, 60 L. Ed at 356.
381 377 S.W.2d at 887.
382 176 Ohio St. 425, 200 N.E.2d 328 (1964).
383 OHIO REV. CODE ANN. § 5516.04 (Page 1970).
384 176 Ohio St. at 440-442, 200 N.E.2d at 339-340.
385 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed,* 393 U.S. 316 (1969).
386 WASH. REV. CODE § 47.42.100 (Supp. 1970).
387 73 Wash. 2d at 425-426, 439 P.2d at 260-261.
388 Nat. Adv. Co. v. County of Monterey, 1 Cal. 3d 875, 464 P.2d 33 (1970).

put into such a district.[388] The court held that the removal requirement was valid as to 31 billboards that had already been fully amortized for tax purposes under the rules of the Internal Revenue Service, expressly stating that the removal requirement could not be defeated on the ground that these billboards had been repaired to such an extent that they had many years of useful life remaining. As to another 11 billboards that had not been fully amortized for tax purposes, the court held that "removal should await expiration of a reasonable amortization period in order to permit plaintiff to recover their original cost."

The only recent case striking down a highway advertising control statute because no provision was made for payment of compensation upon removal of nonconforming signs is *State Highway Department v. Branch,*[389] which invalidated the Georgia Outdoor Advertising Control Act of 1964. The flavor of the Georgia court's opinion can be gathered from the following excerpt: [390]

> We believe this matter is important enough to justify the following observations. Private property is the antithesis of Socialism or Communism. Indeed it is an insuperable barrier to the establishment of either collective system of government. Too often, as in this case, the desire of the average citizen to secure the blessings of a good thing like beautification of our highways, and their safety, blinds them to a consideration of the property owner's right to be saved from harm 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. . . .

Because the opinion is totally lacking in any analysis of the problem of nonconforming uses, the writer must agree with the Washington court in finding the opinion "singularly unpersuasive." [391]

In light of the decisions in the New Hampshire, New York, Kentucky, Ohio, and Washington cases just discussed, it would be expected that similar decisions would be reached in most of the other States with legislation requiring removal of nonconforming highway advertising signs without compensation. As previously indicated, these other States are Colorado, Florida,[392] Illinois,[393] Massachusetts,[394] Nevada, Oregon, Tennessee, and Wisconsin.[395] Moreover, if Congress ultimately decides to repeal the compensation requirement of subsection (g) of Title I of the Highway Beautification Act and to substitute for it some sort of provision for amortization of nonconforming highway advertising signs, it seems probable that the great majority of the States that have adopted compliance laws will be constitutionally capable of eliminating compensation provisions from their statutes and substituting therefor amortization provisions corresponding to the provision in the Federal Act. It is clear that this is true in Vermont.[396]

As previously indicated,[397] a number of State compliance laws provide for payment of compensation upon removal of outdoor advertising signs lawfully erected prior to October 22, 1965, but not upon removal of signs lawfully erected between October 22, 1965, and the date of enactment of the compliance law. It appears that this discrimination is hard to justify, and that it may well be held to deny equal protection of the laws to those who lawfully erected signs between the two dates. The only argument in support of such discrimination is that enactment of Title I of the Highway Beautification Act gave notice to landowners and to advertising companies that enactment of State compliance laws was probable; and that, if such compliance laws should make the minimum provision for compensation required by Title I, subsection (g), no compensation would be payable upon removal of signs lawfully erected between October 22, 1965, and January 1, 1968. Perhaps this notice of the risk of compulsory removal without compensation justifies a separate classification of those signs erected after October 22, 1965, and before enactment of the State compliance law, but it is doubtful.

Other equal protection problems may arise if the current Title I, subsection (g), compensation provision is retained in the Highway Beautification Act and if it should ever be

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[389] 222 Ga. 770, 152 S.E.2d 372 (1966).

[390] 222 Ga. at 772, 152 S.E.2d at 374.

[391] See 73 Wash. 2d at 426-427, 439 P.2d at 261.

[392] That amortization provisions are valid in Florida, *see* Standard Oil Co. v. Tallahassee, 183 F.2d 410 (5th Cir. 1950), *cert. denied,* 340 U.S. 892 (1950), noted 27 N.D. L. REV. 65 (1951).

[393] In Oak Park v. Gordon, 32 Ill. 2d 295, 205 N.E.2d 464 (1965), an "amortization ordinance" was held invalid as it applied to a rooming house in a "dwelling district" on the ground that the financial loss to the property owner was not justified by any evidence in the record showing "that the public interest would be subserved in any way by requiring defendant to alter his property to accommodate two roomers instead of four." But the court expressly said: "In so holding we do not intend to express any opinion as to the validity of this or other amortization ordinances as applied to other properties. Each case must be judged upon the particular facts of that case with due consideration given to the respective interests of the public and the individual property owners."

[394] In General Outdoor Adv. Co. v. Dep't. of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935), *appeal dismissed,* 297 U.S. 725 (1936), the court sustained a statute that was enacted to implement Article 50 of the Amendments to the CONSTITUTION OF MASSACHUSETTS, which provides as follows: "Advertising on public ways, in public places and on private property within public view may be regulated and restricted by law." Although the court did not discuss the problem of nonconforming uses as such, the court did make the following statement on the matter:

> It is not disputed by the defendants that the rules and regulations prohibit the conduct of the outdoor advertising business by signs and billboards located as most of them are now located and require it to be carried on by signs and billboards located on less conspicuous sites. But there is no finding as to the possible number of locations conforming to the rules and regulations as compared with existing sites. That there is not space within the Commonwealth for advertising in accordance with the rules and regulations has not been found by the master and is not required by the evidence. Doubtless the initial expense to the plaintiffs of changing their signs and billboards to conform to the rules and regulations will be considerable. The right to exclude in any particular neighborhood or district all outdoor advertising when interfering with scenic beauty, or on grounds of taste or fitness, "necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the latter." If, however, it be assumed in favor of the plaintiffs that their business on the lines heretofore conducted will not be profitable when conducted in conformity to the regulations, that does not, in all the conditions disclosed, entitle them to relief. . . . The power to regulate outdoor advertising on private land within public view is established by art. 50. The circumstance that the practical effect of the regulations may render the business as heretofore conducted by the plaintiffs unprofitable does not brand the regulations as invalid.

[395] Fuller v. Fiedler, 19 Wis. 2d 422, 120 N.W. 2d 700 (1963), did not deal with the constitutionality of the Wisconsin advertising control statute, WIS. STAT. ANN. § 84.30 (Supp. 1969), added by Laws 1959, c. 458, § 2, although the constitutional issue was raised in the trial court and decided in favor of the statute. Plaintiffs did not appeal, and the State Highway Commission appealed only that portion of the trial court judgment which declared regulations issued pursuant to the statute to be unconstitutional. The Supreme Court reversed "as of course" because respondents did not file a brief or appear for oral argument.

[396] Micalite Sign Corp. v. State Highway Dep't., 126 Vt. 498, 236 A.2d 680 (1967).

[397] See text *supra* in Chapter Two at notes 226-229.

implemented. In those States which prior to October 22, 1965, enacted legislation requiring removal of most outdoor advertising signs along the Interstate highways without compensation (though usually allowing continuance during an amortization period), the subsequent enactment of a compliance law providing for compensation in conformity to Title I, subsection (g), may well be held to result in unconstitutional discrimination against those whose signs along the Interstate highways were previously removed (or are subject to removal at the end of an amortization period) without compensation.[398] The argument would be that if compensation is to be paid upon removal of signs along the Federal-aid primary highways, "equal protection of the laws" requires compensation of those whose signs were (or will be) removed from areas adjacent to the Interstate highways.[399]

The fact, standing alone, that the Highway Beautification Act requires payment of compensation to avoid a 10 percent cut in Federal-aid highway funds and provides for 75 percent of the required compensation to be paid by the Federal government hardly justifies placing previously uncontrolled Federal-aid primary highways in a different "class" than Interstate highways. But other factors may be relevant in determining the validity of the classification and the different treatment of advertising signs adjacent to Interstate and Federal-aid primary highways, respectively.

In the first place, if removal of signs along the Interstate highways is completed by use of the police power before a State compliance law is enacted requiring compensation when signs along the Interstate and the Federal-aid primary highways are subsequently eliminated, a reasonable classification based on time seems possible. Let us consider an analogous case. Suppose, over the years, that a number of nonconforming uses are eliminated from a blighted urban area by means of the police power, without compensation, and that subsequently the entire area is acquired by eminent domain for an urban renewal project. It seems highly unlikely that owners whose nonconforming uses were previously eliminated by means of the police power would have a retroactive right to compensation, based on the equal protection clause, simply because other landowners with nonconforming uses not yet amortized under the municipal zoning ordinance are compensated for those nonconforming uses when their property is condemned for urban renewal use.

Moreover, the Interstate System, by and large, has been constructed on new locations where there were few preexisting signs and where landowners, prior to location of new Interstate highways near their land, had little reason to expect that their land would ever be valuable for outdoor advertising purposes. And by the time the Interstate highway construction program was well under way, the Federal-Aid Highway Act of 1958, through its provision for a bonus to States that undertook a highway advertising control program, had given fair warning that many States might, in the near future, take action to prohibit new signs and to remove existing signs along rural stretches of the Interstate System. Thus, there may be relatively little reason to compensate those whose land was suddenly made valuable for outdoor advertising purposes by construction of an Interstate highway nearby and those who took advantage of this newly created value by leasing the land for advertising purposes. But the Federal-aid primary highways, by and large, were constructed in the 1920's or 1930's, and outdoor advertising has been located along these highways for many years. Landowners, roadside businesses, and advertising companies could, therefore, reasonably have expected that outdoor advertising along the Federal-aid primary highways would be allowed to continue indefinitely into the future; and investments in land, roadside businesses, and advertising plants were presumably made on the basis of this expectation. Consequently there would seem to be a rational basis for compensating those whose reasonable expectations are disappointed and who suffer financial loss as a result of the removal of nonconforming signs along primary highways pursuant to State compliance laws enacted in response to Title I of the Highway Beautification Act.

However, once a compliance law is enacted in a given State, with a provision for compensation of sign owners and landowners upon removal of signs from areas adjacent to the Interstate and Federal-aid highway systems, it will become almost impossible to justify future State police power legislation requiring removal without compensation of outdoor advertising signs along secondary and other state and local highways. Indeed, it will become almost impossible to justify future municipal zoning regulations that require

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[398] There are nine or ten such States. In Illinois, Ohio, Oregon, Washington, and Wisconsin, the legislation requiring removal of signs along the Interstate System without compensation is still in force, and no legislation in response to Title I of the Highway Beautification Act has been enacted. In Kentucky, New Hampshire, Rhode Island, and West Virginia, the earlier legislation requiring removal of signs along the Interstate System was superseded by compliance laws in response to Title I of the Highway Beautification Act, but removals without compensation may have been effected prior to enactment of the compliance laws. It is possible that the same problem may arise in New York because of removals without compensation under N.Y. PUB. AUTH. LAW § 361-a (applicable to N.Y. Thruway) or N.Y. HIGHWAY LAW § 86 (applicable to Interstate highways). The Georgia Outdoor Advertising Control Act of 1964 (LAWS 1964, p. 128), which made no provisions for compensation, was held unconstitutional in State Highway Dep't. v. Branch, 222 Ga. 770, 152 S.E.2d 372 (1966).

[399] The argument is set out, with particular reference to the situation in Washington, by Representative Pelly in his testimony and statement during the 1967 Congressional Hearings on the Highway Beautification Act, as follows:

> . . . [T]he actual operation of the federal act strikes down our state law indirectly but effectively. This results from federal requirements that the primary system highways be controlled. Since Washington has not enacted general legislation controlling billboards on the entire primary system prior to 1965, the state law must now enact a compensation statute for those roads [in order to avoid the 10 percent penalty provided by Title I of the Federal Act].
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> Our State Constitution, Article I, Section 12, provides:
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> "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not belong to all citizens."
>
> If a law does not apply with equal force to all citizens, then it is unconstitutional unless the distinctions drawn in the law rest on reasonable grounds. What reasonable differences are there between billboards on the interstate system and billboards on the primary system? The signs and the use of the land are the same. The only reason for amortizing the signs off the interstate system while buying signs off the primary system is the Federal Highway Beautification Act. It is generally doubted that the Federal Act constitutes reasonable grounds for making the distinction just outlined—thus, if Washington is required to pass a compensation-control law for our primary system, the police power law for the interstate system will become unconstitutional class legislation.
>
> This is not a peculiarity of the Washington Constitution. In fact, the same situation would probably result from applying the equal protection clause of the federal constitution to Washington's acts, and to the enactments of any other state.

[*1967 House Hearings*, *supra* note 38, at 24-25 (testimony), 29-30 (statement).]

removal of signs along city streets without compensation, inasmuch as the compensation requirement in the State's compliance law will apply to all city streets that are Federal-aid primary highways.[400] It is difficult to find any reasonable basis for the unequal treatment of land that appears to be similarly situated. However, on grounds previously stated,[401] the writer is of the opinion that enactment of a State compliance law would not entitle landowners or sign owners, retroactively, to compensation for nonconforming uses previously eliminated without compensation through application of zoning regulations.

To date, Illinois, Ohio, Oregon, Washington, and Wisconsin—all States with police power prohibitions against Interstate highway advertising—have avoided the equal protection problems discussed previously by the simple expedient of not enacting compliance laws providing for payment of compensation when nonconforming advertising signs are removed from areas adjacent to Interstate and Federal-aid primary highways.[402] By the same expedient, Florida, Massachusetts, Nevada, and Tennessee have avoided similar equal protection problems arising from the existence of legislation requiring removal of some advertising signs without compensation.[403] In view of the long delay in implementing Title I of the Highway Beautification Act and the current uncertainty as to continuance of the compensation requirement in Title I, the course chosen by these States may well prove to have been wise.

[400] The problem is well stated, with particular reference to the situation in Washington, by Jack B. Robertson, President of the Washington Roadside Council, Inc., in his statement during the 1967 Congressional Hearings on the Highway Beautification Act, as follows:

> Washington law permits the removal of billboards by the State, counties, cities and towns under the police power, traditionally used for laws, such as zoning laws, which promote or protect the public health, safety, morals or welfare. The Highway Advertising Control Act of 1961 allows sign owners three years to remove their nonconforming billboards or to relocate them in conforming locations.
>
> The Federal act of 1965 requires the states to pay compensation for all billboards which must be removed from protected areas adjacent to the Interstate and Primary Systems.
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> According to legal counsel, any practice of the State of Washington of paying for the removal of billboards along *some* of its highways makes it virtually untenable for the State to require such removal along other highways, e.g., the secondary highways, under its traditional police power. There is no recognizable legal basis for unconstitutional discrimination under the decisions of the Washington State Supreme Court.
>
> The same problem of discrimination, i.e., the lack of equal protection of the laws, would arise where counties, cities and towns try to remove signs under the police power, while the State pays for the removal of the same or similar signs. It is apparent that the Federal requirement of payment would create chaos among local governments in their efforts to remove nonconforming sign structures, and could have a traumatic effect on the removal of other nonconforming uses and structures throughout our state and perhaps the Nation as a whole. . . .

(*1967 House Hearings, supra* note 38, at 52; *1967 Senate Hearings, supra* note 39, at 383-384).

[401] See text *supra*, second paragraph following call for note 398.

[402] The terms of the current advertising control legislation of these States will be found in the following statutes: ILL. ANN. STAT. tit. 121, §§ 451-459 (Supp. 1969); OHIO REV. CODE ANN. §§ 5516.01-5516.99 (Page 1970); ORE. REV. STAT. §§ 377.115-377.545 (1967); WASH. REV. CODE §§ 47.42.010-47.42.910 (1961; Supp. 1967); WIS. STAT. ANN. § 84.30 (Supp. 1970).

[403] The terms of the current advertising control laws of these States, none of which were adopted to comply with the bonus provisions of the 1958 Federal-Aid Highway Act, will be found in the following compilations: FLA. STAT. ANN. §§ 479.01-479.22 (1965; Supp. 1969), and § 335.13 (1968); MASS. ANN. LAWS c. 93, §§ 29-33 (1967); NEV. REV. STAT. §§ 405.020-405.110 (perm. ed.); TENN. CODE ANN. §§ 62-1114 to 62-1132 (Supp. 1970).

CHAPTER FOUR

LEGAL PROBLEMS IN CONNECTION WITH ACQUISITION OF PROPERTY RIGHTS UPON REMOVAL OF NONCONFORMING OUTDOOR ADVERTISING SIGNS

A. INTRODUCTION: SOME PRELIMINARY QUESTIONS

Title I, subsections (c) and (d), of the Highway Beautification Act[404] provide that existing, lawfully erected off-premise advertising signs located within 660 ft of the right-of-way of Interstate and Federal-aid primary highways shall be removed, except for signs located in zoned or unzoned commercial and industrial areas; subsection (g)[405] provides that just compensation shall be paid upon removal of such signs, except for those erected along existing Interstate and Federal-aid primary highways between October 22, 1965, and January 1, 1968. Failure to carry out a program of compensated removal in compliance with Title I may ultimately subject any State to the 10 percent penalty provided in subsection (b),[406] although it is clear that no penalties will be imposed for failure to remove nonconforming signs unless and until funds are available to pay the 75 percent Federal share of the just compensation to be paid upon removal of such signs.[407]

Assuming that the nonconforming sign removal provisions of Title I will eventually be funded by Congress, what legal problems will face the 32 States with compliance laws that require payment of compensation upon removal of nonconforming signs?

[404] 23 U.S.C.A. § 131(c) and (d) (1966).

[405] *Id.* § 131(g) (1966).

[406] *Id.* § 131(b) (1966).

[407] *Id.* § 131(n) (Supp. 1969).

1. Avoidance of Compensation by Simply Prohibiting New Leases

May a State highway agency avoid the necessity of compensating sign owners, in those cases where nonconforming signs are maintained pursuant to advertising leases, simply by forbidding the making of any new leases when the current ones expire, and then ordering the nonconforming sign owners to remove their signs upon expiration of such leases? In theory, this would seem feasible, for upon expiration of his current lease, the sign owner would no longer have a legal right to maintain the sign at the location covered by the expired lease, and the sign owner could be compelled, under most of the State advertising control statutes, to remove the nonconforming sign as a nuisance. But as a practical matter this technique is not likely to be effective. In the first place, many advertising leases negotiated since 1965 are for a substantial term—often five years or more—with provisions for renewal for additional periods at the lessee's option. The result is that States now undertaking to prohibit renewal of advertising leases at the end of their current terms might find that this would not terminate the sign owner's right to maintain an existing sign at its current location within the period allowed under Title I of the Highway Beautification Act.[408] For the purpose of determining when the current lease term expires, all renewal periods must be added to the original term, of course.[409] Moreover, for purposes of deciding whether a State has complied with Title I, subsection (g), it is likely that the removal of a lawfully erected nonconforming sign will be held to be a compensable taking even if a particular State statute forbids making new leases and the current lease authorizing erection and maintenance of the sign has expired—especially if the sign owner does not in fact remove the sign and the State highway agency is compelled to take it down.[410]

It seems clear, however, that Title I, subsection (g), of the Highway Beautification Act does not require States to exercise their powers of eminent domain in order to eliminate nonconforming highway signs; negotiated purchase is authorized. Nor does subsection (g) require them to acquire ownership of all nonconforming signs in order to effect their removal. Agreements between the State highway agencies and the sign owners providing for removal of nonconforming signs—either for relocation at other sites or for storage—may prove feasible in many cases. To the extent that the cost of such negotiated removals is not in excess of the estimated cost of acquiring the sign owner's "right, title, leasehold, and interest" in such signs by negotiated purchase or condemnation, the Federal share will be available to pay 75 percent of the cost of such negotiated removals [411]—provided, of course, that Congress decides to fund the Title I program. But it is clear that the Federal Highway Administration will resist any Federal sharing in payments to sign owners in excess of the estimated cost of acquiring the sign owners' entire property interest.[411] Consequently, an estimate of the cost of complete acquisition will have to be made in every case. Moreover, in many cases it will, as a practical matter, be necessary to acquire the sign owner's entire property interest in a nonconforming sign because the sign will be of no further use to him once it is removed from its current location. This is particularly likely to be true when the sign in question is a nonstandard off-premises sign advertising a roadside business such as a motel, a restaurant, or a service station.

Relocation of nonconforming signs by agreement is more likely to be acceptable to sign owners in the case of signs erected and maintained by the standardized outdoor advertising industry. As a practical matter, most standardized industry signs are located in urban and suburban areas where zoned or unzoned commercial and industrial areas may provide substantial possibilities for relocation. Furthermore, the standardized outdoor advertising industry has in the past been inclined to go along with local regulation of advertising signs (usually through zoning ordinances), and may well go along with reasonable removal proposals from the State highway agencies, in lieu of insisting on full acquisition of every sign that cannot be immediately relocated.

It is clear, however, that a substantial number of nonconforming highway advertising signs—both standard and nonstandard—will have to be acquired by State highway agencies in order to comply with Title I of the Highway Beautification Act. Although it may be expected that a majority of the necessary acquisitions will ultimately be made by negotiated purchase,[412] the terms on which negotiated purchases can be made will depend largely on the nature of the property interests to be acquired and the way in which these interests will be valued in eminent domain proceedings. And there will, of course, be cases where valuation principles will have to be tested in actual eminent domain litigation.

2. Public Purpose and Public Use

One question that immediately comes to mind is whether acquisition of nonconforming highway advertising signs and the advertising rights associated therewith can be deemed to promote a public purpose and to result in a public use of the property acquired. This problem is important because (1) expenditure of public funds for other than public purposes is generally prohibited by State constitutions; [413] (2) almost all State constitutions allow the taking of private property by eminent domain only for public use; [414]

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[408] See *id.* § 131(b), (c), and (e) (1966).

[409] That is, all periods for which the lessee has an option to renew. In support of the rule that a valid, enforceable option to renew is a compensable interest in eminent domain and that the original terms of the lease and the renewal period are treated as one continuous term, *see, e.g.*, Crimmins v. Metropolitan El. Ry., 87 Hun. (N.Y.) 187, 33 N.Y.S. 984 (1895); State Road Dep't. v. Tampa Bay Theaters, Inc., 208 So. 2d 485 (Fla. 1968).

[410] See text *supra* in Chapter One at notes 105-107.

[411] See *Policy and Procedure Memorandum 80-9, supra* note 57, at p. 6, set out in part in text *supra* in Chapter One following note 107.

[412] It is estimated that about 50 percent of all properties involved in right-of-way acquisition are initially condemned rather than settled by negotiation. Of the 50 percent that are condemned, research indicates that one-half actually go to trial, with the other 50 percent being settled out of court or by stipulated judgment. [*1969 Senate Hearings, supra* note 23, at 43.]

[413] Some State constitutions expressly prohibit expenditure of public funds or levying taxes for other than public purposes. (*See, e.g.*, ALASKA CONST. art. IX, § 6; HAWAII CONST. art. VI, § 6; LA. CONST. art. IV, § 8; MO. CONST. art. X, § 3; TEX. CONST. art. VIII, § 3.) Other State constitutions prohibit either a grant of public money or a loan of the State's

and (3) a statute authorizing the taking of private property for other than public use will clearly violate the Fourteenth Amendment's prohibition against deprivation of property without due process of law.[415]

Essentially the same problem was considered at length in the writer's recent monograph on scenic easements.[416] The conclusion there was that both the public purpose and public use requirements will generally be satisfied by acquisition of scenic easements pursuant to the purposes stated in Title III of the Highway Beautification Act and State legislation implementing the Act. The writer now concludes, for the same reasons, that acquisition of nonconforming highway advertising signs and the advertising rights associated therewith will also satisfy the public purpose and public use requirements. Indeed, traffic safety considerations, which in many States would justify elimination of highway advertising signs by use of the police power alone,[417] make the case for elimination of such signs by purchase or condemnation even stronger than the case for acquisition of scenic easements, insofar as the public purpose and public use requirements are concerned.

3. Necessity for Taking

There are many ordinary condemnation cases in which the question of necessity for the taking has been raised. The law on this particular subject is well-settled and should apply in the condemnation of nonconforming signs and associated advertising rights. Simply stated, the rule is that, in the absence of fraud or bad faith, the determination of the condemnor that the taking is necessary will not be reviewed by the courts.[418] Because the State advertising control statutes will, in general, determine both the necessity for the taking of nonconforming signs and associated advertising and the location at which the takings will occur, there will be even less of a problem with respect to delegation of power to the State highway agency than in the case of scenic easement condemnations.[419]

4. Requirement of Bona Fide Purchase Negotiations

In some States the courts have jurisdiction of condemnation cases only when there has been a bona fide attempt to purchase the property by negotiation. In these States, sign owners and landowners may be expected to contest the condemnation of nonconforming signs and associated advertising rights on the ground that a bona fide attempt to purchase has not been made. In general, two questions are likely to be raised: (1) what constitutes a bona fide attempt to purchase; and (2) with whom must the purchase negotiations be carried on? With respect to the first question, Nichols provides the following answer: [420]

> . . . While no general rule can be set forth, it has been held that a reasonable effort must be made in good faith to reach an agreement. A mere formal or perfunctory attempt to purchase is not sufficient to comply with the requirement of the statute, nor is a formal offer and refusal necessary to lay a foundation for a suit. Prolonged negotiations are likewise unnecessary; compliance with the statutory requirement is had when the negotiations have proceeded sufficiently to demonstrate that agreement is impossible. Such impossibility to agree does not mean impossibility to agree at any price, no matter how large, but impossibility due either to the owner's unwillingness to sell at any price or willingness to sell only at a price which the condemnor deems excessive.

The second question is more difficult if the nonconforming sign is located on land not owned by the owner of the sign, pursuant to a lease or license from the landowner. May the State highway agency negotiate jointly with the sign owner and the landowner, or must it negotiate with each separately? May the agency negotiate with the sign owner and landowner on the basis of a gross price for all the interests sought to be acquired, or must it make a separate offer for the interest of each? There are no easy answers to these questions,[421] although it would appear that the intent of Congress and the various State legislatures in enacting Title I of the Highway Beautification Act and the several compliance laws, respectively, was to require the State highway agencies to value the interests of the sign owner and the landowner separately and to compensate each separately.[422] It seems unlikely, as will be argued later,[423] that the unit valuation rule will be applied to condemnations pursuant to Title I of the Highway Beautifica-

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credit to private individuals, associations, or corporations. (*See, e.g.*, ALA. CONST. art. IV, § 94; ARIZ. CONST. art. IX, § 7; CAL. CONST. art. IV, § 31; COLO. CONST. art. XI, §§ 1 and 2; DEL. CONST. art. VII, § 8; NEV. CONST. art. 8, § 9; N.J. CONST. art. VIII, § III, para. 3; N.M. CONST. art. IX, § 14; N.Y. CONST. art. VII, § 8.) And many State constitutions simply prohibit the giving or lending of the State's credit to private individuals, associations, or corporations. (*See, e.g.*, ARK. CONST. art, XVI, § 1; FLA. CONST. art. IX, § 10; GA. CONST. art. VII, § III, para. IV; IDAHO CONST. art. VIII, § 1; IOWA CONST. art. VII, § 1; KY. CONST. § 177; ME. CONST. art. IX, § 14; MD. CONST. art. III, § 34; MINN. CONST. art. IX, § 10; MISS. CONST. art. 14, § 258; N.J. CONST. art. VIII, § 11, para. 1; OHIO CONST. art. VIII, § 4; OKLA. CONST. art. X, § 15; PA. CONST. art. IX, § 6; S.C. CONST. art. X, § 6; TENN. CONST. art. II, § 31; TEX. CONST. art. III, § 50; UTAH CONST. art. 6, § 31; VA. CONST. art. XIII, § 185; WASH. CONST. art. VIII, § 5; W.VA. CONST. art. X, § 6; WIS. CONST. art. VIII, § 3.) Provisions of the latter type, merely prohibiting the giving or lending of the State's credit, have generally been construed to prohibit expenditure of public funds for any nonpublic purpose.

[414] Both the Federal and all but three of the State constitutions contain provisions that have been construed to protect the owner of private property from an exercise of the power of eminent domain for purposes that do not involve a public use. In some cases the State constitutions expressly forbid the taking of private property for private uses. In a majority of cases the negative implication of the conventional condemnation clause—that private property shall not be taken for public use without payment of just compensation—is used to protect a property owner from a taking for private use. Even in the three States having no express constitutional provision as to eminent domain, it has been held that other constitutional provisions preclude the taking of private property for private use or without payment of just compensation. Moreover, most State constitutions contain a clause prohibiting the taking of property without due process of law, or some equivalent provision; and in some instances the State courts have relied on these due process clauses in holding a taking for private use unconstitutional, either because the State constitution did not contain the usual eminent domain clause or because the court was not satisfied with the implied prohibition contained in that clause. For a more extended discussion, with citation of authorities, see 2 NICHOLS, EMINENT DOMAIN § 7.1 (rev. 3rd ed. 1963) [hereinafter cited as NICHOLS].

[415] Clark v. Nash, 198 U.S. 361, 25 S. Ct. 676, 49 L. Ed. 1085 (1905); Hairston v. Danville & W. Ry., 208 U.S. 598, 28 S. Ct. 331, 52 L. Ed. 637 (1908). For discussion, see 1 NICHOLS, *supra* note 414, § 4.7.

[416] See SUTTE and CUNNINGHAM, *supra* note 332, at 33-39.

[417] See text *supra* in Chapter Three between notes 285 and 317.

[418] See 25 AM. JUR. HIGHWAYS § 60; 18 AM. JUR. EMINENT DOMAIN §§ 105-109.

[419] See SUTTE and CUNNINGHAM, *supra* note 332, at 43, 47.

[420] 6 NICHOLS, *supra* note 414, § 24.621.

[421] Relatively little help is provided by the following general statement from 6 NICHOLS, *supra* note 414, § 24.621(1):

> The statutory requirement of an attempt to agree with the owner does not, it has been held, confine the negotiations to the owner of the fee. However, an inability to agree with the fee owner will ordinarily excuse the necessity for negotiations with a co-tenant, a contract vendee, the holder of a vendor's lien, a mortgagee, a tenant, a lessee, or the holder of an inchoate dower interest.

[422] See text *infra* between notes 469 and 470.

[423] See text *infra* between notes 464 and 470.

tion Act and the several State compliance laws. But piecemeal acquisition of separate interests in the same land may present difficult problems if some interests are acquired by purchase and the rest by condemnation. Moreover, the amount of work, trial time, and expense will be substantially the same whether one interest or all interests in a given tract of land are condemned. State highway agencies are therefore likely to prefer to condemn all interests where not all of them can be acquired by negotiated purchase.

B. NATURE OF THE PROPERTY INTERESTS TO BE ACQUIRED

1. Where the Landowner Also Owns the Sign

In cases where the landowner also owns the nonconforming advertising sign to be removed, the property interest to be acquired by the State is twofold: (1) a full ownership interest in the sign itself, and (2) an incorporeal interest in the land. These are discussed separately.

In connection with the landowner's full ownership interest in the nonconforming advertising sign, the principal question is whether the sign will be viewed as a fixture or as mere personal property for purposes of condemnation and compensation. It can be assumed that advertising signs are almost invariably physically annexed or affixed to the land itself, or to buildings which, from a legal standpoint, constitute part of the land. Hence, it would seem that signs erected on land owned by the owner of the sign will almost invariably be classified as fixtures, whether we adopt the simple English common law test of "annexation" [424] or the more complex American test laid down in *Teaff v. Hewitt*.[425] In *Teaff v. Hewitt*, the Ohio court rejected the simple "annexation" test and laid down the rule that a fixture must satisfy the following threefold test: [426]

> 1. Actual annexation to the realty, or something appurtenant thereto.
> 2. Appropriation to the use or purpose of that part of the realty with which it is connected.
> 3. The intention of the party making the annexation, to make the article a permanent accession to the freehold—this intention being inferred from the nature of the article affixed, the *relation* and *situation of the party* making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

Where the annexation is made by the owner of the land, it is clear that most courts will find that the "appropriation to use" and "intention" tests have also been satisfied, and hold that the article annexed (e.g., an advertising sign) is a fixture, and thus part of the realty, as between vendor and purchaser.[427] The same rule is applied in condemnation, as between condemnor and condemnee.

As has been previously seen, the language of Title I, subsection (g), of the Highway Beautification Act [428] is quite ambiguous as to just what interest of the landowner is to be taken and paid for when a lawfully erected nonconforming sign is required to be removed from his land. If Congress intended that the right to erect or maintain any off-premises signs on the land within 660 ft of the right-of-way of an Interstate or Federal-aid primary highway should be taken in perpetuity and paid for, then the interest acquired by the State is a permanent negative easement. What is taken, of course, is not an affirmative right to erect or maintain advertising signs, but a right to prevent the landowner from doing so, or allowing others to do so with his consent. The landowner's affirmative right to erect or maintain advertising signs will really be extinguished,[429] not acquired by the State—which is the essence of a negative easement. The negative easement against advertising is essentially like a scenic easement, but more of the landowner's affirmative rights of use are extinguished by a scenic easement than by an advertising easement.

It is possible, however, that Congress intended that only the landowner's right to maintain an existing advertising sign on his land should be taken when the sign is required to be removed.[430] If so, State compliance laws using the language of Title I, subsection (g), of the Highway Beautification Act will no doubt be construed the same way.[431] In that case, the advertising easement to be acquired by the State highway agency will presumably not be permanent, but will have a duration measured by the estimated life of the nonconforming sign whose removal is required. For the period beyond the duration of this advertising easement, prohibition of the erection of new signboards will be effected by means of the police power.

2. Where the Land and the Sign Are Not Under Common Ownership

The interest of the sign owner, where the sign owner does not own the land on which the sign is located, is really twofold: (1) a so-called leasehold interest in the land, and (2) a full ownership interest in the sign itself.

The so-called leasehold interest of the sign owner in most instances is not a real leasehold estate carrying with it an exclusive right to possession of a defined area for a term of years. It is really some sort of easement or license. As Lesar has pointed out: [432]

> At common law leaseholds were classified as corporeal or possessory interests, licenses, easements, and profits as incorporeal or non-possessory interests. The classification was founded upon the physical differences in the enjoyment of each interest observable in the simple examples then prevalent and in the inability of those who formulated the early common law to distinguish between rights and things. The significant legal results were a difference in modes of conveyance and in forms of action available for protection of the interests. So a lessee must take possession but his grant can be oral; the grant of an easement must be by deed, and the grantee has no

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[424] See discussion in 5 AMERICAN LAW OF PROPERTY § 19.2 (Casner ed. 1952) [hereinafter cited as AM. L. PROP.]; POWELL, LAW OF REAL PROPERTY 48-49 (Rohan recomp. 1968) [hereinafter cited as POWELL].

[425] 1 Ohio St. 511 (1853).

[426] *Id.* at 530. See discussion in 5 AM. L. PROP., *supra* note 424, § 19.3; 5 POWELL, *supra* note 424, at 50.

[427] It is equally clear that an advertising sign actually annexed to the realty becomes a fixture under the so-called institutional test. *See* 5 AM. L. PROP., *supra* note 424, § 19.4; 5 POWELL, *supra* note 424, 50-51.

[428] 23 U.S.C.A. § 131(g) (1966).

[429] The right extinguished by purchase or condemnation is one of the many rights of user which are part of the totality of rights, powers, privileges, and immunities comprising ownership of a fee simple estate.

[430] See text *supra* in Chapter One between notes 110 and 111.

[431] See text *supra* in Chapter Two between notes 229 and 231.

[432] 1 AM. L. PROP., *supra* note 424, at 180-185. *Accord:* Wilson, *Billboards and the Right to be Seen from the Highway*, 30 GEO. L.J. 723, 745-747 (1942).

possession. Eventually lessees are protected by actions of trespass and ejectment, owners of incorporeal interests by action on the case.

Under this classification, possession is the main feature which distinguishes a lessee's interest from a license, easement or profit. The courts have continued to use the classification and the distinction. Possession, of course, is a variable term which may mean different things for different purposes, but it does imply physical control and intention to exclude others. Whether a particular instrument or set of facts results in the transfer of possession, and so is a lease, depends on the intention of the parties as determined by a construction of their language or acts. It is the legal relations intended rather than the terminology employed to which attention is here directed. Hence, what the parties call the transaction is important, but not conclusive. Other factors used in the construction process are the definiteness of the description and the number of restrictions imposed upon the enjoyment of the interest granted. As to the former, since exclusive physical control implies a defined area, an indefinite description indicates a conveyance of an incorporeal interest, a specific description a lease. As to the latter point, a lease may contain restrictions and may even be limited to a particular purpose if the enjoyment thereof is inconsistent with any other use by the owner, but the more narrowly the use is limited, the more likely that there is no lease.

. . . .

Grants or "leases" of the exclusive right or privilege to place signs on walls and fences for a term are frequently occurring transactions. While the grantee in such cases is entitled to the exclusive use of the side of the wall or fence, there is seldom any substantial interference with the grantor's possession and enjoyment of the land owned. Possession, then, does not pass to the grantee, but where consideration is paid there is an intention to create a property interest so that the transaction is more than a license. The proper analysis would seem to be that such a transaction creates an easement.

On the other hand, it is clear that an owner may lease land to another for the sole purpose of erecting signs or billboards if that is the intention.

Transactions involving the right to erect signs on roofs are more difficult than those involving simply the painting of a wall or fence, particularly where the sign is large and the structure occupies a substantial portion of the roof. Even here the grantor usually retains substantial control and enjoyment, and it is believed that the parties would not desire the legal effects of a landlord-tenant relationship. Although there is some conflict, the cases have generally held that such a transaction results in the creation of an easement. By clear expression of intention, however, the parties should be able effectively to designate the nature of the interest created.

Because "leases" that authorize the erection and maintenance of signs on vacant land usually purport to lease "as much of the premises . . . as may be necessary for the construction of advertising structures or displays and supports therefor," [433] without designating very precisely where within the tract leased such structures are to be erected, and allow the lessor to use the land for any purpose that will not interfere with its use for advertising purposes,[434] it seems clear that such a lease really creates an easement for a term of years rather than a true leasehold estate. Some cases describe the interest created by an advertising lease as a "license," but a "license," by definition, is revocable at the will of the landowner. Whenever the advertising lease is for a definite term and indicates the intent of the parties that it should not be revocable at the landowner's will, it should be deemed to create an easement rather than a license.[435]

Whether the easement created by an advertising lease should be classified as an "easement appurtenant" or an "easement in gross" is a more difficult question, however. An easement appurtenant is one that exists for the benefit of a particular piece of real property—the so-called dominant tenement—whereas an easement in gross exists only for the personal benefit of the holder of the easement. In the case of an off-premises advertising sign maintained by a roadside business establishment, it can reasonably be argued that the easement created by the advertising lease is appurtenant to the property where the business is conducted. But it is more difficult to regard the advertising plant of a standardized outdoor advertising company as a dominant tenement to which the easement created by an advertising lease is appurtenant—especially because the plant consists largely of the very advertising structures erected and maintained at various locations by virtue of the company's advertising leases. On the whole, it would seem that the easement created by a lease to a standardized outdoor advertising company is an easement in gross rather than an easement appurtenant.[436] But it is entirely possible that some courts may classify them as easements appurtenant in response to the claims of the outdoor advertising companies for severance damages.

Having decided that the sign owner's interest under an advertising lease is really an easement for a term of years rather than a true leasehold estate, it must be conceded that the term "leasehold" is in common use to describe the sign owner's interest, and that this term is used in Title I, subsection (g), of the Highway Beautification Act.[437] Consequently, the term "leasehold" is used in the remainder of this chapter to describe the sign owner's interest, with the understanding that the interest is really an easement for a term of years, either appurtenant or in gross.

As previously indicated, when an advertising sign is annexed to the land by the landowner himself, it seems clearly to meet the test of a fixture under either the strict English

[433] This wording is from standard lease forms used by Central Advertising Company of Michigan.

[434] Other outdoor advertising companies use lease forms with slightly different language than that used by Central Advertising Company, *supra* in text at note 433, but the substance is generally similar.

[435] Sometimes the instrument gives the outdoor advertising company the right to use the land for advertising purposes for a short term, subject to the landowner's power to terminate the company's rights on 30 days notice in the event the property is sold, leased for anything other than advertising use, or desired for building construction. Even such an instrument—often termed a "letter of permission" rather than a "lease"—seems to create an easement rather than a mere license, although the easement is subject to a power of termination upon the happening of specified events. In some States, some rural advertising signs have been put up on the basis of a mere revocable permission or license, but the author's understanding is that such licenses have generally been replaced by leases creating easements since enactment of the Highway Beautification Act of 1965.

[436] *See, e.g.,* Borough Bill Posting Co. v. Levy, 144 App. Div. 784, 129 N.Y.S. 740 (1911); Rochester Bill Posting Co. v. Smithers, 224 App. Div. 435, 231 N.Y.S. 315 (1928); Whitmier & Ferris Co., Inc., v. State, 12 App. Div. 2d 165, 166, 209 N.Y.S.2d 247, (1961); Rochester Poster Advertising Co. v. State, 27 Misc. 2d 99, 213 N.Y.S.2d 812 (Ct. Cl. 1961), *aff'd mem.,* 15 App. Div. 2d 632, 222 N.Y.S.2d 688 (1961), *aff'd mem.,* 11 N.Y.2d 1036, 230 N.Y.S.2d 30 (1962). The same conclusion is reached in Wilson, *supra* note 432, at 746.

[437] 23 U.S.C.A. § 131(g) (1966).

rule or the American rule as stated in *Teaff v. Hewitt.*[438] But most advertising signs are erected on land not owned by the owner of the sign and are erected pursuant to an advertising lease. In this situation of divided ownership, the American rule gives rise to difficulties. The Ohio court in *Teaff v. Hewitt,* in attempting to supply a "test of general and uniform application"[439] that would resolve all questions, made the same error as the English courts: it applied the same test to both common and divided ownership cases.

Even in the English common law, an exception to the rule that fixtures became part of the realty and could not be removed was made in the case of tenants' trade fixtures, which—although they were held to belong to the landlord while they were in place—could be removed by the tenant at or before the end of his tenancy.[440] In the United States, most courts have liberalized the English trade fixture doctrine very substantially. Niles and Merryman have summarized the American rule on tenants' fixtures as follows:[441]

> Regardless of the reason given by the courts, the results are fairly consistent and reasonably predictable. Tenants are permitted to remove a great variety of fixtures so long as removal does not cause substantial injury to the freehold or the virtual destruction of the fixtures, and so long as the removal takes place within the time limits permitted by law. The old exception in favor of trade fixtures is no longer of significance, although courts still refer to the fact that a given fixture is removable because it is a trade fixture, or a domestic fixture, or an ornamental fixture, or an agricultural fixture. Where the intention test is applied, the courts usually find that the tenant did not intend a permanent annexation.

Unfortunately, however, American courts have had great difficulty in dealing with the question of whether fixtures that are removable by a tenant are real or personal property while they are in place. Courts have generally refrained from laying down rigid rules for determining their character in all situations.[442] But frequently, when the precise legal character of such fixtures is not really in question, courts speak of them as personalty, apparently considering that this legal status necessarily follows from the fact that they are removable by the tenant.[443] Strictly speaking, however, it would seem that removable tenant fixtures, like other fixtures, are part of the realty until removed, with the right of removal existing in the tenant's favor apart from, and independently of, unquestioned right to remove any personal chattel that, although it is on the land, has not become a part of the realty for any purpose.[444] The view that removable tenant fixtures are personal property while in place is certainly inconsistent with the generally accepted rule that the tenant loses his right to remove fixtures, but not mere personal chattels, if he fails to remove them from the leased premises at or before the end of the lease term.[445]

In practice, most courts recognize that removable tenant fixtures are on the dividing line, or in the twilight zone, between real and personal property.[446] As Niles and Merryman have pointed out,[447]

> . . . It should be enough to say that they are fixtures and hence not out-and-out personalty or out-and-out realty. Hence such a fixture while in place might, in some legal transactions and between certain parties, be considered now as personalty and now as realty. Basically, the problem is one of ownership; secondarily, it is a question of the proper legal classification of the fixture while in place. The same fixture might be considered as personalty under the Statute of Frauds when the tenant attempts to sell it separate from the land *and yet be part of the realty when the leased premises are taken in condemnation.* A creditor of a tenant may seize the tenant's movable fixtures under a writ which is appropriate for the seizure of personal property, yet the same fixture might, under a particular taxing statute, be assessed as part of the real property. It is possible to say that a tenant's fixture, while in place, is real property subject to the extraordinary power of the tenant to remove it and to reimpress upon it its characteristics as personalty; or it is possible to say that a removable fixture is personal property except in those transactions in which it must be classed under the words of a particular statute as a *de facto* part of the realty. Neither view would explain all of the cases. . . .

As Niles and Merryman suggest, the view that a removable tenant fixture is realty has generally been applied in connection with the taking of land for public use, so that the condemnor must pay for the fixtures as part of the realty but the compensation therefor will go to the tenant because of his right of removal.[448] Even if a removable tenant fixture is considered as personalty between the landowner and the tenant, the courts almost uniformly take the position that this rule is entirely for the protection of the tenant and cannot be invoked by the condemnor. As Nichols says,[449] "If the 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." Thus, if signs erected pursuant to an advertising lease are classified as removable tenant fixtures, as they will be in most jurisdictions, a state highway agency taking such signs pursuant to an advertising control statute would generally be compelled to treat them as part of the realty rather than as personalty.[450]

It is possible that, in a few states, advertising signs may be held to be personalty even in condemnation proceedings.

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438 1 Ohio St. 511 (1853). *Cf.* State v. Gallant, 42 N.J. 583, 195 A.2d 466 (1964).

439 *Id.* at 530.

440 See discussion in 5 AM. L. PROP., *supra* note 424, at 10-14.

441 *Id.* at 41-42. See general discussion in *id.* § 19.11; 36A C.J.S. *Fixtures* §§ 33-43.

442 *See, e.g.,* Pennington v. Black, 261 Ky. 728, 88 S.W.2d 969 (1935).

443 *See, e.g.,* cases cited in 36A C.J.S. *Fixtures* § 37 n. 48.

444 *See, e.g.,* cases cited in *id.* § 37 n. 50.

445 See discussion of the rule referred to in text, in 5 AM. L. PROP., *supra* note 424, at 43-44; 36A C.J.S. *Fixtures* § 41.

446 *See, e.g.,* Frost v. Schinkel, 121 Neb. 784, 238 N.W. 659, 77 A.L.R. 1381 (1931).

447 5 AM. L. PROP., *supra* note 424, at 42-43.

448 This rule, also stated in 2 NICHOLS, *supra* note 414, §§ 5.81(2) and 5.83; 4 *id.* § 13.12 is supported by many cases—e.g., U.S. v. Certain Property, etc., 344 F.2d 142 (2d Cir. 1965); Carmichael v. U.S., 273 F.2d 392 (5th Cir. 1960); Gilbert v. State, 85 Ariz. 321, 338 P.2d 787 (1959); Los Angeles v. Hughes, 202 Cal. 731, 262 P. 737 (1927); Roffman v. Wilmington Housing Auth., 179 A.2d 99 (Del. 1962); Bales v. Wichita, etc. R.R., 92 Kan. 771, 141 P. 1009 (1914); Sheehan v. Fall River, 187 Mass. 356, 73 N.E. 544 (1905); Cornell-Andrews Smelting Co. v. Boston, etc. R.R., 209 Mass. 293, 95 N.E. 887 (1911); State v. Peterson, 134 Mont. 52, 328 P.2d 617 (1958); Poillon v. Gerry, 179 N.Y. 14, 71 N.E. 262 (1904); Matter of City of New York (Allen Street), 256 N.Y. 236, 176

For example, in *Ghaster Properties, Inc., v. Preston,*[451] in dealing with the question of whether the police power could be used to eliminate lawfully erected nonconforming signs, the court said: "There is nothing to indicate that they ever became fixtures so as to be part of the real estate."[452] The implication is that if the signs were not part of the real estate there would be no right of compensation for them when removal was required. But the *Ghaster Properties* case involved the constitutionality of a statute that did not provide for compensation. As previously indicated, it seems probable that the State advertising control laws that have been enacted to comply with Title I of the Highway Beautification Act *require* payment of compensation, upon removal of any nonconforming sign, for the taking of the sign owner's interest in the sign whether it is classified as real or as personal property.[453] Under these State compliance laws, compensation will have to be paid for the sign owner's interest even if it is deemed to be personalty in a particular State. But in some States, at least, differences in methods of valuation may result from classifying advertising signs as personal rather than real property.

Where a nonconforming advertising sign was lawfully erected pursuant to an advertising lease on land not owned by the owner of the sign, Title I, subsection (g), of the Highway Beautification Act requires payment of compensation for "the taking from the owner of the real property on which the sign . . . is located, of the right to erect and maintain such signs . . . thereon." It seems clear that the interest to be acquired is a permanent negative easement against advertising of the kind previously defined in connection with the discussion of the property interests to be acquired when the signboard and the land are under common ownership, provided the foregoing language from Title I, subsection (g), of the Highway Beautification Act is construed to require acquisition of the landowner's advertising rights in perpetuity. However, it might possibly be construed to refer only to the rights of the landowner under the existing advertising lease pursuant to which the nonconforming sign is maintained on the land. The Federal Highway Administration has apparently adopted this construction of Title I, subsection (g).[454] If this construction, which the writer believes to be erroneous, is ultimately held to be correct, the States will only need to acquire the landowner's rights under existing leases, and prohibition of future signs can be effected by means of the police power. The interest of the landowner to be acquired under such a construction is impossible to describe in terms of traditional property law classifications.

C. GENERAL PRINCIPLES OF VALUATION IN EMINENT DOMAIN

It is elementary that the test of value in eminent domain is normally "market value," usually defined as "the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied."[455] It is clear, however, that the final clause of the definition just quoted must be modified if the market value standard is to be used in valuing the interests of the advertising sign owner and the landowner in the leasehold, the attached sign, and the land. Because the lease authorizes use of the land for advertising purposes only, and because an advertising sign can be used for nothing but advertising, it is obvious that no other use can be taken into consideration in valuing the sign owner's property interest.

Assuming that courts will seek to apply the market value standard in valuing the sign owner's interest when nonconforming advertising signs are required to be removed, how is market value to be established? Traditionally, three appraisal approaches have been recognized by the courts: (1) the market data or sales approach; (2) the income approach; and (3) the cost approach.[456]

N.E. 377 (1931); Consolidated Ice Co. v. Pennsylvania R.R., 224 Pa. 487, 73 A. 937 (1909); North Coast R.R. v. Kraft Co., 63 Wash. 250, 115 P. 97 (1911).

[449] 2 NICHOLS, *supra* note 414, §§ 5.81(2) and 5.83; 4 *id.* § 13.12.

[450] Stein Brewery Co., Inc., v. State, 200 Misc. 424, 426, 103 N.Y.S.2d 946, 949 (Ct. Cl. 1951); Whitmier & Ferris Co. v. State, 12 App. Div. 165, 167, 209 N.Y.S.2d 247, 249 (1961); Rochester Poster Advertising Co. v. State, 27 Misc. 2d 99, 213 N.Y.S.2d 812, (Ct. Cl. 1961), *aff'd mem.*, 11 N.Y.2d 1036, 230 N.Y.S.2d 30 (1962); City of Buffalo v. Michael, 16 N.Y.2d 88, 209 N.E.2d 776 (1965). Some of the State advertising control laws expressly provide that advertising signs shall be deemed to be "trade fixtures." *See, e.g.*, N.M. STAT. ANN. § 55-11-6 (C) (1) (Supp. 1969); OKLA. STAT. ANN. tit. 69, § 1280(b) (1969). In a few States, however, the very existence of the right of removal is a proper basis for the denial of compensation to the lessee or the value of improvements in their unsevered condition. *See, e.g.*, Baltimore v. Gamse, 132 Md. 290, 104 A. 429 (1918).

[451] 176 Ohio St. 425, 200 N.E.2d 328 (1964).

[452] *Id.* at 440, 200 N.E.2d at 339.

[453] See discussion in text *supra* Chapter One between notes 105 and 107.

[454] *Policy and Procedure Memorandum 80-9* (1967), *supra* note 57, at 6.

[455] 4 NICHOLS, *supra* note 414, § 12.2[1] at nn. 3-4. See also *id.* § 12.1:

> The "just compensation" to which . . . [the owner of the property taken for public use] is entitled has been held to be the *value* of the property at the time it is acquired pursuant to an exercise of the sovereign power. It has been held to be the equivalent to the *full value* of the property. All elements of value which are inherent in the property merit consideration in the valuation process. Every element which affects the value and which would influence a prudent purchaser should be considered. No single element, standing alone, is decisive. . . .
>
> It has, in fact, been said that no general rule can be inflexibly adhered to. Each case necessarily differs from all others insofar as its factual situation is concerned, and exceptional circumstances render imperative a fair degree of elasticity in the application of the fundamental rule. It seems almost unnecessary to point out the self-evident fact that in the method adopted for the ascertainment of such value, it is incumbent upon the state to reach a result that is truly "just compensation," that is, a result just to the public as well as to the owner of the property taken.
>
> The criteria for the determination of compensation and the elements which command consideration have not become unalterably fixed, and consideration must be given to the nature of the property affected and the extent of the interest acquired. "Value" is a term which is relative in character. The difficulty experienced in fixing a norm has been the result of the almost infinite variety of circumstances to which it has been sought to apply it.
>
> In one form or another, the value of the property taken by eminent domain has been declared to be its "market value." Thus, "value" has been characterized as *fair market value, cash market value,* and *fair cash market value*. It has been described also as *reasonable cash market value* and *fair cash value*. So long as there is an ascertainable market the market value doctrine is adhered to.

To the same effect, *see* JAHR, EMINENT DOMAIN §§ 66, 70 (1953) [hereinafter cited as JAHR]; 1 ORGEL, VALUATION UNDER EMINENT DOMAIN §§ 11, 17 (2d ed. 1953) [hereinafter cited as ORGEL].

[456] For present purposes it is unnecessary to consider whether all three of these approaches are really designed to establish market value. It may be conceded that the term "market value" is "highly ambiguous and is given a wide variety of meanings by both courts and economists" and that "in the relatively few cases where the question is raised, the opinions make it clear that market value is simply the ordinary test, to be rejected in those exceptional cases where it would not constitute 'just compensation.' " 1 ORGEL, *supra* note 455, at 76, 86. It may also be conceded that both the income approach and the cost approach can be viewed as

1. The Market Data or Sales Approach

Courts are unanimously agreed that evidence of prior sales of the property in question is admissible, provided such sales were voluntary transactions and the time of such sales is not so remote as to destroy their evidentiary value. Aside from the fact that the sale to the present owner may have greater weight because it was the last sale prior to the valuation date, there seems to be no legal doctrine entitling it to greater consideration. But, in practice, judges and juries are likely to be more influenced by the sale price paid by the present owner because of their reluctance to award compensation that is less than the actual cost of the property.

Most courts have also accepted the rule that evidence of sales of other property similar to that condemned, at or about the time of the condemnation, is admissible as independent evidence of the value of the property condemned. As Nichols points out,[457]

> Such evidence is capable of direct proof; it has considerable probative value. Market value is, of course, the price at which an article sells in the open market. This price is fixed by sales actually consummated. Such sales, when made under normal and fair conditions, are necessarily a better test of the market value than the speculative opinions of witnesses; for truly, here is where "money talks."

However, in some States the courts have at one time or another taken the view that evidence of comparable sales is not admissible on direct examination. In any case, admissibility of such evidence is subject to important limitations based on (1) the degree of similarity between the property that was the subject of the sale and the property being valued; (2) proximity between the date of the sale and the valuation date; and (3) the nature of the sale, as determined by the circumstances under which it was made.

The principal danger of using the market data approach is the use of sales of properties not actually comparable. The way most testimony of comparable sales is presented in condemnation proceedings, all sales appear to be approximately equal in evidentiary value and entitled to equal consideration, and the jury cannot properly judge the degree of comparability.

2. The Income Approach

The income approach to valuation is perhaps the least used in condemnation cases, because it is the most difficult for jurors, lawyers, and judges to understand. However, it may be especially useful when the property condemned produces a stream of income but is of such a character that there are few market data in the form of comparable sales. The theory of the income approach is that the market value of the property is the present worth of the net income it will produce during the remainder of its productive life. If the property condemned were coterminous with the entire enterprise from which the income is derived, a capitalization of this income would be not merely a relevant datum for the valuation of the property but might be the best available measure of its value. Although few cases can be found that precisely meet this criterion, there are many cases where it may be approximated,—e.g., the condemnation of rented premises like apartment and office buildings. In such cases, although the presence of the managerial factor and of the movable assets of the enterprise prevents a sale of the land and building from being identical with a transfer of the business, the discrepancy is not wide enough to prevent a derivation of the probable market value of the former from a capitalization of the prospective earning power of the latter. Consequently it is generally held that in such cases, if there is reasonable assurance that the rentals as of the time of the taking may be expected to continue for an appreciable period of time, the market value of the property may properly be determined by capitalization of the rents. When the only property interest acquired is the landowner's advertising rights, it seems clear that capitalization of the advertising lease rentals is a proper way to value the property interest acquired.[458]

To apply the income approach, the income of the property must be translated into a valuation figure. The two most commonly used methods for this purpose are the Gross Rent Multiplier method and the Capitalization of Net Rents method.[459] The Gross Rent Multiplier method is likely to be less reliable, for an arbitrary number is often used as the multiplier. However, if an exhaustive investigation of comparable rental properties previously sold reveals a definite ratio between gross rentals and sales prices, a gross rental multiplier developed from such a ratio may be reasonably reliable. The Capitalization of Net Rents method is based on the obvious fact that the income from rental property may be viewed as the product of the market value and the rate of return on the investment (including return *of* the investment). By algebraic conversion, if the income and the rate of return are known, the market value can be determined by dividing the income by the rate of return. But the accuracy of this method depends on determination of the proper capitalization rate. It will work with the least chance of serious inaccuracy if, for comparison, there are data with respect to a sufficient number of sales of rental properties from which a reliable ratio between sales prices and net income can be worked out. But if a sufficient number of sales of properties are sufficiently

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designed to establish value to the condemnee rather than market value of the property taken.

For a good brief treatment of the three appraisal approaches, see Rollins, *Selection of the Proper Appraisal Approach in Condemnation Suits*, PROCEEDINGS OF THE SIXTH ANNUAL INSTITUTE ON EMINENT DOMAIN 47-72 (1964); Lange, *Advantages and Pitfalls of Appraisal Techniques*, NINTH INSTITUTE ON DOMINANT DOMAIN 83-105 (1969); KALTENBACH, JUST COMPENSATION REVISED ch. III (1964). For a full discussion of the case law as to admissibility of evidence pursuant to each of the three approaches, see 4 NICHOLS, *supra* note 414, §§ 12.311, 12.312, 12.3121, 12.3122, 12.313; 5 *id.* ch. XIX-XXI; JAHR, *supra* note 455, ch. XXI, XXII, XXIV; 1 ORGEL, *supra* note 455, ch. XII, XIV, XV; 2 *id.* ch. XVI. Because these standard works are generally available, the remainder of this section is not encumbered with extensive footnotes.

[457] 4 NICHOLS, *supra* note 414, at 92-93.

[458] "Although courts and text-book writers have often stated that, as a general rule, income in the nature of profits from a business is not admissible evidence of the value of the premises on which the business is located, they have also stated that, as a general rule, income in the nature of rentals is admissible." (1 ORGEL, *supra* note 455, § 179.)

[459] "Apparently both gross and net rental values are referred to by the courts under the general term "rental value"; but many of the opinions leave one uncertain which of the two was offered as evidence." (1 ORGEL, *supra* note 455, § 178.)

comparable for the ratio of sales prices to net income to be reliable, it may be possible to use the direct market data approach; or, if not, the much simpler Gross Rent Multiplier method can be used.

3. The Cost Approach

When the cost approach is used, improved land is first valued as if vacant, by using market data, and to the land value is added the reproduction cost of the improvements less depreciation. Strictly speaking, of course, the proper measure of compensation in eminent domain is the market value of the land with the improvements on it, and the owner is entitled to nothing for the improvements unless they increase the market value of the realty. So evidence of the structural value of the improvements is not admissible as an independent test of value. But if it is shown that the character of the improvements is well adapted to the location, the reproduction cost of the improvements, after making proper deductions for depreciation, is generally held to be a reasonable test of the amount by which the improvements enhance the market value of the realty, and it is admissible to prove such enhancement.

The reproduction cost new of an improvement on land can be determined by various methods: e.g., the Quantity Survey method, the Unit Cost in Place method, or the Square Foot or Cubic Foot method. "Depreciation" means the loss of value from all causes, and can be divided into physical deterioration, functional obsolescence, and economic obsolescence. The primary difficulty in the use of the cost approach, generally speaking, is the difficulty of measuring depreciation. However, the cost approach is a useful and often underrated method of arriving at a determination of market value. In general, it is considered that the cost approach will furnish the upper limit of market value because of the principle of substitution, which states that a person would not be justified in paying more for an improved property than the total cost of the vacant land plus the cost of constructing the improvements.

D. VALUATION OF PROPERTY INTERESTS TAKEN

1. Sign and Land Under Common Ownership

When a nonconforming advertising sign is located on land owned by the owner of the sign, the problem of valuation in eminent domain is difficult, though not quite as difficult as in cases where the sign and the land are under different ownership. Assuming that the sign in place is a fixture,[460] the general rule for valuation would be relatively simple if the condemnor were taking the entire fee simple estate in the land: the land and the fixture would be valued as a unit, not by adding the aggregate value of the land and fixture as separately determined. Valuation of the land and the fixture as a unit could be based on the market data approach, the income approach, or a combination of the two. Moreover, many courts would permit use of the cost approach as a third alternative, although it would, in fact, involve separate valuation of the land and the fixture. In the cost approach, the property would be appraised by the summation of the market value of the land as if vacant, plus the reproduction cost of the fixture less depreciation.

When a State highway agency requires removal of nonconforming highway signs, however, it will not take a fee simple estate in any land; as previously indicated, it will be taking a negative easement against use of the sign itself. The effect of the acquisition of the negative easement is to extinguish the landowner's right to use the land for advertising purposes, but it does not confer on the State any affirmative privilege to use the land. Yet it may be argued that the valuation rules applied to the taking of affirmative easements should be applied when negative easements are taken. If so, additional complications are presented.

Compensation in affirmative easement cases is generally based not on the separate value of the easement taken, but on the damage to or diminution in the value of the owner's remaining property and estate attributable to the taking of the easement and to the prospective use to be made of it by the condemnor.[461] Although this may be regarded as the value of the easement to the landowner from whom it has been taken, the courts do not often speak in terms of the value of the easement as the measure of compensation. Instead they use language appropriate to ascertainment of severance damages in cases of partial taking in fee simple. Thus, it is generally said that the damages for taking of an affirmative easement are either (1) the difference between the market value of the entire tract before and after the taking of the easement,[462] or (2) the difference between the value of the easement strip before and after the taking plus the difference between the value of the remainder before and after the taking.[463] The latter appears to be the more prevalent formula in the State courts.[464]

The formula last stated poses some very difficult problems of valuation even as applied to affirmative easements. As Orgel points out,[465] it could be acceptable if strictly and logically applied, so that both the easement strip and the remainder were valued as separate tracts. But the courts have generally required that the value of the easement strip be determined as part of the whole tract, which compels the commission or jury in some vague way to apportion the value of the whole tract between the easement strip and the remainder. Moreover, the usual definition of "severance damages" as the diminution in market value of the remainder that results from the taking raises more questions than it answers. It assumes that the remainder may be appraised separately by reference to its "before" and "after" values, and thus aggravates the difficulties created by the artificial apportionment of the value of the whole tract between the easement strip and the remainder. By failing to draw a clear line of demarcation between the value of the easement strip and the damages to the remainder, the formula invites duplication of compensation, although in particular cases it may result in undercompensation of the landowner.

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[460] *Supra* note 450.
[461] 4 NICHOLS, *supra* note 414, § 13.12[1]; 1 ORGEL, *supra* note 455, § 106; West, *Condemnation of Limited Use Easements,* PROCEEDINGS OF THE SIXTH ANNUAL INSTITUTE ON EMINENT DOMAIN 109, at 115 (1964).
[462] *Ibid.* This is the rule in the Federal and some State courts.
[463] West, *supra* note 461, at 118.
[464] *Ibid.* See also 1 ORGEL, *supra* note 455, at 301.
[465] 1 ORGEL, *supra* note 455, at 301-302, from which the discussion in the text is drawn.

The generally accepted formulae for valuing affirmative easements taken for public use cause even more difficulty when they are applied to negative easements. These rules have, in fact, been applied in a number of cases involving the taking of so-called avigation [466] and clearance easements,[467] and the simple "before and after" formula was recently applied in Nebraska [468] to the taking of a permanent easement for the control of advertising, pursuant to the advertising control statute adopted to qualify Nebraska for the Federal bonus provided by the 1958 Federal-Aid Highway Act. The Nebraska cases, which involved farmland on which no advertising signs had actually been erected (although in one of the cases [469] an advertising company had an option to lease the land for advertising use), resulted in determinations that the landowner was entitled to no compensation because there was no difference in the "before and after value" of the land. Such a result can be justified, of course, as perfectly consistent with the basic rule that the fair market value of the property taken is the constitutional measure of just compensation, inasmuch as no market value was proved.[470]

In the cases that will arise under most of the State advertising control statutes, however, condemnation will occur only when there is a nonconforming highway advertising sign on the land. The sign obviously has some value, so application of the easement valuation formulae will not be likely to result in determinations that no compensation is payable to the landowner.[471] But serious valuation problems will arise. Suppose, for example, that a court tries to apply the simple "before and after value" formula. It may be possible to determine the market value of the entire tract before the taking on the basis of market data, but it is unlikely that the after value can be determined on the basis of market data, for comparable sales data are not likely to be available. Thus, the court probably will have to allow use of either the income or the cost approach to determine the value of the property interest taken from the landowner. If the before value is determined, whether on the basis of market data or otherwise, the after value will be equal to the before value minus the value of the property interest taken from the landowner as determined by means of the income or cost approach. But the difference between the before and after values as thus determined will, by definition, be exactly equal to the value of the property interest taken as determined by means of the income or cost approach. (That property interest, as has been seen, is a negative easement against outdoor advertising plus a full ownership interest in a fixture.)

If a court tries to base the compensation on the formula for "damage to the easement strip plus damage to the remainder," it will necessarily end up with the same result. Inasmuch as the easement that is taken is a negative easement, it cannot adversely affect the value of the remainder (that part of the tract not subject to the negative easement). And, as has been seen, the only way to determine the damage to the easement strip will be, in all probability, to ascertain, by means of the income or the cost approach, the value of the property interest that is taken.

Assuming that the value of the property interest taken is the proper measure of compensation when a nonconforming advertising sign is required to be removed, it seems clear that proof of the value by means of market data will be difficult, for there will be few, if any, comparable sales. So, as previously suggested, it will probably be necessary to use the income or the cost approach, or both.

If the owner of the land and the nonconforming sign deals directly with advertisers and receives income through rental of the space on his signboard, it would seem that the market value of the property for advertising purposes can be determined by simply capitalizing the rental income at an appropriate rate. This would yield a unit value for the sign as a fixture and the advertising rights component of fee simple ownership that underlies use of the land for advertising purposes. It is this unit value that is really being taken from the landowner when his sign is taken and a negative easement against advertising is imposed on his land. Because the land is actually being used for outdoor advertising purposes, and because the right to use it for such purposes is the only right being extinguished by the taking, it is clear that the sign rental income is derived from the single use to which the property taken (the signboard and the advertising rights component of fee simple ownership) is best adapted. In short, the highest and best use of the property taken is the existing use for advertising purposes.

If the advertising sign and the land on which it is located are under common ownership and the sign is used only to advertise a business that the owner operates at a different location—e.g., a motel, restaurant, or service station —the income approach will be difficult to employ for unit valuation purposes because it will be difficult to impute rental income to the owner with any accuracy. Presumably the only way to do so will be to ascertain what the owner would have had to pay an outdoor advertising company for rental of advertising space on a similar sign, and treat this as imputed rental income, which may be capitalized to determine the value of the sign and the nega-

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[466] *See, e.g.,* United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946) (inverse condemnation); Griggs v. Allegheny County, 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962) (same); Wright v. United States, 279 F.2d 517 (Ct. Cl. 1960) (same); Davis v. United States, 295 F.2d 931 (Ct. Cl. 1961) (same); Batten v. United States, 292 F.2d 144 (10th Cir. 1961) (same); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962) (same).

[467] United States v. An Easement and Right of Way in DeKalb County, Tennessee, 182 F. Supp. 899 (M.D. Tenn. 1960); United States v. 51.8 Acres of Land, Town of Hempstead, Nassau County, N.Y., 151 F. Supp. 631, 633 (E.D.N.Y. 1957); United States v. 26.07 Acres of Land, Town of Hempstead, Nassau County, N.Y., 126 F. Supp. 374 (E.D.N.Y. 1954).

[468] Fulmer v. State, 178 Neb. 664, 134 N.W.2d 798 (1965); Mathis v. State, 178 Neb. 701, 135 N.W.2d 17 (1965); Wolfe v. State, 179 Neb. 189, 137 N.W.2d 721 (1965).

[469] Mathis v. State, *supra* note 468. The court said, *inter alia:* "There was never a sign on the plaintiff's land, and no promise that one would ever be erected there. He had received no sign rental income, and it was not shown with reasonable certainty that he would receive such income at any future time. Whether or not he would ever receive any sign rental income was very speculative and uncertain." 178 Neb. at 706, 135 N.W.2d at 20.

[470] *Cf.* dissenting opinion of Spencer, J., in *Fulmer* and in *Mathis, supra* note 468. Spencer, J., would appear to have based his dissent on two erroneous propositions: (1) that "the State is actually acquiring rights which it *can use* for any public purpose . . . not the mere negative restrictive easement the State seeks to have us believe"; and (2) that the market value of the advertising easement could be established by purely speculative evidence as to what the rental income of the land for advertising use would be *if* anyone wanted to lease it for that purpose, where there was little or no evidence that anyone was at all interested in acquiring an advertising lease on the land. Compare the statement of the majority in *Mathis, supra* note 469.

[471] *Compare* cases *supra* note 468.

tive easement that are taken. But it probably will be hard to find similar signs, for the actual sign to be valued will ordinarily be a nonstandard sign that varies considerably in size, design, and construction from the signs maintained by the standardized outdoor advertising companies.

In cases like that discussed in the preceding paragraph, use of the cost approach will also be difficult. The reproduction cost of the sign itself and the amount of depreciation can probably be established fairly easily. But determination of the value of the negative easement against advertising will be more difficult. The only apparent way to do so is to ascertain what the owner would have to pay as rent for an advertising lease on his own location if he did not own it, and then capitalize this imputed rental income to determine the value of the advertising rights taken when the negative easement is imposed on the land. Evidence to support allegations as to what the lease rental would be if someone else owned the sign location may be hard to obtain.

2. Sign Constructed on Land of Another

Unit Valuation of Interests of Lessor and Lessee

In the great majority of American jurisdictions, when a condemnor acquires a fee simple estate in land subject to an outstanding lease, the condemnation award is determined in two steps: (1) the value of the unencumbered fee simple estate in the land is determined; and (2) this amount is apportioned between the landowner and the lessee. The process has been described as follows: [472]

> In the majority of states as well as under the federal rules of procedure, eminent domain is procedurally an in rem action. That is to say, the land itself is taken rather than the separate interests of the individuals claiming rights in relation to the land. The condemnor pays only for the value of the land unenhanced by the separate estates or interests.
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> Under this concept of eminent domain, the constitutional requirement [of just compensation] . . . is met when the value of the unencumbered land is ultimately determined and the monetary equivalent of its worth deposited with the court. Since condemnation extinguishes all rights existing in relation to the land, the estates or interests of the various owners are then in theory transferred to the eminent domain award.
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> The tenant and all others claiming an interest in the land are then entitled to share proportionately in the distribution of the awards according to the nature of their compensable interests.

When the interests of both lessor and lessee under an advertising lease are condemned, however, it is submitted that the unit valuation method just described is not appropriate and that it probably will not be applied in condemnation cases arising under State advertising control laws. It is clear that the State is not condemning a fee simple estate, and that condemnation does *not* extinguish "all rights existing in relation to the land." At most, the State condemns a permanent negative easement against use of the land for outdoor advertising. The fee simple estate will remain vested in the landowners, subject to the negative easement held by the State. Consequently the theory on which the unit valuation method rests is not applicable. The State does not condemn the land itself, or even any estate in the land, and in the great majority of cases there is no possibility that the total value of the separate interests of the landowner and the lessee will be more than the value of an unencumbered estate in fee simple absolute. Thus, there seems to be no reason why the courts should close their eyes to reality and treat as a single unit the separate interests of the landowner and the lessee of advertising rights.

If Title I, subsection (g), of the Highway Beautification Act [473] and State compliance laws using identical language are construed to require only that all rights under current advertising leases be acquired and paid for when nonconforming signs are required to be removed,[474] the argument for applying the unit valuation method is even less persuasive. Cases applying the unit valuation method in condemnation of a fee simple estate are even more clearly not in point as precedents, inasmuch as the State will not even be condemning a permanent interest in the land. All the State will be doing is extinguishing rights under the current advertising lease and relying on its police power to prohibit erection of any new signs in the future. If the rights of landowner and lessee under the current advertising lease can be considered to constitute a unit, it certainly is not any unit now recognized by the law of property.

Even as applied to the condemnation of a fee simple estate in land that is subject to an outstanding lease, the unit valuation method has been subject to severe criticism in recent years,[475] and several State courts have rejected this method and approved independent valuation of the interests of landowner and lessee.[476] It seems likely that most courts today will refuse to apply the unit valuation method in the condemnation of advertising rights, inasmuch as stare decisis clearly does not require application of that method.

In any case, it is strongly arguable that Congress intended, in enacting Title I, subsection (g), of the Highway Beautification Act,[477] to assure separate valuation of the interests of landowner and lessee, because the right to just

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[472] Baker, *Condemnation: Concepts and Consequences of Public Intervention in Landlord-Tenant Relationships*, 9 KAN. L. REV. 399, 401-402 (1961). *See also* 1 ORGEL, *supra* note 455, § 112 as follows:

> In estimating compensation to owners of land held in divided ownership, the statutes and the judicial decisions usually require that compensation be first estimated in one gross amount and subsequently apportioned . . . . In a few cases, they [the courts] have intimated that they would assess compensation on the basis of independent valuations of the separate interests, if it appeared that these interests were in sum worth much more than the undivided fee. . . . (*Accord:* 4 NICHOLS, *supra note* 414, § 12.36[1]; JAHR, *supra* note 455, § 122. *See also* 1 ORGEL, *supra* note 455, § 109.)

[473] 23 U.S.C.A. § 131(g) (1966).

[474] See discussion *supra* in Chapter One, in text between notes 109 and 111, and Chapter Two, text between notes 230 and 232.

[475] *See, e.g.*, Polasky, *The Condemnation of Leasehold Interests*, 48 VA. L. REV. 477, 485-486, 490-493 (1962); Johnston, *"Just Compensation" for Lessor and Lessee*, 22 VAND. L. REV. 293, 302-320 (1969).

[476] *See, e.g.*, City of Baltimore v. Latrobe, 101 Md. 621, 61 A. 203 (1905); Viers v. State Road Comm'n, 217 Md. 545, 143 A.2d 613 (1958); Sholom v. State Road Comm'n, 246 Md. 688, 229 A.2d 576 (1967); State Highway Comm'n v. Fox, 230 Ark. 287, 322 S.W.2d 81 (1959); State Highway Dept. v. Thomas, 115 Ga. App. 372, 154 S.E.2d 812 (1967); People v. Lynbar, Inc., 253 Cal. App. 2d 870, 62 Cal. Rptr. 320 (1967); Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85 (1948); State v. Platte Valley Pub. Power & Irrigation Dist., 147 Neb. 289, 23 N.W.2d 300 (1946); Gardella v. Redevelopment Auth., 413 Pa. 181, 196 A.2d 344 (1964).

[477] 23 U.S.C.A. § 131(g) (1966).

compensation for the taking of each interest is separately provided for. If that was the intent of Congress, the same intent must be attributed to the State legislatures who have enacted compliance laws that repeat the language of Title I, subsection (g). Indeed, a few State legislatures have made clear their intent that the interests of landowner and lessee shall be separately valued by adopting express language to that effect in their compliance laws.[478]

Valuation of Sign and Leasehold

Assuming that an advertising sign in place pursuant to an advertising lease will be treated as a removable tenant fixture,[479] how is the interest of the lessee in his sign and in the land to be valued in eminent domain? The generally accepted view is that removable tenant fixtures are not to be valued separately as personal property, but that their value is taken into account insofar as they enhance the value of the realty.[480] Although the writer has rejected the unit valuation rule in favor of the separate valuation of the lessor and lessee interests under an advertising lease, it would seem that the entire interest of the lessee—the leasehold interest with its value enhanced by the sign erected on the land pursuant to the terms of the lease—should be valued as a unit, if possible.

If the market data approach is sought to be applied to valuation of the sign owner's interest in an individual leasehold with the sign annexed thereto, it will probably be found that there have been almost no sales of individual leasehold and sign properties from one advertising company to another. Hence, the market data approach will be almost useless until enough individual sales have been negotiated pursuant to State advertising control programs to provide comparable sales information. But there is in fact a lively market in the sale of complete advertising plants. Since 1963 more than 100 outdoor advertising plants have changed ownership in the United States,[481] and more than one-half of the advertising firms serving the top 50 outdoor advertising markets have changed ownership.[482] Clearly the sales prices paid for entire advertising plants or firms in recent sales will be relevant evidence of market value if the States should ultimately undertake to implement Title I of the Highway Beautification Act by making a single purchase from each outdoor advertising company of all its nonconforming signs and leaseholds, as is contemplated by the Snarr plan. Moreover, the price at which an entire outdoor advertising plant has recently been sold may provide a basis for evaluating individual signs and leaseholds if a reasonable basis for apportioning the total sales price can be found.[483] But apportionment will present a difficult problem, and, unless this problem can be solved, the market data or sales approach will not provide an adequate method of valuation of individual sign and leasehold properties.

When sign and leaseholds belonging to standardized outdoor advertising companies are taken, it would appear that the income approach to valuation is the one most likely to yield acceptable results.[484] For valuing both types of standardized signboards, a Gross Rent Multiplier method is suggested. Thus, for example, if it is determined, after analyzing all the market data on sales of outdoor advertising companies and plants, that outdoor advertising plants are selling for twice the collectible gross rental income plus the value of receivables, rolling stock, shop, and office, and that a particular painted bulletin has a collectible gross rental of $1,000 per year, then the market value of the painted bulletin and its associated leasehold will be $2,000. This is relatively simple, because painted bulletins are sold to advertisers on an individual basis.

Valuation of individual poster panels and their associated leaseholds is more difficult—they are usually sold to advertisers as part of a "showing." Assume that a typical #100 showing[485] consists of 80 poster panels with a collectible gross rental income of $85,000; if the gross rent multiplier is 2, then the entire #100 showing will have a value of $170,000. But this total value of $170,000 must be apportioned in some rational manner among the 80 poster panels that comprise the #100 showing. One way would simply be to take an average—i.e., divide the total value by 80—to give a value of $2,125 for each poster panel. But this does not take account of the fact that some of the 80 poster panels with their leaseholds are more valuable than others because they have better location and higher "circulation." Thus, under the averaging method, the advertising company would be overpaid for poster panels and leaseholds at the poorer locations, and underpaid for those at the better locations. Various methods of rating the various poster panels and leaseholds within a showing, to give a more accurate value for individual panels at particular locations, are described later in this report.

The Gross Rent Multiplier method seems to be the most feasible method for valuing the property interests of standardized outdoor advertising companies taken pursuant to State programs of highway advertising control, pending the time when more adequate information concerning expenses and profits becomes available and can be analyzed to deter-

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[478] *See, e.g.*, W.VA. CODE § 17-22-6 (Supp. 1970); N.M. STAT. ANN. § 55-11-6(B) (Supp. 1969).

[479] See *supra* note 450.

[480] 4 NICHOLS, *supra* note 414, § 13.12[1]. For detailed treatment of fixture valuation problems, see Sackman, *Fixtures in Condemnation—Concepts Old and New*, PROCEEDINGS OF THE SIXTH ANNUAL INSTITUTE ON EMINENT DOMAIN 1-45 (1964).

[481] For example, Naegele Advertising Company recently sold $30 million worth of advertising plants in Milwaukee, Denver, Oakland, and several smaller markets. Metromedia bought General Outdoor Advertising Company's plants in New York City, Chicago, Cleveland, Cincinnati, and Toledo. Brown Bolte paid $1,204,000 for Metromedia's New York and Connecticut suburban properties, and reportedly offered $4 million for the Dallas plant of Middleton, Inc. Metromedia recently sold its Utah plants to Galaxy Outdoor in Salt Lake City for $1 million. Source: *California Study for the Appraisal of Outdoor Advertising* (unpublished 1966) [hereinafter cited as *California Study*].

[482] For example, Foster & Kleiser, Inc., was sold to Metromedia by W. R. Grace Company; Ryan Consolidated Petroleum Company bought California Outdoor Advertising, Inc., for a reported price of $500,000; and Brown Bolte paid $2.5 million for North Texas Advertising Company of Fort Worth. Source: *California Study, supra* note 481.

[483] Brown Bolte's average investment for the 4,000 sign panels he owned in 1966 was $1,125 each. His offer to Middleton, Inc., of $4 million for 2,500 panels works out to an average price of $1,600 per panel. See *supra* notes 481, 482. A rule of thumb in the standardized outdoor advertising industry is that an advertising plant will sell for $1,000 per sign panel. Source: *California Study, supra* note 481. But the average price per panel may be very misleading, of course.

[484] This is the conclusion of Patchin Appraisals, Inc., of Minneapolis, in its presentation to the Roadside Business Association Sign Compensation Symposium, May 23, 1968, at Fort Lauderdale, Florida. (Unpublished manuscript is in possession of the writer.)

[485] A "# 100 showing" is one that includes enough locations to provide full coverage of a particular advertising market.

mine whether a net income capitalization method of valuation is feasible. If such data accumulate to the point where use of the net income capitalization method becomes feasible, it will, of course, be necessary to determine what the appropriate capitalization rate is in any given case. As previously indicated, the capitalization rate consists of the sum of the interest rate on, and the periodic recovery of, the capital investment. Direct or straight-line capitalization provides for a decline in net income as the property ages. But this is not generally appropriate for standardized outdoor advertising sign and leasehold investments. Outdoor advertising signs generally have a level or increasing net income regardless of the age of the sign. There are many signboards in the United States that, although they are thirty or forty years old, are yielding the same net income as a brand new sign. Historically, signs have yielded a level or increasing net income so long as the location remains good, the structure is well maintained and periodically rebuilt or improved, and there is a demand by advertisers for space. Thus, it would appear that it will often be appropriate to use annuity mathematics to ascertain the proper rate of capitalization, even though the net income from outdoor advertising signs does not possess exactly the character of an annuity. In cases where use of the land for outdoor advertising is not its highest and best use and where the existing sign will interfere with the highest and best use, however, it may be necessary to assume that the advertising lease will not be extended by the landowner beyond the period covered by the lease term and the advertising company's renewal options. In such cases, the capitalization rate would have to be determined on the basis of the unexpired term of the particular lease plus all optional renewal periods, rather than on an annuity basis.

When a substantial part of the total number of signs and leaseholds constituting a particular advertising plant are taken, a special problem is presented. In such cases, the loss of so large a part of the advertising plant—e.g., 60 signboards and leaseholds out of a total of 150—may result in a disproportionate reduction in the total income of the plant. There is also something like severance damage to the remainder of the advertising plant as a result of the taking. This is a consequence of several factors. When many existing sign locations are eliminated, the number of showings the advertising company can make available to advertisers may be substantially reduced. The value of some conforming signs may be substantially reduced in value because of the advertising company's inability to relocate such signs along new highways where traffic either has been or will be rerouted because of new highway construction. Some advertising companies will be left in a situation where geographic factors will make it economically infeasible to continue to operate all of their remaining signs because it will no longer be profitable to send a crew and equipment into an area for service and maintenance on the few remaining signs. And some advertising companies may be left with overimproved equipment and plant facilities—i.e., they may be left with far too large an inventory of equipment and sign parts in relation to their remaining conforming signs.

It would seem that the problem of damage to the remainder is most likely to arise in States where most standardized advertising signs are located in rural areas—e.g., the intermountain and plains areas of the West—for most nonconforming signs are located in rural areas. At least four States have advertising control laws that expressly provide that compensation for the taking of nonconforming signs shall include severance damage or damage to the remainder of the outdoor advertising plant, or both.[486] In these States, at least, it would seem that the simplest way to determine compensation for the taking of nonconforming signs will be to ascertain the value of the entire advertising plant before and after all takings are effected, and to allow the difference as compensation for the taking. This will be possible if the State highway agency will arrange to take all nonconforming signs and associated leaseholds comprising parts of a given outdoor advertising plant at the same time. Otherwise, the severance damage will have to be determined in connection with each individual taking. Even if the latter procedure is followed, however, it will clearly be desirable to base compensation on the difference between the before and after value of the entire advertising plant. As previously suggested, the income approach appears to be the best way to determine these values.

In those States where the advertising control statutes do not expressly require that compensation for the taking of nonconforming signs shall include severance damage or damage to the remainder, it is difficult to predict whether the courts will, in fact, allow such damages to be included in cases where a substantial part of the total outdoor advertising plant is taken. It is clear that the traditional view as to definition of the entire property in partial-taking[487] cases would not permit the courts to treat an advertising plant consisting of many leaseholds on noncontinguous tracts of land plus affixed signboards, the office, shop, storage areas, and rolling stock, as the entire property. But the advertising plant is an entity with which the courts have not had to deal in the past.[488] It is strongly arguable that the basic constitutional and statutory mandate for payment of just compensation requires, or at least permits, a court to treat the outdoor advertising plant as the entire property and to allow severance damage as part of

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[486] IND. ANN. STAT. § 36-3507 (Supp. 1969); KAN. STAT. ANN. § 68-2223 (Supp. 1970); UTAH CODE ANN. § 27-12-136.11 (2) (1969); WYO. STAT. § 24-105(e) (1967).

[487] 4 NICHOLS, *supra* note 414, at 507-508:

> In determining the extent of an owner's remainder area and its relationship to the parcel taken consideration must be given to the physical conditions which exist and not to the manner in which the land is utilized by an owner. The parcel taken and the remainder area must, prior to the taking, have constituted a single physical unit. Where two physically separated tracts of the same owner are operated as unit by the owner and only one of such tracts is affected by a partial taking, the unity of operation is not in and of itself sufficient to merit consideration of the second tract as part of the remainder area.

1 ORGEL, *supra* note 455, at 228-229:

> The criteria are somewhat arbitrary in their nature. In the first place, they generally restrict the remaining property for which [severance] damage may be recovered to *tangible real* property. This restriction excludes from the partial-taking rules not only those cases where the condemnation of an entire tract of land results in an injury to a business enterprise as distinct from an injury to the real estate, but also those cases where the taking results in the loss of place-value to the movable property. . . . In the second place, the mere fact that the taking of one piece of real estate may result in a material fall in the value to the owner (possibly even in the

the compensation awarded. If this be deemed a violation of the settled rule that, in takings of real property, no compensation is to be paid for business losses,[489] it can be noted that courts today are somewhat less inclined than they were in the past to treat as sacred dogma the rule against compensating condemnees for business losses,[490] and that the dogma has increasingly been the subject of critical attack in recent years.[491]

An alternative to the income approach to valuation of the nonconforming signs and associated leaseholds of the standardized advertising companies is the cost approach. If the cost approach is used in valuation of these properties, it will, of course, be necessary to determine the reproduction cost, new, of the signs, and also to determine the amount of depreciation to be deducted from the reproduction cost. If valuation of signs is carried out on individual bases, various types of evidence will have to be used—e.g., evidence of the original cost, current cost information obtained from national firms specializing in the supplying of such information, and bids from local signboard construction companies. But if acquisition is carried out on a companywide basis—i.e., all the nonconforming signs owned by each advertising company are acquired at the same time—it should be possible to use the so-called Utah formula.[492] This formula calls for determination of the average square-foot cost of standardized advertising signboards and the application of this average cost to all the signboards to be acquired.[493]

If signboard acquisition proceeds on an individual signboard-by-signboard basis, depreciation will presumably have to be determined on the basis of direct observation of each sign. Because the standardized outdoor advertising industry continually refurbishes its signboards and replaces deteriorated materials and worn-out components, most standardized signboards will probably show relatively little physical deterioration. It should be possible, however, to determine the economic life of the sign and then assign a

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market value) of the owner's real-estate holdings is apparently insufficient to bring the case into the category of a partial-taking. There must be a very obvious *physical* relationship between the property that is taken and the property that is left in order to induce a court to allow a recovery for damages to the remaining property.

Accord: JAHR, *supra* note 455, § 97.

488 It would appear that in recent years there has been some tendency for courts to relax the traditional rules, *supra* note 487, and treat "unity of use" as sufficient to bring several distinct parcels of land within the category of an entity for purposes of applying the partial-taking rules. *See, e.g.,* Jones v. Commonwealth, 413 S.W.2d 65 (Ky. Ct. App. 1967); U.S. v. Evans, 380 F.2d 761 (10th Cir. 1967); Swett v. Mississippi State Highway Comm'n, 193 So. 2d 596 (Miss. 1967); DeVirgilio v. Florida State Road Dep't., 205 So. 2d 317 (Fla. Dist. Ct. App. 1967). See also U.S. v. Mattox, 375 F.2d 461 (4th Cir. 1967); Central Illinois Pub. Serv. Co. v. Montgomery, 225 N.E.2d 412 (Ill. App. Ct. 1967).

A rather technical argument can be made that the leaseholds of a standardized outdoor advertising company are really easements appurtenant to the company's office, shop, and other realty. Consequently, it can be argued that when one or more leaseholds (with attached signboards) are taken, there is a partial taking, and that the proper measure of damages is the difference between the before and after values of the entire advertising plant (excluding personal property such as rolling stock and furniture). But the few cases in point generally hold that the advertising leasehold is an easement in gross. *See, e.g.,* Borough Bill Posting Co. v. Levy, 144 App. Div. 784, 129 N.Y.S. 740 (1911); Rochester Bill Posting Co. v. Smithers, 224 App. Div. 435, 231 N.Y.S. 315 (1928); Whitmier & Ferris Co., Inc., v. State, 12 App. Div. 2d 165, 166, 209 N.Y.S.2d 247, 248 (1961); Rochester Poster Advertising Co. v. State, 27 Misc. 2d 99, 213 N.Y.S.2d 812 (Ct. Cl. 1961).

489 See 2 NICHOLS, *supra* note 414, § 5.76; JAHR, *supra* note 455, §§ 111-115; 1 ORGEL, *supra* note 455, §§ 66-78; Kratovil & Harrison, *Eminent Domain—Policy and Concept,* 42 CALIF. L. REV. 596, 615-620 (1954); Polasky, *The Condemnation of Leasehold Interests,* 48 VA. L. REV. 477, 521-529 (1962); Woodruff, *Legal Damages in the Partial Taking of a Leasehold Interest,* PROCEEDINGS OF THE FIFTH ANNUAL INSTITUTE ON EMINENT DOMAIN 137, 151-156 (1963); Stubbs, *Compensable and Noncompensable Items in Condemnation,* PROCEEDINGS OF THE SEVENTH INSTITUTE ON EMINENT DOMAIN 137, 183 (1967).

490 *See, e.g.,* Bowers v. Fulton County, 221 Ga. 731, 146 S.E.2d 884 (1966); Simmons v. State, 234 A.2d 330 (Me. 1967); Mackie v. Miller, 5 Mich. App. 591, 147 N.W.2d 424 (1967). In the *Bowers* case, *supra,* the court said:

> The constitutional provision is susceptible to no construction except the condemnee is entitled to be compensated for all damage to his property and expense caused by the condemnation proceedings. Such damages and expenses are separate and distinct items from the amount which he was entitled to recover as the actual value of his building. . . . The destruction of an established business is and must be a separate item of recovery. The holdings of some cases that the loss of prospective profits is to be considered in determining the value of the real estate is one thing. This means no more than that the potential uses of the property may be proved for that purpose. The loss of an established business is an altogether different matter; such loss does not merely reflect the value of the real estate, for frequently the value of the business greatly exceeds that of the premises where it is conducted. (146 S.E.2d 890-891.)

In the *Miller* case, the court said that the owner of a going business

> . . . is entitled to compensation for his losses resulting from an interruption of his business as a result of a taking, provided such losses are such as would naturally and normally result from the interruption of the business and are established by evidence not unduly speculative.

Statutes in Florida and Vermont expressly authorize the payment of compensation for business losses. The Florida statute permits recovery of business losses resulting from condemnation provided the business is one of more than five years standing and is located on land adjoining the land condemned. FLA. STAT. ANN. § 73.10(4) (1964). But it was recently held that a condemnee could recover business losses in cases where the business was located on the land condemned, by virtue of the constitutional mandate for just compensation, although such cases are not covered by the Florida Statute. State Road Dep't. v. Bramlett, 179 So. 2d 137 (Fla. Dist. Ct. App. 1965). Vermont's statute is less restrictive and provides that a condemnee may recover for any loss of business resulting from a taking. The condemnee may be entitled to compensation, independent of and in addition to that allowed for the land itself, where the evidence indicates that he has suffered a loss to his business that has not necessarily been included in the compensation given for the land. *See* VT. STAT. ANN. tit. 19, § 221 (1968). *See also* Penna v. State Highway Bd., 122 Vt. 392, 173 A.2d 849 (1961); Spear v. State Highway Bd., 122 Vt. 406, 175 A.2d 511 (1961).

The new Pennsylvania Eminent Domain Code has provisions giving tenants a right to recover as damages "the reasonable expenses of the removal, transportation and reinstallation of . . . machinery, equipment or fixtures" not forming part of the realty; giving condemnees generally the right to recover damages "for dislocation of a business located on the condemned property, but only where it is shown that the business cannot be relocated without substantial loss of patronage"; and giving possessors of land that is condemned the right to recover as damages "the reasonable moving expenses for personal property other than machinery, equipment or fixtures." PENNA. STAT. ANN. tit. 26, §§ 1-608 to 1-610 (Supp. 1970). There are dollar limits on recovery under all of these sections.

It should also be noted that a long line of New York cases extending back more than 100 years has resulted in the evolution of a partial method of paying for business losses by compensating landowners for business property that would lose substantially all its value when removed from the condemned premises, even though such property might generally be classified as personal property rather than realty. These cases developed the so-called specialty doctrine. For a detailed treatment of the specialty doctrine, see Aloi & Goldberg, *A Reexamination of Value, Good Will and Business Losses in Eminent Domain,* 53 CORN. L. REV. 604, 607-614 (1968). See also the discussion of the admission of evidence of the amount of business on the subject property to show the highest and best use, and the loss of business to show loss of the highest and best use, in Stubbs, *Compensable and Noncompensable Items in Condemnation,* PROCEEDINGS OF THE SEVENTH INSTITUTE ON EMINENT DOMAIN 137, 184-192 (1967).

It can also be argued that the courts are in fact compensating for damage to equipment and loss of going-concern value through a liberal application of the income and the cost approaches to value. See Aloi & Goldberg, *supra,* at 615-622.

491 *See, e.g.,* Aloi & Goldberg, *supra* note 490; Johnston, *"Just Compensation" for Lessor and Lessee,* 22 VAND. L. REV. 293, 294-302 (1969); Comment, *Eminent Domain in an Age of Redevelopment: Incidental Losses,* 67 YALE L.J. 61 (1957). *See also* Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain,* 48 VA. L. REV. 437 (1962). And see Kratovil & Harrison, *Eminent Domain—Policy and Concept,* 42 CALIF. L. REV. 596, 599-601, 619 (1954); Polasky, *Condemnation of Leasehold Interests,* 48 VA. L. REV. 477, 487-488, 534-535 (1962), suggesting that compensation doctrine is moving in the direction of indemnity and away from market value as the measure of just compensation.

492 See *1969 Senate Hearings, supra* note 23, at 40-43.

493 *Id.* 41-42.

depreciation figure based on the percentage of economic life remaining.[494] If signboard acquisition proceeds on a company-wide basis, it should be possible to develop an average economic life for all the company's nonconforming signs and determine an average depreciation for these signs, which can then be multiplied by the number of nonconforming signs to be acquired.[495] The resulting total depreciation figure can then be subtracted from the total reproduction cost figure obtained by applying the average square-foot cost to the total number of square feet of signboards to be acquired.[495]

Considering that the value of the sign as a fixture is to be used only for the purpose of determining how much the affixation of the sign has enhanced the value of the leasehold under the suggested approach, how is the basic value of the leasehold to be determined? Because the entire leasehold and the underlying advertising rights of the landowner are taken, it is clear that the lease is terminated by the taking and that the lessee's liability for future rent is extinguished.[496] Consequently, the basic value of the leasehold is the difference between the economic rent and the contract rent for the balance of the lease terms, plus any periods for which the lessee has the option of renewal.[497] It seems clear that, in some cases, the lessee will be able to prove that the leasehold has a bonus value—i.e., that the economic rent is greater than the contract rent.[498] In other cases the lessee will not be able to prove any bonus value, and the value of the leasehold without the signboard will be zero.[499] If acquisition of advertising leaseholds is made on an individual leasehold basis, a determination as to the existence of bonus value will have to be made with respect to each leasehold that is acquired. If acquisition is carried out on a company-wide basis, however, it may be possible to develop average bonus figures that can then be applied to the number of nonconforming leaseholds to be acquired.

In many rural areas, most of the nonconforming signs will be nonstandard signs erected pursuant to leases given directly to advertisers by landowners. These nonstandard signs vary greatly in size, shape, and appearance. Generally they are used to advertise such roadside business establishments as motels, restaurants, and service stations. Because space on these nonstandard signs is not sold to national, regional, or local advertisers and does not produce actual rental income, it would appear that the income approach to valuation will not be feasible. Instead, the cost approach will almost certainly have to be used.[500] In general, the reproduction cost, new, and depreciation of the signs will probably have to be determined on an individual sign-by-sign basis, except where a substantial number of standardized roadside business signs, such as those used to advertise national chains of motels, restaurants, and service stations, are taken. In the case of signs owned by such national chains, the standardized design and size of the signs may permit the use of the Utah formula for valuation by the cost approach.[501]

If a State court should hold that advertising signs are personal property rather than fixtures, it would appear that the cost approach to valuation of the signs and their associated leaseholds will be the most feasible in most cases. There is much judicial authority in support of the view that personal property need not be taken when realty is condemned and the view that the owner of the personal property may be required to remove it at his own expense, yet the State highway advertising control laws are almost certain to be construed as requiring that the State take nonconforming signs and pay for them whether they are classified as fixtures or as personalty,[502] unless such signs are voluntarily removed by their owners pursuant to agreements with the State highway agencies. It will thus be appropriate to value the nonconforming signs by means of the cost approach, and to value the associated leaseholds

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494 Patchin Appraisals, Inc., *Roadside Business Association Compensation Study for RBA Members*, at pp. 20-22 (unpublished 1968) [hereinafter cited as *RBA Compensation Study*.].

495 *1969 Senate Hearings* 42. This is part of the "Utah formula."

496 4 NICHOLS 304, 308-309; 1 ORGEL 521-522; Baker, *Condemnation: Concepts and Consequences of Public Intervention in the Landlord-Tenant Relationship*, 9 KAN. L. REV. 399, 414-415 (1961); Polasky, *Condemnation of Leasehold Interests*, 48 VA. L. REV. 477, 493 (1962); Johnston, *"Just Compensation" for Lessor and Lessee*, 22 VAND. L. REV. 293, 304 (1969).

497 "In determining the compensation to which a lessee is entitled it is necessary to compute the value of the balance of the lessee's term, taking into consideration the effect thereon of the lessee's right of renewal, if any, and deducting therefrom the agreed rental which the lessee would have paid pursuant to the terms of the lease." 4 NICHOLS 314-315. *Accord:* Polasky, *supra* note 496, at 516; Johnston, *supra* note 496, at 305-306. Generally, on valuation of leaseholds in eminent domain, see 4 NICHOLS, *supra* note 414, § 12.42[3]; JAHR, *supra* note 455, §§ 130, 131; 1 ORGEL, *supra* note 455, §§ 123-126; Purnell, *The Valuation of the Leasehold Estate*, PROCEEDINGS OF THE 1959 INSTITUTE ON EMINENT DOMAIN 79; Hitchings, *The Valuation of Leasehold Interests and Some Elements of Damage Thereto*, PROCEEDINGS OF THE SECOND ANNUAL INSTITUTE ON EMINENT DOMAIN 61 (1960); Woodruff, *Legal Damages in the Partial Taking of a Leasehold Interest*, PROCEEDINGS OF THE FIFTH ANNUAL INSTITUTE ON EMINENT DOMAIN 137 (1963); Speir, *Allocation of the Recovery Between Lessor and Lessee*, PROCEEDINGS OF THE EIGHTH INSTITUTE ON EMINENT DOMAIN 159 (1968).

498 "The 'rental value' of the lessee's interest is determined by first assigning a fair rental, or 'economic rent,' payable for the leased property. If this amount exceeds the rent specified in the lease, the lessee's recovery is the aggregate of this excess throughout the remaining term of the lease. . . . [when discounted to present terms]." (Johnston, *supra* note 496, at 306 and n. 59. Johnson cites Profit-Sharing Blue Stamp Co. v. Urban Redev. Auth., 429 Pa. 396, 241 A.2d 116 (1968). *Accord:* JAHR, *supra* note 455, at 198.)

"The relative paucity of cases denying any compensation to the tenant under a lease of measurable duration suggests that courts and juries are generally ready to assume an excess of rental value over rent reserved. This assumption is probably justified in most cases where the tenant has installed fixtures on the premises which add to their rental value and to their market value. Moreover, the disposition of the tribunal to find a substantial excess in rental value may be due to its recognition that a tenant would otherwise receive no compensation for removal costs and loss of business resulting from the enforced relocation." (1 ORGEL, *supra* note 455, § 124.)

499 "Where the rent reserved in the lease is equal to or in excess of the rental value of the balance of the demised term, it has been held that the lessee has suffered no damage and is, therefore, not entitled to compensation for this aspect of damages." (4 NICHOLS, *supra* note 414, at 316. *Accord:* JAHR, *supra* note 455, at 198; 1 ORGEL, *supra* note 455, § 123; Johnston, *supra* note 496, at 306.)

As Orgel points out, there is

". . . no case which holds the tenant liable to continue these excessive rent payments. . . . Nor do we find any case in which the tenant has been compelled to pay the landlord a *quid pro quo* for the extinction of this liability." (1 ORGEL, *supra* note 455, § 530. *Accord:* Polasky, *supra* note 496, at 499.)

It has been suggested that when a bonus leasehold interest does exist under an advertising lease, it is relatively small in terms of dollars and that outdoor advertising leases are generally too short and too easy to cancel by either party to generate much over-all leasehold interest. *RBA Compensation Study, supra* note 494, at 22-23 (1968). The Utah formula for nonconforming sign valuation apparently assumes no over-all leasehold interest or bonus value will be found to exist. See *1969 Senate Hearings, supra* note 23, at 41-43.

500 This approach is recommended in *RBA Compensation Study, supra* note 494, at 7-9 (1968).

501 *1969 Senate Hearings, supra* note 23, at 40-43.

502 See text *supra* in Chapter One, between notes 105 and 107, and text *supra* this Chapter following notes 446 and 447.

separately on the basis of a determination of their bonus values.

At this point some mention should be made of the so-called Snarr plan.[503] In substance, the Snarr plan envisages that the State highway agency would buy and each advertising company would sell all its nonconforming signs within a given State on the basis of a per-company, single, negotiated contract basis, instead of having the State highway agency buy or condemn all of its nonconforming signs one at a time on a beautification project basis. The plan would involve the following steps: [504]

1. The State appraises all nonconforming signs of a willing sign company within the boundaries of that State in accordance with established appraisal procedures and guidelines set forth and approved by the Federal Highway Administration.

2. A contract is consummated in which the State agrees to purchase and the sign company agrees to sell all its nonconforming signs within the State.

3. The contract contains two schedules. The first schedule lists all of the company's nonconforming signs and agreed-upon total award for each sign. The second schedule is a takedown schedule wherein the sign company determines the takedown date for each nonconforming sign on a quarterly basis. This takedown schedule would not, however, preclude removal of any signs in a construction project area.

Although the Snarr plan was worked out in Utah on the assumption that all nonconforming sign acquisitions would be by negotiated purchase and that valuation of nonconforming signboards would be determined on the basis of the cost approach,[505] it would appear that the plan could also be adapted to use in cases where negotiated purchase turns out to be impossible and where the income approach might provide a better method of valuation. Where no all-inclusive purchase agreement can be negotiated with a particular advertising company, it might still be desirable to condemn all that company's nonconforming signs and associated leaseholds at one time. In most instances this procedure should save a substantial amount of money in appraisal fees, court costs, and attorneys' fees.[506] And where the State highway agency is acquiring signs and associated leaseholds owned by standardized outdoor advertising companies, the income approach is often likely to provide a better method of valuation than the cost approach, whether the acquisition is by negotiated purchase or by condemnation. Of course, even under the Snarr plan, any sign and leasehold owned by a single roadside business establishment will have to be individually valued. And where a roadside business establishment owns a small number of nonconforming signs and associated leaseholds, the savings resulting from a single purchase or condemnation of all these properties will be much less than in the case of standardized outdoor advertising companies who own many nonconforming signs.

Landowner's Interest

The landowner's advertising right must generally be acquired whenever a nonconforming highway advertising sign lawfully erected pursuant to an advertising lease is removed.[507] The interest acquired by the State highway agency will be a permanent negative easement against advertising under the most probable construction of the State advertising control statutes. But how should this negative easement be valued? For reasons previously stated, it appears that compensation should be based directly on the value of the negative easement taken, rather than on an attempt to establish a before and after value of the land.[508] And the market value of the negative easement will be the present value of the anticipated rental income that would be realized by the landowner from the leasing of his advertising right if he were not prohibited from leasing his land for advertising purposes. As Nichols points out: [509]

> When property is leased, the rent is derived almost entirely from the property, although, of course, a landlord can sometimes get more than the fair rental value from a tenant who has established a profitable business on the property, and who will pay a high price for a renewal of his lease rather than incur the expense and loss of custom incident to a removal. However, as a safe working rule, if property is rented for the use to which it is best adapted, the actual rent reserved, capitalized at the rate which local custom adopts for the purpose, forms one of the best tests of value, and accordingly evidence of rent actually received at a time reasonably near the *punctum temporis* of the taking, should be admitted. . . .
>
> There is no fixed rule as to the rate of capitalization although it has been held that the basis for the rate used in a specific case must be established by factual data supporting such rate.

In the case of an advertising lease, the rent is in fact derived *entirely* from the property inasmuch as no managerial skills of the landowner are involved. Moreover, gross and net rents are equal, for the landowner has no business expenses.[510] And, as was previously brought out, it is clear that the sign rental income is derived from the highest and best use to which the property taken could be devoted, for the only thing taken is the right to use the land for advertising purposes. Moreover, in the case of rural land, at least, it will usually be clear that the existing use of the land for advertising purposes does not interfere with the primary use of the land—usually for agriculture—by the owner. So there will be no offsetting benefit to the landowner when a permanent negative easement against advertising use is

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[503] See *1967 House Hearings, supra* note 38, at 351-354; *1969 Senate Hearings, supra* note 23, at 16-19. Valuation of Utah signs under the so-called Snarr plan would be carried out in accordance with the Utah formula. *1969 Senate Hearings, supra* note 23, at 40-43.

[504] *1969 Senate Hearings, supra* note 23, at 16.

[505] *Id.* 40-43.

[506] For a comparison of costs in Utah under the Snarr plan and the Utah formula, as against the costs if nonconforming signs were acquired on a sign-by-sign basis with a substantial amount of condemnation, *see 1969 Senate Hearings, supra* note 23, at 43-48.

[507] This is generally true wherever the State has an advertising control statute that requires taking and just compensation. However, some State statutes generally require just compensation but make an exception for signs lawfully erected between October 22, 1965, and either July 1, 1968, or the date of enactment of the statute, whichever is earlier.

[508] See text *supra* between notes 461 and 472.

[509] 4 NICHOLS, *supra* note 414, § 12.3122. *Accord:* JAHR, *supra* note 455 § 147; 1 ORGEL, *supra* note 455, § 157.

[510] See discussion of the use of gross and net rents as a basis for capitalization of income in JAHR, *supra* note 455, § 147; 1 ORGEL, *supra* note 455, § 177.

taken. Annuity mathematics would seem to be appropriate for capitalizing the rents in such cases.[511]

In some instances, however, especially in urban or suburban areas, it may well be that the land has substantial development value for a more profitable use that is inconsistent with use of the land for advertising purposes, and that the landowner is simply waiting for a good opportunity to convert his land to the more profitable use. In such a case, it is clear that it cannot be assumed that the existing use of the land for advertising will continue in perpetuity, and the capitalization of rental income cannot be effected by using annuity mathematics. Instead, it will be necessary to determine the probable continued period of use of the land for advertising purposes, keeping in mind the unexpired balance of the current advertising lease plus all periods for which the lessee holds the option to renew. The present value of the current lease rentals for this continued period of use would then be the value of the negative easement against advertising acquired from the landowner. And if a State's advertising control statute should be construed as only authorizing the acquisition of the landowner's advertising rights during the period of the existing lease, the value of the negative easement acquired would only be the present value of the lease rental for the balance of the lease term plus all periods for which the lessee has the option of renewal.

[511] "In a growing community the prospective or future rentals may rise considerably. To what extent should the appraiser be influenced by the prospective rental values? The courts do not tell us." (JAHR, *supra* note 455, § 148.)

APPENDIX A

STATE LEGISLATION ON CONTROL OF HIGHWAY ADVERTISING DISPLAYS

Legislation Enacted Wholly or Partly in Response to the Highway Beautification Act of 1965 Which the Secretary of Transportation Regards as Complying With the Act

Alaska Stat. §§ 19.25.080-19.25.180 (perm. ed.).
Arkansas Stat. Ann. §§ 76-2502 to 76-2512 (Supp. 1969).
California Bus. and Prof. Code §§ 5200-5326, as amended (Deering Supp. 1971). (See especially §§ 5286-5288.7.)
Connecticut Gen. Stat. Ann. §§ 13a-123 to 13a-123b (Supp. 1970).
Hawaii Rev. Laws §§ 111-60 to 111-69 (1955), as amended by Acts 1966, No. 45.
Idaho Code §§ 40-2811 to 40-2838 (Supp. 1969).
Kentucky Rev. Stat. Ann. §§ 177.830-177.890 (Bald. 4th Ed. 1969).
Louisiana Rev. Stat. §§ 48.461 to 48.461.8 (Supp. 1969).
Maine Rev. Stat. Ann. tit. 32, §§ 2711-2723 (Supp. 1970).
Maryland Code Ann., Art. 89B, §§ 226-235 (1964 repl.), §§ 250-262 (Supp. 1970).
New Mexico Stat. Ann. §§ 55-11-1 to 55-11-7.1 (Supp. 1969).
New York Highway Law § 88 (McKinney Supp. 1970).
North Carolina Gen. Stat. §§ 136.126 to 136.140 (Supp. 1969).
Rhode Island Gen. Laws §§ 24-10.1-3 to 24-10.1-6 (Supp. 1970).
Utah Code Ann. §§ 27-12-136.1 to 27-12-136.13 (1969).
Vermont Stat. Ann. tit. 9, §§ 3683a, 3688 (Supp. 1970); tit. 10, §§ 321-345 (Supp. 1970).
Virginia Code Ann. §§ 33.1-351 to 33.1-381 (1970).
West Virginia Code §§ 17-22-1 to 17-22-25 (Supp. 1970).

Legislation Enacted in Response to the Highway Beautification Act of 1965 Which May or May Not Comply With the Act

Arizona Rev. Stat. Ann. §§ 18-711 to 18-720 (Supp. 1970).
Delaware Code Ann. tit. 17, §§ 1101-1125 (Supp. 1970).
Mississippi Code Ann. §§ 8059.5-01 to 8059.5-17 (Supp. 1968).
North Dakota Century Code §§ 24-17-01 to 24-17-15 (1970).
South Dakota Comp. Laws Ann. §§ 31-29-17 to 31-29-60 (1967 and Supp. 1970).

Legislation Enacted in Response to the Highway Beautification Act of 1965 Which Does Not Comply With the Act

Colorado Rev. Stat. Ann. §§ 120-5-11 to 120-5-25 (Supp. 1967), as amended by Acts 1970, c. 78.
Georgia Code Ann. §§ 95-2001a to 95-2015a (Supp. 1970).
Indiana Ann. Stat. §§ 36-3501 to 36-3517 (Supp. 1969).
Kansas Stat. Ann. §§ 68-2216 to 68-2230 (Supp. 1970).
Michigan Comp. Laws Ann. §§ 252.251-252.262 (1967).
Missouri Ann. Stat. §§ 226.500-226.600 (Supp. 1970).
Montana Rev. Codes §§ 32-4701 to 32-4714 (Supp. 1969).
New Hampshire Rev. Stat. Ann. c. 249-A (Supp. 1970).
Oklahoma Stat. Ann. tit. 69, §§ 1271-1285 (1969, and Supp. 1970).
Wyoming Stat. §§ 24-96 to 24-109 (1967).

Legislation Enacted Wholly or Partly to Comply With the 1958 Federal-Aid Highway Act Which Does Not Comply With the Highway Beautification Act of 1965

Illinois Ann. Stat. tit. 121, §§ 451-459 (Supp. 1970).
Iowa Code Ann. §§ 306B.1-306B.8 (Supp. 1969).
Minnesota Stat. Ann. §§ 173.01-173.24, 173.31-173.54 (Supp. 1970).
Nebraska Rev. Stat. §§ 39-1304 to 39-1305, 39-1320 to 39-1320.03 (Vol. 3, 1968 reissue).
New Jersey Stat. Ann. §§ 27:7A-11 to 27:7A-24 (1966).
Ohio Code Ann. §§ 5516.01-5516.99 (Page 1970).
Oregon Rev. Stat. §§ 377.115-377.545 (1967).
Pennsylvania Stat. Ann. tit. 36, §§ 2718.1-2718.10 (Supp. 1970).
Washington Rev. Code §§ 47.42.010-47.42.910 (1961, and Supp. 1970).
Wisconsin Stat. Ann. § 84.30 (Supp. 1970).

Other Legislation Which Does Not Comply With the Highway Beautification Act of 1965

Florida Stat. Ann. §§ 479.01-479.22 (1965), as amended (Supp. 1969), and § 335.13 (1968).
Massachusetts Ann. Laws, c. 93, §§ 29-33 (1967).
Nevada Rev. Stat. §§ 405.020-405.110 (perm. ed.).
Tennessee Code Ann. §§ 62-1114 to 62-1132 (Supp. 1970).

APPENDIX B

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