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Valuation of Billboards for Removal Under the Highway Beautification Act of 1965

LEGISLATIVE BACKGROUND

The Highway Beautification Act of 1965 (23 US Code, "Highway", Section 131) calls for States to establish control of outdoor advertising in roadside areas extending 660 feet from the edges of rights-of-way of Interstate and Federal-Aid Primary highways. States which do not establish "effective control" of such zones are subject to 10 percent reduction of Federal-Aid highway apportionments. "Effective control" under the Federal law means that only certain classes of signs, listed in Sec. 131(c), will be permitted, and certain of these signs must comply with national standards for size, lighting and spacing. Removal of nonconforming signs in the controlled zones is provided for in Sec. 131(e); and Sec. 131(g) sets forth the following requirement:

> "(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays and devices:
> (1) those lawfully in existence on the date of enactment of this subsection (October 22, 1965),
> (2) those lawfully on any highway made a part of the interstate or primary system, on or after the date of enactment of this subsection and before January 1, 1968, and
> (3) those lawfully erected on or after January 1, 1968.

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"The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:
(A) the taking from the owner of such sign, display or device of all right, title, leasehold, and interest in such sign, display or device; and
(B) the taking from the owner of the real property on which the sign, display or device is located, of the right to erect and maintain such signs, displays or devices thereon."

The Federal law did not, however, indicate the basis of the mandatory payments beyond stating they should be "just compensation." Specific methods for valuation of compensation interests were left to be provided by the Secretary of Transportation, and were provided in Policy and Procedure Memorandum 80-5.2, dated December 12, 1972.

VALUATION OF COMPENSABLE INTERESTS FOR REMOVAL OF NONCONFORMING ROADSIDE SIGNS

General. Policy and Procedure Memorandum (PPM) 80-5.2 authorizes States to determine compensation by use of (1) schedules or formulas, (2) valuation by abbreviated or standard appraisal reports, (3) leasehold value, or (4) special valuation where severance damage may be involved. These methods are authorized for valuation of both signs and sign sites.

Since compensation is paid for extinguishing legal rights to erect and maintain signs, no compensable interest is recognized where signs unlawfully encroach on highway rights-of-way or other publicly owned land, or are erected without permission of the owner of the site. Also, since many signs are of small intrinsic value, States may establish minimum payment levels in their schedules (not to exceed $100), and compensate on such basis without individual valuation.

Valuation of Sites. It is expected that normally sites can be valued by use of schedules without requiring before and after appraisals. Schedules may use the additional income produced by a sign as the primary indicator of the value of the landowner's interest. Valuation will thus be based on the terms of the existing lease, annual rent, factors affecting remaining life of the sign at the site, and interest rates reflecting the durability and quality of the income stream.

Valuation of Signs. For guidance in developing schedules or payment formulas, PPM 80-5.2 contains a national schedule of sign costs and depreciation rates, accompanied by a series of "modifiers" or differential factors applicable to various regions of the United States. Correlated to postal service ZIP codes, these modifiers would be used to adjust national cost schedules to reflect differences in sign construction costs in different parts of the country. The objective of the schedules and modifiers is to provide States with an equitable,

uniform basis for reimbursing individual and sign company owners for typical, average quality units in the categories of standard poster panel and painted bulletin signs.

The national schedules and modifiers relate to all direct and indirect costs required to construct advertising signs (including labor, material, overhead and profit) which are typical of the billboard industry. They are not intended to apply to non-standard or miscellaneous signs, for which the PPM authorizes valuation by appraisal or other acceptable negotiated valuation methods. Also, States may add factors not included in the suggested national modifiers, such as special lighting equipment or construction features, when such additional costs are appropriate and verified.

Once costs are determined by reference to the national schedules and modifiers or by another approved State schedule, they are depreciated by losses due to deterioration, obsolescence or both. Deterioration is related to physical condition of a sign; obsolescence may be either economic or functional. Obsolescence may include evidence of transition of the area of the sign site which threatens the sign or makes abandonment likely, reduction of a sign's effectiveness through obstruction of its view, prospective change in property making a sign incompatible, zoning, and the like.

PPM 80-5.2 contains schedules of depreciation percentages which are mandatory if the national cost schedules and modifiers are used. However, in application of depreciation rates, adjustments may be made in several circumstances.

Where leaseholds are involved, and economic site rent exceeds contract site rent, the bonus value may be added to a sign owner's compensation when computed in accordance with applicable State law and appraisal methods.

As an alternative to the cost-less-depreciation method of valuation, PPM 80-5.2 recognizes that a "gross rent multiplier" method may be used where sufficient reliable data on current sales of rented signs are available. In considering gross rental data, fair market sales must be used, and items not normally considered in eminent domain must be deducted. Approval of the use of this method by FHWA is required in each case.

STATE COURT DECISIONS ON COMPENSATION FOR REMOVAL OF NONCONFORMING ROADSIDE ADVERTISING SIGNS

Appropriateness of valuation methods used in determining compensation for the taking of roadside advertising signs through condemnation has been passed upon by courts in a number of States. Notes summarizing a selection of recent cases of this type are set forth below.

In addition to the cases below, it should be noted that decisions relating generally to valuation of leasehold interests in eminent domain may indirectly rule regarding valuation of advertising signs where such signs involve formal leases. Among leading recent cases in this area of the law are: United States v. Petty Motor Co., 327 US 372 (1945); E. B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F. 2d 1141 (S cir., 1970); Almota Farmers Elevator & Warehouse Co. v. US, ____ US ____ (Jan. 16, 1973).

NEW YORK STATE THRUWAY AUTHORITY v ASHLEY MOTOR COURT, 176 N.E. 2d 566 (N.Y. Ct. of Appeals, 1961)

Action by Thruway Authority to enjoin motel owner and landowner from maintaining off-premise advertising sign within 500 ft. of thruway. Appeal from judgment for Thruway Authority challenged constitutionality of statute regulating roadside advertising signs. In upholding the constitutionality of regulatory statute, court stated the following dicta regarding value of signs:

> "Even supposing, however, that the defendants possessed valid and subsisting property rights which the legislation here at issue has abrogated, this would not provide sufficient basis for declaring the statute unconstitutional. In this connection, it is to be borne in mind that it was the very construction of the thruway which created the elements 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 travelers 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."

CITY OF LAKEWOOD v ROGOLSKY, (Cuyhoga Co., Ohio) 252 N.E. 2d 872 (1969)

Following appropriation by city of land on which billboards were located, advertising company claimed a share of award as compensation for value of its leasehold interest and for fair market value of two illuminated signs maintained by the company under a 5-year lease, renewable annually at the company's option. Signs were erected on pillars set in concrete and, with maintenance, had an expected remaining life of 25-30 years. Appropriation occurred approximately 9 months prior to expiration of the lease, but the signs remained in place and continued to produce rental income for the company until expiration of the lease.

Landowner claimed the continued rental of the signs until expiration of the lease showed that company had suffered no loss of income, and hence no loss of leasehold value. As to company's claim that appropriation of the land also appropriated the signs thereon, landowner argued that terms of the lease allowed the company to remove them at any time, and provided that they were to remain personal property of the company.

On appeal from the referee's apportionment of the award, it was held (1) a leasehold has value only when the reasonable value of the lease exceeds the rental to be paid for the real estate so leased. Hence, the advertising company cannot claim loss of income from the sign location while at the same time it collects income from its signs at that location; (2) the advertising company may share in the award for replacement value of signs where they are considered part of the realty taken. Here the company claimed its signs were fixtures. However, the court held that the intention

of the parties regarding the status of the signs was controlling, and it clearly showed they intended to have the signs considered personal property. Moreover, these signs did not enhance the value of the property on which they were located, and thus were distinguishable from other cited cases involving signs which were permanent fixtures on the land and added to its value.

CITY OF CLEVELAND v ZIMMERMAN (Cuyhoga Co., Ohio) 253 N.E. 2d 327 (1969)

In condemnation of vacant lot, referee apportioned award between landowner and advertising company holding a lease for billboard site on the lot. The lease, originally for one year, had been renewed yearly at $60 annual rent up to the time of condemnation action. Terms of the lease allowed landowner to terminate on 30 days notice and company to terminate when, in its opinion, its signs were obscured or the value of the site for advertising decreased. The parties also agreed that signs should be considered as company's personal property.

In February 1968, based on notice of intent to condemn his land, landowner notified company of his desire to terminate lease and have signs removed. Company replied the lease could not be terminated and kept signs on the site until after condemnation cut off landowner's title in July 1968.

As to apportionment of award, landowner argued that only the pro rata refund of annual rent which was unused should be awarded to company. Company argued that its award should be as follows:

Value of leasehold until end of term	$ 5.98
Value of loss of profits from being deprived of operation of signs until end of lease	270.00
Fair market value of signs on site	5,000.00
Total	$5,275.98

On appeal from referee's award, court held: (1) company was entitled to refund of prepaid rent for period from condemnation until end of lease term; (2) profits from sign rental lost by termination of lease before end of display contract; (3) company is not entitled to value of signs since parties agreed they were to be considered personal property, which is not compensable in condemnation.

RICHARDS-DOWDLE, INC. v STATE, (N.Y. Ct. Claims) 276 N.Y.S. 2d 795 (1966)

Following State's appropriation of land for highway, claimant advertising company sued for the value of four signs erected on the site. Claimant showed it owned the site and had intended to maintain these signs on site indefinitely, and with good maintenance they had 25-30 year service life remaining. Undisputed testimony showed that billboard site was the highest and best use of the land in question. Claimant alleged there was very little

salvagable material left from signs after their removal. Evidence showed that reasonable charge for erecting signs was $1,200 each, that their location abutted a new, heavily-traveled expressway, was near a large shopping center, and in a site zoned "commercial" under local ordinance. Real property taxes on the site listed value of land as $900 and sign as $1,100. State appraiser testified that highest and best use of site was for billboard signs.

Claimant's expert set value of property at $11,100 for land and $4,600 for signs. Value of sign was computed by a 5% depreciation of reconstruction cost ($4,800). State's expert put value of land at $5,000 and sign at $2,640.

Court held that claimant's expert had overestimated value of land, but State's expert did not give sufficient weight to value of sign. In making an independent judgment as to value of the property as improved by the sign, Court set claimant's award at $11,000.

Court's award considered sign as a fixture annexed to and forming part of the land, meeting the three necessary tests of a fixture, i.e., it was annexed to the real property, it was well-adapted to its location, and installed with intention to be permanent.

In dicta, Court observed that permanency of sign's attachment depends more upon motive and intention rather than on degree of physical attachment to the land. Also, owner's subsequent removal of parts of sign did not alter its legal status at time of approptiation. Also, unique location of sign in this case justified use of reconstruction cost less depreciation method of valuation of sign as it enhanced value of claimant's land as a whole.

ROCHESTER POSTER ADVERTISING CO. v STATE, (Ct. of Claims, N.Y.)
213 N.Y. Supp. 812 (1961)

Action by advertising company for damages due to forced removal of signs when State appropriated for highway right-of-way the land on which signs were located. Claimant had erected signs under agreement with owner of site which allowed claimant exclusive right to occupy site for erecting and maintaining six signs at annual rental of $69. Agreement was for 5-year term, renewable for 10 more years. Signs were wood, mounted on wood posts, unlighted, 12 x 24 ft. Initially erected in 1945, claimant acquired them in 1950. State appropriated site for highway project in 1958.

State took position the signs were personal property, and therefore not compensable. Advertising company claimed $3,095 as (1) difference between fiar market value of its leasehold interest and rent called for by lease, (2) fair market value of sign, and (3) removal costs.

Court held agreement between parties here created easement in gross, and award of damages may be based on value that claimant's fixtures add to

land taken. Court awarded claimant $900 as replacement value of signs at time of approptiation, and $650 for fair rental value of lease beyond the rent reserved. Removal costs were not allowed.

WHITMER & FERRIS CO. v STATE, (N.Y. App. Div.) 209 N.Y.S. 2d 247 (1961).

Outdoor advertising company sued State for damages resulting from appropriation of land on which company had erected signs. On appeal from judgment dismissing claims, State argued that company's ground leases were not interest which constituted "property" within meaning of eminent domain statute, and signs were personal rather than real property.

Evidence showed that company used ground leases, which conveyed to it a described plot of land and right to maintain advertising sign on it, subject to right of termination if land is sold or permanent structure is built on the site by owner. Company's wall lease granted right to use of wall of described building for advertising purposes.

Court held this agreement created easement in gross which was a compensable interest under State eminent domain law. Also, it held that company's signs were sufficiently annexed to the land to be treated as property under the eminent domain law. However, Court held that company had not offered sufficient proof of value. Evidence showed that signs from land taken by the State had all been removed by company, stored and eventually erected again on other sites. Thus Court questioned whether it could be shown that company's signs actually enhanced the value of land as a whole by their presence. Accordingly, case was remanded for new trial to see whether damage can be proved.

FULMER v STATE DEPARTMENT OF ROADS, (Nebraska S.Ct., Dec. 1964), 131 N.W. 2d 657; Reargued April 1965, 134 N.W.2d 798

In condemnation of permanent easement for control of outdoor advertising within 660 ft. of Interstate highways, Court instructed jury that where State took no property but only prohibited use of land for outdoor advertising, the landowner's right of recovery was limited to difference between reasonable value of property before and after easement was taken. On appeal from trial court judgment, awarding $25 damages, landowner argued that easement had ascertainable value of its own, and offered proof of value in the form of 5-year contract providing for $40 annual rental with prospect of renewal.

Court held that trial court instruction was erroneous since the easement was a compensable item of damage having substantial value. Case was remanded for new trial.

Concurring Opinion thought that the action here was a compensable taking of property through the police power rather than a proper act of eminent domain.

On motion for reargument, FULMER v STATE DEPARTMENT OF ROADS, (April 1965), Court withdrew its earlier opinion and affirmed trial court award. In reversing its position the Court compared the taking of advertising easement to taking right of access which affects value of property but cannot be ascertained except by comparison of the before and after value of the land.

Dissenting Opinion: Dissent argued that the right in question was substantial and its value was ascertainable, and therefore the trial court erred in its instruction.

MATHIS v STATE DEPARTMENT OF ROADS, 135 N.W. 2d 17 (Nebraska, 1965)

In condemnation of permanent easement to control outdoor advertising on farmland adjacent to Interstate highway, landowner showed he had leased to advertising company two sign sites for $80 total annual rent for 5 years with renewal privilege for 5 years more. At time State condemned easement no signs had been erected, and no rent had been paid. Landowner also testified that erection of signs would not interfere with farming operations. State appraisers awarded $1,500 based on capitalization of potential rental income from signs.

On appeal to District Court, State claimed this award was excessive. After landowner's proof was submitted, Court granted State's motion for directed verdict because landowner had failed to prove substantial injury.

On appeal to Supreme Court, directed verdict was affirmed. Court dicta noted that counsel for landowner here were same that tried Fulmer v State. Having failed to recover substantial damages in that case on basis of value of land before and after taking the easement, counsel sought recovery of damages on theory that proper measure was potential sign rental income capitalized at normal interest rate. However, Court found that condemnee had suffered no actual damage, and held that therefore nominal damages were allowable but substantial damages were not. Citing Illinois case of Department of Public Works v Filkins, 104 N.E. 2d 214, which stated: "The property owner is entitled to be compensated justly for what is given up to the State. If what he has given up is of no value, the making of an award would not be required in order that he be justly compensated," the Nebraska Supreme Court held that when State takes control of outdoor advertising on land, the owner is not entitled to substantial compensation in the absence of proof of actual damage.

Dissenting Opinion argued that it was useless gesture to say that a compensable right had been taken and then apply a rule that yields a zero verdict.

CITY OF BUFFALO v MICHAEL, (N.Y. Ct. of Appeals, July 1965) 209 N.E.2d 776

As part of urban clearance and rehabilitation program, city appropriated apartment building owned by defendant, who had rented roof space to

advertising company for maintenance of 15 x 40 ft. "spectacular"-type sign. Sign company paid defendant $250 annual rent for roof site, and leased sign to its client for $4,800 per year rent. Sign company's lease with defendant was year-to-year, with sign removable at option of sign company. However, construction of sign was such that removal necessarily would have damaged building.

In appropriation of building, award to defendant did not include any damages for sign since Court regarded it as personal property. However, Appellate Division reversed, and on new trial defendant was awarded $4,926 for value of sign less depreciation and salvagable items.

On appeal, Court of Appeals held that the sign in this case was a compensable fixture. However, the sign had not "lost its identity" by becoming a structural part of the building, and so the tenant was entitled to a separate award for the value of the sign.

NAEGELE OUTDOOR ADVERTISING COMPANY OF MINNESOTA v. VILLAGE OF MINNETONKA, (Minn., Oct. 1968) 162 N.W. 2d 206

Under zoning ordinance excluding billboards from residential areas, Village notified sign company to remove its non-conforming signs within 3-year period. Sign company sought declaratory judgment that this was unconstitutional.

Trial court held that zoning ordinance was not unconstitutional by its terms, but it had been applied with discrimination against sign company. On appeal, Supreme Court held that ordinance was not unconstitutional because it was based on aesthetic values of the Village; and that requirement for removal of non-conforming signs within 3 years was not unconstitutional on its face and sign company had not offered any evidence that this was an unreasonably short period.

In dicta the Court discussed the Village's amortization provision as follows:

> "It was thus hoped that non-conforming uses would soon vanish due to destruction, exhaustion, or obsolescence. This, however, has not happened. These non-conforming uses have often enjoyed an unchallenged monopoly in the residential areas because of the zoning ordinances, and with reasonable maintenance, they have prospered instead of withering away.
>
> In recent years a number of municipalities have sought to eliminate preexisting non-conforming uses by means of so-called amortization provisions, of which the Minnetonka provision is a prime example. The theory behind this legislative device is that the useful life of the non-conforming use corresponds roughly to the amortization period, so that the owner is not deprived of his property until the end of its useful life. In addition, the monopoly position granted

> during the amortization period theoretically provides the owner with compensation for the loss of some property interest, since the period specified rarely corresponds precisely to the useful life of any particular structure constituting the non-conforming use. . . .
>
> The question becomes one of the unconstitutional application of the ordinance in a given case, and the burden is on the plaintiff to establish the ordinance as applied is unconstitutional."

In Re: URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH; Appeal of PITTSBURGH OUTDOOR ADVERTISING CORP., (Pa., Oct. 1970) 272 A. 2d 163

Following Redevelopment Authority's acquisition of buildings in fee, condemnation proceedings were started by Authority to acquire two leasehold interests of appellant sign company. Appeal of condemnation award presented issue of proper method of valuation of advertising lease.

Evidence leases ran for 5 years. One covered a roof site for four signs, 12 x 25 ft. for which $250 annual rent was paid; other covered wall space for one sign at $50 annual rent. At time of condemnation each lease had 3 years, 7 months to run. Trial court awarded $16,800 based on testimony of capitalized income to sign company.

On appeal, Authority claimed trial court had improperly considered "income flow" of the sign company from its customers as being all attributable to the use of the sign sites covered by the leases. While business income might properly be considered in condemnation of freehold interest, it was not proper for a leasehold. Under Authority's theory, the sign company was entitled to an award which would enable it to obtain lease at a comparable location, replace its signs, and resume business with the same income flow as before. In this instance, sign company and Authority witnesses agreed that combined fair rental value of leaseholds was $300 per year.

Evidence of possibility of renewal of lease was improperly admitted due to its speculative nature.

Court held that judgment of trial court should be vacated and case remanded for further evidence and award without the irrelevant income information.

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