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RECENT DEVELOPMENTS IN HIGHWAY BEAUTIFICATION

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RECENT DEVELOPMENTS IN HIGHWAY BEAUTIFICATION

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The following remarks were presented at the Highway Research Board's 12th Annual Workshop on Highway Law held at the University of Colorado, July 29-August 3, 1973.

During the past year, FHWA amended and re-issued two PPM's which comprise the major sources of guidance regarding control of roadside advertising under the Highway Beautification Act. These are PPM 80-5.2, relating to acquisition of interests in signs and sign sites as part of the elimination of nonconforming signs, and PPM 90-6, relating to establishment and maintenance of regulatory controls over the 660 ft roadside zones along Interstate and Federal-Aid Primary Highways.

ACQUISITION OF NONCONFORMING SIGNS AND SIGN SITES

In August 1972, PPM 80-5.2 was amended to authorize a simplified procedure for negotiating and documenting payments for signs and sites of nominal values--set in the PPM at up to $100.[1]

In December 1972, PPM 80-5.2 was expanded to include a series of suggested cost and depreciation schedules for the two main types of standardized billboards, the "poster panels" and "painted bulletins."[2] These schedules were designed for use nationwide by applying "modifiers" in the form of percentage figures correlated with the differing levels of sign construction costs by regions. The modifiers were keyed to the postal service's ZIP Code system, and were arrived at after taking into account all direct and indirect costs of constructing these types of signs (that is, labor, materials, overhead and profit found to be typical of the sign industry).

States which previously had adopted a schedule of costs and depreciation approved by FHWA were authorized to continue with it or use the socalled National Schedules; but whichever they used had to be applied statewide. The hard question of severance damages was also addressed in the PPM,[3] since throughout the months of developing this formula the billboard industry had persisted in trying to get such damages included. The PPM restated the Federal position that FHWA would not participate in payment of damages to remaining signs due to taking other nonconforming units of a company's inventory; but it left the door unlocked by saying that Federal participation in special cases would have to have prior concurrence in such action by

submission of appraisals and other documentation.

ADMINISTRATION OF REGULATORY CONTROLS

PPM 90-6, issued July 9, 1973, deals with a number of problems involved in administering the roadside sign zoning laws which all States now have enacted with approval of the Secretary of Transportation. And, as might be expected, many of the questions raised by these laws relate to the handling of nonconforming signs.

One such problem involves the status of nonconforming signs in commercial and industrial areas which are covered by a "grandfather clause" in a Federal-State agreement. Many agreements on size, lighting and spacing regulations for commercial and industrial areas provide that signs lawfully existing in these locations on a specified date will be permitted to remain there even though not conforming to standards. In the case of such exceptions it was expected that obsolescence, abandonment or destruction would eliminate them. The PPM states that grandfather status applies to individual signs, and allows their retention for the period of their remaining normal life with customary maintenance.

Other signs which became nonconforming by reason of application of the regulatory standards to their locations were subject to compensated removal under the provisions of the State's compliance law at any time.

For both these classes of signs, the PPM spelled out six criteria or requirements for their maintenance as nonconforming signs, following zoning law principles for such situations, as follows:

(1) The sign must actually have been in existence at the effective date of the regulatory law.
This criterion deals with the questionable cases where signs were not fully erected (e.g., bare poles only) and sign leases were executed but not performed by the required date. Where a sign permit has been issued and money spent in good faith, an exception is recognized. However, this does not apply to the sign owner who has obtained permits or otherwise acted obviously in an effort to avoid the intention of the law. Essentially the same criterion of good faith applies to those limited number of cases where State law or agreements allow for construction of signs under a preexisting lease within 6 months after the effective date of the law.

(2) The property interest of the signowner must be substantial.
Paper posters on trees, abandoned signs, and the like are not recognized.

(3) Rights in a sign may be transferred commercially, but the sign may not be moved.
A sign forced to move because of right-of-way acquisition must

find a conforming location.

(4) The sign must have been lawful on the effective date of the law, and must continue to be lawfully maintained.

(5) A nonconforming sign may not be changed.
That is, it must remain substantially the same as it was on the effective date of the law. Enlargement of the sign is a change in the existing use. So is replacement, rebuilding or reconstruction (except where destruction is due to vandalism). Reasonable maintenance and change of advertising copy is not a change of use.

What consitutes enlargement, rebuilding or replacement must be determined by the States, which are expected to develop their own specific criteria to say where customary maintenance ends and substantial change begins. Colorado, for example, recognizes substantial replacement when repair costs 50 percent or more of the sign's original cost.[4]

(6) A nonconforming sign is not considered to be continued if it is abandoned, discontinued or destroyed.

Again, each State is expected to develop specific criteria for deciding when non-use constitutes discontinuance. A sign which stands without any advertising copy of a specified period of time, say, 6 months, might be considered as discontinued. Prolonged periods of displaying obsolete advertising matter or the continued need of substantial repairs might also be deemed to constitute abandonment.

In developing criteria for determining when there is substantial change, abandonment or discontinuance, the States' natural recourse would seem to be to the body of zoning law their courts and regulatory bodies have provided. These all are questions which have arisen in dealing with the elimination of nonconforming land uses and variances under zoning laws and building codes.

These criteria and rules will be applied both to regular nonconforming signs and signs in a grandfather clause status. Their purpose is not to harrass billboard companies, but rather to deal with the very practical matter of assuring that if compensation is paid for removal of a sign, the payment will be for the same sign that originally established the entitlement to compensation.

ON-PREMISE SIGNS

Sec. 10 of PPM 90-6 deals with some of the problems of applying the statutory exception covering on-premise signs.[5] Efforts by motorist service businesses to use this exception to erect signs

in favorable roadside locations has been both notorious and ingenious. They have included erecting high-rise brand-name signs over dummy gas pumps placed on small roadside plots, and connected to the operating gas station by long strips of land owned in fee or covered by easement. Other instances of this same technique have included socalled "dog walks", linear parks with wālking paths and picnic tables. Gas stations, restaurants and motels were the principal users of these signs.

Practices of this sort have sharpened the need for clarifying the definition of on-premise signs. As defined in PPM 90-6, an on-premise sign must (1) be located on the same premises as the activity or property advertised, and (2) have as its purpose the identification of the activity, its products or its services, or the sale or lease of that property, rather than general advertising.

Meeting the "premises test" is determined by reference to physical facts rather than property lines. Prime importance is given to the functional arrangement of buildings and open spaces used for advertised activity. Sites in extensive undeveloped highway frontage, or used for other purposes (such as crop cultivation, residential use, or commercial or industrial use not related to the advertised activity) are not considered as part of the premises for this purpose.

Functional relationship seems to be the touchstone of the premises test. Thus a sign site which is located some distance from the principal activity, and is closer to the highway than to the activity, and is developed only in the area of the sign or between the sign and the activity, and is occupied solely by structures that have no integrated purpose except to qualify it for a sign, would not meet the on-premise criteria.

The "purpose test" is most clearly satisfied by signs which consist solely of the name of the establishment, or identify the establishment's principal or accessory products or services. It is most clearly not satisfied by signs that bring in rental income to the property owner, or consist of brand name advertising, or products or services which are only incidental to the establishment's main activity. Thus a sign advertising brands of tires or automotive equipment would be acceptable for a gas station, but a sign advertising chewing gum would not. Similarly, a sign preeminently advertising activities not related to the main activity of an establishment would disqualify a sign, even though it mentioned the main activity. (E.g., a sign for a motel not located at that site would not be made into an on-premise sign by adding the words "dog kennels here" and placing a kennel at the sign sign).

The same criteria of purpose are applicable to signs that advertise sale or lease of property incidental to other messages for

an off-premise business establishment.

Where a sign does not meet the "premise test" or the "purpose test", it must be treated as an off-premise sign in the location where it stands. And if it is in a commercial or industrial area, it must meet size, lighting and spacing standards for off-premise signs.

CONTINUANCE OF BONUS AGREEMENT CONTROLS

States which had entered into bonus agreements prior to June 30, 1965 are entitled to remain eligible for bonus payments by continuing to enforce the terms of these agreements; but they must also comply with the terms of the Highway Beautification Act.[6] This means extending control to Federal-Aid Primary Highways, and to additional Interstate highway roadsides covered by the 1965 act.

Bonus Laws which excluded socalled "Cotton Areas" (right-of-way acquired prior to July 1, 1956) must control them unless they are in commercial or industrial areas. The "Kerr Areas" (commercial or industrial areas within boundaries of incorporated municipalities as of September 21, 1959) must also be subjected to size, lighting and spacing rules.

DESTRUCTION OF TREES WITHIN RIGHTS-OF-WAY

Instances of destroying trees or shrubs within rights-of-way must, at the present time, be handled by States under their law. However, PPM 90-6 requires that these cases be referred to the State Police or other appropriate agency for investigation and possible criminal prosecution. The PPM recommends that State licensing and permit regulations stipulate that unlawful destruction of trees or shrubs on rights-of-way be cause for permit or license revocation.[7]

MAINTENANCE OF ADVERTISING COPY ON SIGNS

Finally, PPM 90-6 addresses the question of when is a sign a sign, and when it is not a sign under the beautification law. Is a set of supporting poles subject to the billboard control law? Is a sign that is blank and never has had any advertising copy a sign within the meaning of the law? Is the back side of a sign subject to the National Standards on size and spacing?

PPM 90-6 takes the position that none of these are signs within the meaning of the Highway Beautification Act. They may become signs, but only when advertising copy actually is placed on them.[8]

A sign's status is determined as of the date it gets its advertising copy. Thus a set of bare poles, or an empty sign board may not have the benefit of a grandfather clause if it had no copy on the date specified in that clause. Similarly, if it is in a commercial or industrial area, it must comply with the size, lighting and spacing rules applicable on that date when it became a sign. If it is not in one of these areas, it may be an illegal sign, unless it qualifies as a directional or on-premise sign. And, as noted earlier, if a sign stands without advertising copy for more than 6 months, it will be considered as having ceased to be a sign, and thus become illegal.

Does this violate property law principles when an advertising company has a lease for erecting and maintaining a billboard? Arguably it does not, for it can be viewed as a case of frustration of an executory contract where the parties were bound to consider the fact that future circumstances may occur to make performance impossible or illegal before it can take place. In such instances contract law governs the position of the parties.

PUBLICATION OF FEDERAL REGULATIONS

A sequel to the issuance of PPM 80-5.2 appeared in June 1973 in the form of its publication in the Federal Register as part of a recodification of the principal FHWA regulations relating to the control of outdoor advertising.

Previously the regulations which appeared in the Code of Federal Regulations consisted of (1) the National Standards relating to signs along Interstate highways, promulgated for the 1958 Bonus Act, (2) the National Standards for Directional and Other Official Signs, promulgated for the Highway Beautification Act of 1965, and (3) the National Standards for Official Highway Signs Within Interstate Highway Rights-of-Way Giving Specific Information for the Traveling Public. These were Parts 20,21 and 22 of Title 23, Ch. 1, CFR. PPM 80-5.2 had not been so published.

By the Federal Highway Administration's action in June, these three items were republished, together with PPM 80-5.2, under a new designation -- Part 750, Ch.1, Title 23, CFR. The four items became Subparts A, B, C and D.

This action leads to several questions and comments. First, without doubt this republication increases the convenience of finding these regulations, and improves the orderly format of the Code.

It also meets at least one objection that has been raised recently by the public that Federal highway regulatory, policy and procedural documents are not readily available outside FHWA and the State highway departments. In June 1973, this complaint resulted in an action being filed against the Secretary of Transportation to compel him to publish in the Federal Register more of the policy, guideline and regulatory documents relating to the Federal-aid highway program.[9]

Specifically, the complaint alleged the Secretary had violated the Freedom of Information Act[10] and the Federal Register Act by failing to publish:

> "(a) statements of the general course and method by which the functions of FHWA with respect to the Federal-aid highway program are channeled and determined, (b) rules of procedure, (c) description of forms available, substantive rules of general policy and interpretations of general applicability which FHWA has adopted, and statements of general policy and interpretations of general applicability which FHWA has formulated and adopted with respect to the Federal-aid Highway Program, and (d) amendments, revisions or repeals of the foregoing."

The complainant here is a national organization active in environmental improvement programs, and the thrust of its interest is in problems of route location, air and water pollution, noise abatement, and land use changes. But the implications of the complaint are not restricted to any segment of FHWA's actions.

Promulgation of the new Part 750 in the Code of Federal Regulations was introduced by the statement that it involved "redesignation...and republishing" the old Parts 20, 21 and 22, together with the new sub-part consisting of PPM 80-5.2, issued December 12, 1972. Yet comparison of the language of the initial and present versions of the PPM shows places where formal and procedural provisions are not the same; and at least one instance where substantive features of the PPM were changed.

The latter involved changing FHWA's recommendation on the order of priority for sign removals to a proviso that "selection and programming of sign removal projects will be the responsibility of the States."[11]

This prompts the question of when changes in regulations require publication as proposals for comment before final adoption as official revisions.

In another part of the republished material -- the National Standards for Directional and Other Official Signs -- [12] the definition of "public service signs" on school bus shelters was changed to specify that the public service message should occupy at least 50 percent of the sign instead of at least 60 percent as originally specified. Notice of this change was published in the Federal Register when the change was made in February, 1973;[13] however, no previous notice of proposed change was issued for this revision.

Again, the question of compliance with the Administrative Procedure Act is raised by the manner in which these changes were made. There may be good and sufficient reasons to sustain the manner in which these changes were made, but the policy of the Department of Transportation does not seem ever to have been authoritatively stated on this matter, and has resulted in situations such as the pending suit to compel greater use of hearings and public participation in this administrative process.

LITIGATION RELATING TO STATE COMPLIANCE WITH FEDERAL LAW

Implementation of the Highway Beautification Act has resulted in a series of actions which have provided an extremely interesting episode in the history of the Federal-aid highway program, and which may test this mechanism more severely than any stresses which it has been subjected to in the past. Federal highway policies are applied indirectly through actions of the States; and in the past Federal offers of financial assistance through grants generally have furnished sufficient incentives for State actions conforming to the national policy. Penalties for not carrying out Federal policy have taken the form of (1) Federal administrative refusal to participate in certain costs of individual projects where it was deemed improper to do so, or (2) administrative determinations to withhold part of a State's total apportionment until it corrected the aspects of its law or procedure deemed to be in violation of the national policy.

An example of the former is the refusal to participate in the cost of acquiring access rights where Federal authorities determined that the costs were not compensable. Most States had this experience at one time or another, and negotiated their disputes with the Federal authorities.

Examples of the latter were rare before 1965, and practically all of them had to do with the Haydon-Cartwright Amendment of 1935 requiring States to prevent diversion of highway user tax revenue to non-highway purposes.[14]

Against this background, systematic and vigorous enforcement of the Highway Beautification Act's penalties for failure to establish "effective control" of billboards and junkyards set up an almost unprecedented demand on the mechanism for reconciling differences between the State's laws and the Federal policy. Commencing in February 1972, administrative determinations by the Secretary of Transportation that some 17 States were not in compliance with the Federal law led to a series of negotiations and proceedings to either secure compliance or else prepare the way for orders withholding 10 percent of the State's Federal-aid highway apportionment as a penalty.

In all but two instances these proceedings led to State action needed for compliance approval. In two cases penalty orders were issued, and the State challenged its validity in Federal court. These cases involved South Dakota and Vermont, each penalized for different reasons. Both, however, raised the common question of the propriety of Federal policy requiring States to reverse or ignore specific and deliberate actions of their legislatures, and, in the case of Vermont, of the State's supreme court.

The South Dakota case[15] involved a Secretarial determination that the State's zoning law, which, among other things, designated roadside areas as commercial areas, did not meet the criteria of genuine zoning, and so could not be accepted in lieu of a negotiated definition of these areas through a formal agreement between the State and Secretary of Transportation.[16] The Federal District Court held that the Secretary's determination and order were not arbitrary, unreasonable and capricious, and accordingly declined to issue an injunction to compel the Secretary to make a full apportionment to the State without penalty.

Not only did the court indicate that it agreed with the Secretary on his judgment of the merits of the State law, but it declared that Congress' statutory statement of policy was entitled to judicial respect in the construction of the law, and the order of the Secretary, having a rational basis and being within the scope of his administrative responsibility, would not be upset.

The second case involves a Secretarial finding that the law of Vermont is not in compliance with the Federal law because it does not require payment of compensation in cash when signs not conforming with the State's billboard control along Interstate and Primary highways are ordered removed. Vermont's position is that its law, allowing a 5-year amortization period prior to mandatory removal, satisfies the Congressional requirement of "effective control" in the areas specified by the Federal law.[17]

The State's pleading recited that:

> "It remains the position and public policy of Vermont that Vermont may, consistent with the Constitution of the United States and of Ver-

> mont, and applicable laws, control and remove outdoor advertising along Vermont highways through the exercise of its police power without the payment of compensation, monetary or otherwise, and without the penalty here threatened by the Secretary."[18]

Two cases in which this proposition had been upheld by the supreme court of Vermont were cited.[19]

To date this case has not been argued on its merits; and the only proceedings held have involved argument on a petition of the Outdoor Advertising Association of America to be allowed to enter the case as an intervenor.

What the court will say in the Vermont case is, at this time purely speculative. But I think I see in the South Dakota and Vermont cases a corrolary application of Justice Holmes' remark that hard cases make bad law. In Vermont the hard case is created by the chain of events leading from Congress' expression of policy in the statute, the Secretary's interpretations which link payment of cash compensation with the requirement of effective control, and the use of a penalty mechanism to enforce this interpretation notwithstanding clearly contrary State law. In principle, the same issue is presented in South Dakota with the administrative interpretation of the concept of zoning and effective control.

The impression emerges from these cases that Congress has left less room for accommodation of differences in State law regarding highway beautification than it has provided in other aspects of the national policy on the Federal-Aid Highway Systems. Given the diversity of circumstances, resources and values of the States' natural and manmade environments, the patterns of highway travel, State laws and capabilities for administration of roadside land-use controls, and the level of popular sentiment regarding highway beautification, some might argue that legislative wisdom should design a system that concentrated on laying down goals for achievement, and allowed maximum flexibility for State action in achieving them.

LITIGATION RELATING TO VALUATION OF ROADSIDE SIGNS

Related to the problem of valuation of billboards and other roadside signs upon their compulsory removal under zoning law is the decision of the U.S. District Court for Colorado in April 1973[20] in Art Neon Co. et al v City and County of Denver. The case dealt with a local zoning ordinance, but it is of interest because

of the recently promulgated national cost and depreciation schedules. It brings to a sharp focus the issue of an underlying rationale for applying the principle of just compensation to the core problem of all land-use control programs, namely, the removal of nonconforming uses.

The City and County of Denver wrote its sign code in the manner that municipal attorneys for many years have thought was adequate to satisfy the Fifth Amendment mandate that just compensation shall be provided when private property is taken for public use. Its zoning restrictions were prospective in their application; and, in the elimination of nonconforming signs, the actual removal was postponed for a period of time in order to allow signowners to amortize their investments, and thus minimize or avoid the economic hardship of compulsory removal. This amortization period varied according to the value of the nonconforming sign; and was laid out in the statute as follows:

$0 - 3,000.............2 years
$6,001 - 15,000.........4 years
$3,001 - 6,000..........3 years
$15,001 and over.......5 years

In this respect it may be assumed that the City-County felt a measure of security, relying on decisions of State supreme courts that have upheld the constitutionality of laws that either allowed no amortization period or else one which specified a single period for all billboards regardless of their physical differences and signowners' investments.[21] However, the Federal District Court of Colorado saw the matter differently.

At this point it may be worth noting that the Court and the City-County agreed on a good many things. First, there was no doubt about the power or propriety of Denver to regulate or prohibit altogether advertising signs in order to preserve or improve the visual quality of the environment. Berman v Parker decided this twenty years ago.[22]

Second, there was no question that the prospective application of a prohibition on sign construction in the future was proper.

And third, the Court had no quarrel with Denver on the theoretical proposition that payment in cash is not necessarily the only acceptable method of providing just compensation when it is required by the Fifth Amendment.

The next question -- and the one on which the court and Denver parted company -- was whether the method used in the Denver

ordinance actually satisfied the substantive standard of just compensation. The Court said it did not. The ordinance purported to key its amortization schedule to cost of replacement of nonconforming signs, but the Court declared

> there is no conceivable economic or accounting theory which lengthens or shortens the amortization period on the basis of replacement cost of a sign...Amortization is but a function of depreciation.[23]

The Court's idea of the substantive standard of just compensation, it turned out, was "fair market value". It viewed the value of signs in terms of the practices of the billboard industry, and cited the following characteristics:

> Most signs are leased for five years, and approximately three-fourths of the leases are renewed for an additional term or terms. Although the lessor sign companies attempt to make a small profit during the initial leasehold term, the real profit is derived from the renewals....
>
> There is a market for the sale of sign leases, and sales prices of sign leases include the incentive of the probability of renewal of the lease.
>
> ...
>
> Almost without exception, the signs are not adaptable for use elsewhere, the salvage value of a sign which must be removed does not equal removal cost.
>
> ...
>
> There is no relationship between replacement cost and unexpired leasehold term, and there is but limited relationship between replacement cost and either market value or useable life. There is a relationship between investment and replacement cost, but they are a far cry from being identical.[24]

From these findings, the Court indicated that up to January 16, 1973 it would have been prepared to accept the value of a sign's leasehold as a fair enough proxy for just compensation, and hence allowance of nonconforming use for an unexpired term of a lease would be acceptable compensation.[25] However, on that date, the US Supreme Court's decision in <u>Almota Farmers Elevator & Warehouse Co. v US</u> held that in condemnation of a leasehold the award should take into consideration the possibility of the lease being renewed as one of the factors influencing what a willing buyer would pay for the lease.[26] Thus, market value over the useful life of a structure, including the provable value of the probability of renewal, must be paid for.

> "If Almota means what we think it says", the court declared "even the longest amortization permitted under the Denver ordinance does not approach compensating the owners for the values of the signs over their useful life, even if amortization is said to be permissible compensation... Legislative rough approximations of just compensation won't do".[27]

As to where this left the city and county, the Court said:

> Denver's signs can be eliminated if Denver is willing to provide for such elimination in the way the federal government and state has so provided. Whether Denver wants to incur the expense is a decision the City Council and the taxpayers must make.
>
> We do not hold that immediate full payment in cash is necessarily the only possible solution. We hold that the present Denver ordinance does not provide for the payment of just compensation. Whether a constitutional ordinance which does not require a cash payment...can be devised, we leave to the ingenuity of the City. Our decision today is limited to the existing ordinance which is all that is before us."[28]

From this decision a number of questions would seem to arise. One is whether the recently issued FHWA schedules of replacement cost less depreciation will henceforth be acceptable as a measure of compensation to the standardized billboard industry which uses leases most generally for its signs, and hence has the most to gain from the Art Neon Co. decision. And, if they are challenged in Federal courts by the billboard companies, will these regulations be held unconstitutional? In this respect the Court's closing remark that Denver would have passed its test if it had eliminated signs "in the way the federal government and the state has so provided" is puzzling.

The Court's ruling that "useful life" should be the yardstick for determining compensation (because this is what willing buyers actually buy) raises other questions. Does it mean useful physical life or useful economic life? The former is fairly accurately measured by materials engineers; but the latter is affected by such things as the average daily traffic count on the highways at which a sign is aimed; and this may vary as the character of land uses change or vehicular traffic flows shift within the street and highway system. Can one say, for example, what effect a zoning code's restriction of future sign construction will have in reducing commercial development in a locality?

And, if it has the effect of reducing the ADT in front of a sign, does this hasten its obsolescence, and thus shorten its "useful life?"

Would a socalled amortization period which is correlated to the ADT on the street or highway in front of the sign be an appropriate proxy for earning power, and hence the type of fair market value the court asked for?

The Denver decision is that it approaches the removal of nonconforming signs as if it is a form of taking for public use through eminent domain. It speaks as if a taking for public use occurs whenever property is destroyed to achieve a public purpose; and the touchstone test of this is whether any valid functional use of the property remains beyond the scope of the restriction that is imposed.[29]

I am not so sure that this is the way to regard cases of this type. The Court may have glossed over a subtle distinction between the police power and eminent domain which applies here. Land use control through zoning, as an exercise of the police power, involves a governmental determination that henceforth certain land uses--in this instance billboards--are prohibited in specified areas. Sign companies which do not already have billboards up in the restricted areas must and do accept the fact as good citizens that they may not go against this legislative decisions. Morally and legally it is wrong, once the government has spoken, to refuse to comply.

But when does the billboard owner who has a sign in a restricted area come under this obligation? Can he claim a moral as well as a legal right to hold out against what the legislature has decided is for the public good so long as he can make a profit from this nonconforming use?

Does he have no obligation to recognize that the public has held his presence in a certain area to be inconsistent with its values, and come into line with this new value system?

If the elimination of future competition from new signs gives a nonconforming signowner additional economic leverage in his business, is he entitled to take this windfall without any corresponding obligation to ultimately come into line with the objective sought by the zoning law?

To say simply that when restriction of use goes so far that all normal uses are prohibited there is a taking under the police power should not necessarily equate it to condemnation of property for public use, or lead to the conclusion that valuation principles of eminent domain are the only appropriate measures of compensation.

This is what the Denver case may have done when it is carefully considered. Yet, this is not calculated to clear up the interpretation of the Fifth Amendment in the eyes of the courts which must apply this approach in future cases.

A D D E N D U M

Subsequent to the time when the foregoing remarks were made at the Highway Research Board's Workshop, an appeal was taken in the case of Art Neon Co. et al. vs. City and County of Denver, discussed on pages 10-15 above.

The result of that appeal was published on November 23, 1973, in a decision of the U.S. Court of Appeals, 10th Circuit (No. 73-1404, Nov. Term 1973). The appellate court reversed the U.S. District Court, stating that Denver's method of terminating nonconforming signs met the tests of reasonableness required by constitutional limitations on the police power.

The court was, however, critical of the city's establishment of four amortization periods of differing length based on replacement costs of signs, stating:

> The replacement cost of the signs is not related to any of the relevant factors in the reasonableness tests, and presents no valid basis for different treatment of different signs ranging from three to five years....The most that can be said for replacement cost is that it could indicate, as of the date used, the size and complexity of a sign, but this is no real help. When the categories so constructed are removed, we are left with the five-year maximum period for removal of all nonconforming signs in the ordinance, and this period, we have stated, is a valid one.

Reference to the operation of the Highway Beautification Act in the District Court's opinion prompted the Court of Appeals comment that

> The matter of preemption by the Federal Highway Beautification Act...or by the Colorado Highway Sign Act...has been argued by the parties, but we find no such preemption. Nor do we find therein any example or standard binding in any way on the city.

Concluding, the court distinguished the operation of the Denver ordinance from situations in which eminent domain principles of compensation applied, and also held that it did not constitute an impairment of the obligation of contracts under the U.S. Constitution.

FOOTNOTES

(1) PPM 80-5.2, para. 18, Aug., 28, 1972

(2) PPM 80-5.2, para. 19, December 12, 1972

(3) PPM 80-5.2, para. 11(d), April 4, 1972

(4) Colo. Rev. Stats, 120-5-28

(5) 23 US Code, "Highways", sec. 131(c)

(6) 23 US Code, sec. 131(j)

(7) PPM 90-6, sec. 13

(8) PPM 90-6, sec. 14

(9) National Wildlife Federation v Brinegar, Civ.____(USDC, DC, June 1973)

(10) 5 US Code sec. 552 (a)(1)(B) thru (E)

(11) 23 CFR, Ch. 1, Pt. 750.310(c)

(12) 23 CFR 750.153(q)

(13) Federal Register, vol. 38, No. 38, p. 5242, February 27, 1973

(14) 23 US Code, sec. 126

(15) State of South Dakota v Volpe, CIV 72-4024 (USDC, SD, S. Dak., Jan. 23, 1973)

(16) SDCL (1967) Ch. 31-29 and 23 US Code, "Highways", sec. 131 (d)

(17) 10 Vt. Stat. Annot., sec. 336. provides mandatory compensation "only if and to the extent Federal law, when in effect, requires payment of compensation for the taking or removal of outdoor advertising on state highways as a condition of payment of federal highway funds, and federal funds are available."

(18) State of Vermont v Volpe, Civ. Action 6809, (USDC, Vt., Dec. 8, 1972), Appeal from Final Determination of the Secretary of Transportation.

(19) Kelbro v Myrick, 113 Vt 64, 30 A.sd 527 (1943); Micalite Sign Corp. v State Highway Department, 126 Vt. 498, 236 A.2d 680 (1967).

(20) Art Neon Co. et al v City & County of Denver, Civ. C-3427, (US DC, Colo., Apr. 4, 1973)

(21) E.G., Naegele OUtdoor Advertising Co v. Village of Minnetonka, 162 N.W. 2d 206 (Minn. 1968); Markham Advertising v State, 439 P.2d 248(1968)

(22) 348 US 26 (1954)

(23) Art Neon Co v City-County of Denver, Memorandum Op., p. 18

(24) Ibid., pp. 13-14

(25) See E. B. Elliott Advertising Co. v Metropolitan Dade County, 425 F.2d 1141 (US CCA, 5 Cir., 1970)

(26) _____US_____(decided January 16, 1973)

(27) Almota case, memorandum opinion, p. 18

(28) Ibid . 13-14

(29) Citing Lamm v Volpe, 449 F.2d 1202 (US, CCA, 10 Cir., 1971)