Harris County vs. Clear Channel Outdoor, Inc.

Richard Rothfelder represented Clear Channel, an international outdoor advertising company, in the administrative, trial, and appellate courts in the condemnation of Clear Channel's billboard and lease in Houston, Texas. In the first appellate opinion in Texas addressing the condemnation and compensability of billboard properties, the Court of Appeals for the Fourteenth District of Texas at Houston ruled in favor of Clear Channel. Rothfelder & Falick also represents all types of land and business owners in eminent domain proceedings across Texas.

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Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

SUBSTITUTE MEMORANDUM OPINION

Court of Appeals of Texas,
Houston (14th Dist.).
HARRIS COUNTY, Texas, Appellant
v.
CLEAR CHANNEL OUTDOOR, INC., Appellee.
No. 14-07-00226-CV.

April 29, 2008.

West KeySummary
Eminent Domain 148 ⟹87

148 Eminent Domain
148II Compensation
148II(B) Taking or Injuring Property as Ground for Compensation
148k81 Property and Rights Subject of Compensation
148k87 k. Personal Property and Rights Therein. Most Cited Cases

The leasee whose billboard was removed by the county for purposes of a road project was entitled to just compensation since the removal of the billboard constituted a taking under the Fifth Amendment. The county argued that the billboard was non-compensable personal property, contending that the trial court erred when it initially determined the forced removal of the billboard was a taking which entitled the leasee to just and fair compensation. Specifically, the county argued that it was not required to compensate the leasee for the loss of the billboard because the billboard was not sufficiently attached to the real property and therefore remained personal property, which was not compensable in an eminent domain proceeding. U.S. Const. amend. V.

On Appeal from the County Court at Law No. 2, Harris County, Texas, Trial Court Cause No. 824011.
Douglas P. Ray and Michael R. Hull, for Harris County, Texas.

Richard L. Rothfelder and Sydney N. Floyd, for Clear Channel Outdoor, Inc.

Panel consists of Justices ANDERSON, BOYCE and Senior Chief Justice MURPHY.[FN*]

FN* Senior Chief Justice Paul Murphy sitting by assignment.

SUBSTITUTE MEMORANDUM OPINION

JOHN S. ANDERSON, Justice.

*1 Appellant, Harris County, Texas, appeals a final judgment rendered in favor of appellee, Clear Channel Outdoor, Inc. We affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

This is a condemnation case initiated by appellant to take property for a road project at FM 1960 at Kuykendahl Road. The road project was a joint project between the Texas Department of Transportation (TxDOT) and appellant. The federal government partially funded the project. Under the agreement between appellant and TxDOT, appellant was responsible for the acquisition of the right of way for the project. Because the federal government was providing funding for the project, appellant was required to comply not only with TxDOT policies, but also with all federal laws in handling those acquisitions.

Located within a portion of the property sought by appellant was a billboard owned by appellee. While the sign was considerably older, appellee had executed a twenty-year lease with the property owners in 2003. Prior to December 2004, both TxDOT policy and federal law considered billboards removed for transportation projects to be real property and required that the billboard owner be compensated for the loss of the sign or the cost of relocating the sign. However, in late 2004, for reasons not disclosed in the record, TxDOT initiated changes in the regulations addressing how billboards affected by transportation projects should be handled. These changes, which took effect in December 2004, dictated that billboards affected by transportation projects would no longer be treated as real property and the sign owners would no longer be offered compensation for the loss of the sign.

The road project, as well as appellee's billboard, were located within the City of Houston. City of Houston ordinances generally prohibit the construction of new off-premise billboards such as the one owned by appellee. However, the City of Houston created an exception for billboards affected by transportation projects. Under this exception, the City of Houston allows a billboard affected by a transportation project to be relocated to a new location within the City of Houston for a maximum period of ten years. In addition to the time limit, the new location must comply with other restrictions such as the billboard cannot be within 1,500 feet of another billboard or within a designated scenic or historic district.

Although appellant notified appellee it had to remove the sign for the road project, appellant took the position, in line with TxDOT's billboard policy, it did not have to pay appellee compensation for the sign structure, only for the loss of the leasehold itself. The Special Commissioners awarded appellee a total sum of $60,000.00 for appellee's property interests affected by the project. Appellee filed objections to the Special Commissioners' award and filed an inverse condemnation counterclaim to seek compensation for the loss of the billboard as well as the leasehold estate.

***2** Appellee eventually filed a motion for partial summary judgment in which it argued appellant's action in forcing appellee to remove its billboard was a taking under both the federal and Texas constitutions for which the payment of just and adequate compensation is required. In response, appellant argued appellee's billboard was personal property and, under Texas law, personal property was not compensable. The trial court agreed with appellee and granted appellee's motion for partial summary judgment.

Having determined appellant's action was a taking and appellee was therefore entitled to compensation for the loss of the billboard, the issue on the amount of compensation owed to appellee was tried to the court. The stipulations included the prerequisites of the right to take, the procedural posture of the case, the parties' opinions of value, and the authenticity of their respective appraisal reports. Because appellant instructed its appraiser to exclude the value of the billboard structure from his valuation, the only evidence of value for the billboard structure was the valuation prepared by appellee's appraiser. Appellee's appraiser determined the value of the billboard structure was $305,500.00 and placed the bonus value of the lease at $20,000.00. Appellant's appraiser determined the bonus value of the lease was $17,662.00. The trial court entered a final judgment that awarded appellee's property interests, including the billboard, to appellant and $324,331.00 compensation to appellee. Appellee's compensation included $305,500 .00 for the billboard and $18,831.00 for the lease bonus value. No findings of fact and conclusions of law were requested or entered. This appeal followed the denial of appellant's Motion to Modify the Judgment and Alternatively, Motion for New Trial.

DISCUSSION

I. The Standard Of Review

On appeal, appellant does not challenge the amount of compensation the trial court awarded appellee for either the loss of the lease or the actual billboard. Instead, appellant, arguing the billboard was non-compensable personal property, contends the trial court erred when it initially determined the forced removal of appellee's billboard was a taking which entitled appellee to just and fair compensation. This issue was resolved when the trial court granted appellee's motion for partial summary judgment. A partial summary judgment becomes appealable after a final judgment is rendered disposing of all issues in a case. *Newco Drilling Co. v. Weyand,* 960 S.W.2d 654, 656 (Tex.1998). The movant for summary judgment has the burden to show there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.,* 690 S.W.2d 546, 548 (Tex.1985). In determining whether there is a genuine fact issue precluding summary judgment, evidence favorable to the non-movant is taken as true and the reviewing court makes all reasonable inferences and resolves all doubts in the non-movant's favor. *Id.* at 548-49.We review a trial court's summary judgment *de novo. Valence Operating Co. v. Dorsett,* 164 S.W.3d 656, 661 (Tex.2005). When a trial court's order granting summary judgment does not specify the ground or grounds relied on for the ruling, the summary judgment will be affirmed on appeal if any theory advanced is meritorious. *Carr v. Brasher,* 776 S.W.2d 567, 569 (Tex.1989).

II. Waiver

***3** In a single issue on appeal, appellant contends the "trial court erred when it awarded [appellee] non-compensable property damages in addition to the properly awarded damages for the leasehold interest in the real property acquired in this condemnation case."However, within that single issue, appellant makes five independent arguments as to why the trial court erred: (1) state and federal law do not entitle appellee to compensation beyond its leasehold interest and relocation costs; (2) appellee's billboard was not affixed to the real property such that it became a part of the real property and thus was not compensable beyond the value of the leasehold; (3) the billboard was appellee's personal property as determined by appellee's intent and appellant is not required to pay compensation for personal property; (4) appellee's billboard was a trade fixture and, therefore, was not compensable; and (5) there was no inverse condemnation as appellant sought only to condemn appellee's leasehold interest and not appellee's billboard. In response, appellee asserts appellant, with the exception of the third argument above, has waived the remaining arguments as appellant did not include these contentions in its summary judgment response. We agree.

In the context of a summary judgment, a non-movant is required to expressly present to the trial court, by written answer or response, any issues defeating the movant's entitlement to summary judgment. *Tello v. Bank One,* 218 S.W.3d 109, 118 (Tex.App.-Houston [14th Dist.] 2007, no pet.)(citing Tex.R. Civ. P. 166a(c)). To "expressly" present issues as required by Rule 166a(c), the written answer or response to the motion for summary judgment must fairly apprise the movant and the trial court of the issues the non-movant contends should defeat the motion for summary judgment. *Id.* at 119.In determining what issues were expressly presented to the trial court, a reviewing court may not rely on the appellate briefs or the summary judgment evidence. *Dubose v. Worker's Med., P.A.,* 117 S.W.3d 916, 920 (Tex.App.-Houston [14th Dist.] 2003, no pet.). Any issues not expressly presented to the trial court in a written response shall not be considered as grounds for reversal. *Id.* Thus, the failure to present issues to defeat summary judgment in the trial court waives those issues on appeal. Here, appellant presented a single argument in its summary judgment response: (1) compensation is not required for personal property, and (2) application of the *Logan* test indicates appellee intended the billboard to remain personal property.[FN1]Appellant did not raise any of the remaining arguments in its response to appellee's motion for partial summary judgment. Therefore, appellant has waived those arguments on appeal.

FN1. The *Logan* test is used to determine whether personalty has become a fixture. *Logan v. Mullis,* 686 S.W.2d 605, 607 (Tex.1985). It examines three factors: (1) the mode and sufficiency of annexation, either real or constructive; (2) the adaptation of the article to the use or purpose of the realty; and (3) the intention of the party that annexed the chattel to the realty. *Id* . We address the applicability of this test to a condemnation proceeding below.

III. The United States Constitution Requires Appellant To Compensate Appellee For The Taking Of Appellee's Billboard For Public Use

In its motion for partial summary judgment, appellee argued it was entitled to compensation for the loss of the billboard under both the Fifth Amendment to the United States Constitution and Article I, section 17 of the Texas Constitution. We agree with appellee that the Fifth Amendment to the United States Constitution requires appellant to compensate appellee for the loss of the billboard.[FN2]Because we hold the Fifth Amendment mandates appellee receive compensation for the loss of the billboard, we need not address appellee's contention the Texas Constitution also requires compensation.Tex.R.App. P. 47.1; *Carr,* 776 S.W.2d at 569.

FN2. This provision of the Fifth Amendment is made applicable to the states by the Fourteenth Amendment which provides that no state may deprive any person of property without due process of law. *State v. Ware,* 86 S.W.3d 817, 822 (Tex.App.-Austin 2002, no pet.)(citing U.S. Const. amend. XIV).

***4** Eminent domain has been described as one of the inalienable rights of sovereignty. *State v. Ware,* 86 S.W.3d 817, 821-22 (Tex.App.-Austin 2002, no pet.). It is the power to take private property for public use. *Id.* at 822.However, the government cannot take private property without payment of the market value for that property. *Id.* The Fifth Amendment provides private property may not be taken for public use without just compensation. *Id.* (citing U.S. Const. amend. V). Under the Fifth Amendment, the term "taken" is construed broadly to mean the deprivation of the former owner rather than the accretion of a right or interest to the sovereign. *United States v. Gen. Motors Corp.,* 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945). Under the Fifth Amendment "just compensation" means the full monetary equivalent of the property taken. *Almota Farmers Elevator and Warehouse Co. v. United States,* 409 U.S. 470, 473, 93 S.Ct. 791, 794, 35 L.Ed. 1 (1973). The owner is to be put in the same position as he would have occupied if his property had not been taken. *Id.* at 473-74, 93 S.Ct. at 794. Under this concept, the owner is entitled to the fair market value of the property at the time of the taking. *Id.* at 474, 93 S.Ct. at 794. This fair market value is normally to be ascertained from what a willing buyer would pay in cash to a willing seller. *Id.*

Appellant argues it is not required to compensate appellee for the loss of the billboard because, in appellant's view, the billboard was not sufficiently attached to the real property and therefore remained personal property, which is not compensable in an eminent domain proceeding. We disagree. In *Almota,* the Supreme Court stated the government cannot refuse to provide fair compensation for business improvements that are taken and dismiss the improvements as worth no more than scrap value simply because it did not intend to use them. *Almota,* 409 U.S. at 475 n. 2, 93 S.Ct. at 795 n. 2. The Supreme Court also determined a condemning authority cannot take advantage of an agreement between a lessor and lessee designating an improvement made by the lessee as personal property.[FN3] *Id.* at 477 n. 5, 93 S.Ct. at 796 n. 5. The Supreme Court then went on to state "this rule ... exists entirely for the protection of the tenant, and cannot be invoked by the condemnor. If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award."*Id.*

FN3. Appellant's citation of the *Logan* Test in support of its contention appellee's billboard is non-compensable personal property is inapposite. While routinely used to determine ownership of a fixture or liability for an injury, the test does not apply to condemnation proceedings. This limitation on the test is further confirmed by the cases cited by appellant as none involve a condemnation proceeding. *See Logan,* 686 S.W.2d at 607 (dispute between neighboring landowners over use of a bridge); *Tex. & N.O. R.R. Co. v. Schoenfeld,* 136 Tex. 173, 146 S.W.2d 724, 725 (1941) (dispute over ownership of railroad track materials); *Trenolone v. Cook Exploration Co.,* 166 S.W.3d 495, 497 (Tex.App.-Texarkana 2005, rule 53.7(f) granted) (dispute over right to use subsurface gas pipeline); *Lingleville I.S.D. v. Valero Transmission Co.,* 763 S.W.2d 616, 617 (Tex.App.-Eastland 1989, writ denied) (tax dispute involving the classification of a pipeline as either real or personal property); *Trans-Nebraska Corp. v. Cummings, Inc.,* 595 S.W.2d 922, 922-23 (Tex.App.-Houston [14th Dist.] 1980, no writ) (conversion case involving an advertising sign); *Vermillion v. Fidel,* 256 S.W.2d 969, 969 (Tex.App.-Amarillo 1952, no writ) (dispute over ownership of oil field production equipment); *Rogers v. Fort Worth Poultry & Egg Co.,* 185 S.W.2d 165, 167 (Tex.App.-Fort Worth 1944, no writ) (venue case involving a bus crashing into a building); *Maro Co. v. State,* 168 S.W.2d 510, 511 (Tex.App.-Amarillo 1943, writ ref'd) (tax dispute over an oil and gas leasehold).

Here, it is undisputed appellee held a twenty-year lease on part of the real property condemned by appellant for a publicly financed road project. It is also undisputed appellee owned a billboard on the leased property. Further, it is also undisputed that the base of the billboard was buried in asphalt twenty feet deep in the ground. It is also undisputed appellant ordered appellee to remove the billboard from its location to make way for the road project. Finally, it is undisputed appellee had to essentially destroy the billboard in order to remove it from the property acquired by appellant for the road project. Accordingly, we hold appellant, by forcing appellee to remove its billboard as part of the road project, took appellee's private property thus entitling appellee to just compensation for the loss of that private property. Accordingly, we overrule appellant's single issue on appeal and affirm the judgment of the trial court.

CONCLUSION

***5** Having overruled appellant's single issue on appeal, we affirm the trial court's final judgment.

Tex.App.-Houston [14 Dist.],2008.
Harris County v. Clear Channell Outdoor, Inc.
Not Reported in S.W.3d, 2008 WL 1892744 (Tex.App.-Hous. (14 Dist.))

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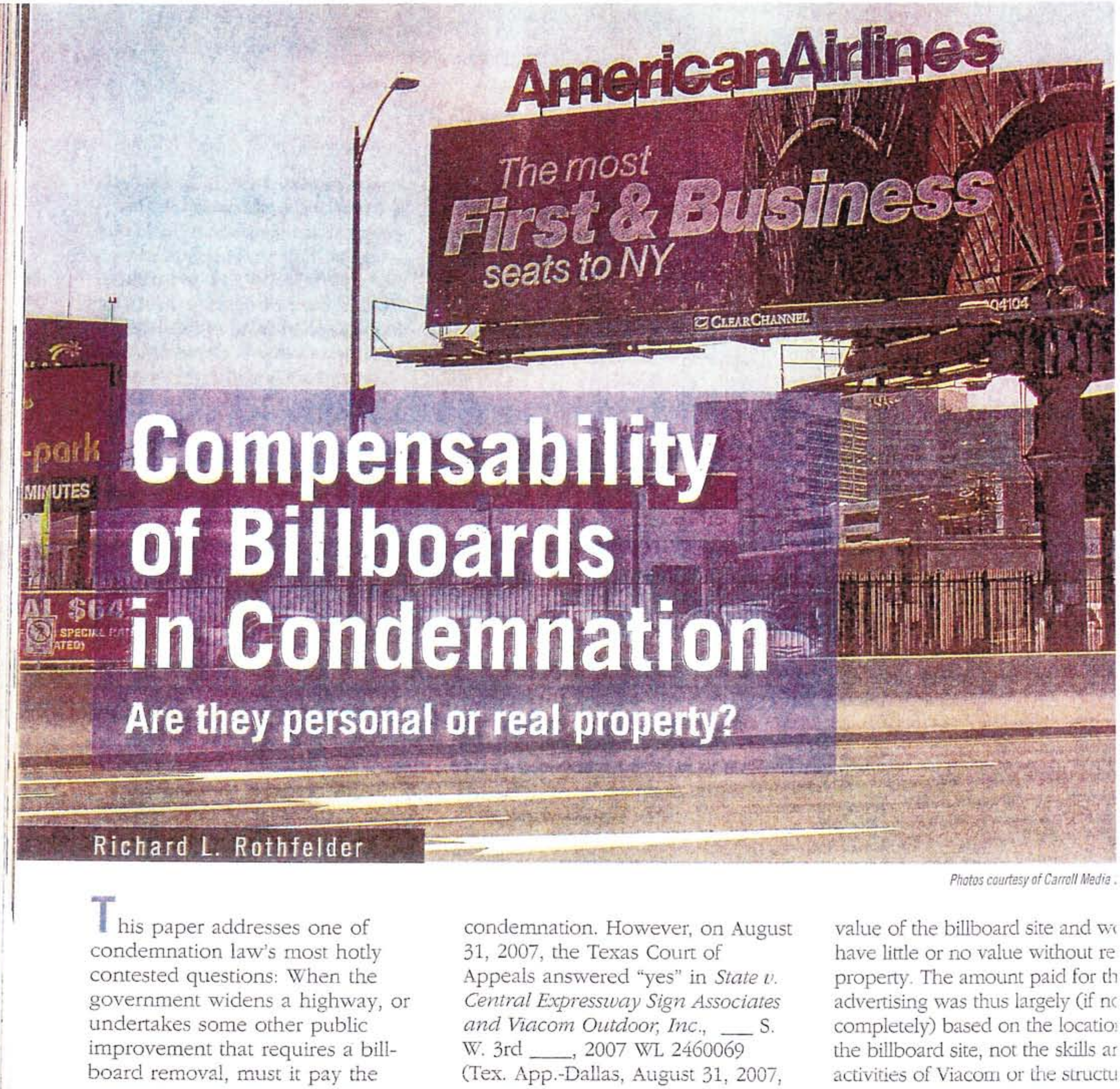


Compensability of Billboards in Condemnation

Are they personal or real property?

Richard L. Rothfelder

Photos courtesy of Carroll Media .

This paper addresses one of condemnation law's most hotly contested questions: When the government widens a highway, or undertakes some other public improvement that requires a billboard removal, must it pay the owner just compensation? Most governmental entities typically answer "no," arguing that billboards are personalty [moveable assets that aren't real property], and only entitled to relocation benefits.

Billboard owners, by contrast, claim billboards are like any other private property; if the government takes or damages them for a public purpose, it must pay just compensation, regardless of how the property is characterized.

Existing case law

Texas and most other states have limited case law as to whether billboards are compensable in condemnation. However, on August 31, 2007, the Texas Court of Appeals answered "yes" in *State v. Central Expressway Sign Associates and Viacom Outdoor, Inc.*, ___ S. W. 3rd ____, 2007 WL 2460069 (Tex. App.-Dallas, August 31, 2007, no pet.h.). In so ruling, the Court rejected most of the government's arguments discussed below. For example, the Court rejected the State of Texas' argument that billboard-advertising revenue was unrelated to the underlying realty and not compensable:

"The billboard site, in a very busy location in North Dallas, generated a significant amount of income from advertisers. Viacom received this income by entering into 'advertising contracts.' The contracts were location specific and required Viacom to do little more than post and maintain signs on the billboard structure. The value of the physical billboard structure itself was insignificant to the value of the billboard site and w
have little or no value without re
property. The amount paid for th
advertising was thus largely (if nc
completely) based on the locatio
the billboard site, not the skills ar
activities of Viacom or the structu
of the sign. We conclude income
generated from such advertising i
generated by the real property uр
which the billboard structure is
located." Id.*4

The Court rejected the possib
of relocation as an excuse for
denying compensation for bill-
boards: "[I]ncome received from
billboard site is location specific
and not unique to the billboard
structure. Further, to relocate the
billboard, another such site wou
have to be acquired. Any such
income so generated is not bein
'replicated' any more than it cou
be said 'ordinary' rent is replicat
when a landlord generates incor
after requiring another rental pr

erty . . .[W]e conclude income received for billboards is primarily attributable to the land . . ." Id.

The State's argument that "income generated by a billboard should not be considered because such income is determined by traffic flow and damages for such loss of 'visibility' and 'exposure to traffic' are not compensable" was also denied by the Court. Id.*5.

Other states and commentators have addressed this topic, with myriad results. For example, in *Lamar Corp. v. City of Richmond*, 241 Va. 346, 402 S.E.2d 31 (1991), the Supreme Court of Virginia contrasted the billboard-characterization issue with disputes between a landlord and tenant, versus. a condemnor and condemnee. The Court said billboards were compensable in condemnation, regardless of definition:

"Under the modern law of [trade] fixtures, and the terms of the leases here, structures attached by the lessee to the real estate may be removed by the lessee at any time during the term, provided such removal can be made without injury to the freehold. To apply the three-prong test would, therefore, inevitably result in a finding that the lessee's structures were personalty, precluding their inclusion in the condemnation award and precluding any compensation to the lessee therefrom, even though the structures were acquired or damaged by the condemnation. Therefore, we have adopted the general rule that, as between the condemnor and lessee, structures attached to the condemned real estate, but owned by the lessee, are realty. This is the case, even though, as between the landlord and lessee, the structures may be personalty." Id. at 34 (citations omitted).

Other cases support such compensation: *Vivid, Inc. v. Fiedler*, 182 Wis.2d 71, 512 N.W.2d 771 (1994); *Lamar Advertising Co. v. Charter Township of Clinton*, 241 F. Supp.2d 793 (E.D. Mich. 2003); *Lamar Corp. v. Commonwealth Transportation Commission*, 262 Va. 375, 552 S.E.2d 61 (2001); *City of Fort Collins v. Root Outdoor Advertising, Inc.*, 788 P.2d 149 (Colo. 1990); and *RHP, Inc. v. City of Ithaca*, 457 N.Y.S. 2d 645 (NY App. Div. 1982).

Other states' appellate courts have issued opinions that deny such compensation: *Commissioner of Transportation vs. Rocky Mountain, LLC*, 894 A. 2d 259 (Conn. 2006) and *Rite Media, Inc. vs. Secretary of the Massachusetts Highway Department*, 712 N.E. 2d60 (Mass. 1999).

Finally, Nichols on Eminent Domain, which canvassed billboard cases nationwide, concludes government's denial of compensation based on the realty and personalty distinction "misses the mark":

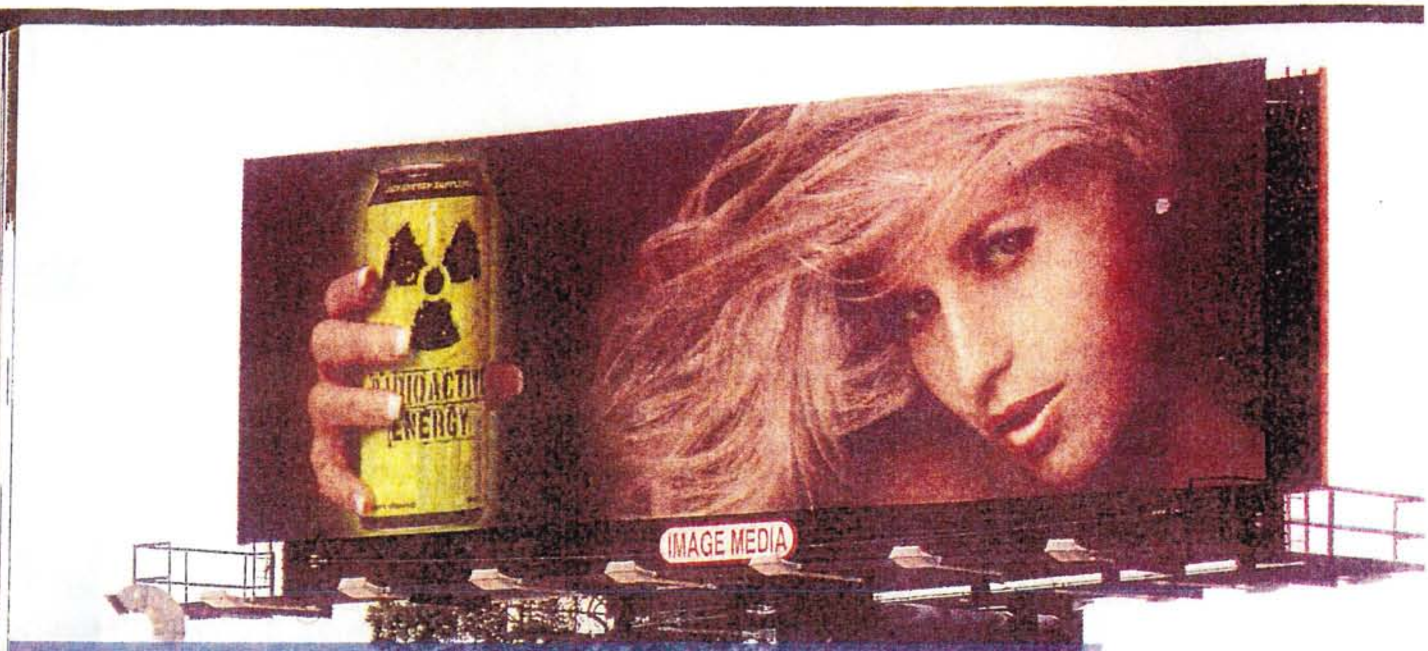
"Virtually all courts dealing with that assertion, when made by the condemnor in eminent-domain proceedings, hold that, in so far as determining compensability of signs as against the government, compensation is due to the sign owner for the billboard, provided the lease has not been terminated at the time the condemnor acquired the land. This conclusion is ordinarily predicated on the theory that it makes no difference whether the sign is classified as personalty, realty, fixture, trade fixture, improvement or structure, because the taking of the land includes all that is attached to it, and this appears to be the better rule." Nichols on Eminent Domain, §23.03 [5], pp. 39-42.

Government's argument

Highway improvements by governmental entities often require billboard removals. Most governmental entities offer only reimbursement of relocation expenses under federal and state laws for billboards displaced by highway improvements. [See Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 USC §4601; Texas Property Code, §21.043.]

The government argues billboards are characterized as personal property, which the owner can simply relocate and operate at a different site, thus negating compensation. Assuming only real property is compensable in eminent domain, the government then applies various judicial tests to determine if an item is real

The value of a billboard clearly changes if it's moved. A pole set in concrete clearly constitutes a permanent structure.



Consequently, billboard owners argue they're legally entitled to fair-market value when their billboards are displaced by highway improvements or other public projects.

or personal property.

For example, the Texas Supreme Court, in *Logan vs. Mullis*, 686 S.W. 2d 605 (Tex. 1985), examined the following factors to determine a drainage culvert was "personalty:"

1. The mode and sufficiency of annexation, either real or constructive;
2. The adaptation of the article to the use or purpose of the realty; and
3. The intention of the party to annex the chattel to the realty.

The Texas DOT for example, articulates this test in its TxDOT Appraisal and Review Manual, Ch.3, §2, pp. 3-4. The manual illustrates several situations that distinguish personalty and realty:

1. Air-conditioning units: Ordinarily, such units are not permanently affixed to a building. They're often easily removed without damage to the building. Their standard design allows installation on most buildings. Because their purpose is temporary relief from the heat, they wouldn't be considered fixtures. However, an opposite conclusion would be justified if the units were mounted in special spaces cut in the walls or if the window frames required considerable alteration prior to installation.

2. Furniture: All such items are considered personal property, including gas stoves and electric refrigerators. However, some "built-in units" could be exceptions, such as dishwashers.

3. Carpeting: Sometimes, carpet merely protects a finished floor, thus it wouldn't be considered permanent. Thus, it rates as personal property, even though it may be secured by tacks to prevent slipping. However, wall-to-wall carpeting on an unfinished wood or concrete floor would justify an opposite conclusion. Id. at pp.3-5.

In summation, most governmental entities treat billboards as relocatable personal property, worthy of only relocation rights and costs, regardless of actually feasibility. The government concludes compensation should be denied in eminent-domain cases, to avoid "double recovery" via both relocation and compensation.

Billboard owners' argument

Billboard owners collectively argue relocation of their billboards, displaced by highway improvement, should be optional, but not a mandate. In contrast, federal and state constitutions and statutes strictly require government compensation when billboards are removed for public use. If the owner chooses to relocate his billboard, compen tion would be satisfied, but the owner wouldn't be forced to acce such compensation.

The billboard owner often ha sound business and legal reason for rejecting relocation and choosing compensation. Housto for example, incorporates amort tion: the owner can relocate and operate his billboard for only 10 years, after which he must remo it without any compensation. [Se Houston Sign Code, §4617(a)(10

Indeed, Section 4617(b) of the Houston Sign Code declares this option shall not "be construed to abrogate the right of the sign owner . . . to refuse to accept th proposal by the governmental u for the . . . relocation of the sign under this section and to choose instead to seek monetary compensation."

Of course, the billboard own can't seek both billboard reloca tion and compensation. Most applicable state regulations require the billboard owner to execute a written damages wai when choosing relocation inste of an eminent-domain award. [See 43 Texas Administrative Code §21.160(e).]

Consequently, billboard owne argue they're legally entitled to fa market value when their billboar are displaced by highway improv ments or other public projects, whether the billboard is called personalty, realty or anything else.

Constitutions: The U.S. Constitution must initiate any analysis of billboard owners' and the government's rights and obligations. The federal and various state constitutions grant enormous power to eminent domain, but this is counterbalanced by the corresponding obligation to pay just compensation for this private property taken for public use, regardless of nomenclature. The Fifth Amendment simply states: "nor shall private property be taken for public use, without just compensation." The U. S. Supreme Court gives broad meaning to the term "taken":

"In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one doesn't take what one destroys. But the construction of the phrase hasn't been so narrow. The courts have held that the deprivation of the former owner, rather than the accretion of a right or interest to the sovereign, constitutes the taking. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

Thus, the government's standard argument – it doesn't want the billboard it displaces -- is irrelevant; the government has still taken the owner's billboard. The Constitution also broadly defines the word "property," and it's "doubtless used in its legal sense, and means not only the thing owned, but also every right which accompanies ownership and its incident." *Gulf, Colorado & Santa Fe Ry. v. Fuller*, 63 Tex. 467, 469 (1885); accord *Houston N. Shore Ry. Co. v. Tyrell*, 98 S.W.2d 786, 793 (Tex. 1936).

The "constitutional protection is not confined to real property, but includes any character of property necessarily damaged in promoting a public enterprise." *Dallas County v. Hart Bros*, 271 S.W. 408, 409 (Tex. Civ. App. – Texarkana, 1925), rev'd on other grounds, 279 S.W.2d 1111, 1112 (Tex. Comm'n App. 1926, opinion adopted); *Renault, Inc. v. City of Houston*, 415 S.W.2d 948, 952 (Tex. Civ. App.—Waco 1967), rev'd on other grounds, 431 S.W.2d 322 Tex. 1968) ("The term 'property,' as used in the Fifth Amendment, relates to every species of property, including personalty.")

In fact, the Supreme Court says the Fifth Amendment isn't designed to protect property at all, but the rights of a person to use the property: "The dichotomy between personal liberties and property rights is a false one. Property doesn't have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a 'personal' right, whether the 'property' in question is a welfare check, a home or a savings account." *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552 (1972).

Real versus personal property: Regardless of relevance, billboards have been specifically classified as real property under various federal and state statutes, legal tests and governmental correspondence and manuals. For example, the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §4652 (1995), confirms that compensation must be paid for sign structures.

Specifically, Section 4652 states: "Notwithstanding any other provisions of law, if the head of a Federal Agency acquires any interest in real property in any State, he shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired, and which he requires to be removed from such real property or which he determines will be adversely affected by the use to which such real property will be put." (emphasis added)

Courts nationwide have recognized the word "structure," under the Uniform Act, includes sign structures. Thus, when the Uniform Act applies, i.e., when the government acquires property for highway improvements, the condemnor must also acquire the billboard and pay compensation. *United States v. 40.00 Acres of Land, More or Less*, 427 F.Supp. 434, 440 (W.D. Mo. 1976); *Whitman v. State Highway Comm'n of Missouri*, 400 F.Supp. 1050, 1070 (W.D. Mo. 1975).

Governmental regulations, right-of-way manuals and correspondence: Governmental entities regularly referred to billboards as "realty" in their regulations, manuals and correspondence . . . until they realized how this affected their characterization of billboards. For example, before amending it in 2004, TxDOT provided the following [in 43 Texas Administrative Code §21.160(c)(10)] as relocation guidelines for displaced billboards:

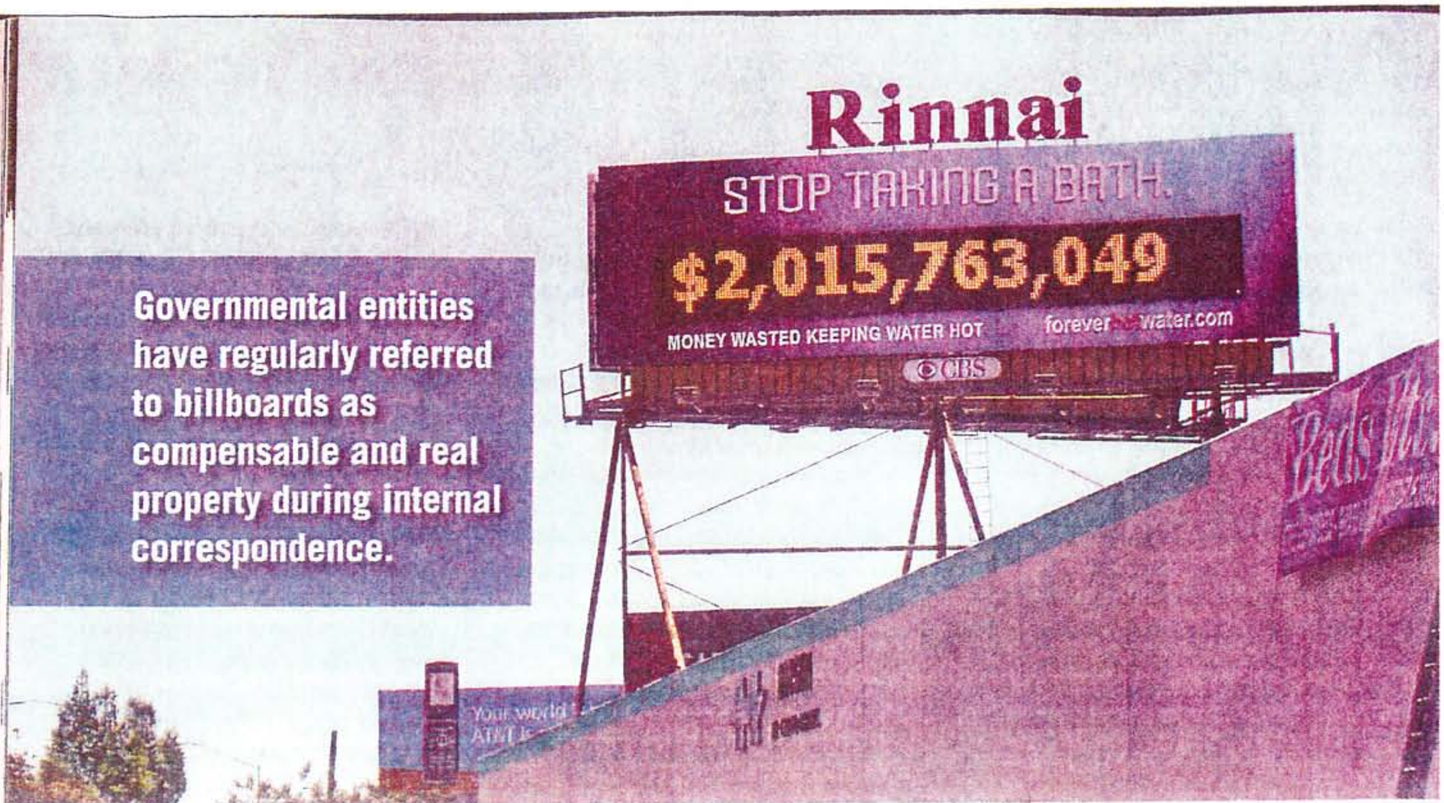
"A permit may be issued pursuant to this section if a sign is designated by the owner as personal property and the sign owner receives relocation benefits, or, if the sign is designated by the owner as realty, valued and purchased according to the department's sign-valuation schedules, and retained by the sign owner. A permit may not be issued under this section to relocate a sign purchased through an eminent-domain proceeding." (emphasis added)

The Texas Highway Commission amended this provision at TxDOT's request. TxDOT said it conflicted with current department policy:

"Section 21.160 also sets the criteria for alternative locations for these relocated signs. There has been confusion due to the language included in §21.160(c)(10) that the department may consider sign structures as real property. This section is contrary to current department policy, and §21.160 is amended to delete any reference to the treatment of signs as real property for relocation assistance purposes." (emphasis added) [Texas Register, Vol. 29, No. 37, September 10, 2004.]

TxDOT's Right of Way Manual also outlined the procedure for acquiring non-relocated billboards through eminent domain:

"When a sign is not voluntarily



Governmental entities have regularly referred to billboards as compensable and real property during internal correspondence.

offered to the State by the sign owner, and the sign owner or site owner refuses to accept the State's offer of compensation, the State may proceed to acquire the sign or site interest, or both such interests, by an eminent-domain proceeding . . . The procedure for handling an eminent-domain proceeding, including the award, deposit, appeal and settlement, will be the same for the Department's right-of-way acquisition through eminent domain." [TxDOT Right of Way Manual, Ch. VII, §§725.18 and 725.19, pp. 7-50 and 51.]

Governmental entities have regularly referred to billboards as compensable and real property during internal correspondence. For example, TxDOT's Director of District Right of Way for the Houston District stated the following in her September 1999 letters to high-ranking officials with the City of Houston and Harris County:

"In the past, our office has requested an interpretation from the Federal Highway Administration and our Austin office, which determined the necessity for paying compensation for the signs affected by proposed transportation projects. These signs are considered real property, and, as such, Title III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 must be complied with. Failure to comply with Title III would jeopardize the present and future federal transportation funding. Federal regulations, specifically Title 49, Code of Federal Regulation (CFR), § 24.105 (a), mandate that TxDOT must pay compensation or relocation benefits to move the signs, regardless of whether or not the sign owner's leases have been terminated." [September 1 and 13, 1999 letters from Frances Willison to First Assistant Harris County Attorney Michael Stafford and Houston Right of Way Agent Charles Manual.] (emphasis added)

The appropriate legal standards: The three-prong test articulated in *Logan v. Mullins*, supra, and other cases cited by the government to distinguish between realty and personalty, applies to ownership disputes between landlords and tenants, but not to the compensation owed by condemnors to condemnees. The U.S. Supreme Court clearly foreclosed use of the test in condemnation cases when it held, "this rule [personalty vs. realty] cannot be invoked by the condemnor. If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award." *Almota Farmers Elevator and Warehouse Co., vs. United States*, 409 U.S. 470, 478, n. 5 (1973).

For condemnation cases, by contrast, compensation is required for "improvements" on land. As ear as 1893, for example, the Texas Supreme Court recognized that "the word 'land' includes, not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage and water, or by the hand of man, as buildings and fences." *McGee Irrigating Ditch Co. v. Hudson*, 85 Tex. 587, 22 S.W. 967, 968 (1893).

As such, "improvements situated upon the portion of the land taken are to be considered as a part of th realty." *State v. Carpenter*, 89 S.W.2 979, 980 (Tex.1936); accord *Gomez v. State*, 418 S.W.2d 544, 548 (Tex. Civ. App. – El Paso, 1967, rev'd on other grounds, 426 S.W.2d 562 (Tex.1968). In *Texas Pig Stands, In vs. Kruegar*, 441 S.W.2d 940, 944 (Tex. Civ. App – San Antonio 1969 writ ref'd n.r.e.), the Court stated "i is uniformly recognized that where a lessee erects improvements on th virtue of his agreement with the lessor . . . lessee is entitled to . . . value of such improvements [in condemnation]."

Similarly, the Court, in *Brazos River Conservation and Reclamation District vs. Adkisson*, 173 S.W.2d 294, 299 (Tex. Civ. App—Eastland 1943, writ ref'd) noted that, where the fixture is vita to the continuation of the lessee's estate, such fixtures "must be paid for as part of the real estate," and any agreement allowing removal of the fixtures by the lessee "must be rejected . . . as irrelevant."

While many improvements, including even homes, can be physically dismantled and relocated at a different site, the Court, in *State v. Miller*, 92 S.W.2d 1073 (Tex. Civ. App.-Waco 1936, no writ) demonstrated how a condemnor is prohibited from using this possibility to deny compensation. The State of Texas had argued it shouldn't be required to compensate for improvements because the building "could be removed from the condemned land to another location (on the remainder) at little expense and without material damage," but the Court rejected this position as intolerable:

"[An eminent domain] proceeding is in the nature of an enforced sale in which the agency so appropriating the land stands in the position of a buyer. Consequently, it must either take the land with permanent improvements thereon as it stands and pay for it accordingly, or reject it in total. It can't strip the improvement therefrom and compel the owner to provide other land to receive the salvage, and then rightfully insist that the owner is compensated by the payment of the value of the naked land so appropriated." Id. at 1074.

In conclusion, billboard owners say governmental treatment of their billboards as non-compensable; relocatable, personal property is inconsistent and discriminatory, and contrived solely to avoid acquisition costs. Even if the three-part test accurately determined compensation for condemned billboards, no rational person would suggest a steel structure more than 40 ft. tall, and imbedded in a 20-ft.-deep concrete foundation, is any less attached or annexed to the real estate than air-conditioning units, wall-to-wall carpeting, or built-in furniture. Indeed, the government has readily and repeatedly called billboards "real property" in its correspondence, manuals and regulations, before realizing its impact on acquisition costs. Once again, therefore, billboards displaced for public improvements are compensable in condemnation, regardless of what the government calls them.

State and federal highway-beautification acts: Rather than engage in this name calling of realty versus personalty, the federal and various state highway beautification acts specifically compel compensation payment upon removal of any "outdoor advertising sign." Section 131(g) of the federal act, for example, was amended in 1978 by adding the following phrase in bold font to the section: "Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section . . ." (emphasis added).

The amendment responded to a Federal Highway Administration (FHWA) decision, which declined to penalize a state when a city removed a sign pursuant to its police power. The Court, in *City of Ft. Collins v. Root Outdoor Advertising, Inc.*, 788 P.2d 149 (Colo. 1990) explained, "Congress amended the act to require just compensation for the removal of all signs within the act's control zone, 'whether or not removed pursuant to or because of the federal act.'" Id. at 153.

The FHWA, in reviewing the 1978 amendments, also stated:

"The States are required to ensure that just compensation is paid for any sign lawfully erected along the Interstate and primary systems and required to be controlled, even though the removal is made pursuant to a State or local law unrelated to the Highway Beautification Act." Id. at 154.

An application of this rule is found in *Vivid, Inc. v. Fielder*, 182 Wis.2d 71, 512 N.W.2d 771 (1994), where the Wisconsin DOT acquired the land on which Vivid's two signs were located, contending the signs were Vivid's personal property and could be moved to another permitted location within the market area. The Wisconsin Supreme Court held, because the signs were subject to the federal and state highway-beautification acts, just compensation was required:

"The fact that the billboards were removed in the context of an eminent-domain proceeding, rather than under [the Highway Beautification Act] is irrelevant. The express language of [the statute] requires payment of just compensation, regardless of whether the sign was removed because of this section." Id. at 79.

Conclusion

The goal to contain government spending, including acquisition costs in eminent-domain proceedings, is understandable and even desirable. However, attempting to achieve that goal by a result-oriented analysis that treats billboards as non-compensable and relocatable, personalty can't be allowed to override fundamental Constitutional protections and rights. Justice Brandeis' warning about governmental powers is especially appropriate in takings cases, where clever lawyering can obviate the checks and balances on such power:

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."

Olmstead v. United States, 277 U.S. 438, 479 (1928)(Brandeis, J., dissenting), overruled in part, 388 U.S. 41 and 389 U.S. 347. Just compensation is constitutionally mandated whenever billboards are taken for public use, just as compensation is required when homes, offices and any other private property is taken or damaged by the government for the public's use. ■