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Billboard Valuation – Sign Owner's Perspective
Presented by Richard L. Rothfelder, Rothfelder & Falick, L.L.P.

The valuation of billboards, or off-premise signs, has become a hot topic for the appraisal industry in the last several years for a couple of reasons. First, the recent increase in highway improvements undertaken by the Texas Department of Transportation and other condemnors requires the acquisition of title to, or at least the removal of billboards adjacent to the thoroughfares. Second, there has been unprecented consolidation in the outdoor advertising industry, as three multi-national corporations have now acquired the majority of the billboards that were formerly operated by hundreds of companies and individuals in Texas.

In both of these instances, the appraiser is called upon to evaluate extraordinarily valuable property. It is not unusual for billboards located at ideal sites to generate more than $300,000.00 per year in advertising revenue, or landowners to receive more than $50,000.00 per year in ground rental income. Indeed, the values assigned to billboards in condemnation cases are often higher than those afforded to the underlying real estate.

Perhaps because of the financial burden imposed on condemnors in the acquisition of billboards, several issues have arisen on the compensability of billboards in condemnation cases. For example, TxDOT or other condemnors have attempted to minimize or even eliminate their acquisition obligations by asserting the following arguments in condemnation cases:

1. Billboards are personalty rather than realty, so they are not subject to compensation in a condemnation proceeding.
2. The advertising revenue generated from billboards represents business profits, which are not compensable in condemnation proceedings.

3. If the title to the real estate underneath the billboard can be acquired, so that the condemnor can take an assignment and then terminate the billboard lease, the owner has no further contractual rights to maintain his billboard and must remove it without compensation.
4. To the extent they are compensable, billboards should be appraised pursuant to the cost approach, and not under the gross income multiplier method combining the income and comparable sales approaches.

Representatives of the outdoor advertising industry adamantly oppose condemnor's positions on these issues, all of which will be thoroughly debated in this seminar presentation. For a more detailed discussion of these and other legal issues related to the condemnation and valuation of billboards, I have also attached Chapter 23 of *Nichols on Eminent Domain*. Don T. Sutte has also published an outstanding book on billboard appraisal methodology, entitled *The Appraisal of Outdoor Advertising Signs* published in 1994 by the Appraisal Institute. Finally, a typical brief submitted on behalf of the billboard owner in a condemnation case is also attached, which categorically rebuts these arguments for diminishing the compensability of billboards.

COMPENSABILITY OF BILLBOARDS UNDER TEXAS CONDEMNATION LAW

Are They Personal Or Real Property; Or Does It Make Any Difference?

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Omni Hotel Downtown, Austin, Texas

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I. Introduction

This paper addresses one of the most hotly contested questions in Texas condemnation law: when the government widens a highway, or undertakes some other public improvement requiring removal of a billboard, is it required to pay the owner just compensation? The Texas Department of Transportation ("TxDOT") and other governmental entities typically answer no, arguing that billboards are personalty only entitled to relocation benefits. Billboard owners, by contrast, claim billboards are like any other private property, so that if the government takes or damages them for a public purpose, it must pay just compensation without regard to the characterization of the property.

II. Background

A. Outdoor Advertising Industry

Outdoor Advertising is the second fastest growing medium of advertising in the world, right behind the internet. Several new nontraditional types of outdoor advertising are being used, such as advertisements displayed on buses, taxis, trucks, and other vehicles; benches, bus shelters, public toilets, and other street furniture; inside and outside of sports facilities; and even wrapped around the perimeter of high rise buildings.

The most popular and commonly known form of outdoor advertising remains the use of billboards. Billboards, also known as "off premise signs," contain advertisements of goods or services not located on the same site as the sign. By contrast, "on premise signs" identify the goods, services, or businesses offered or operated on the same site as the sign.

Billboards come in many different heights, sizes, and materials. Modern billboards, however, are usually situated on a single steel column, imbedded approximately 20 feet into a concrete foundation, with an overall height of 42.5 feet, containing two display faces of 14' x 48' each.

As billboards have become more valuable, their owners have attempted to acquire more security by purchasing fee title or permanent easements of the land underneath them. However,

usually billboards are maintained pursuant to 20 year or other long term leases, which often afford the owner the right to remove his billboard upon expiration of the lease.

The advertising revenue generated from the billboard displays vary, depending upon the location, traffic count or "daily effective circulation," and type of thoroughfare and billboard. However, a good billboard next to the Katy Freeway in Houston, for example, could rent for approximately $20,000.00 per month.

Billboard companies rely upon advertising revenue when buying or selling billboards. They typically utilize an "Annual Gross Rent Income Approach," under which the annual advertising revenue generated from the billboard is multiplied by a factor derived from comparable billboard sales in order to determine fair market value. For example, if an Annual Gross Rent Multiplier was determined from the data to be 9 for a particular billboard valuation, a billboard earning $240,000.00 per year would sell for approximately $2,160,000.00.

B. Billboard Regulations

1. *Federal*

Billboards are heavily regulated at the federal, state, and local level. The Federal Highway Beautification Act ("HBA"), 23 USC §131, requires the states to effectively control the erection and maintenance of billboards within 660 feet of interstate and primary highways by imposing regulations limiting billboards to specified commercial and industrial areas. Federal law also compels the payment of just compensation whenever regulated billboards have to be removed because of governmental actions:

> 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.

23 USC § 131(g).

2. *State*

The HBA imposes financial penalties on states that do not enact legislation that complies with the Federal Act. 23 USC § 131 (b). Texas complied by passing the Texas Highway Beautification Act, Chapter 391 of the Texas Transportation Code. *See* Tex.Transp. Code §391.002 (a) ("[I]t is the intent of the legislature to comply with the [HBA]. This chapter is conditioned on that law.")

The Texas HBA contains a laundry list of height, size, spacing, and proximity restrictions on the erection and relocation of billboards adjacent to federal interstate and primary highways. Section 391.033 of the Texas Transportation Code also addresses acquisition of billboards by the State of Texas:

(1) The Commission may purchase or acquire by eminent domain outdoor advertising that is lawfully in existence on a highway in the interstate or primary system.
(2) If an acquisition is by eminent domain, the Commission may pay just compensation to:
    (a) The owner for the right, title, leasehold, and interest in the outdoor advertising; and
    (b) The owner or, if appropriate, the lessee of the real property on which the outdoor advertising is located for the right to erect and maintain the outdoor advertising.

The Texas Attorney General has acknowledged the obligation under the HBA to pay compensation when a regulated sign has to be removed. Op. Tex. Atty Gen. No. GA – 0192, 2004 WL 1140410, *1 (2004).

The Texas Highway Commission also adopted rules to implement the regulation of outdoor advertising adjacent to federal interstate and primary highways. *See* 43 Texas Administrative Code §21.141 *et seq.* Section 21.160 addresses the relocation of billboards removed to accommodate regulated highway improvements, and subsection (e) requires the execution of a damages waiver when the billboard owner elects the option of relocating the sign:

> The sign owner must enter into a written agreement with the acquiring agency waiving and releasing any claim for damages against the acquiring agency and the State for any temporary or permanent taking of the sign in consideration of the payment by the acquiring agency of a mutually agreed specified amount of money calculated to cover the cost of the sign owner of the relocation of the sign.

3. *Municipal*

Chapter 216 of the Texas Local Government Code governs regulation of outdoor advertising signs by cities, including home-rule cities. *See* Op. Tex. Atty Gen No. GA- 0192, 2004 WL 1140410 at *3. "A municipal sign ordinance applies throughout the city and may include the city extraterritorial jurisdiction." *Id.* at *4. A municipality may impose its own regulations to signs on streets that are not part of the interstate of primary highway systems; however, "state law supersedes such ordinances in areas subject to the HBA and Transportation Code Chapter 391." *Id.* at *5. Accordingly, municipalities usually pass additional regulations on billboards and on premise signs within their corporate limits and extraterritorial jurisdictions.

Some cities, such as Fort Worth, do not permit the erection of new billboards, nor the relocation of existing billboards displaced by highway improvements. Other cities, such as Houston, prohibit the erection of new billboards [Houston Sign Code, §4612(b)], but permit the limited relocation of existing billboards to accommodate highway improvements.

Section 4617(a)(2) of the Houston Sign Code, more particularly, affords the "sign owner the option of seeking a special permit to alter or relocate a sign" removed because of "a publicly funded transportation system improvement project being undertaken by the State of Texas or a political

subdivision". However, this "special permit" allows the operation of the billboard at the relocation site for only ten years, after which the billboard must be removed by its owner without any additional compensation. Houston Sign Code, §4617(a)(10). Finally, Section 4617(b) confirms that relocation and 10 years of operation at the relocation site is an option available to the billboard owner, but not an obligation imposed on him:

> Nothing contained in this section shall be construed to abrogate the right of the sign owner or underlying property owner to refuse to accept the proposal by the governmental unit for the alteration or relocation of the sign under this section and to choose instead to seek monetary compensation.

III. Existing Case Law on the Compensability of Billboards in Condemnation.

A. Texas Case Law

Texas and most other states have limited case law on whether billboards are compensable in condemnation. However, on August 31, 2007, the Texas Court of Appeals answered this question "yes" in *State vs. Central Expressway Sign Associates and Viacom Outdoor, Inc.*, ___ SW 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 would have little or no value without real property. The amount paid for the advertising was thus largely (if not completely) based on the location of the billboard site, not the skills and activities of Viacom or the structure of the sign. We conclude income generated from such advertising is generated by the real property upon which the billboard structure is located.

*Id.**4 The Court went on to reject the possibility of relocation as an excuse for denying compensation for billboards: "[I]ncome received from a billboard site is location specific and not unique to the billboard structure. Further, to relocate the billboard, another such site would have to be acquired. Any such income so generated is not being 'replicated' any more than it could be said 'ordinary' rent is replicated when a landlord generates income after requiring another rental property...[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.

In addition to *State vs. Central Expressway Sign Associates*, the following proceedings are currently pending in the Texas Courts of Appeal, and they may at least partially address the issue of the compensability of billboards in condemnation: No. 140600696CV, Harris County Flood Control District vs. Roger Roberts and Clear Channel Outdoor, in the 14th Court of Appeals, Houston; No. 02-06-01107-CV, State of Texas vs. MNC Retail/Service Center and Clear Channel Outdoor Inc., in the 1st Court of Appeals, Houston; No. 01-07-00353-CV; The State of Texas vs. William R. Murphy and Clear Channel Outdoor, Inc., in the First Court of Appeals, Houston; and No. 14-07-00369-CV, The State of Texas vs. Sterling Family Properties and Clear Channel Outdoor, Inc., in the Fourteenth Court of Appeals, Houston.

The Harris County Courts at Law have also granted summary or final judgments that billboards were condemned and compensable in the following proceedings: Cause No. 848,274, State of Texas v. SignAd, Ltd.; Cause No. 834-248, State v. Clear Channel Outdoor, Inc.; Cause No. 838,887, State v. MNC Retail/Service Center and Clear Channel Outdoor, Inc.; Cause No. 824,011, Harris County v. Clear Channel Outdoor, Inc; Cause No. 857,472, State of Texas vs. William R. Murphy and Clear Channel Outdoor, Inc.; and Cause No. 885715; State of Texas vs. William D. Hardin, et ux., et al.

B. Out of State Cases and Commentators

Other states and commentators have written on the compensability of billboards in condemnation, and they have reached different results. For example, in *Lamar Corp. v. City of Richmond*, 241 Va. 346, 402 S.E.2d 31 (1991), the Supreme Court of Virginia addressed the characterization of a billboard as personalty or realty, in the context of disputes between a landlord and tenant and between a condemnor and condemnee. The Court held billboards were compensable in condemnation, regardless of what they are called, reasoning as follows:

> Under the modern law of [trade] fixtures and the terms of the leases here, structures attached by the lessee to the real estate may be removed by the lessee at any time during the term, provided such removal can be made without injury to the freehold. To apply the three-prong test set out above would, therefore, inevitably result in a finding that the lessee's structures were personalty precluding their inclusion in the condemnation award and precluding any compensation to the lessee therefrom eve 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).

Some of the other out of state cases supporting the compensability of billboards in condemnation include the following: *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 Transp. 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); *RHP, Inc. v. City of Ithaca*, 457 N.Y.S. 2d 645 (NY App. Div. 1982).

The appellate courts of some other states have issued opinions denying compensation for billboards removed to accommodate public projects, such as the following: *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 canvassed the billboard cases across the country, and concludes the government's denial of compensation based on the distinction between realty and personalty "misses the mark":

> [V]irtually 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.

IV. Government's Argument and Authorities.

Highway improvements by TxDOT and other governmental entities have been extensive throughout the State, including the expansion of I-10 from Downtown Houston to West of Katy. The Katy Freeway project alone required the removal of over 100 billboards.

Most governmental entities, including TxDOT, offer only relocation benefits 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 sometimes does not even name the billboard owner in the eminent domain case, especially if the lease is not recorded, or the fee is acquired through voluntary purchase.

In support of its position, the government argues that billboards are characterized as personal property, for which compensation is not required in a condemnation proceeding. Specifically, it contends that Section 21.042 of the Texas Property Code limits recovery in a statutory eminent domain proceeding to the market value of any condemned real property, plus damage to the remainder.

Assuming that only real property is compensable, the government then proceeds to utilize the three part test under *Logan vs. Mullis*, 686 S.W. 2d 605 (Tex. 1985), to argue that billboards are characterized as personalty or fixtures: (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. Since the third element regarding the intent of the party

placing the property is preeminent, *Sonnier vs. Chisholm-Rider Co., Inc.*, 909 S.W. 2d 475, 479 (Tex. 1995), the government emphasizes the provision often found in billboard ground leases reserving the right of the owner to remove his billboard after the termination of the lease.

TxDOT even articulates this test in its Appraisal and Review Manual. TxDOT Appraisal and Review Manual, Ch.3, §2, p. 3-4. The TxDOT Manual goes on to illustrate several situations distinguishing between personalty and realty:

- Air-conditioning units: Ordinarily such units are not permanently affixed to a building and are designed to be easily removable without damage to the building. They are usually designed for installation in any type building rather than peculiar buildings. The purpose for such units is to provide temporary relief from the heat; therefore, the conclusion would be that these units are not 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 in order to install the units.
- Furniture: All items will be considered personal property, including gas stoves and electric refrigerators. However, under certain circumstances a different conclusion may be reached if some of the items of furniture are "built-in units." i.e. dishwashers.
- Carpeting: Under this limited fact situation, it appears that the carpet was merely put down to protect the finished floors as distinguished from making it a permanent part of the building. Therefore, it would be concluded that it has the nature of personal property even though it may be secured in certain spots by tacks or some other means to prevent slipping. However, if there were wall-to-wall carpeting on an unfinished floor of wood or concrete, then an opposite conclusion would be justified.

Id. at p.3-5.

TxDOT also states in its Right of Way Manual that "when property is acquired in fee or easement in the State's name in condemnation proceedings, title to all *fixed improvements* located on the property should also be acquired." TxDOT Right of Way Manual, Vol. 4, §4, p. 4-9. Elsewhere in its Manual, TxDOT includes instructions on appraising "lessee-owned improvements." TxDOT Appraisal and Review Manual, Ch. 3, §5, p. 3-23. However, TxDOT's Manual specifically excludes in its instructions to appraisers compensation in eminent domain for billboards, even though they are also improvements owed by lessees. *Id.*

In sum, therefore, TxDOT and most other governmental entities treat billboards as relocatable personal property. They offer only relocation rights and costs, regardless of whether the billboards can actually be legally, physically, or financially relocated. The entities often argue that compensation to the owner in eminent domain should be denied in order to prevent an owner from realizing an unfair double recovery by both relocating and obtaining a condemnation award for his displaced billboard.

V. Billboard Owners' Argument and Authorities.

A. Summary

Succinctly stated, billboard owners argue that the relocation of their billboards displaced by highway improvements is an option they may select, but not an obligation they must obey. By contrast, the Texas and Federal Constitutions and statutes strictly require the government to pay compensation when requiring billboards to be removed for public use. The government's legal obligation of compensation could be satisfied, if the owner elected his option to relocate the billboard, but he does not have to do so.

While he does not need a reason for exercising his constitutional rights, the billboard owner often has sound business and legal reasons for rejecting relocation and choosing compensation for his displaced billboard, such as the limitation to ten years of continued operation imposed by the Houston Sign Code. *See* Houston Sign Code, §4617(a)(10). Indeed, Section 4617(b) of the Houston Sign Code clarifies that the existence of this option shall not "be construed to abrogate the right of the sign owner...to refuse to accept the proposal by the governmental unit for the...relocation of the sign under this section and to choose instead to seek monetary compensation."

Of course, the billboard owner cannot realize an unfair double recovery by seeking both the relocation of his billboard and a condemnation award for taking it. However, this danger is eliminated under 43 Texas Administrative Code §21.160(e), which specifically requires the billboard owner to execute a written damages waiver when electing to relocate his sign instead of seeking an eminent domain award for taking it.

For these reasons, therefore, the billboard owner argues he is legally entitled to recover the fair market value for his billboard displaced by highway improvements or other public projects.

B. Constitutions

Any analysis of the rights and obligations of billboard owners and the government begins with the Constitutions. Both the United States and Texas Constitutions grant the government the enormous power of eminent domain, strictly checked by the corresponding obligation to pay the property owner just compensation for this private property taken for public use, regardless of the nomenclature used for the acquired property.

1. *United States Constitution*

The Fifth Amendment to the United States Constitution simply states: "nor shall private property be taken for public use, without just compensation." In recognition of the government's obligations under the Fifth Amendment, the United States Supreme Court gives broad meaning to the term "taken":

> In its primary meaning, the term 'taken' would seemed to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not 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); *see also Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) ("Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation.").

In fact, the Supreme Court has explained that the Fifth Amendment is not designed to protect property at all, but instead the rights of a person to use the property:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not 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 be a welfare check, a home or a savings account.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972).

2. *Texas Constitution*

The Texas constitutional Takings Clause, Article I Section 17, is even broader than the Fifth Amendment: "no person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person." Texas law is in accord with the U.S. Supreme Court's holding in *General Motors, supra*, that a "taking" is determined by deprivation to the property owner, not gain to the condemnor. *State v. Ware*, 86 S.W.3d 817,825 (Tex.App. -- Austin 2000, no pet.) ("A condemnee must be paid for what it has lost, not for what the condemnor has gained."). Thus, the government's standard argument that it does not want the billboard it displaces by its highway or other public improvements is irrelevant, as the owner has still lost his billboard by the government's action.

In addition to compensation for a "taking," the Texas Constitution obligates the government to pay adequate compensation when property is merely "damaged or destroyed." As explained by the Court in *Brewster v. City of Forney*, 223 S.W. 175, 176-177 (Tex. Comm'n App. 1920):

> The Constitution of Texas and the decision of her courts reveal a zealous regard for the rights of the individual citizen. Not only will they not permit his property to be 'taken' for a public use without compensation, but will not permit it to be damaged unless the citizen is compensated to the extent of such damage. To hold otherwise would be to put upon one citizen a burden which should rest upon the aggregate citizenship, as direct beneficiary of the public work, the construction and operation of which has damaged the property of one citizen.

As in the federal system, the word "property" in Article I Section 17 of the Texas Constitution is also broadly defined, and "is 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 to the constitution relates to every species of property including personalty.") The protection extends not only to real property, but all types of personal property, including improvements, a business, loss of profits, goodwill, and contracts. *See City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978) (loss of rentals); *City of LaGrange v. Pieratt*, 175 S.W.2d 243, 246 (Tex. 1943) (loss of profits); *Lone Star Gas Co. v. City of Fort Worth*, 98 S.W.2d 799, 803 (Tex. Comm'n App. 1936, opinion adopted) (gas plant of a public service corporation).

As far as the United States and Texas Constitutions are concerned, therefore, billboards are compensable whenever they are removed by governmental action for public projects, whether they are called personalty, realty, or anything else.

C. Real versus Personal Property

1. *Uniform Relocation Assistance and Real Property Acquisition Policies Act*

As if it made any difference, billboards have been specifically classified as real property under various federal and state statutes, legal tests, and governmental correspondence and manuals anyway. 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 provides as follows:

> (a) 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 throughout the country have recognized that the word "structure" under the Uniform Act includes sign structures. Thus, when the Uniform Act applies, as it does 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); *see also City of Scottsdale v. Eller Outdoor Advert. Co. of Arizona, Inc.*, 579 P.2d 590 (Ariz. 1978); *Dept. of Transp. v. Heathrow Land and Dev. Corp.*, 579 So. 2d 183 (Fla. Dist. Ct. App. 1991); *State ex rel State Highway Comm'n v. Volk*, 611 S.W.2d 255 (Mo. Ct. App. 1980); *Lamar Corp. v. City of Richmond*, 241 Va. 346, 402 S.E.2d 31 (1991).

2. *TxDOT Regulations*

TxDOT regularly referred to billboards as realty in its regulations until recently. For example, before its amendment in 2004, 43 Texas Administrative Code §21.160(c)(10) provided the following 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)

This provision was amended by the Texas Highway Commission in 2004 at the request of TxDOT, which explained that it was no longer consistent 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.

3. *TxDOT Right of Way Manual*

Although deleted from TxDOT's regulations, the reference to relocated billboards as real property was retained in its Right of Way Manual. TxDOT Right of Way Manual, Vol. 7, Ch. 8, §11, p. 8-24.

TxDOT's Right of Way Manual also outlined the procedure for acquiring billboards through eminent domain, when they are not relocated:

> When a sign is not voluntarily 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.

4. *Government Correspondence*

Governmental entities have regularly referred to billboards as compensable and real property when corresponding with one another. 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. (emphasis added)

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.

5. *The Appropriate Legal Standards*

The three-prong test articulated in *Logan v. Mullins*, *supra*, to distinguish between realty and personalty applies to ownership disputes between landlords and tenants, but not to the compensation owed by condemnors to condemnees. For condemnation cases, the requirement of compensation for improvements on land has been well established by the Texas Supreme Court since 1893. "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). The Texas Supreme Court has regularly repeated this standard, and it remains the law today. "Improvements situated upon the portion of the land taken are to be considered as a part of the realty." *State v. Carpenter*, 89 S.W.2d 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) ("The improvements on the land taken are to be considered as part of the realty."). Finally, the U.S. Supreme Court clearly foreclosed the use of the "Logan" 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).

Texas courts routinely recognize the compensability of improvements such as billboards, which are usually constructed of steel, over 40 feet tall, and imbedded in 20 foot deep concrete foundations. For example, in *Texas Pig Stands, Inc. vs. Kruegar*, 441 S.W.2d 940, 944 (Tex.Civ.App-San Antonio 1969, write ref'd n.r.e.) the Court stated "it is uniformly recognized that where a lessee erects improvements on the 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 vital 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 that it should not 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 cannot 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, the billboard owners point out that the treatment of their billboards by TxDOT and other governmental entities as non-compensable relocatable personal property is inconsistent and discriminatory, and contrived solely to achieve the result of avoiding acquisition costs. Even if the three-part test was applicable for determining the compensability of billboards in condemnation, no rational person would suggest that a steel structure that is over 40 feet tall and imbedded in a 20 foot 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, TxDOT has readily and repeatedly called billboards real property in its correspondence, manuals, and regulations, when it was not cognizant of the impact of the characterization on its acquisition costs. Once again, therefore, billboards displaced for highway or other public improvements are compensable in condemnation, whatever the government wants to call them.

D. State and Federal Highway Beautification Acts

Rather than engage in this name calling of realty versus personalty, the State and Federal Highway Beautification Acts specifically compel the payment of compensation upon the 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...**".

The amendment was in response to a Federal Highway Administration 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 vs. Root Outdoor Advertising, Inc.*, 788 P.2d 149 (Colo. 1990) explained that "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 that:

> 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 Department of Transportation 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 that 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.

The Texas Highway Beautification Act, discussed above and codified in Section 391.033 of the Texas Transportation Code, similarly requires compensation where the State acquires "outdoor advertising" in eminent domain. Thus, rather than attempting to draw some distinction between realty, personalty, fixtures, or other terminology, these federal and state laws expressly compel compensation for "outdoor advertising signs" removed by governmental actions.

VI. 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 relocatable personalty cannot be allowed to override fundamental constitutional protections and rights. Justice Brandis' 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 vs. United States, 277 U.S. 438, 479 (1928)(Brandis, 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.