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United States Government Accountability Office
Washington, DC 20548

B-302809

November 12, 2004

The Honorable Mike McIntyre
U. S. House of Representatives

Subject: *Case Law Pertaining to Constitutionality of Billboard Amortization by State and Local Governments*

Dear Mr. McIntyre:

This responds to your request for an update of our February 6, 1991 opinion to Senator Chafee, B-239187 (Enclosure 1), summarizing case law regarding the permissibility of billboard amortization under the U.S. Constitution. At the time of our 1991 opinion, the vast majority of cases had upheld the general practice of amortization as constitutional; some courts also addressed, on a case-by-case basis, whether a particular amortization practice was constitutional. As discussed below and in Enclosure 2, the small number of additional cases involving billboard amortization decided since 1991 have likewise upheld this practice, ruling that billboard restrictions which provided for an amortization period did not rise to the level of a "taking" triggering constitutional compensation obligations.

Background

The Takings Clause of the Fifth Amendment to the Constitution prohibits the federal government from taking private property for public use unless the government provides "just compensation." The courts have long imposed these same obligations on state and local governments through the Fourteenth Amendment. *See, e.g., Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226 (1897). Under the government's inherent "police power," the use of private property may be reasonably regulated and restricted through zoning or other land use laws, as long as the regulation bears a substantial relationship to the public health, safety, convenience or general welfare. *See, e.g., Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The Supreme Court has specifically applied these principles in the context of billboards, holding that a local ordinance excluding billboards (among other things) from a village residential district was a permissible exercise of municipal power. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). When such regulations effectively take the billboard owner's property, however, by eliminating or severely restricting

the owner's reasonable investment-backed expectations, they may rise to the level of a so-called regulatory taking and require compensation under the Takings Clause. *See, e.g., Penn Central*, above.

State and local laws restricting or prohibiting billboard use are an example of such public welfare regulations. In a number of cases, the restrictions are mitigated by inclusion of a phase-in period, allowing the billboard owner to continue using the billboard for a specified period after which it is considered a non-conforming use and must be removed. This phase-in is referred to as amortization. Billboard owners have argued that the restrictions constitute a taking of their property and that the taking is unconstitutional because the government has not paid them monetary compensation. Governments have responded that the restrictions do not rise to the level of a taking, because of the effect of the amortization, or that even if there is a taking, amortization constitutes just compensation. In either case, the governments believe, amortization is constitutional.

Our 1991 Opinion and Subsequent Case Law

Our 1991 opinion reviewed a number of cases in which billboard amortization was challenged on constitutional grounds. These cases, representing the decisions of three federal appellate courts and 17 state courts, and amortization periods ranging from one year to 10 years, uniformly rejected the argument that amortization was a *per se* violation of the Takings Clause. As we explained, however, in deciding whether a particular amortization scheme was reasonable and constituted just compensation, courts were required to carefully weigh a number of factors reflecting public and private interests. [1]

As identified in Enclosure 2, there have been only five additional cases reported since 1991 ruling on the constitutionality of billboard amortization as a general practice, none of which has held that an ordinance's amortization feature rendered it unconstitutional.[2] None of the courts we cited in 1991 has repudiated its earlier analysis; none of the billboard decisions has been overruled by a higher court; and the U.S. Supreme Court has declined to review one billboard amortization case.[3] Courts have continued to evaluate the constitutionality of billboard amortization laws based on the reasonableness of the amortization period and other factors discussed

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[1] For purposes of context, our 1991 opinion also summarized cases involving amortization for non-billboard uses. In response to our 1991 opinion, Senator Chafee asked whether we had considered four particular 1987 Supreme Court decisions in our analysis. By letter dated May 17, 1991, we explained that we had considered those cases but found them inapplicable. The cases addressed whether various takings had been for a public versus a private purpose, rather than whether takings for a public purpose were compensable by amortization rather than monetary payment.

[2] There have also been cases, not included in this letter or enclosures, addressing the reasonableness of a particular amortization period.

[3] *See Naegele Outdoor Advertising v. City of Durham*, 803 F. Supp. 1068 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994), discussed in footnote 4 below.

in our 1991 opinion.[4] In *Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996), for example, the United States Court of Appeals for the Eighth Circuit joined the Fourth, Fifth, and Tenth Circuits, whose opinions we cited in our 1991 opinion, in rejecting a constitutional challenge to the use of amortization. The billboards in *City of Burlington* had been purchased at a "bargain price" after a billboard ban with a 5-year phase-in amortization period had gone into effect. Under these circumstances, the court ruled, the billboard owner had no reasonable investment-backed expectation that it could continue using its non-conforming billboards indefinitely, so there was no taking triggering the constitutional compensation requirement.

In the only significant development in the amortization arena since 1991, one of the few courts that had previously found amortization to be unconstitutional—in a *non*-billboard context—has changed its position. In *Board of Zoning Appeals v. Leisz*, 702 N.E.2d 1026 (Ind. 1998), the Indiana Supreme Court overruled its 1983 decision in *Ailes v. Decatur County Area Planning Comm.*, 448 N.E.2d 1057 (Ind. 1983), *cert. denied*, 465 U.S. 1100 (1984), in which the court had ruled that amortization is unconstitutional *per se* under the Fifth Amendment. The *Leisz* court recognized that its earlier decision in *Ailes* was inconsistent with the decisions of other state and federal courts:

> With the sole exception of this Court's decision in *Ailes*, state courts that have found amortization provisions unconstitutional have done so on the basis of their state constitution. We can only conclude that *Ailes*, in holding that amortization provisions are unconstitutional *per se*, incorrectly decided an issue of federal constitutional law. No issue has been raised and we express no opinion as to any state constitutional point.

Leisz, 702 N.E.2d at 1032 (citations omitted). Thus, Indiana has now joined the other state and federal courts that have found amortization to be constitutional under the Fifth Amendment.

It is useful to understand the broader context in which billboard regulations have been enacted, to explain why there have been relatively few decisions addressing the permissibility of billboard amortization under the U.S. Constitution. One reason is that the practice is often expressly prohibited by state statute, meaning that courts in those states are not called upon to rule on whether it would be constitutional. More than a third of states have enacted such legislation.[5] In *Eller Media Co. v.*

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[4] In our 1991 opinion, we identified the 15 factors listed by the Fourth Circuit in *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988), as typical of the case-by-case inquiry required by the courts. The Fourth Circuit remanded the *Naegele* case for factual development regarding the amortization ordinance at issue, following which the district court found the ordinance did not constitute a taking because the billboard owner retained some economically viable use of its property. *See Naegele Outdoor Advertising, Inc. v. City of Durham*, 803 F. Supp. 1068 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994).

[5] Billboard amortization bans have been passed in at least nineteen states. *See* Charles F. Floyd, "Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker, Part III, Zoning

Montgomery County, 795 A.2d 728 (Md. Ct. Spec. Apps. 2002), for example, the court ruled that a Maryland state law requiring that just compensation be made in the form of a monetary payment superseded a local ordinance providing for an amortization period. The court stated that "[f]air compensation, as defined in [Md. Code Ann. 25-122E(a),] must be paid even if a reasonable amortization period was provided for in the ordinance." *Id.* at 739. A second reason for the small number of billboard amortization constitutionality cases is that courts sometimes strike down state amortization laws under state constitutions, rather than the U.S. Constitution, so the question of their status under federal law is not reached. *See generally Pa. Northwestern Distributors, Inc. v. Zoning Hearing Bd.*, 584 A.2d 1372 (Pa. 1991) (local non-billboard amortization ordinance violated Article I, section 1 of Pennsylvania constitution).

Finally, in practice, certain provisions of the federal Highway Beautification Act have prompted states to prohibit localities from providing billboard amortization as a way of compensating owners for lost use of their property, again meaning that courts are not called upon to address the constitutionality of this practice. As amended in 1978, the Highway Beautification Act requires that states exercise "effective control" of billboards located along federal interstate or primary highways. A state that fails to do so faces the loss of 10 percent of its federal highway funds. 23 U.S.C. § 131(b). The Act permits certain informational or historic billboards, 23 U.S.C. § 131(c), as well as billboards maintained pursuant to agreement with the U.S. Department of Transportation, 23 U.S.C. § 131(d), but all other billboards must be removed and states must contribute 25 percent of the resulting requisite "just compensation" (the federal government pays the remaining 75 percent). 23 U.S.C. § 131(g). Thus while the statute does not directly prohibit amortization, it creates a "powerful incentive" for states to prohibit local governments from using amortization as a means of compensating for billboard restrictions. *See National Advertising Co. v. City of Ashland, Ore.*, 678 F.2d 106, 107 (9th Cir. 1982). As one commenter has explained, the practical effect of the Act has been to serve as a shield, protecting billboards covered by the statute from removal by state and local governments who would otherwise use amortization. *See* Floyd, footnote 5 above, 3 *Wash. U. J. L. & Pol'y* at 375.

Conclusion

The overwhelming majority of court decisions addressing the permissibility of billboard amortization under the U.S. Constitution, both before and since our 1991 opinion, have upheld this practice, either because ordinances incorporating amortization have been found not to constitute a taking or, if the ordinances are deemed takings, amortization has been found to constitute just compensation. There have been relatively few billboard amortization decisions overall, however, for a

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Aesthetics, Chap. 5, The Takings Clause and Signs: The Takings Issue in Billboard Control," 3 *Wash. U. J. L. & Pol'y* 357 (2000) at 376. North Carolina passed a temporary anti-amortization statute last year, in effect through December 31, 2004, prohibiting local governments from enacting any new ordinance amortizing off-premises outdoor advertising or extending or expanding any existing ordinance amortizing off-premises outdoor advertising. N.C. Sess. Laws 2003-432.

variety of reasons, including that some states prohibit localities from using amortization, some state constitutions have been interpreted as prohibiting amortization, and the Highway Beautification Act has had the practical effect of limiting localities in some states from using amortization as a means of compensating for billboard restrictions.

If you have any questions regarding this opinion, please contact Susan D. Sawtelle, Associate General Counsel, at (202) 512-6417, Doreen S. Feldman, Assistant General Counsel, at (202) 512-8264, or Barbara R. Timmerman, Senior Attorney, at (202) 512-8265.

Sincerely yours,

Anthony H. Gamboa
General Counsel

Enclosures - 2

Comptroller General
of the United States

Washington, D.C. 20548

ENCLOSURE 1

B-239187

February 6, 1991

The Honorable John H. Chafee
United States Senate

Dear Senator Chafee:

This is in response to your letter of March 5, 1990, requesting that the General Accounting Office (GAO) review and analyze existing case law with regard to the constitutionality of the use of amortization in the removal of billboards. Amortization in this context is the permission for continued use of a billboard for a specified period of time in lieu of monetary compensation for the immediate removal of the billboard. As a result of meetings with your staff, it was agreed that GAO would (1) review the existing case law to determine if a majority of the cases hold that amortization in the removal of billboards is constitutional; (2) indicate timeframes that courts have determined to be constitutional; (3) provide a representative list of citations for the cases; and (4) review some cases involving the amortization of other nonconforming uses.

Our review indicates that a vast majority of the cases hold that billboard amortization is a reasonable exercise of the police power of a state and not violative of the constitution. Our analysis of the issues raised by the various cases is set forth in Enclosure I. Enclosure II contains a representative listing of those federal and state cases and includes for each the length of the amortization period involved. Enclosure III contains a list of cases where amortization was held constitutional for other nonconforming uses, together with the nature of the respective nonconforming use.

We hope that these comments are useful to you. In accordance with our usual procedures, this opinion will be available to the public 30 days from its date.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosures (3)

ENCLOSURE I

ANALYSIS OF BILLBOARD AMORTIZATION CASE LAW

Statement of Issues

The question presented is whether a majority of the courts have found amortization to be just compensation for a taking within the meaning of the constitution. The fifth amendment of the U.S. Constitution provides in part that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The fourteenth amendment applied this restriction to the states when it provided "nor shall any state deprive any person of life, liberty, or property, without due process of law." Just compensation is measured by the value of the interest taken from the owner.

Our review disclosed that a majority of federal and state billboard amortization cases have held the amortization process to be constitutional. For example, the Fourth Circuit Court of Appeals stated in 1988: "A majority of courts that have considered amortization periods of various lengths have approved them as a means of enabling an owner to recoup or minimize his loss." Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 at 177 (4th Cir. 1988).

Our analysis of the billboard amortization cases indicated that the appellate courts believe that two constitutional principles must be considered.1/ One principle, which is now well established, is that under the police power of the state, the use of private property may be reasonably regulated and restricted through the use of zoning as long as the regulation and restriction bears a substantial relationship to

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1/ Some of the cases also addressed first amendment free speech constitutional challenges. However, since a plurality of the court in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) recognized that an ordinance prohibiting off-premise commercial billboard advertising would not have offended the first amendment if it had not preferred commercial over noncommercial advertising, ordinances that do not make that distinction are generally upheld as constitutional. Moreover, since compensation is not an issue in such first amendment challenges, we were advised that we did not need to address first amendment issues in our review.

the public good or general welfare of the community. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).2/ A second principle is the protection explicitly afforded by the fifth amendment of the U.S. Constitution, as applied to the states under the fourteenth amendment, that a person shall not be deprived of property rights without due process of law and payment of just compensation. See Chicago, Burlington and Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897).

Amortization has been accepted by most courts as a form of compensation when private property is taken by a governmental entity for the public good. Under the amortization concept, no money is paid. Instead, it is a procedure under which a billboard owner is put on notice by an ordinance that he has a specified time period in which to remove his sign. The sign is considered nonconforming at the end of the prescribed time period and may be removed without monetary reimbursement to the owner. Art Neon Co. v. City and County of Denver, 488 F.2d 118 (10th Cir. 1973), cert. denied 417 U.S. 932 (1974).

Billboard owners claim that the affected property interest is the loss of the land's value because it has no other commercial use, or the value of the sign itself because it is economically impractical to move it. Therefore, judicial review occurs when they challenge the constitutionality of the zoning ordinance which they believe is "taking" their property without payment of monetary compensation.

Standard of Review

A majority of the cases that we reviewed hold that zoning provisions which utilize amortization to eliminate non-conforming uses are not facially unconstitutional as long as they represent a valid exercise of police power and are reasonable as applied to the specific facts of the case. In other words, not only must the ordinance requiring the termination of a nonconforming use be reasonably in furtherance of public health, safety, or welfare, it must also be reasonable as applied to the particular property owner, i.e., long enough to allow the sign owner to recoup his

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2/ The U.S. Supreme Court ruled in Euclid that before the provisions of a land use ordinance passed under the police powers of a state could be declared facially unconstitutional, "it must be said . . . that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U.S. at 395.

investment, thereby constituting an alternative to paying monetary compensation for the sign's removal.

The cases that we reviewed discussed the need for a range of factual inquiries in an effort to strike a balance between the fifth amendment's protection of the individual's property rights with a state's right to regulate that property pursuant to its police powers.3/ The following list, provided by the Fourth Circuit in the Naegele case when it remanded and directed the trial court to "make findings pertaining to every aspect of (the billboard owner's) business that will be affected by the ordinance," is representative of those factual inquiries:

(1) number of billboards that can be economically used for advertising;

(2) number of billboards that are economically useless;

(3) terms of the owner's lease for billboard locations;

(4) value of billboard owner's land;

(5) other uses the billboard owner can make of the land;

(6) value of billboards that cannot be used;

(7) amount of depreciation taken on the billboards that cannot be moved;

(8) actual life expectancy of billboards that cannot be moved;

(9) amount of income expected during the amortization period;

(10) salvage value of the billboards that cannot be used;

(11) amount of shared revenue that will be lost;

(12) the percentage of the owner's total signs that the affected signs represent;

3/ Generally, an appellate court examines the trial record and stipulated facts in order to decide whether it has sufficient facts about the need for the zoning provision and economic factors concerning the owner's business upon which to render a decision, or whether it should remand the case to the trial court to develop those facts.

(13) relative value between the affected signs and remaining signs;

(14) any other facts presented by the parties that the court deems relevant; and

(15) reasonableness of the length of the amortization period.

Amortization Period

The amortization period is the primary factor that courts consider in deciding the reasonableness of the zoning ordinance. Some courts give particular emphasis to the length of the amortization period in relation to the investment. Others place importance on the relationship between the length of the amortization period and the nature of the nonconforming use. However, courts almost uniformly decline to designate one specific amortization period that they would consider reasonable for every factual situation.

The Fourth Circuit stated that it considered Modjeska Sign Studios, Inc. v. Berle, 373 N.E. 2d 255 (1977), appeal dismissed, 439 U.S. 809 (1978) "perhaps the leading case on (amortization)." Naegele, 844 F.2d at 177. According to the Fourth Circuit:

> "The court (in Modjeska) recognized that the reasonableness of the amortization period could not be decided on summary judgment, and it remanded the case for an evidentiary hearing to determine whether the loss that the owner of the billboards suffered was substantial."

Naegele, 844 F.2d at 177.

The Fourth Circuit recently framed what it believed to be problems in declaring any amortization period per se constitutional. That court was attempting, for a second time, to provide guidance to a trial court for determining the reasonableness of a Waynesville, North Carolina, ordinance which provided for a 4 year amortization period when it opined:

> "[I]n rare cases even the briefest amortization period would not be unreasonable. Conversely, because an ordinance could accomplish a taking after the expiration of a very long amortization period, in other rare cases an amortization provision would not be reasonable.

> Therefore, amortization periods cannot be viewed in isolation."

Georgia Outdoor Advertising, Inc. v. City of Waynesville, 900 F.2d 783 at 786 (4th Cir. 1990).

A state appellate court described the issue this way:

> "It could hardly be said that a zoning ordinance in a metropolitan area declaring any building in excess of five stories to be a nonconforming use and setting a thirty-year 'amortization' period would be a reasonable zoning ordinance in this day and age. While the time period might well be reasonable, since the building could be fully depreciated within the time limit, absent more, the simple designation of all buildings over five stories as a nonconforming use by the zoning body would certainly be unreasonable."

Rives v. City of Clarksville, 618 S.W.2d 502, at 510 (Tenn. App. 1981).

While courts generally appear unwilling to declare a specific amortization time period per se constitutional, several courts have given great deference to whether the billboards will have been fully depreciated for federal Internal Revenue Service (IRS) purposes.4/ Courts accept IRS depreciation periods5/ as persuasive evidence that the billboard owner will not suffer an economic loss and that, therefore, his fifth amendment rights have not been violated. The basis for this view is well stated by the Maryland Supreme Court. That court concluded:

> "A corporation that has regularly, year by year, acted in its financial affairs, under the oath of its authorized officers (and penalty of perjury), on the premise that the full useful life of its billboards is five years is handicapped seriously in arguing persuasively that

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4/ Income tax depreciation was the deciding factor in National Advertising Company v. County of Monterey, 464 P.2d 33 (Cal. 1970), cert. denied, 389 U.S. 946 (1970) where a 1 year amortization period had been challenged. The court declared the 1 year period constitutional only with respect to the fully depreciated billboards.

5/ The IRS depreciation period most commonly referenced by the courts is 5 years.

> legislative reliance on that same premise has done it a constitutional wrong--has taken from it substantial property without compensation--by banning the further use of those billboards."

Grant v. Mayor and City Council of Baltimore, 129 A.2d 363, at 372 (Md. 1957).

ENCLOSURE II

CASES HOLDING THAT THE AMORTIZATION OF NONCONFORMING SIGNS WITHOUT COMPENSATION IS CONSTITUTIONAL

AMORTIZATION PERIOD	REMAND *	FEDERAL CASES
4 years	*	Georgia Outdoor Advertising, Inc. v. City of Waynesville, 900 F.2d 783 (4th Cir. 1990).
5 1/2 years	*	Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988).
5 1/2 years		Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986).
5 years		E. B. Elliott Adv. Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970).
5 years		Art Neon Co. v. City & County of Denver, 488 F.2d 118 (10th Cir. 1973) cert. denied, 417 U.S. 932 (1974).
		STATE CASES
4 years		Donrey Communications Co. v. City of Fayetteville, 660 S.W.2d 900 (Ark.1983), cert. denied, 466 U.S. 959 (1984).
1 year		National Advertising Company v. County of Monterey, 464 P.2d 33 (Cal. 1970), cert. denied, 398 U.S. 946 (1970).

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1-4 years (Depending upon value)		Metromedia, Inc. v. City of San Diego, 610 P.2d 407 (Cal. 1980), rev'd on other grounds, 453 U.S. 490 (1981).
2 years		Murphy, Inc. v. Board of Zoning Appeals of Witton, 161 A.2d 185 (Conn. 1960).
3 years	*	Mayor & Council v. Rollings Outdoor Advertising Co., 475 A.2d 355 (Del. 1984).
10 years		Lamar Advertising Assocs. of East Florida, Ltd. v. City of Daytona Beach, 450 So.2d 1145 (Fla. App. 1984).
2 years		City of Doraville v. Turner Communications Corp, 223 S.E.2d 798 (Ga. 1976).
7 years		Village of Skokie v. Walton on Demptser, Inc., 456 N.E.2d 293 (Ill. App. 1983).
5 years		Grant v. Mayor & City Council, 129 A.2d 363 (Md. 1957).
3 years		Naegele Outdoor Advertising Co. v. Village of Minnetonka, 162 N.W.2d 206 (Minn. 1968).
3 years		University City v. Dively Auto Body, 417 S.W.2d 107 (Mo. 1967).
--		Beals v. County of Douglas, 560 P.2d 1373 (Nev. 1977).
6 1/2 years	*	Modjeska Sign Studios, Inc. v. Berle, 373 N.E.3d 255 (N.Y. 1977), appeal dismissed, 439 U.S. 809 (1978).
5 years	*	Temple Baptist Church, Inc. v. City of Albuquerque, 646 P.2d 565 (N.M. 1982).

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5 1/2 years	R.O. Givens, Inc v. Town of Nags Head, 294 S.E.2d 388 (N.C. App.), cert. denied & appeal dismissed, 297 S.E.2d 400 (N.C. 1982).
5 years	Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978), appeal dismissed, 439 U.S. 808 (1979).
6 1/2 years	Lubbock Poster Co. v. City of Lubbock, 569 S.W.2D 935 (Tex. App. 1978), cert. denied, 444 U.S. 833 (1979).
3 years	Markham Advertising Co. v. State, 439 P.2d 248 (Wash. 1968), appeal dismissed, 393 U.S. 316 (1969).

*Cases remanded to the trial court for an evidentiary hearing on the reasonableness of the muncipality's exercise of its police power (health, safety, and welfare of the public) versus the sign owner's potential business loss due to the sign's removal without compensation.

ENCLOSURE III

CASES HOLDING THAT AMORTIZATION OF OTHER NONCONFORMING LAND USES WITHOUT COMPENSATION IS CONSTITUTIONAL

AMORTIZATION PERIOD	REMAND	USE	STATE CASES
2 years		Junkyard	Spurgeon v. Board of Comm'rs, 317 P.2d 798 (Kan. 1957).
2 years		Trailer Park	Gates v. Jaravis, Cornette & Payton, 465 S.W.2d 278 (Ky. 1971).
1 year		Grocery Store	State ex rel. Dema Realty Co. v. McDonald, 121 So. 613 (La. 1929).
7 years		Dog Kennels	Wolf v. City of Omaha, 129 N.W.2d 501 (Neb. 1964).
5 years		Trash Baler	Sullivan v. Zoning Bd. of Adjustment, 478 A.2d 912 (Pa. Cmwlth. 1984).
5 years		Auto Storage	Collings v. City of Spartanburg, 314 S.E.2d 332 (S.C. 1984).
2 years (residential) * 5 years (nonresidential)		Junkyard	Rives v. City of Clarksville, 618 S.W. 2d 502 (Tenn. App. 1981).

*Cases remanded to the trial court for an evidentiary hearing on the reasonableness of the muncipality's exercise of its police powers (health, safety, and welfare of the public) versus the sign owners's potential busines loss due to the sign's removal without compensation.

I. CASES DECIDED SINCE JANUARY 1, 1991 HOLDING THAT AMORTIZATION OF NON-CONFORMING BILLBOARDS, WITHOUT MONETARY COMPENSATION, IS CONSTITUTIONAL[1]

Federal Court Decisions

1. *Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996).

The court ruled that a city ordinance banning billboards in residential areas and requiring removal of existing billboards after a 5-year amortization period was not a taking, and thus did not present constitutional problems, where the billboard owner was on notice of the ban at the time of purchase. The court found that the billboard owner did not have a reasonable investment-backed expectation that it would be allowed to continue indefinitely with the non-conforming use.

2. *Naegele Outdoor Advertising, Inc. v. City of Durham*, 803 F. Supp 1068 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994).

The court held that a Durham, NC ordinance prohibiting commercial, off-premises advertising signs after a 5-½ year amortization period was not a taking, and thus did not present constitutional problems, because the billboard owner retained some economically viable use of its property.

State Court Decisions

3. *Eller Media Co. v. City of Houston*, 101 S.W.3d 668 (Texas Ct. App. 1st Dist. 2003).

The court found that billboard amortization periods of 17 years and 21-½ years allowed more than enough time for owners to recover their investment and make an additional profit and thus a regulation requiring termination of the signs after the amortization periods was not a taking and did not present a constitutional problem.

4. *Naegele Outdoor Advertising, Inc. v. City of Winston-Salem*, 440 S.E.2d. 842 (N.C. Ct. App. 1994), *aff'd on other grounds*, 340 N.C. 349 (1995).

The North Carolina Court of Appeals rejected a challenge to a zoning ordinance requiring billboard removal after an amortization period, holding that the ordinance did not constitute a taking and that the challenge was also time-barred under the statute of limitations. The North Carolina Supreme Court assumed, without deciding, that the ordinance was in fact a taking, but agreed that the action challenging the ordinance was barred under the statute of limitations.

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[1] These cases include only those addressing the constitutionality of amortization without monetary compensation, and do not include other cases such as those addressing the reasonableness of a particular amortization period.

5. *Tahoe Regional Planning Agency v. King*, 233 Cal. App. 3d 1365 (Cal. App. 3d Dist. 1991)

The California Court of Appeal considered whether the Tahoe Regional Planning Agency could constitutionally or statutorily compel removal of a billboard after a 5-year amortization period without paying monetary compensation. The court held that where the amortization period is reasonable and does not deprive the owner of all economic use of its property, there is no taking triggering the Constitution's compensation requirement. The court remanded the case for further factual development on that point. The Court also ruled that amortization was allowable under the federal Highway Beautification Act's monetary compensation scheme for billboards removed along federal highways, because the Act only encourages, but does not mandate, monetary compensation, and in any event, the Tahoe agency was covered by an exception to the Act.

II. CASES DECIDED SINCE JANUARY 1, 1991 HOLDING THAT AMORTIZATION OF NON-CONFORMING LAND USES OTHER THAN BILLBOARDS, WITHOUT MONETARY COMPENSATION, IS CONSTITUTIONAL

Federal Court Decisions

1. *World Wide Video of Washington, Inc. v. City of Spokane*, 227 F. Supp. 2d 1143 (E.D. Wash. 2002).

A city ordinance provided for an amortization period of 12 months for non-conforming "adult retail use establishments." The court found no genuine issues of material fact which precluded it from finding, as a matter of law, that Spokane's ordinances were valid under both the First and Fourteenth Amendments of the U.S. Constitution. The court concluded that the effective 20-month amortization period was reasonable as a matter of due process and that any hardship to plaintiff was outweighed by the benefit to the public from termination of the non-conforming use.

State Court Decisions

2. *Lone v. Montgomery County*, 85 Md. App. 477, 584 A.2d 142 (Md. Ct. Spec. App. 1991).

An ordinance providing a 10-year amortization period for owners of non-conforming multi-family housing to change to single-family use was not an unconstitutional taking.

3. *Chekenian v. Town Bd.*, 202 App. Div. 2d 542, 609 N.Y.S. 2d 280 (Sup. Ct. 1994).

The court affirmed denial of a motion for summary judgment challenging the constitutionality of an amortization provision affecting a non-conforming home office. The court ruled that the amortization provisions were presumptively valid and should generally be sustained where the time period allowing the owner to recapture

the investment in the use is reasonable. The case had to continue because there were material disputes of fact.

4. *Village of Valatie v. Smith*, 83 N.Y.2d 396, 632 N.E.2d 1264 (N.Y. 1994).

The court upheld a local ordinance that terminated the non-conforming use of mobile homes upon the transfer of ownership. An amortization period is presumed to be reasonable, the court ruled, unless it unreasonably inflicts substantial loss on the owner or fails to comport with the reasonableness required by due process.

5. *Board of Zoning Appeals v. Leisz*, 702 N.E.2d 1026 (Ind. 1998).

The City of Bloomington passed a zoning ordinance limiting the number of unrelated adults who could reside in a dwelling and providing for the forfeiture of prior non-conforming uses if they were not registered. The court held the ordinance did not effect an unconstitutional taking in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and found that the registration requirement and the forfeiture sanction advanced a legitimate state interest. The court overruled its earlier decision in *Ailes v. Decatur County Area Planning Comm'n*, 448 N.E.2d 1057 (Ind. 1983), cert. denied, 465 U.S. 1100 (1984), in which it had held that amortization provisions were *per se* unconstitutional.