EMINENT DOMAIN COMMITTEE NEWSLETTER

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MESSAGE FROM THE CHAIR

Dear Colleagues:

We are rapidly approaching our final meeting for the 2001-2002 year. Each of you should previously have received agendas from the Florida Bar pertaining to our upcoming meeting on June 21, 2002, at the Boca Raton Resort & Club. At that meeting, we will be having presentations from two outside consultants which should prove to be very interesting and informative. Dr. Melissa Pigott of Magus Research Consultants will be making a presentation on 25 Common Mistakes Attorneys Make in Voir Dire. Additionally, Robert Philipson and Terry Bees of Legal-eze Graphics Company, Inc. will be making a presentation on the use of technology in the courtroom. We will also be receiving reports from Robert Scanlan, Esq. of the Jury Instructions Subcommittee and from James Anderson, Esq. of the Legislative Input Subcommittee.

At our June 21, 2002 meeting, the gavel will also be passed to James Anderson, Esq. who will be assuming the position of Chair of the Eminent Domain Committee for the 2002-2003 year and will be assisted throughout his tenure by Barry Balmuth, Esq., Paul Golis, Esq., Brian Patchen, Esq., and Jim Spalla, Esq., all of whom have been appointed as Vice Chairs for the upcoming Committee year.

Since our last meeting, the Committee presented its Eminent Domain Seminar, with a live presentation held on January 31, 2002, at the Tampa Airport Marriott. At the seminar, Paul Golis, Esq. spoke on ethics and professionalism requirements, Brian Seymour, Esq. and Barry Balmuth, Esq. spoke on orders of taking and related issues, Ken Davis, Esq. spoke on business damages, Jay Small, Esq. and Jim Spalla, Esq. spoke on community redevelopment projects, Robert Gill, Esq. and Victor Gerald Meaders, Esq. spoke on the relationship between severance damages and police power regulations, Jeff Savlov, Esq. and Charles Stratton, Esq. spoke on supplemental proceedings and Brian Patchen, Esq. spoke on the right of access. The seminar was videotaped on January 31, 2002, and subsequently replayed at various locations throughout the state of Florida. The seminar was extremely well attended and well received. Sincere

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SO LONG AMORTIZATION, HELLO COMPENSATION: A VICTORY FOR PROPERTY RIGHTS

By Mark Bentley, Esquire, AICP

Before you execute that billboard lease or agree to remove a billboard because of governmental pressure, I suggest that you read about the new law abolishing amortization as a substitute for compensation.

In signing House Bill 715 creating Section 70.20 Florida Statutes, Governor Jeb Bush took a major step in protecting private property rights. The law, which among several things, requires local governments, excluding the Florida Department of Transportation, to pay sign owners just compensation, becomes effective July 1, 2002. Notably, prior to this law, local governments could satisfy the full compensation clause of the Florida Constitution by simply allowing for an arbitrary amortization period for off-site signs to presumably exist to allow recovery of an owner's investment backed expectations. No longer will these blanket amortization periods serve as a substitute for compensation, and from now on, a property owner whose sign is forced to be removed or altered by a local government action is entitled to payment based not simply on the depreciated value of the sign structure, but the lost future profits associated with the expected advertising income, reduced to a present value. This is the present method typically employed in eminent domain proceedings relating to billboard acquisition.

The new law, which is notably included in the Chapter entitled "Relief From Burdens On Real Property," that also contains the "Bert J. Harris, Jr. Private Property Rights Protection Act," is intended to reduce local governments' right of way acquisition costs, by providing a mandatory dispute resolution process. This process provides a forum to allow the government and a sign owner to explore the possibility of entering into a consensual contract to allow the relocation and reconstruction of existing signs, or the removal of a sign and construction of a new sign to substitute for the sign that is intended to be removed. The law does not apply to situations wherein a sign owner has by prior written agreement, waived all right to challenge the validity, constitutionality, and enforceability of a sign ordinance.

A local government that is seeking to remove a sign in furtherance of either a public goal (*i.e.*, aesthetic appearance of the community) or public project, must first provide notice to the affected sign owner, pursuant to the new law. The parties must then within thirty days meet to discuss relocation and reconstruction. In the event the parties should fail to enter into a relocation and reconstruction agreement within 120 days after the initial notice to the owner, either party may request a mandatory non-binding arbitration to attempt to resolve the dispute. Each party has the right to select an arbitrator, who must in turn select a third arbitrator to create an arbitration panel. At the conclusion of the arbitration, the panel must present the parties with a proposed relocation and reconstruction agreement that is intended to balance their respective rights, interests, obligations, and reasonable expectations. If the parties accept the panel's recommendation, they are required to equally share the costs of the arbitration, along with their own direct costs. In the event the parties cannot resolve their dispute, the local government is then free to proceed with its project only after paying just compensation to the owner, which in Florida, includes payment of the owner's reasonable attorneys' fees and costs. It should be noted that since arbitration is an optional exercise, in the event neither party should agree to arbitration, the government is then in exchange for a development approval, forced to pay full compensation to the owner prior to removal of the sign.

The law further prevents a local government from avoiding the payment of compensation. Specifically, the law prohibits the government from ordering that a sign be removed as a condition precedent to the issuance or renewal of a development order. A development order is defined as any order, or notice of proposed state or regional governmental agency action, and can include a rezoning, variance, subdivision approval, administrative permit, special use permit, or any other similar action. The development order may allow, however, as a condition of approval, the replacement of the existing sign with a new one. For example, if a le-

gally nonconforming billboard was located on property that was designated residential on both the local government's land use plan and zoning maps, and the developer sought a rezoning approval, the local government could not force the removal of the sign as a condition of approval, although the sign would clearly be prohibited under the new zoning category. Therefore, in order to force the owner to remove the sign, the required just compensation would first have to be paid to the owner. The only exception to this rule would be if an owner of land, wherein a sign is situated, was seeking to have the property re-designated to an exclusively single-family use under the government's comprehensive plan. Then, only in this instance, the government could order the removal of the sign as a condition of approval, and avoid any obligation to compensate the owner. Oftentimes, properties that are encumbered with billboards are conveyed to the government either voluntarily, or under the threat of condemnation. The law, however, contemplates this scenario and makes no exception as it treats the conveyance as compelling a forced removal, thereby requiring payment to the owner.

Importantly, the law only requires the payment of just compensation for lawfully erected signs that were existing on its effective date of July 1, 2002. Therefore, a sign could be beyond a local government's amortization period and be considered illegal as of July 1, 2002, but would still be entitled to compensation as long as it was originally lawfully permitted. There are numerous signs located in both Hillsborough County and the City of Tampa that were legally permitted but were not included in any prior agreements. Therefore, since amortization is no longer a legally sufficient substitute for compensation, the only way the City or County can now force their removal or alteration is to adhere to the new law and pay the owner.

In the City of Tampa, the major stakeholders in the outdoor advertising business, The Viacom Outdoor Group (f/k/a Infinity Broadcasting Corporation and 3M Company) and Clear Channel Outdoor (f/k/a Eller Media Company), who own or control the majority of existing billboards, cannot challenge the City's ordinance and seek compensation under this new legislation as they have previously entered into agreements in 1996 with the City that generally allow existing signs to remain and/or be replaced. The same situation holds true for sign owners controlling the majority of existing billboards in Hillsborough County, who as a result of litigation in 2001, also entered into settlement agreements with the County.

The law does not apply to signs that are required to be removed by a date certain in areas determined by local ordinance (as opposed to settlement agreements) as "view corridors" if the ordinance creating the view corridors was enacted under the following conditions: (1) it was enacted to effectuate a consensual agreement, and (2) that the consensual agreement related to two or more sign owners. For example, a review of the City of Tampa's recently enacted sign ordinance indicates that it has expanded the number and geographic boundaries of the view corridor areas that were contained in its consensual agreements with Infinity and Clear Channel. Therefore, the City's ordinance provision that requires non-consensual agreement signs located within view corridors to be amortized and removed by 2004 is not enforceable, and the City will now be required to compensate these sign owners if the City should seek their removal.

The new law is also not applicable to any signs that are subject to an existing amortization period which has expired, only if the challenged ordinance was the subject of judicial proceedings that were commenced on or before January 2001. The litigation challenging the validity of Hillsborough County's sign ordinance was filed in 2000. Therefore, signs whose amortization periods have expired in the County can apparently be removed without payment of compensation to the owners. Logically, the law does not prohibit a local government from prospectively regulating the placement, size, height, or other aspects of new signs, including their complete prohibition, nor does it affect existing ordinances that impose a ban or partial ban on new signs.

In summary, the new law eliminates the confusion and uncertainty relating to the application of the amortization theory. It establishes a simple, coherent process for local governments to negotiate and compensate sign owners for their constitutionally protected and very valuable property interest. If a local government deems the removal of billboards to be an important public policy, it will now have to pay full compensation to the sign owners, which has otherwise historically only been provided to these owners in the context of eminent domain proceedings.

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