No. S132619

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

REGENCY OUTDOOR ADVERTISING, INC.,
Appellant,
vs.
CITY OF LOS ANGELES, et al.,
Respondent

After a published opinion of the California Court of Appeal,
Second Appellate Dist., Div. Four
No. B159255

Superior Court of the State of California
County of Los Angeles
Hon. Jean Matusinka, Judge

APPLICATION TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, IN SUPPORT OF THE CITY OF LOS ANGELES

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Pursuant to rule 29.1 (f) of the California Rules of Court, the League of California Cities respectfully requests permission to file the amicus curiae brief that follows within this binding. The League, and its 476 member cities, have a substantial interest in this case because if the Court should conclude that public entities must pay compensation to billboard companies when public landscaping projects result in diminished visibility of billboards, then the potential risk would be so large that local governments would have to pay exorbitant costs to inspect vegetation and remove view obscuring plant life. In many cases, local leaders would scale back, eliminate, or decline to install public landscaping, in spite of the large potential benefit to the public.

The undersigned attorneys has examined the briefs of the parties and is familiar with the issues involved and the scope of the case. The League respectfully submits that the Court's ultimate deliberation on the issue in this case can be aided by persuasive authority from other jurisdictions, which is largely ignored in the parties' briefs. The proposed amicus brief collects and surveys cases from Tennessee, North Carolina, Delaware and Georgia, all of which analyze the key issue of this case, namely: if and when a billboard company is entitled to monetary compensation for lost or diminished visibility of its signs, resulting from growth of trees and vegetation,

or other view - obscuring actions by government.

Therefore, and as further explained in the Interest of Amici portion of the proposed brief, the League respectfully requests leave to file the amicus curiae brief that is bound with this application.

Date: January 19, 2006

Respectfully submitted,

Randal R. Morrison
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Attorney for League of
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IDENTITY AND INTEREST OF AMICUS

The League of California Cities ("League") is an association of 474 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys representing all 16 geographical divisions of the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as this one, that are of statewide significance to all cities.

The League and its members are gravely concerned about the possible consequences of this case. Appellant argues that local governments must compensate billboard companies whenever public landscaping projects have the incidental effect of reducing visibility of billboards. If this proposition were accepted by this Court, and announced as the law of the state, the consequences would be devastating to local governments, the state government, and the public's interest in public beautification by trees and shrubbery.

The proposed brief, which follows, surveys the cases from other jurisdiction where the same or nearly identical issue has been addressed by various courts. In every case, the billboard company's theory of "inverse condemnation" from visibility reduction, resulting from governmental acts intended to benefit the public generally, have been rejected.

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ARGUMENT

I. APPELLANT'S ARGUMENT HAS BEEN REJECTED BY EVERY COURT WHICH HAS CONSIDERED IT

Appellant claims a right to money damages, under an inverse condemnation theory, because visibility of its commercial billboards was partially obstructed by the planting of trees on public property, as part of a civic landscaping project.

Although this is a rare issue, it has been raised and decided in several other jurisdictions. In the Nichols treatise on Eminent Domain we find:

> It has also been argued that the planting of trees or the construction of sound walls along interstate highways gives rise to a claim for just compensation under a state's Highway Beautification Act on the theory that such actions are the equivalent of forced removal, although no court has yet been presented with facts sufficient to grant relief.

8A-23 Nichols on Eminent Domain, section 23.03 (Matthew Bender / Lexis Nexis, current to 2005.)

Amicus will now survey the cases from other jurisdictions.

A. THE TENNESSEE CASE

One leading case on point is *Outdoor Advertising Ass'n of Tennessee v. Shaw, Commissioner of Transportation* (1980) 598 S.W.2d 783, 21 A.L.R.4th 1296 (TN App., cert. denied by the state supreme court). A trade association of billboard companies, and one of its members, sought a declaratory judgment "that planting or permitting of vegetation on highway rights of way obstructing licensed billboards is unlawful and unconstitutional;" they also sought money damages. *Id.* at 785.

The billboard companies' theory of a "taking" was virtually identical to that asserted in this case. They claimed advertisers cancelled or threatened to cancel their contracts

> because the view of the structure from the interstate highway was obstructed by the growth of trees and bushes planted or permitted on the right-of-way. . . As a result of this obstruction, this sign structure as an advertising medium at its present location is now non-productive and without value...

Id. at 785.

The court stated the issue of the case thus:

> Where the State of Tennessee plants vegetation on its right of way and fails to prune vegetation on its right of way in a general and non-discriminatory manner and such vegetation eventually obscures a billboard so as to render it useless, has there been a constructive taking of the billboard for which the owner is entitled to compensation?

Id. at 787.

The court then answered the question in the negative, rejected the claim of "constructive taking" (inverse), rejected the claim for damages, and established a rule for deciding future cases:

> The State may with impunity interfere with the view of motorists to adjacent property so long as the interference is the result of a bona fide program of highway beautification, and a litigant who seeks damages for such interference must allege and prove discriminatory conduct outside the general program of highway beautification.

Id. at 788.

The court also noted that neither Tennessee state law nor the federal Highway Beautification Act, 23 U.S.C. 131(g) contemplates "taking" by the growth of trees or obstructing vegetation. *Id.* at 789. The current text of the

federal statute, as quoted in the footnote,[1] has not changed in any significant way. The corollary California statute, Business and Professions Code 5412, requires compensation for the compelled removal or limitation of customary maintenance or use. However, no California court has ever held that this language requires compensation for the partial obstruction of billboard visibility by a public landscaping project.

The Tennessee court wisely pointed out the practical difficulties which would arise if the billboard companies' "taking theory" were accepted:

> [T]o preserve visibility of a given sign, it would be necessary for the State to keep vegetation pruned to a certain maximum height for the entire distance of visibility. Such a requirement would place an unreasonable burden upon the State and cause endless quarrels and

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[1] (g) 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 Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

bickering about whether particular vegetation did or did not lie within the line of sight between the billboard and the passing motorists.

Id. at 790.

B. THE NORTH CAROLINA CASE

Another case raising the same issue – and again rejecting the billboard companies' inverse theory – is *Adams Outdoor Advertising of Charlotte v. North Carolina Dept. of Transp.* (1993) 112 N.C.App. 120, 434 S.E.2d 666 (NC App.). The issue of the case was virtually the same as here:

> [W]e must determine whether defendant's [State Dept. of Transportation's] planting of trees and vegetation within its right of way adjacent to properties on which plaintiff owns and leases outdoor advertising signs (billboards) constitutes a taking of plaintiff's property such that plaintiff if entitled to compensation.

424 S.E.2d at 667. Square brackets added; material in parenthesis in original.

The court rejected the inverse theory because the view obstruction by vegetation was an incidental effect, as opposed to a primary purpose. *Ibid.* The primary act was the planting of trees for the purpose of beautifying the highways, while the consequential or incidental effect of the program was

the obscuring of the billboards. This distinction parallels that used in the Tennessee decision, where the court rejected the takings claim when the "interference is the result of a bona fide program of highway beautification" in contrast to "discriminatory conduct outside the general program of highway beautification."

Both the Tennessee and North Carolina cases say, in essence, that vegetation growth that obscures billboard visibility is compensable only when the government's main purpose and intent is to cause the diminished visibility. However, when, as in this case, the purpose is public landscaping, and the visibility impairment is a mere side effect, there is no compensable taking.

C. THE DELAWARE CASE

In re Condemnation by Delaware River Port Authority (1995) 667 A.2d 766 (Pa.Cmwlth) is yet another case rejecting a claim of inverse taking from partial loss of billboard visibility, this time caused by the erection of sound barriers on a freeway. The court said:

> The only "right" that was taken in this case was the "right," if it is one, to have the sign viewed by traffic on the approach to the bridge and the bridge itself. We have therefore examined the case law to

resolve whether the abutting property owner has a right to have his sign viewed by the traffic on the approach to and from the bridge, so that any de facto taking of that right entitles the owner to compensation. We conclude that the property owner does not have such a right.

667 A.2d at 768:

D. THE GEORGIA CASE

In *Rolleston v. Dept. of Transportation* (2000) 242 Ga. App. 835, 531 S.E.2d 719 (GA. App.) the billboard company requested permission to raise the height of existing billboards, to compensate for visibility lost because of highway reconstruction. When permission was denied, the billboard company claimed a taking and demanded compensation. The court rejected the claim of violation of equal protection, based on billboards which had been raised, because those other signs were raised illegally, without permits, and their owners had been fined $6,000 for illegally trimming trees to increase visibility.

II. THE COURT OF APPEALS REACHED THE RIGHT DECISION

When this case was decided by the Court of Appeal, Justice Epstein concluded that Appellant Regency Outdoor was not entitled to compensation because California case law shows that the visibility right exists only when coupled with another right.

This same concept can be recast as outlining the ways in which billboards are different from other land uses. As early as 1919 the U.S. Surpeme Court held that "billboards properly may be put in a class by themselves," *St. Louis Poster v. City of St. Louis* (1919) 249 U.S. 269, 274. "It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an esthetic harm." *Metromedia v. San Diego*, 453 U.S. 490, 510 (1981) (plurality opinion). California has separate bodies of statutory regulations for billboards (Business and Professions Code section 5200 *et seq.*, the "Outdoor Advertising Act") and for on-site commercial signs (B&P section 5490 *et seq.*, on-premise advertising displays).

A billboard is not a store. In *Williams v. Los Angeles Railway* (1907) 150 Cal. 592, the signs were placed on a retail curio building. They were

onsite commercial signs. And in *United Cal. Bank v. People ex rel Dept. of Public Works* (1969) 1 Cal.App.3d 1, the visibility issue concerned a store sign and some window displays. In both of these cases – the only "sign visibility" cases cited by Appellant, the signs were *accessories to the principal use of the land*: a retail store, where customers who had been attracted by the sign could walk in, find a sales clerk and merchandise, and make a purchase.

The billboard has none of these characteristics. It is a stand-alone advertising monolith, a multi-ton permanent steel structure. See *Horizon Outdoor v. City of Industry* (2003) 2003 WL 24135456 at *1 (U.S. Dist. Ct., Central Dist. Cal). The sole purpose of a billboard is to distract the public, to interrupt the view of the normal scenery and impose an advertising message upon the viewer. By deliberate design and intent, the billboard is visually invasive. The message on a billboard does not invite customers into the store; instead, it usually encourages viewers to go elsewhere to make their purchases. The billboard is unattended by human beings. There is no "door to walk into," and there is no merchandise to purchase. No human services are offered at the billboard. The billboard is not an accessory to another other use on the land. If there is a store on the same parcel, then the

billboard is a second principal use.

The sign on a store, at least when mounted on the wall, does not create a new interruption of the public view. Rather, the store itself is the main land use, and adding a wall sign does not increase the view interruption.

The onsite commercial sign provides location identification information about the store. The billboard does neither.

These characteristics explain why the law has long treated billboards differently from other signs, and indeed as a distinct class of land use. See *Ackerley of the Northwest v. Krochalis*, 108 F.3d 1095, 1099 (9th Cir. 1997) ("we deal here with the law of billboards"). It is also why courts have consistently upheld the onsite / offsite distinction, made in virtually all sign regulation schemes, as not being "content based regulation," but instead, a location criterion which is in the control of the private land owner. *Clear Channel Outdoor v. City of Los Angeles* (2003) 340 F.3d 810, 813 (9th Cir.).

III. PUBLIC POLICY CONSIDERATIONS REQUIRE REJECTION OF REGENCY'S CLAIM TO COMPENSATION

Appellant's position is, essentially, that any significant interruption of billboard visibility, by public landscaping, must be compensated. If that view were adopted by this Court, the impact on the public interest would be devastating. To avoid liability for view interruption, local governments would have to spend huge sums inspecting and trimming trees and other vegetation. As noted above on p. 4, such a rule would lead to endless bickering and litigation over how much line of sight interruption is necessary to reach the "visibility impairment" threshold. Faced with such overwhelming risk, many city councils and county boards of supervisors would simply cancel public landscaping projects, to the great detriment of the public welfare.

Most importantly, the billboard company's demand for compensation ignores the fact that it seeks private profit by usurping thoroughfares which have been created at public expense. This concept is made most pointedly in *Kelbro v. Myrick* (1943) 30 A.2d 527 (Vermont), quoting *General Outdoor Adv. Co. v. Dept. of Public Works* (1935) 289 Mass 149, 168 (Massachusetts):

> The only real value of a sign or billboard lies in its proximity to the public thoroughfare within the public view. *** The object of outdoor advertising in the nature of things is to proclaim to those who travel on highways ... that [message] which is on the advertising device, and to constrain such persons to see and comprehend the advertisement. *** In this respect the plaintiffs [billboard companies] are seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways. * * * [Plaintiff's claim of right] to use private land as a vantage ground from which to obtrude upon all the public traveling upon highways, whether indifferent, reluctant, hostile or interested, an unescapable propaganda concerning private business with the ultimate design of promoting patronage of those advertising.

30 A.2d at 529.

IV. CONCLUSION

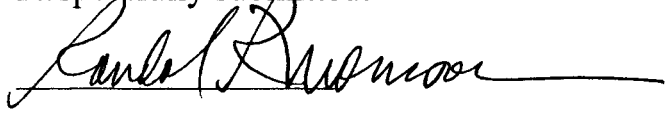
Century Boulevard, leading to the Los Angeles International Airport, was created at public expense for the purpose of providing a transportation corridor to and from the airport. It was not built for the purpose of providing Regency Outdoor with a captive audience for the advertising messages of its clients.

The public landscaping which Regency claims violated its property rights to visibility was not installed for the purpose of limiting the public view of the signs. The trees were planted, at public expense, for the laudatory purpose of beautifying the public view leading to the airport.

Any reduction of revenue from the partial obstruction of billboard visibility is an incident of ownership, a risk inherent in all forms of property. There has been no taking, and Regency is not entitled to any compensation.

Date: January 19, 2006

Respectfully submitted:



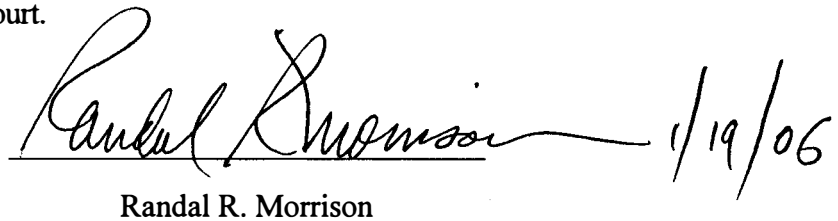
Randal R. Morrison

Attorney for Amicus Curiae

League of California Cities

CERTIFICATE OF WORD COUNT

I, Randal R. Morrison, certify that the foregoing amicus curiae brief contains 2,322 words in the argument section, and 501 words in the Application for Permission to File and Interest and Identity of Amicus sections, as reported by WordPerfect version 12, counted as provided in rule 29.1, subdiv. (c) of the California Rules of Court.



Randal R. Morrison

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CERTIFICATE OF SERVICE

COURT: Supreme Court of California
CIVIL NO.: S132619 (Regency v. Los Angeles)
HEARING DATE: NA

I certify that I am over the age of 18 years and not a party to this action, that my employment address is Sabine & Morrison, 110 Juniper Street, PO Box 531518, San Diego California 92153-1518, which is in the same county where service by mail (if such manner is indicated below) occurred. I served the document(s) described herein as follows:

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2. Manner of service (check all applicable):

☐ First class mail, package or envelope sealed, first class postage fully prepaid, deposited in U.S. Mail receptacle at San Diego California on January 19, 2006.

3. Document(s) served:

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I declare under penalty of perjury that the foregoing document is true and correct. Executed at San Diego, State of California, this January 19, 2006.

_____

Name and signature of person authorized to make service
Sherry H. Morrison