

# PROTECTING BILLBOARDS IN SOUTH CAROLINA AT THE EXPENSE OF LOCAL GOVERNMENT: THE PROPOSED “BILLBOARD PROTECTION” BILL, H3381/S420

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## I. Introduction

“When a man throws an empty cigarette package from an automobile, he is liable for a fine of \$50. When a man throws a billboard across a view, he is richly rewarded.”<sup>1</sup> The South Carolina Legislature is threatening to lead its state in a similar direction. In 2004, the outdoor advertising industry introduced legislation to the South Carolina Legislature to eliminate the amortization process, instead requiring local governments of the state to relocate the billboard rather than having it removed.<sup>2</sup> Moreover, if a comparable location is not available, then the local government would be required to pay cash compensation for the cost of the billboards, relocation costs, and the revenues lost as a result of the removal of the sign.<sup>3</sup> Furthermore, the local government would be required to pay the property owner where the billboard was located

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<sup>1</sup> Billboard Legislation and the Takings Issue, at <http://www.scenicflorida.org/bblegistakings.html> (Apr. 10, 2005) (quoting California Governor Pat Brown).

<sup>2</sup> S. 831, 2003 Sen., 115th Sess. (S.C. 2003). The Relocation and Reconstruction Agreement Act was introduced and submitted to Senate Committee on Transportation on Jan. 14, 2004. This legislation did not pass.

<sup>3</sup> *Id.*

for revenues lost due to the removal of the sign.<sup>4</sup>

Similar legislation has been introduced in 2005 and has passed the South Carolina House of Representatives.<sup>5</sup> In April it stands before the Senate awaiting discussion. If this legislation passes, it will all but eliminate local governments' ability to establish community appearance standards, effectively cutting against the principal of home rule. The outdoor advertising industry has put forth a national initiative by the industry carried out over the past few years "to secure state legislation reducing the rights of local government to require removal or alteration of billboards along local roads."<sup>6</sup> This initiative now finds itself in the South Carolina capitol. This paper will discuss the monetary implications to local governments in South Carolina resulting from the loss of amortization as a land use tool and the requirements of the proposed South Carolina Landowner and Advertising Protection and Property Valuation Act.<sup>7</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> S. 420, 2005 Sen., 116th Sess. (S.C. 2005). This legislation was introduced as House Bill No. 3381 by Harry Cato, R-Greenville; the bill has had over 50 sponsors.

<sup>6</sup> Billboard Legislation and the Takings Issue, at <http://www.scenicflorida.org/bblegistakings.html> (Apr. 10, 2005).

<sup>7</sup> Actual quantitative figures are outside the scope of this paper in regards to the monetary costs that local governments would incur under this proposed bill. It should be noted that this is an area of contention, and an area of concern for opponents to the proposed bill. The Municipal Association of South Carolina has stated that "[i]f the billboard industry wants city and county taxpayers to pay the billboard industry for its claimed lost future business profits," then the industry should "tell the taxpayers what amount that is." Memorandum from the Municipal Association of South Carolina, Talking Points: Billboards - Just Compensation for Removal 2 (Mar. 27, 2005) (on file with author). However, The State Newspaper stated that the "S.C. Municipal Association estimates the change could cost local governments about \$300,000 to \$400,000 per billboard." Gina Smith, *Billboard Caps and Removal*, THE STATE, Mar. 1, 2005, at b.

## II. FRAMING THE ANALYSIS

### A) The Proposed Legislation Generally

In 2005, Republic Representative Harry Cato from Greenville proposed a bill titled “South Carolina Landowner and Advertising Protection and Property Valuation Act.”<sup>8</sup> The primary consequence of this bill would be to require local governments desiring to have an “off-premises outdoor advertising sign”<sup>9</sup> removed to cooperate with the sign owner to have such sign relocated to a comparable location.<sup>10</sup> Thus, this proposed legislation would effectively destroy

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<sup>8</sup> S. 420, 2005 Sen., 116th Sess. (S.C. 2005), *available at* [http://www.scstatehouse.net/sess116\\_2005-2006/bills/420.htm](http://www.scstatehouse.net/sess116_2005-2006/bills/420.htm) (Apr. 23, 2005). This bill was introduced to the South Carolina House of Representatives on Jan. 26, 2005 and sent to the House Committee on Labor, Commerce and Industry. On Feb. 23, 2005 the Committee reported favorably with amendment. Then on March 2, 2005 the Committee’s amendment was adopted by the House, and the following day H. 3381 passed the House.

<sup>9</sup> “Off-premises outdoor advertising sign” essentially means “billboard;” the proposed bill defines this term as: a lawfully erected, permanent sign which relates in its subject matter to products, accommodations, services, or activities sold or offered elsewhere other than upon the premises on which the sign is located. For the purposes of this article, the related leasehold or other property interests together with the lawfully issued permit is considered to be part of the off-premises advertising sign. S. 420, 2005 Sen., 116th Sess. § 2, 39-14-20(2) (S.C. 2005). Billboards, more properly referred to as off-premise outdoor advertising signs, must be distinguished from on-premise signs. The on-premise sign is an integral part of the business where it is located, and serves to index the business environment, that is, to inform potential customers where they can find various goods and services. The off-premise advertising sign, on the other hand, is designed to use the roadside environment to advertise a good or service found at some other location. *The Takings Issue in Billboard Control - 2000 APA Proceedings*, *at* <http://www.asu.edu/caed/proceedings00/FLOYD/floyd.htm> (Apr. 10, 2005).

<sup>10</sup> S. 420, 2005 Sen., 116th Sess. § 1 & 2 (S.C. 2005).

South Carolina's existing amortization ability.<sup>11</sup> Furthermore, as part III discusses, it's debatable whether the bill successfully encourages cooperation between the local government and sign owner.

## **B) Land Use Regulation as a “Taking” and Billboard Amortization**

The concept of billboard amortization allows cities or other local governing bodies to require the removal of existing nonconforming billboards without providing for reimbursement to outdoor advertising companies.<sup>12</sup> In passing local laws or ordinances that restrict billboards, the laws or ordinances may provide for a “phase-in period” that would “allow 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.”<sup>13</sup> This is amortization. By providing this phase-in period, sign owners should be able to “recoup their investment.”<sup>14</sup>

Providing for amortization in outdoor advertising restrictions has long been a legislative response and judicially favored means to avoid such restrictions from “ris[ing] to the level of a ‘taking’ triggering constitutional compensation obligations.”<sup>15</sup> The Fifth Amendment of the

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<sup>11</sup> See S.C. Code Ann. § 5-7-30 (2005).

<sup>12</sup> 83 AM. JUR. 2D *Zoning and Planning* § 266 (West 2004). See also 8 A.L.R.5th 391 (West 2005).

<sup>13</sup> Letter to The Honorable Mike McIntyre dated Nov. 12, 2004 (B-302809) from General Counsel Anthony H. Gamboa, available at <http://www.gao.gov/decisions/other/302809.htm> (Apr. 10, 2005).

<sup>14</sup> Katherine D. Parsons, Comment, *Billboard Regulation After Metromedia and Lucas*, 31 Hous. L. Rev. 1555, 1596 (1995).

<sup>15</sup> Letter to The Honorable Mike McIntyre dated Nov. 12, 2004 (B-302809) from General Counsel Anthony H. Gamboa, available at <http://www.gao.gov/decisions/other/302809.htm> (Apr. 10, 2005) (“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. [C]ases

United States Constitution provides that no private property shall be taken for public use without providing just compensation.<sup>16</sup> The “takings clause” of the Fifth Amendment has been incorporated by the United States Supreme Court through the Fourteenth Amendment to apply against the states, as well as local governments in the states.<sup>17</sup> A great deal of debate and contention has resulted from both the judicial and legislative policies centered upon the termination of billboards as nonconforming uses.<sup>18</sup> The outdoor advertising industry has been at the forefront “bitterly contest[ing]” this issue.<sup>19</sup>

Outdoor sign advertisers and billboard owners argue that billboard restrictions and prohibitions are “takings” under the Fifth Amendment requiring just compensation.<sup>20</sup> Additionally, it’s argued that the requirement under the Constitution’s “takings clause” is for payment of monetary compensation.<sup>21</sup> “The billboard industry’s goal has been to completely eliminate amortization as a land use tool.”<sup>22</sup> One observance has been that “[t]he billboard

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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.’”).

<sup>16</sup> U.S. CONST. amend. V.

<sup>17</sup> Letter to The Honorable Mike McIntyre dated Nov. 12, 2004 (B-302809) from General Counsel Anthony H. Gamboa, *available at* <http://www.gao.gov/decisions/other/302809.htm> (Apr. 10,2005) (citing Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897)).

<sup>18</sup> The Takings Issue in Billboard Control - 2000 APA Proceedings, *at* <http://www.asu.edu/caed/proceedings00/FLOYD/floyd.htm> (Apr. 10, 2005).

<sup>19</sup> *Id.*

<sup>20</sup> Letter to The Honorable Mike McIntyre dated Nov. 12, 2004 (B-302809) from General Counsel Anthony H. Gamboa, *available at* <http://www.gao.gov/decisions/other/302809.htm> (Apr. 10, 2005).

<sup>21</sup> *Id.*

<sup>22</sup> Billboard Legislation and the Takings Issue, *at* <http://www.scenicflorida.org/bblegistakings.html> (Apr. 10, 2005).

industry recognizes the fact that it is facing a losing battle in the courts, especially if the courts focus on the ‘reasonableness’ of the length of amortization periods being adopted by local governments.”<sup>23</sup> In response to this “fact,” the billboard industry has refocused its efforts to the state legislatures, where it is better equipped to capitalize on its “lobbying prowess” to effectively “frustrate land use decisions at the local level.”<sup>24</sup>

On the other side, local governments have countered the constitutional attacks by maintaining that a reasonable amortization period is “just compensation” to satisfy the government’s obligations for billboard restriction and removal, or alternatively, that it prevents there from existing a “taking” in the first place.<sup>25</sup> The reasonableness of a phase-in period under amortization is typically measured by whether the length of time is sufficient “so as to allow a billboard owner to recoup its original investment in the sign structure.”<sup>26</sup> Generally, such a test of reasonableness should be satisfied if the amortization period adopted provides for at least five years of continuing the nonconforming use.<sup>27</sup> This doesn’t even account for the owner’s ability

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See also Katherine D. Parsons, Comment, *Billboard Regulation After Metromedia and Lucas*, 31 Hous. L. Rev. 1555, 1596 (1995) (“the billboard industry’s increasing pressure on legislatures to abolish amortization is intended to force local governments to pay cash as ‘just compensation’ or refrain from enacting sign ordinances.”).

<sup>23</sup> Billboard Legislation and the Takings Issue, at <http://www.scenicflorida.org/bblegistakings.html> (Apr. 10, 2005).

<sup>24</sup> *Id.*

<sup>25</sup> Letter to The Honorable Mike McIntyre dated Nov. 12, 2004 (B-302809) from General Counsel Anthony H. Gamboa, available at <http://www.gao.gov/decisions/other/302809.htm> (Apr. 10, 2005).

<sup>26</sup> Billboard Legislation and the Takings Issue, at <http://www.scenicflorida.org/bblegistakings.html> (Apr. 10, 2005).

<sup>27</sup> *Id.* (“In practice, amortization periods of five or more years allow a billboard company the opportunity to recoup far more than its original investment in the construction and erection of the sign structure.”).

to reuse the parts once removed.<sup>28</sup> According to William D. Brinton, any “[s]uggestion[] that the government is either ‘destroying’ the structure or ‘physically taking’ the structure away from the sign owner [is] untrue.”<sup>29</sup> This conclusion is further discussed by Dr. Charles F. Floyd, long-time Professor of Real Estate at the University of Georgia.<sup>30</sup> Dr. Floyd specifically states that amortization does *not* “involve a physical invasion of property,” and he goes on to buttress this statement by referencing a case in which the Fourth Circuit Court of Appeals agreed.<sup>31</sup>

### **C) Changing the Analysis: Lobby for Legislation / Defeat Home Rule**

With such constitutional interpretations favoring a balance of local governments’ autonomy and authority over the billboard industry’s power, the industry has now strategically targeted state legislatures in an effort to curtail the self-governing efforts of many local governments. The billboard industry, through the efforts of its major conglomerates, has found success in this lobbying effort.<sup>32</sup>

This consequence cuts against the principle of home rule. Home rule generally is the

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> The Takings Issue in Billboard Control - 2000 APA Proceedings, *at* <http://www.asu.edu/caed/proceedings00/FLOYD/floyd.htm> (Apr. 10, 2005).

<sup>31</sup> *Id.* (citing Major Media of the Southeast, Inc. v. City of Raleigh, 621 F. Supp. 1446 (E.D.N.C. 1985), *aff’d*, 792 F.2d 1269 (4th Cir. 1986)).

<sup>32</sup> Billboard Legislation and the Takings Issue, *at* <http://www.scenicflorida.org/bblegistakings.html> (Apr. 10, 2005) (“In each of the past three years [1999, 2000, and 2001], the billboard industry has successfully lobbied at least one state legislature to completely eliminate local governments’ rights to use the amortization approach for the removal of billboards.”).

delegation of authority and powers by the state to the local government units.<sup>33</sup> Typically, this limits interference by the state in the affairs of the cities and counties. “Under home rule, local governments may enact regulations deemed necessary and proper for the general welfare unless such regulations are actually inconsistent with the Constitution or general law of the state.”<sup>34</sup> South Carolina established power in the local governments of the state in Article VIII, Section 17 of the South Carolina Constitution, thus making South Carolina a home rule state.<sup>35</sup> Section 17 provides: “The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.”<sup>36</sup> Furthermore, South Carolina Code Section 4-9-25<sup>37</sup> and 5-7-10<sup>38</sup> define county and municipal powers. Moreover, it has been held by the South Carolina Supreme Court

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<sup>33</sup> BLACK’S LAW DICTIONARY 738 (7th ed. 1999).

<sup>34</sup> Douglas T. Kendall, *Preserving South Carolina’s Beaches: The Role of Local Planning in Managing Growth in Coastal South Carolina*, 1 S.C. ENVTL. L.J. 61, 69 (2000).

<sup>35</sup> *Glasscock Co. v. Sumter County*, 361 S.C. 483,490-91, 604 S.E.2d 718, 722 (Ct. App. 2004).

<sup>36</sup> S.C. CONST. art. VIII, § 17.

<sup>37</sup> Section 4-9-25 provides: All counties of the State . . . have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. S.C. Code Ann. § 4-9-25 (1976).

<sup>38</sup> “The powers of a municipality shall be liberally construed in favor of the municipality and the specific mention of particular powers shall not be construed as limiting in any manner the general powers of such municipalities.” S.C. Code Ann. § 5-7-10 (1976).

that South Carolina local governments “are granted broad police powers to enact ordinances with respect to any subject which appears necessary and proper for the security, general welfare and convenience of the municipality.”<sup>39</sup>

Although courts in the past have reasoned that zoning regulations founded on “aesthetic preference would be arbitrary,” this reasoning has shifted over time to fit such regulations within a local government’s inherent police power.<sup>40</sup> In *Village of Euclid v. Ambler Realty Co.*, the United States Supreme Court “held that the village had the authority to affirmatively determine how private property could be used, without landowner compensation, and to enact zoning restrictions in reasonable furtherance of the general welfare.”<sup>41</sup> This position was carried further by the Supreme Court in *Berman v. Parker*, “to include the public’s interest in aesthetics.”<sup>42</sup> This interest can be even more prominent in states, such as South Carolina, that rely on tourism to contribute to its economy.<sup>43</sup> “It is not speculative to recognize that billboards by their very

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<sup>39</sup> Peterson Outdoor Adver. V. City of Myrtle Beach, 327 S.C. 230, 234, 489 S.E.2d 630, 632 (1997) (citing S.C. Code Ann. § 5-7-30 (Supp. 1996)).

<sup>40</sup> Katherine D. Parsons, Comment, *Billboard Regulation After Metromedia and Lucas*, 31 Hous. L. Rev. 1555, 1558 (1995). “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.” Letter to The Honorable Mike McIntyre dated Nov. 12, 2004 (B-302809) from General Counsel Anthony H. Gamboa, *available at* <http://www.gao.gov/decisions/other/302809.htm> (Apr. 10,2005) (citing Penn. Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)).

<sup>41</sup> Katherine D. Parsons, Comment, *Billboard Regulation After Metromedia and Lucas*, 31 Hous. L. Rev. 1555, 1558 (1995) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391-95 (1926)) (footnotes omitted).

<sup>42</sup> *Id.* (citing *Berman v. Paker*, 348 U.S. 26 (1954)).

<sup>43</sup> Katherine D. Parsons, Comment, *Billboard Regulation After Metromedia and Lucas*, 31 Hous. L. Rev. 1555,

nature, wherever located and however constructed, can be perceived as an “esthetic harm.”<sup>44</sup> And with these considerations in mind, the South Carolina Supreme Court has so held that the broad authority entrusted South Carolina’s local governments extends to “the power to enact regulations based on aesthetic considerations.”<sup>45</sup>

### **III. THE PROPOSED SOUTH CAROLINA LEGISLATION, H3381 / S420**

The reason that it is of real importance to look at the secondary effects of S420 as it dampens the home rule authority of local governments to govern local affairs is that such legislation could potentially impact a much broader area than simply the relationship between outdoor advertisers and the local government. As William D. Britton noted in a Continuing Legal Education presentation in Coral Gables, Florida in 2001, “the adverse consequences to the public welfare [of billboard protection legislation] are just now becoming visible.”<sup>46</sup>

#### **A) Purpose**

In analyzing the provisions of the proposed legislation before the South Carolina Senate it is important to keep in mind the state policies driving its adoption. S420 states: “it is the policy of this State to promote arbitration as a means of settling disputes regarding the valuation

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1562 (1995) (“[W]here aesthetics and tourism are closely associated, courts take note of the relationship between aesthetics and economics on the theory that regulations based on dual purposes are more closely tied to a state’s interest.”).

<sup>44</sup> The Takings Issue in Billboard Control - 2000 APA Proceedings, *at* <http://www.asu.edu/caed/proceedings00/FLOYD/floyd.htm> (Apr. 10, 2005) (quoting Justice White in *San Diego v. Metromedia*, 453 U.S. 490, 510 (1981)).

<sup>45</sup> *Peterson Outdoor Adver. V. City of Myrtle Beach*, 327 S.C. 230, 234, 489 S.E.2d 630, 632 (1997)

<sup>46</sup> *Billboard Legislation and the Takings Issue*, *at* <http://www.scenicflorida.org/bblegistakings.html> (Apr. 10, 2005).

of off-premises outdoor advertising signs instead of litigation.”<sup>47</sup> The legislature attempts to carry out this stated purpose through several provisions incorporated throughout the remainder of the proposed bill.

### **B) Self-Imposed Monetary Compensation**

First, in accordance with Section 39-14-30(B), a new ordinance passed by a local government requiring “removal of any nonconforming, lawfully erected off-premises outdoor advertising sign” may self-impose a requirement to pay just compensation for such removal.<sup>48</sup> As long as the adequacy of the compensation for removal is not disputed by the sign owner<sup>49</sup> or property owner, an ordinance or law that establishes a policy of providing just compensation in such circumstances would nullify any need to litigate or arbitrate the matter. While this scenario effectively carries out the above stated purpose, to avoid litigation, it still remains to be discussed the propriety of requiring local government to pay monetary compensation, as would necessary under this provision. Additionally, the ability of the local governments to pay just compensation may be hampered by the speculative nature in which this bill attempts to calculate just compensation. This aspect is discussed in greater detail later in this paper.

### **C) Mutual Agreement or Arbitration**

Rather than the local government simply providing for payment of just compensation in its ordinance or law, another option is for the government and the sign owner to enter into an agreement that again would forego the necessity of litigation or arbitration. However, because of

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<sup>47</sup> S. 420, 2005 Sen., 116th Sess. § 1 (S.C. 2005).

<sup>48</sup> S. 420, 2005 Sen., 116th Sess. § 39-14-30(B) (S.C. 2005).

<sup>49</sup> “‘Sign owner’ means the owner of an off-premises outdoor advertising sign.” S. 420, 2005 Sen., 116th Sess. § 39-14-20(4) (S.C. 2005).

the proposed bill's provisions addressing the sufficiency of such an agreement, it may be difficult for the local government to reach a reasonable agreement with a sign owner. S420 provides that the parties, local government and sign owner, can enter into an agreement subject to the provisions in subsections (D) and (F) of Section 39-14-30(B).<sup>50</sup>

### **(1) Relocation to “Comparable Location”**

Under subsection (D), the agreement may provide for relocation and reconstruction of the nonconforming off-premises outdoor advertising sign.<sup>51</sup> This in turn requires that a comparable site be offered in which to relocate the sign, as well as providing compensation for the costs associated with the relocation and reconstruction.<sup>52</sup> Arguably, this gives sign owners considerable leverage and bargaining power, assuming the local government wishes to negotiate terms of an agreement. The bill's description of a “comparable location” may leave considerable room for disagreement over the adequacy of a proposed relocation site for a targeted billboard.

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<sup>50</sup> S. 420, 2005 Sen., 116th Sess. § 39-14-30(B)(1) (S.C. 2005).

<sup>51</sup> S. 420, 2005 Sen., 116th Sess. § 39-14-30(D) (S.C. 2005).

<sup>52</sup> S. 420, 2005 Sen., 116th Sess. § 39-14-30(D)(1) and (2) (S.C. 2005). In considering what constitutes a “comparable location,” it should be taken into account, the: (a) size and format of the sign;(b) characteristics of the proposed relocation site, including visibility, traffic count, area demographics, zoning, and any uncompensated differential in the sign owner's cost to lease the replacement site; and(c) timing of the relocation.S. 420, 2005 Sen., 116th Sess. § 39-14-30(D)(1)(a)-(c) (S.C. 2005). Additionally, S420 list several factors for consideration in calculating the cost of relocation and reconstruction. These are:(a) the actual cost of removing the sign;(b) the actual cost of necessary repairs to the real property for damages caused in the removal of the sign;(c) the actual cost of installing the sign at the new location; and(d) an amount of money equivalent to the income received from the lease of the sign for a period of up to thirty days if income is lost during the relocation of the sign.S. 420, 2005 Sen., 116th Sess. § 39-14-30(D)(2)(a)-(d) (S.C. 2005).

It may well be in the sign owner's interest to apply a "hard bargaining" strategy in order to get the government to offer a more prime location for its billboard. The worst result, from the sign owner's aspect, under this bill would be that government refuses to offer a more desirable location, possibly resulting in the parties arbitrating the issue.

In addition to subsection (D)'s provisions discussed above, a proposed agreement under Section 39-14-30(B)(1) is also subject to subsection (F).<sup>53</sup> In accordance with subsection (F), if the local government offers certain terms of relocation and reconstruction of a sign for agreement and the parties subsequently disagree as to the adequacy of the "comparable location" after 120 days, then the parties can mutually agree to enter into binding arbitration.<sup>54</sup> This binding arbitration is to "determine the comparability of the site offered for relocation."<sup>55</sup> In the instance that arbitration is chosen, unless otherwise agreed, each party is responsible for their respective costs of the arbitration.<sup>56</sup> Perhaps this counterbalances the shift of power mentioned above that places the burden on local government to offer an agreement that satisfies the provisions of Section 39-14-30(D), inasmuch as subsection (F) allows the local government to propose an agreement for relocation of the nonconforming sign to a specified location of its choosing with the knowledge that if the sign owner chooses not to accept the agreement within 120 days, then arbitration is available to resolve the dispute. Initially, this provision appears to create procedural equality for both the local government and the sign owner; however, it should be

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<sup>53</sup> S. 420, 2005 Sen., 116th Sess. § 39-14-30(B)(1) (S.C. 2005).

<sup>54</sup> S. 420, 2005 Sen., 116th Sess. § 39-14-30(F) (S.C. 2005).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* ("including the costs of the services of his attorneys and witnesses, plus his proportionate share of the costs associated with the arbitration").

considered what the possible outcomes are of the arbitration and how other provisions of S420 respond.

First, the arbitrators could find in favor of the government’s proposed location (i.e., that the location is sufficiently comparable). In such a case, the local government would have its pick of location. However, the sign is not eliminated, and the government still must pay for costs of removal and relocation, as well as its proportionate costs of the arbitration.<sup>57</sup>

The arbitrators could find in favor of the sign owner (i.e., that the proposed location is not “comparable to or better than the existing site”).<sup>58</sup> In such a case, section 39-14-30(G) applies and the local government is given two options. First, the government may choose to continue with the removal.<sup>59</sup> The other option is for the government to allow the sign to remain until further action is taken, such as possibly later agreeing with the sign owner on another comparable location.<sup>60</sup> If the former action is taken, this provision requires that the government pay just compensation to the sign owner, as determined under section 39-14-20(3).<sup>61</sup>

## **(2) “Just Compensation”**

The bill establishes a set of factors for determining the fair market value of the sign to calculate the compensation to be paid the sign owner by the government for the sign’s removal.<sup>62</sup>

The bill provides:

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<sup>57</sup> *Id.*

<sup>58</sup> S. 420, 2005 Sen., 116th Sess. § 39-14-30(G) (S.C. 2005).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> S. 420, 2005 Sen., 116th Sess. § 39-14-20(3) (S.C. 2005).

‘Just compensation means the cash payment of the fair market value of the off-premises outdoor advertising sign in place immediately before its removal and without consideration of the effect of the ordinance or a diminution in value caused by the ordinance requiring its removal. The Uniform Standards of Professional Appraisal Practices (USPAP) must be used in determining the fair market value for just compensation and includes the following factors:

- (a) the sale price of similar off-premises outdoor advertising signs;
- (b) the physical condition of the off-premises outdoor advertising sign;
- (c) the productivity of the off-premises outdoor advertising sign;
- (d) the economic utility of the property on which the off-premises outdoor advertising sign is located, or the usability and adaptability for industrial, commercial, and adaptability for industrial, commercial, or other purpose;
- (e) the value of the off-premises outdoor advertising sign permit issued by an appropriate governing body; and
- (f) any other factor that may affect the value of the property on which the off-premises outdoor advertising sign is located.<sup>63</sup>

Notwithstanding arguments directly against a monetary compensation requirement in general, the above just compensation provisions are arguably overly harsh. For example, the

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<sup>63</sup> *Id.*

Municipal Association of South Carolina (“MASC”) maintains that the bill “creates an unlevel playing field because it requires local governments to comply with a higher standard for just compensation than state government when a billboard is removed.”<sup>64</sup> Specifically, MASC points to the requirement that local governments pay sign owners for “lost future revenues” under S420, a consideration not imposed on the state of South Carolina in identical matters.<sup>65</sup>

Notwithstanding these specific attacks, the requirement of monetary compensation, as calculated in accordance with the factors provided, will be sure to place an enormous, cumulative financial burden on the towns and other local governments of South Carolina. Such costs would effectively be borne by taxpayers and most incentives for pursuing town beautification initiatives that would seek to have area billboards removed could be nullified by this bill. A potential concern is that funds to establish a broad billboard-elimination objective will be lacking under such a compensation system. Therefore, MASC, the South Carolina Association of Counties (“SCAC”) and the South Carolina Coastal Conservation League (“SCCCL”) proposed certain amendments to the bill while it was before South Carolina House.<sup>66</sup> These proposed amendments included eliminating the “lost future revenues” provision<sup>67</sup> and the provision requiring consideration of the sign’s permit value<sup>68</sup> to be paid by the local government.<sup>69</sup> In

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<sup>64</sup> Memorandum from the Municipal Association of South Carolina, Talking Points: Billboards - Just Compensation for Removal 1 (Mar. 27, 2005) (on file with author).

<sup>65</sup> *Id.* See also S. 420, 2005 Sen., 116th Sess. § 39-14-20(3)(c) (S.C. 2005).

<sup>66</sup> Proposed Amendments to H.3381 from the Municipal Association of South Carolina 1 (Feb. 13, 2005) (on file with author).

<sup>67</sup> S. 420, 2005 Sen., 116th Sess. § 39-14-20(3)(c) (S.C. 2005).

<sup>68</sup> S. 420, 2005 Sen., 116th Sess. § 39-14-20(3)(e) (S.C. 2005).

<sup>69</sup> Proposed Amendments to H.3381 from the Municipal Association of South Carolina 1 (Feb. 13, 2005) (on file

addition, the groups also sought inclusion of factors that exist under North Carolina statute for determining the amount of just compensation, such as the “replacement cost of the property,” the property’s age, remaining life, and the “effect of obsolescence on the property.”<sup>70</sup> Alternatively, the groups sought amending the bill to bring its definition of just compensation in line with the South Carolina Department of Transportation’s scheme.<sup>71</sup> These proposed amendments, amongst others, were summarily refused.<sup>72</sup>

Therefore, if the parties have failed to come to terms regarding the relocation of a billboard, they must agree to the amount of just compensation to be paid within thirty days of the arbitrators’ determination that a proposed location for relocation is not comparable.<sup>73</sup> If they fail to so agree, then they may again mutually agree to binding arbitration for the purpose of determining just compensation.<sup>74</sup> Again, each party is responsible for its respective share of the arbitration costs.<sup>75</sup> Throughout this process, the sign owner still has been allowed to maintain its nonconforming sign while the local governing body seeks to enforce its local ordinance. Regardless of the outcome, the local government must incur the costs of two arbitrations, in addition to the expense of paying the sign owner for removal and just compensation, and any costs due to the property owner for damage or lost income.

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with author).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Interview with Christie Renken, Legislative Liaison, South Carolina Coastal Conservation League, in Columbia, S.C. (Mar. 27, 2005).

<sup>73</sup> S. 420, 2005 Sen., 116th Sess. § 39-14-30(G) (S.C. 2005).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

### **C) Action in Circuit Court to Carry Out Removal**

The proposed bill also provides specific procedures for situations in which the parties cannot agree to binding arbitration for determination of either relocation or compensation.<sup>76</sup> Should this situation arise, the government again has two options. First, the government may forego enforcing its ordinance and allow the nonconforming sign to remain. Alternatively, the government may proceed with the sign's removal. To carry out the latter, the government must bring an action in circuit court for a determination of just compensation.<sup>77</sup> However, the provision under this bill for such a circuit court action requires the court to not only make a determination of an amount of just compensation, but the court also "shall determine and award reasonable attorneys' fees and expert witness fees incurred by the sign owner in the proceedings."<sup>78</sup> Mandating that the court shall award such fees in favor of the sign owner could effectively discourage the government from ever refusing arbitration. However, no provision is made to ensure the sign owner's compliance or cooperation with proposed arbitration proceedings. In order to submit the dispute to arbitration, the parties must mutually agree to such.<sup>79</sup> Therefore, this bill creates some incentive for the sign owner to refuse arbitration by failing to address such a situation in which the sign owner does so refuse arbitration with the expectation that the statute provides for per se awarding of fees, should the government seek enforcement in circuit court. In consideration of such inequities, this bill encourages sign owners to "wait-out" the local government until it brings an action in circuit court, while simultaneously

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<sup>76</sup> *Id.*

<sup>77</sup> S. 420, 2005 Sen., 116th Sess. § 39-14-30(H) (S.C. 2005).

<sup>78</sup> *Id.*

<sup>79</sup> S. 420, 2005 Sen., 116th Sess. § 39-14-30(F) and (G) (S.C. 2005).

discouraging the local government from bringing such an action. Thus, a likely outcome is that the local government will avoid the potential high costs associated with removal of nonconforming signs, and will be forced to allow nonconforming signs to remain on their current premises. As William Britton stated, “State legislatures have the power to ensure that ‘just compensation’ doesn’t turn into an ‘unjust enrichment’ scheme.”<sup>80</sup> However, that is just the “scheme” that S420 threatens to impose.

For example, the proposed bill also includes four limited exceptions to the general requirement of just compensation that don’t appear to offer any significant protection to the local government. These are: (1) for the “local governing body and the owner of the nonconforming off-premises outdoor advertising sign enter into a relocation agreement. This agreement must provide for relocation to a comparable area (accounting for, among other things, visibility, traffic, area demographics, and cost difference in lease price). Also, the agreement must additionally provide for cost of removing sign, property damage due to removal, cost of installation, and lost revenue during the time of relocation. (2) The governing body and sign owner enter into a voluntary agreement where the sign owner agrees to the sign’s removal after a set time period in lieu of compensation. (3) The sign is adjudicated to be a public nuisance or detrimental to the health and safety of the public. And (4) “removal is required for . . . Improving streets or sidewalks . . . or improving a public enterprise, and the local governing body allows” for relocation of sign to a comparable location in terms of the location’s value as determined under the just compensation provisions.

#### **IV. CONCLUSION**

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<sup>80</sup> Billboard Legislation and the Takings Issue, at <http://www.scenicflorida.org/bblegistakings.html> (Apr. 10, 2005).

Today, billboards are viewed as a visual blight that destroys the aesthetic features of a city, clutters the roadways, diminishes property values, and suffocates the character of the community and the spirit of individuals. The contrary argument is that billboards serve an important marketplace function by allowing advertisers to reach consumers.<sup>81</sup>

The stakes are high on both sides, and it's highly unlikely that there is a "right" answer. However, local governments in South Carolina have long since enjoyed the authority to regulate land use issues within their own boundaries as necessary to best serve their individual needs. They deserve more than S420.<sup>82</sup> The South Carolina Constitution's grant of home rule authority to local governments should guide the hands and minds of the South Carolina Legislature so as to reject the "Billboard Protection Act." "[I]mplicit in Article VIII [of the South Carolina Constitution] is the realization that different local governments have different problems that require different solutions."<sup>83</sup> It has been, and must continue to be recognized that the issues to which local governments are best suited to respond are deserving of some deference. One commentator has noted that Supreme Court has recognized "that an oppressive visual

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<sup>81</sup> Katherine D. Parsons, Comment, *Billboard Regulation After Metromedia and Lucas*, 31 Hous. L. Rev. 1555, 1604 (1995) (footnotes omitted).

<sup>82</sup> And possibly the local governments of South Carolina are entitled to more than S.420, meaning that consideration needs to be given whether the proposed bill is even constitutional. However, such an inquiry is beyond the scope of this paper.

<sup>83</sup> *Glasscock Co. v. Sumter County*, 361 S.C. 483,490-91, 604 S.E.2d 718, 722 (Ct. App. 2004) (quoting *Hospitality Ass'n of S.C. v. County of Charleston*, 320 S.C. 219, 230, 464 S.E.2d 113, 120 (1995)).

environment can ‘suffocate the spirit’ and ‘make living an almost insufferable burden.’<sup>84</sup> Shouldn’t the local citizens, the “suffocated spirits” themselves, have the ability to control the appearance of their own community within the bounds of the Constitution?

The proposed bill only complicates an already complicated situation. For example, in 2004, the Myrtle Beach City Council was finally able to reach a settlement in a lawsuit brought by ClearChannel challenging restrictions imposed on area billboards that would have caused ClearChannel to remove 55 of their nonconforming signs after a seven-year amortization period.<sup>85</sup> However, Mayor Mark McBride said that it cost Myrtle Beach approximately \$250,000 in the end, and that only 11 billboards were to be removed in accordance with the agreement.<sup>86</sup> Myrtle Beach, and other South Carolina local governments are working to alleviate these sort of issues in their localities, and at the very least, are being successful mitigating some of the perceived harm caused by the proliferation of billboards. Of course this potential for long-term success is the incentive for the billboard industry’s lobbying efforts to have S420 enacted. However, it’s difficult to see how this bill could encourage better compromise between the billboard industry and the local government by stripping the local governments of their home rule authority, however limited.

In conclusion, maybe it’s best to consider one final thought, posed by John F. Rohe, a legal practitioner in Petoskey, Michigan:

Planners are once again fostering a spirit of community and

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<sup>84</sup> Katherine D. Parsons, Comment, *Billboard Regulation After Metromedia and Lucas*, 31 Hous. L. Rev. 1555, 1558 (1995) (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

<sup>85</sup> Emma Ritch, *Myrtle Beach City Council Staff to Settle Billboard Suit*, MYRTLE BEACH SUN NEWS, Dec. 15, 2004, at Local & the Carolinas.

<sup>86</sup> *Id.*

hometown pride. Architecturally pleasing civic centers, spaces on a pedestrian scale, front porches, and sidewalks all contribute to creating urban spaces that honor inhabitants as community members, rather than as mere consumers or motor vehicle occupants. . . . Community planning today will determine the monuments by which we will be memorialized tomorrow. Will our era be recalled as one that promoted dignity and respect for our communities and their residents, or will it commemorate an interval of self-indulgent consumerism?<sup>87</sup>

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<sup>87</sup> John F. Rohe, *General: Billboard Regulations in Michigan: Navigating the Line Between Free Speech and Aesthetic Considerations*, 83 MICH. BAR J. 27 (Sept. 2004).