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What’s the Value of a Billboard? Billboards, Takings, Eminent Domain, and the Environment

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Elimination of duplication with State and local procedures, 40 C.F.R. § 1506 (2004).

*Chancellor Media Whiteco Outdoor Corp. v. State, Dept. of Transp.*, 796 So.2d 547, 549 (1st DCA 2001).


*Outdoor Advertising Ass’n of Tennessee, Inc. v. Shaw*, 598 S.W.2d 783 (1980).


*Perlmutter v. Greene*, 259 N.Y. 327 (1932).


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Extract of Essay. The original is over 40 pages.
While billboards provide company for the lonely traveler, assist in advertising campaigns, and provide landowners with income opportunities without having to develop the land or otherwise use it, there exists a trade-off for the creation of the billboard. The formula for the trade-off balances on the land consumed to create a line of visibility for the advertising structure. When the consumption of land is weighed against the advertiser’s benefits, it seems as though the proper conclusion would be to limit the number of billboards. While this has yet to occur, this essay will treat many of the underlying legal battles of limiting billboards. These issues will be discussed throughout the remainder of the essay.

The legal issues presented by many of the billboard companies are the following: does the industry have an inherent right to advertise via these mega structures which are located on another person’s land? If so, when the government allows for trees and other vegetation to grow in the line of sight for the billboards, is there a legitimate claim that said vegetation is illegal, such as: this growth constitutes a regulatory taking or creates an action for inverse condemnation? The ultimate question is whether the right to advertise is the same under common law, Federal, and local (Florida) Statutes. If the outcome of these tests is dissimilar, what must be done to reconcile these issues? Finally, what solutions may be presented to limit the future construction of these advertising monsters?

I. FIRST ISSUE PRESENTED: IS THERE A COMMON LAW RIGHT TO ADVERTISE ON ANOTHER’S LAND?

A. The Right to Be Seen: Rafferty and its Progeny.

One of the first cases to address the issue of property rights and billboards, by a US court governed body occurred in the Philippines at the turn of the Twentieth Century. The case was *Churchill and Tait v. Rafferty*, 248 U.S. 591 (1918). The issue presented in
"Rafferty" was whether the advertising industry received its compensation from the usage of the billboard or whether the value of the billboard was inherent in its relation to the adjoining thoroughfares.\(^1\) The court held the following:

The success of billboard advertising depends not so much upon the use of private property as it does upon the use of the channels of travel used by the general public...and its real dependency not upon the unrestricted use of private property but upon the unrestricted use of the public highways is at once apparent. Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares.\(^2\)

The court held that the value of advertising is neither in the structure (billboard) itself, nor in the land on which the advertisement exists, rather, the value of advertising is found in the lands adjacent to the advertisement which allows it to be seen. The value of a billboard is derived from its ability to be seen by the local travelers. This relationship analysis of advertisements has been consistently followed since the "Rafferty" holding over one century ago.

In 1932, the same issue was addressed by the Court of Appeals of New York in the case of *Perlmutter v. Greene*.\(^3\) In *Perlmutter*, the court was concerned with the safety found in the illumination of an advertising structure on the highway, as weighed against the property owner’s rights to use the land as he pleased.\(^4\) The court held that the right to advertise was limited by the state’s powers to relegate safety. This power was delegated to its Superintendent of the Public Works. Further, the court argued, that the superintendent had the authority to determine the best aesthetic use of lands adjacent to


\(^2\) Id.

\(^3\) *Perlmutter v. Greene*, 259 N.Y. 327 (1932).

\(^4\) Id. at 329.
the highways. The Superintendent determined that it was necessary to screen (block) the billboard, as opposed to lighting it to maintain the aesthetics of the land. The screen, the Superintendent held, was the safest use for the traveler. The court upheld the Superintendent’s use of authority to block view of the billboard per the safety concern, stating that the safety of the travelers far outweighed the right to be seen, and any income received from advertisements, of the land owners. Perlmutter created the right of privacy for the highway traveler through its cost-benefit analysis.

B. The Traveler and His Right to Privacy: the Right Not to See Billboards.

Shortly after Perlmutter was decided, the Massachusetts Supreme Court heard a case in which the persistent issue was whether the traveler had a right to not to be forced to view billboards on publicly travelled highways. The court in General Outdoor Advertising, Co. v. Dep’t. of Public Works defined the right of freedom from viewing advertisements as the “right to privacy.” The court held that the only value of billboards on the highway was derived from the traveler viewing the advertisement. Plaintiffs brought suit claiming they had the right to advertise at will. Defendants claimed that no such right exists as the sole value of a billboard is derived from others viewing the advertisements. The court followed Defendants’ argument claiming that travelers had the right to travel the road unencumbered with advertisements.

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5 Id. at 330-31.  
6 Id. at 332.  
7 Id. at 333.  
8 Id.  
11 Id. at 801.  
12 Id. at 808.  
13 Id.
The Court, in its analysis of determining the value of a billboard, held that the advertising companies were, “seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways and the acquisition and improvement of public parks and reservations.”14 While the right to profit on one’s property has long been established, the court held that it clearly does not supersede the right of the traveler to travel without obtrusion of, “indifferent, reluctant, hostile or interested, an inescapable propaganda concerning private business with the ultimate design of promoting patronage of those advertising.”15 Finally, the court held that it is impossible to believe that the traveler could find himself on the interstate highway system, eyes closed, to avoid these advertisements; as such traveling would prove dangerous. As the court opined, “One cannot well travel upon the highway with any enjoyment or with safety to himself or others with his eyes shut.”16

The Public Works court held that the individual’s traveler’s right to not have advertisement forced upon him superseded the right to advertise on lands adjacent to public roads. The court stated:

Billboards, signs and advertising devices when located at or near public parks and reservations tend to detract from the surroundings and enjoyment of such places, and thereby, in some measure, to affect the public health and public welfare, through lessening, by their presence and persistent intrusion upon observers, the beneficial influence of mental and physical rest, relaxation and enjoyment which are intended to be, and are afforded by such places. I find that billboards, signs and advertising devices when erected in sections or locations chiefly of historic interest or possessing natural beauty of landscape, pleasant or agreeable situation, prospect, view and attractive or picturesque surroundings or character, are inharmonious with and disfigure the same, and affect injuriously the benefits to be derived there-from, and the enjoyment of the public therein,
as also the economic value thereof to the Commonwealth and its citizens.\textsuperscript{17}

The crux of the holding is the following simple cost benefit analysis: Loss of right to view nature as weighed against right to advertise. In the court’s opinion, the clear victor was the individual whose right to experience nature in her untouched state was impinged.

\textbf{C. Trees Too Tall. Overgrowth and Trees: Modern Takings.}

The previously discussed right to view nature in her natural state allocates nearly unlimited powers to the state to limit deforestation and clear cutting for economic benefit.\textsuperscript{18} In the mid 1970’s, Tennessee land owners determined that the prior courts had incorrectly decided that the traveler’s right superseded their rights and challenged the holdings by suing the state to obtain permission to maintain property adjacent to the highway in a manner congruent with the landowners’ desires.\textsuperscript{19} Due to the previous holdings, the state allowed trees and bushes maintained by federal and local funds, to grow at their natural rate, billboards were blocked and property owners sued, claiming, the loss of value to their enterprise.\textsuperscript{20} The land owners claimed that under 23 U.S.C. 131, “just compensation must be paid by states whenever lawfully existing advertising signs are taken or when an existing and reasonable use of the land for advertising purposes is restricted.”\textsuperscript{21} The court disagreed with this creative argument.

In determining that no such taking had occurred, the central issue was the definition of “taking” under the aforementioned statute. The Appellants argued that mere obstruction of the billboards, by trees planted by the state, was sufficiently detrimental to

\textsuperscript{17} Id. at 812.
\textsuperscript{18} Id.
\textsuperscript{19} Outdoor Advertising Ass’n of Tennessee, Inc. v. Shaw, 598 S.W.2d 783, 786 (1980).
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 787 (Citing 23 U.S.C. 131 (2006)).
their business purpose to require just compensation. This claim too was based on 23 U.S.C. 131. The Appellants’ claimed that under the statute, if a billboard pre-exists the competing purpose of the land (the government’s interest of painting trees); the latter owner’s use has been illegally abated. Further, the private owner’s interest should supersede that of public’s interest in overgrown foliage. While this argument had the merit of common sense, the court disagreed.

The court held that the statute required just compensation solely upon improper removal of signage, not upon the state planting trees in areas in which signs exist. The court distinguished removal from impeding the right of visibility by the general public. Under (g) of 21 U.S.C. 131, the court found that, “removal is not accomplished by growth of obstructing vegetation.” The court further held that no such law has existed and that to create such a law would be improper and that such a law would place an unreasonable burden on the state. Finally, the court stated, “There can be no declaration of unlawful conduct as requested by the plaintiff.” The Tennessee case has provided substantial background to the issue of the modern takings.

To better understand the takings issue previously presented, one must look also to the Federal High Way Administration’s “vegetation control” scheme. In this Act, taking was viewed against “vegetation control.” As trees planted by federal funds received from the Highway Beautification Act were destroyed by local advertisers, the

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22 Id.
23 Id.
24 Id.
25 Id. at 787-89.
26 Id. at 789.
27 Id.
issue was brought to the Highway Administrator’s attention.\textsuperscript{29} As the advertising industry continued its war against nature, complaints were filed with the Highway administrator. In response, the Administrator, determined to please the advertising companies, determined that “maintenance agreements” would allow the advertising companies to deforest if trees blocked the view of advertisements.\textsuperscript{30}

Shortly after the policy allowing for widespread deforestation was implemented in 1976, the U.S. Department of Transportation determined it was being heavily abused. In 1984, the General Office of the Department wrote that the Outdoor Advertising Program, which allowed the cutting of trees to create a visual right for advertising had, “not significantly improved the aesthetic quality of the interstate highways.”\textsuperscript{31} Despite the Department’s determination that clear cutting was not beneficial to the traveler, the department insisted on allowing for continued clear cutting to provide for even more highway-adjacent advertising.\textsuperscript{32} These decisions demonstrate the inability of the Department of Transportation to regulate clear cutting in a consistent manner. Though the Department was unable to make a determination on the issue of clear cutting, the regulations set forth in the United States Code remained the same.

Under 23 U.S.C. 116 entitled Federal Aid Highways: Maintenance, the State Departments are granted the power to regulate the construction and maintenance of highways and lands adjacent.\textsuperscript{33} The authority to maintain the highways is statutorily delegated in (a), while maintenance is defined in (d). The sections read as follows:

\begin{itemize}
  \item \textsuperscript{29} \textit{Id.} at 3.
  \item \textsuperscript{30} \textit{Id.} at 4-5.
  \item \textsuperscript{31} \textit{Id.} at 5.
  \item \textsuperscript{32} \textit{Id.} at 6.
  \item \textsuperscript{33} 23 U.S.C. 116 (2005).
\end{itemize}
(a) It shall be the duty of the State transportation department to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior Acts. The State's obligation to the United States to maintain any such project shall cease when it no longer constitutes a part of a Federal-aid system. 

(d) Preventive maintenance--A preventive maintenance activity shall be eligible for Federal assistance under this title if the State demonstrates to the satisfaction of the Secretary that the activity is a cost-effective means of extending the useful life of a Federal-aid highway.  

As this statute provides, the state shall supply funds to maintain the highways, the determination of a taking is to be made on a state level, as opposed to the federal. While the history of the takings/highway maintenance claim is murky, it is clear that the current state of the claims allow the state to regulate the land as needed. Such a provision allows the state to plant trees and other foliage which would block the line of vision of a billboard, when necessary. 

D. Regency Outdoor Advertising v. City of LA: Example of a Modern Takings Claim.

In 2000, the city of Los Angeles determined it was necessary to plant trees to beautify their city. As the trees began to flourish, many billboards were blocked and the owners determined to bring suit against the city for removal of the trees. The Advertising agency further claimed that by not removing the trees from the line of sight, the city was improperly inversely condemning their property; as such, the city had a duty to reimburse the company for any loss of value to the land. The court held, however that no such right, the right to be seen from another’s land, has ever existed. The court further held that no compensation would be necessary in blocking one’s view from another’s property. Moreover, the court opined that the loss in visibility, though

34 Id.
36 Id. at 121.
37 Id. at 124-6.
damaging, was not to be addressed as a takings, rather the plaintiff need establish a physical taking to be compensated under the theory of inverse condemnation.\footnote{Id. at 126.}

Ultimately, the court held that it would be necessary to weigh the state’s right to provide comfort for its traveling citizens against the loss of value in advertising.\footnote{Id. at 128.} Since the state has the duty to provide for its citizens, its interest was held to be much greater than any value derived from, “disproportionate effect on the narrow parcel or interest in land” held by Plaintiffs.\footnote{Id.} Finally, the court held that the “common-sense” meaning of the statute was that a taking did not occur, as the land maintained value, though not for the purpose which provided basis for this suit.\footnote{Id.} \textit{Regency Outdoor Advertising v. City of LA} has proved a crucial case, as it has determined that the root of the legal issue of takings and billboards remains the same: there is no taking, as the state has the right to maintain its roads as it sees fit, even if its interest must be placed against the desires of an individual to generate revenue via billboard advertising.

\textbf{II. SECOND ISSUE PRESENTED: DOES A BILLBOARD NEED TO BE READABLE TO BE LEGALLY CONSIDERED A BILLBOARD?}

In 1998, the Fifth Circuit District Court of Appeals of Florida determined that it was not necessary that a sign be readable by travelers to constitute a billboard.\footnote{Republic Media Inc., v. Dep. of Trans., State of Florida, 714 So.2d 1203, 1205 (5th DCA 1998).} Such a decision gives the state powers to regulate more structures than the common billboard. In \textit{Republic Media Inc., v. Dep. of Trans., State of Florida}, the issue was whether a billboard which would not easily be seen by travelers unless they were to turn their necks...
constituted a “billboard.” The Plaintiff’s proposed sign, which the Department of Transportation denied, was a “double-faced, V-shaped billboard, designed and intended to present advertising messages to traffic traveling on I-4, near the Princeton overpass.”

The Plaintiff claimed that due to the size and location of the sign, it was visible for a very limited time, rendering the sign non-readable. In order to read the sign, Plaintiffs claimed travelers would need to turn their heads while driving to be able to gain sufficient visibility of the advertisement to understand its message. While the sign was difficult to read, due to its location and size, Plaintiff admitted that the billboard was visible from the highway. Plaintiff claimed that such a classification would allow Plaintiff to place the signage without being bound by the State’s billboard regulations.

The court held that Plaintiff’s concession that the sign was visible rendered the sign readable. This implication, allowed the court to determine that the sign was a billboard; as such, the Department of Transportation had the authority to regulate pertinent issues relating to the billboard, such as size, zoning, and location. The court stated:

We affirm Department Of Transportation's interpretation of the statutes. The distance requirement in section 479.07(9)(a) [the statute upon which the Department relied to determine that the billboard was not proper per the location] is related to the structures themselves, not the readability of the advertising message. This broader interpretation is consistent with the Legislature's intent to reduce visual clutter along the highways, whether it can be read in full or not.

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43 Id. at 1204-05.
44 Id. at 1204.
45 Id.
46 Id.
47 Id. at 1205.
48 Id.
This holding is central to the history of the regulation of billboard usage in the state of Florida. Not only did this court establish that the power to define a billboard is inherent to the Department of Transportation, but it also upheld the Department’s definition of a “Billboard.” From this case, one can determine that the ultimate question to be posed in deciding whether a sign is a billboard is not whether it is readable, but whether the sign is simply visible from the highway. The Florida holding is consistent with prior decisions of various courts and demonstrates that the landowners’ claims to advertisements are limited, at best. Thus far, the issues presented have discussed the individual traveler’s rights as weighed against the landowner’s rights, but does the law change when viewing strictly the rights of the landowners?

III. THIRD ISSUE PRESENTED: I OWN THIS LAND. I CAN USE IT AS I PLEASE. THE LANDOWNERS’ REBUTTAL

It is sensible that landowners adjacent to the highways would want to capitalize on the potential income from advertising. Simple economics demonstrate that there exists great value in billboard advertising. In the billboard industry, an individual simply rents land to an entity that will ensure the owner of the upkeep and will likely not need any assistance from the owner. Just because owning a billboard is economically sensible, does not mean that there exists a right to advertise. As the issue discussed stems from an economic standpoint, rather than by legal footing, there is no need to address the economically based claims by billboard owners.

A. From the Right to Be Seen, to Inverse Condemnation. Damning the Visual Floods.

Many of the landowners, irate at the loss of income from the inability to use their land for advertising purposes, have attempted to claim that the limitations placed on
advertising uses of their lands has created inverse condemnation. The landowners claimed the existence of a right to be seen from the adjacent public property, although the courts have held that this is a non-existent right.\(^{49}\) In the reply to the *Amicus Curiae* Brief in *Regency Outdoor Advertisements v. City of LA*, the land owners noted that the courts in California had recognized the right to be seen for over one century and that this right was, “on par with the rights of ingress and egress.”\(^{50}\)

The California statute held that an inverse condemnation claim may be asserted by a land owner not only when a billboard is removed, but also when the “customary maintenance or use” of the billboard is limited.\(^{51}\) As this is the case in California, land owners have raised claims of inverse condemnation for a multitude of acts which limit their right to use the land as they please.\(^{52}\) Further, the California courts have defined inverse condemnation as the, “distrib[ion] throughout the community the loss inflicted upon the individual by the making of public improvements…and to socialize the burden…rather than placing it on a single property owner.”\(^{53}\) The California case is not the sole case on point in relation to inverse condemnation.

In 1993, a similar case came before the North Carolina Court of Appeals.\(^{54}\) In *Adams Outdoor Advertising of Charlotte v. North Carolina D.O.T.*, the court held that planting trees on state owned land, which was leased by Appellants for the purpose of advertising, was not an act of inverse condemnation.\(^{55}\) The Plaintiff claimed that by planting vegetation in the view zone of the billboard, the effect was, or will be, to obscure

\(^{49}\) *Id.* at 124.
\(^{50}\) *Reply Brief: Regency Outdoor Advertising v. City of LA*, No. S132619, at 4-6, Feb. 2006
\(^{51}\) *Id.* at 7.
\(^{52}\) *Id.* at 8.
\(^{53}\) *Id.* at 6 (citing *Holtz v. Superior Court*, 475 P.2d 441, 452-3 (1970)).
\(^{55}\) *Id.* at 667.
the view of the billboards, rendering the advertisements “economically useless.” This devaluation, or the potential thereof, founded Appellants’ claim of inverse condemnation.\(^{56}\)

In defining Inverse Condemnation, the court looked to precedent and held the following definition:

Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Department of Transportation ... [may] file a complaint in the superior court ...” to obtain compensation for the taking. An action in inverse condemnation must show (1) a taking (2) of private property (3) for a public use or purpose.\(^{57}\)

Given this definition, the Appellants claim is sufficient to appeal to the court, but the appeal goes no further. North Carolina precedent has determined that post appeal, the Appellant must demonstrate, “an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental.”\(^{58}\) The court then determined that there was no “interference” or “disturbance” to the Appellants’ property, and a taking did not occur, but rather the damages were merely “consequential.” Further, the court held that such damages are non-compensable, as the Appellant failed to present, “any compelling reason why we should find a basis or authority for a taking based upon the “right to be seen.”\(^{59}\)

The last argument on behalf of the landowners in relation to the inverse condemnation issue is that there exists an easement which may be utilized by the public for ingress and egress. This argument was founded in *Matter of McNair v. McNulty*. In

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\(^{56}\) Id. at 667-8.

\(^{57}\) Id. (citing *Advertising Co. v. City of Charlotte*, S.E.2d 920, 922 (1980)).

\(^{58}\) Id. at 669 (Citing *Long v. City of Charlotte*, S.E.2d 101, 109 (1982)).

\(^{59}\) Id. at 667-69.
the Brief for Respondents, the Respondents claimed such a right is naturally occurring.\footnote{Respondent’s Brief: Matter of McNair v. McNulty. 2001WL34686332 at 4.} The court held that while the easement exists, trees planted near to the highway are not inconsistent with the State’s right to create comfort for its travelers. The court held that “the planting of trees on the public right-of-way, but off the driving portion of the road… is not a “wholly inconsistent use” of the public highway and in this manner, the municipality may properly interfere with easements of light and air enjoyed by abutting owners.”\footnote{Id. at 5.} Respondents’ claim was based on the precedent held in Perlmutter which was preceded by Robert v. Powell. In Powell, the court held that, “trees do not constitute a nuisance.”\footnote{Id. (citing Robert v. Powell, 61 N.E. 699 (1901)).} Ultimately, Respondents’ claim is that the state has the right to plant trees to provide for comfort of travelers, so long as it is not “wholly inconsistent” with the use of the state’s land use.\footnote{Id. at 6.} Ultimately, it has been held that the state may do as it pleases without being forced into paying just compensation to the landowners, so long as the state determines that the interference with Defendants’ land is of “mere consequence.” This holding presses the landowners to find other claims.

**B. Going Once, Going Twice, Taken. Takings: Who Has the Right to Use My Land?**

As the landowners claims of inverse condemnation have failed, the group has stretched to find any viable means by which they may continue to use the land for their advertising purposes. The landowners’ next argument was that the government had created a taking by the local government.

As the concept of takings has become widespread, some local governments have moved to protect the advertising industry. One such example is the legislature of the
state of Georgia. In 1998, the legislature passed O.C.G.A. §32-6-75.3 which reads, “it is in the public interest to provide highway advertising for food, lodging, motor vehicle services, and any other service or product available to the general public.”64 This statute gives the appearance of affording landowners the opportunity to advertise, although the advertising must be for the welfare of the traveler. Not only does this statute provide that the landowners may advertise for the traveler, but the statute also allows the advertising companies to clear cut foliage to provide greater visibility for the advertisements.65 This statute has opened the doors for litigation on behalf of the land owners and advertisers.

Prior to the enactment of the statute, a suit was brought in Georgia. This occurred in Garden Club of Georgia v. Shackelford. On appeal, the court cited the floor history of the aforementioned Georgia statute, stating it occurred as a direct result to the suit brought by the Garden Club of Georgia in 1995.66 In Shackelford, the court held that the garden club had a private right of action when the State Department of Transportation allowed private interest groups to receive substantial benefits in exchange for the use of public land.67 The court held that the DOT was in violation of the Georgia constitution, in light of these “gratuities.”68 This issue was predominately addressed to the advertising community, as the holding hinged on the direct benefit to the general public derived from billboard advertisements. The court held that if the benefit from these signs is not a “substantial benefit;” the advertising industry is receiving unwarranted gratuities. By providing gratuities for the advertising industry, the first Shackelford court held that the

65 Id.
67 Id.
state is ignoring its constitution. This decision led to the creation of the statute, but failed to curb further conflict.

In the second Shackelford case, the court held that since the state legislature had enacted O.C.G.A. §32-6-75.3, these “gratuities” no longer existed. The court’s decision was a two prong approach. First, the legislature determined that the general public derived benefit from the advertisements. Second, to remove the trees for advertising purposes, the landowners must compensate the state for the loss in value of the trees. While the court did not agree with the legislature’s decision, it held that the statute’s reasoning was valid, thus the landowners’ compensation payments for the trees alleviated the concern of “gratuities.” The Shackelford cases and the O.G.C.A. present a clear demonstration and rule of the takings issue. The rule is that the state, at least in Georgia, may promote advertising/land use agenda wherein the landowners may receive financial benefits, so long as the citizen “benefits from the advertisement.”

C. How Easy Is It? I have Rights to This Land Through an easement.

The prior section discussed the land owners’ inability to claim the rights to advertise through the application of inverse condemnation and takings. Prior to these claims, the right to advertise was wrought by the ancient property right to claim “use” of the highway land through easements. In 1943, in Kelbro v. Myrick, Plaintiffs sought renewal of permits for existing billboards on lands adjacent to the highways. As the Secretary of State denied Plaintiffs’ permit, stating the billboards were too close to the highway, less than 300 feet from the traveled portion of the highway interchange, Plaintiffs claimed that the prohibition of such advertising was unconstitutional. This

69 Id.  
70 Id.  
71 Kelbro Inc. v. Myrick, 30 A.2d 527, 528 (1943).
challenge was based on a direct limitation upon their business, violating the right of gainful employment. Plaintiffs’ argument further stated that the limitation was solely upon their industry and that the prohibition limited the use of their privately owned property. The court did not agree with Plaintiffs’ assertions that there existed an infringement upon their right to use the land as they pleased.

As the court reviewed Plaintiff’s claims, it determined that the issue was whether there existed an inherent right to advertise in the public’s right to public thoroughfares. The court held that, “Plaintiffs are not exercising a natural right, they are seizing for private benefit, an opportunity for quite a different purpose by the expenditure of public money in the construction of the public ways.” The court further denied that the property owner’s held inherent rights to advertise on lands adjacent to a highway. In its discussion, the court held that two types of rights are analogous, though inapplicable to the instant discussion. The first type of rights includes the rights which are inherent to all persons, such as the right to access their property through ingress and egress. While these rights are public rights, which provide benefits to all citizens, they are unrelated to the current matter.

The latter of the rights discussed by the court, are privately held rights, and the owner of the land may not constitutionally be deprived of these rights without just compensation. These rights include the right to ingress and egress, light, air, and lateral support, and are termed easements in appurtenance. Nowhere in the law of property, has

72 Id.
73 Id. at 528-29 (emphasis added).
74 Id. at 529.
75 Id. (citing Perlmutter v. Greene, 259 N.Y. 327 (1932)).
76 Id.
77 Id. at 529.
the right to consume the land, or the right to use the land in a manner which is completely
dependent upon the utilization of the highway by others for its success, such as
advertising, been given to those who receive an easement in appurtenance.\textsuperscript{78} Thus, under
the reasoning in \textit{Kelbro} and according to the history of the law of property, the right to
advertise on lands adjacent to the highways has never been determined a constitutional
right. Further, under \textit{Kelbro}, the right to an easement in appurtenance cannot be assigned
to another person. This argument denies Plaintiffs’ claim that as lessees of the land, the
right to advertise is innately acquired through the leasing process.\textsuperscript{79}

Further, the court in \textit{Kelbro}, citing precedent, held that easements in appurtenance
are non-transferable.\textsuperscript{80} The court stated that such an easement, “cannot be used for any
purpose unconnected with the enjoyment of the dominant tenement, neither can it be
assigned by the dominant owner to another person…nor can he license anyone to use the
way when he is not coming to or from the dominant tenement.”\textsuperscript{81} The court further
opined that the right to advertise could not be included in the conveyance of an easement;
as such, there is no way Plaintiffs could convey the right to advertise in the easement
conveyed.\textsuperscript{82} Thus, the central holding to \textit{Kelbro} is that there exists no right to advertise;
further, if these lands are obtained through an easement, were the right to advertise
existent, it would be non-transferable. While the aforementioned cases have presented
many courts’ views on the regulation of billboards, none of the cited cases are from
Florida. As such, the previously discussed cases are not binding on the State’s courts and
render necessary an inquiry into the Florida statutes.

\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.} at 528.
\textsuperscript{80} \textit{Id.} at 530.
\textsuperscript{81} \textit{Id.} (citing \textit{McCullough v. Broad Exch. Co.}, 101 App. Div. 566 (emphasis added)).
\textsuperscript{82} \textit{Id.}
IV. FOURTH ISSUE PRESENTED: FLORIDA CASE AND STATUTORY LAW PERTAINING TO THE RIGHTS OF ADVERTISERS.

Through the years, the Florida statutes have varied on the subject of right to advertise a land use. Under Title 14-40 of the Florida Administration Code the power to manage and landscape lands adjacent to the highway are allotted to the Department of Transportation. Under §14.40.30, the statute requires that a “person or entity [who desires] to remove, cut, or trim trees, shrubs, or herbaceous plants,” must do so to “make visible or ensure future visibility of off-premise outdoor advertising signs.” While this statute allows the private entity to utilize the lands for advertising purposes, the right does not exist without limitations.


Fla. Admin. Code § 14-40.30, discusses the regulation of newly constructed advertising billboards. The crucial limitations listed are the following: the site must have a current permit, the view zone must be strictly limited to 500 feet, and vegetation which has important historical, cultural, or economic value and foliage may be protected by state law, limiting the clear cutting to present a viewable billboard. Should a party desire to clear cut, for the purpose of making signage visible, the administrative code proposes a scheme for mitigation compensation of the lost foliage. The code states that to obtain a permit for the construction of signs which result in the destruction of foliage the requesting entity will be required to remove two non-conforming signs. Thus, the State’s admin code narrowly regulates the construction of new billboards while

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84 Id. at (e)(2-7)
85 Id. at (9).
regulating existing billboards. This section of the code has often proven an issue for those desiring to construct new billboards.

Further, the Florida Statutes discuss mitigation, creating further difficulties for billboard constructors. Section §479.126 of the Florida Statutes allocates power to the state to create programs for beautification of other lands, in lieu of direct billboard mitigation (such as the aforementioned one for the price of two).\textsuperscript{86} Under §479.126, the Department of Transportation is to determine the use of lands once occupied by billboards. The statute states that the Department may determine to use such lands for beautification as a type of mitigation.\textsuperscript{87} Accordingly, the state may rezone lands once used for billboards, returning nature to her intended state.

One example of the application of the mitigation funds was discussed by the Florida Department of Transportation in 2004 when the Department held its annual meeting at its headquarters in Tallahassee. In this meeting, the Department discussed the possibility of an annual addition of $5 million to the mitigation funds to purchase new lands to preserve. The current annual funding for mitigation to preserve lands, per the Florida statute, is $1 million.\textsuperscript{88} These monies, received by the government and by the statutory fines (discussed in Florida Statute §479.126) have been applied to purchase diverse lands to be preserved by the Department.

An illustration of the “on-site wildlife mitigation,” as the preservation was termed, which was discussed in the 2004 meeting, was “the development and implementation of a mitigation park program as an alternative wildlife mitigation-

\textsuperscript{87} Id.
compensation method.” The particular site discussed was the Johnson tract (nearly 1700 acres) in Highland County. This particular tract was deeded to the Florida Fish and Wildlife Conservation Commission to “manage in perpetuity.” As the Department stated, the purpose was to “allow[s] impacts to several upland species in a several county area to be compensated for.” The Johnson tract is one of many example of the utilization of mitigation funds.

The preservation of the tract and areas of the like are necessary to keep the beauty of nature. These areas provide great benefit to the scenic nature and beautification of the state of Florida. Further, these projects serve to validate the Florida statute and demonstrate the importance of mitigation via preservation, which is one of the many manners in which mitigation efforts occur.

B. Relocation and Reconstruction: Another Type of Mitigation.

Further mitigation includes the removal and replacement of older billboard signage. Under Florida Statute § 70.20, entitled Balancing of Interests, the state is given the power to relocate and reconstruct signs which were once in conformity with the statute. So long as the municipality and the entity are capable of agreeing upon the new location, size, and reconstruction of the sign, the process is allowed to occur. The statute reads as follows:

(1) Municipalities, counties, and all other governmental entities are specifically empowered to enter into relocation and reconstruction agreements on whatever terms are agreeable to the sign owner and the municipality, county, or other governmental entity involved and to provide for relocation and reconstruction of signs by agreement, ordinance, or resolution. As used in this section, a "relocation and reconstruction agreement" means a consensual, contractual agreement between a sign owner and a municipality, county, or other governmental entity for either

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89 Id.
90 Id.
the reconstruction of an existing sign or the removal of a sign and construction of a new sign to substitute for the sign removed.\textsuperscript{91}

Though this portion of the statute allows for the government to contract with the advertisers, it is necessary to note that the following portion of the statute determines that this power does not give the parties free reign to contract as they please. The statute holds that there exist necessary means by which a municipality and advertising agency may contract for removal.

Under (2) of the statute, the limitations are given. In this portion of the statute, it is stated that just compensation by the government is necessary per each billboard removed. The statute reads as follows:

(2) Except as otherwise provided in this section, no municipality, county, or other governmental entity may remove, or cause to be removed, any lawfully erected sign located along any portion of the interstate, federal-aid primary or other highway system, or any other road without first paying just compensation for such removal as determined by right to challenge. Except as otherwise provided in this section, no municipality, county, or other governmental entity may cause in any way the alteration of any lawfully erected sign located along any portion of the interstate, federal-aid primary or other highway system, or any other road without first paying just compensation for such alteration as determined by agreement between the parties or through eminent domain proceedings. The provisions of this section shall not apply to any ordinance the validity, constitutionality, and enforceability of which the owner has by written agreement waived all right to challenge.\textsuperscript{92}

It is necessary to note that the highways discussed are not solely locally funded; rather, the statute addresses federally funded highways. The importance of this fact is that the challenger has various avenues of redress and methods to challenge the law if the roads are federally funded. One such concept to be later treated is that those who desire to

\textsuperscript{92} Id. at (2).
remove billboards may challenge these structures under NEPA, which is directed solely at federally funded programs.

Finally, there exist further limitations on the removal of the billboards. The statute reads as follows:

(8) Nothing in this section shall prevent a municipality, county, or other governmental entity from acquiring a lawfully erected sign through eminent domain or from prospectively regulating the placement, size, height, or other aspects of new signs within such entity's jurisdiction, including the prohibition of new signs, unless otherwise authorized pursuant to this section.

(9) This section applies only to a lawfully erected sign the subject matter of which relates to premises other than the premises on which it is located or to merchandise, services, activities, or entertainment not sold, produced, manufactured, or furnished on the premises on which the sign is located.

(10) This section shall not apply to any actions taken by the Department of Transportation that relate to the operation, maintenance, or expansion of transportation facilities, and this section shall not affect existing law regarding eminent domain relating to the Department of Transportation. 93

Under the statute, it is necessary that the sign was erected and exists legally. Further, it is necessary that the advertisement exists to advertise for business purposes which take place on the property upon which the billboard exists. Finally, the statute allows for the Department to take the property under Eminent Domain. The statute allows the state entity to take the property under the premise that the land is utilized for transportation purposes related to the statutory funding. These underlying concepts and others will be treated in the concluding sections which discuss alternative means by which the state may take the property, thereby condemning the billboard.

93 Id. at (8-12).
C. Visibility, Who Needs To Be Seen?

Under Florida Statute §479.106, the Department of Transportation is granted authority to deny or permit landscaping in furtherance of billboard advertisements.\(^94\) Under the statute, such permits for signs which will require cutting or clearing of plant life are permitted for, “a new sign…on public right-of-way for the sign face to be visible from the highway when the sign owner has removed at least two nonconforming signs of approximate comparable size and surrendered the permits for the nonconforming signs to the department for cancellation.” Thus, under the statute, it is the Department, not the Court or the Legislature, who has the ultimate power to determine the regulations and permitting of signs. Ultimately, the regulation determines that the Department of Transportation has ultimate control in determining which signs will be removed and which will not.

Further, this statute allows the Department to determine which “trade-offs” will occur per “beautification projects.”\(^95\) The statute states that owners of signs permitted after July 1, 1996 shall not receive permission to cut or trim if the vegetation to be cut is part of a beautification project specified by the Department of Transportation.\(^96\) Such a reading of the statute demonstrates that trimming and cutting of trees in relation to billboards are to be determined by the DOT. Further, the DOT is given complete control over newly created signs. This allocation of power has created a hot bed for advertising litigation. This hot bed is found in the litigation of the replacement of pre-existing, non-conforming signs which have been destroyed.

\(^95\) Id.
\(^96\) Id.
D. I’m Not So Old: The Grandfathering of Non-Conforming Signs.

In *Chancellor Media Whiteco Outdoor Corp. v. State, Dept. of Transp.*, the hot bed was struck as a non-conforming advertisement was destroyed by wildfire.\(^{97}\) As multiple signs were destroyed in a natural disaster, Plaintiffs claimed that the state was to blame as the Department of Fire had not acted with sufficient speed to save the billboard. In addition to Plaintiffs’ claim that the state was slow to act, Plaintiffs claimed that the Federal statutes, 23 U.S.C. 131 and 23 C.F.R. § 750.707(c) & (d) allowed Plaintiffs’ non-conforming billboards to be “grandfathered in.”\(^{98}\) Though this claim seemed viable, the court held it was not a viable argument, claiming that the issue was controlled by federal, not local statutes. The court stated,

> Although the federal regulation does not expressly prohibit the erection of a like-kind sign to replace a grandfathered sign which has been destroyed by wildfire, such would constitute a violation of the federal regulation and the Highway Beautification Act. The federal regulation prescribes the contours of the narrow grandfather exception to the 23 U.S.C. § 131 requirement that a state must remove nonconforming signs from federal highways in order to qualify for its full share of federal highway dollars. Subsection (c) of the regulation provides that a grandfather clause only allows an individual grandfathered sign at its particular location for the duration of its normal life subject to customary maintenance. Subsection (d) then provides that a grandfathered sign may continue as long as it is not destroyed. But it further provides that, if permitted by state law and re-erected in kind, exception may be made for grandfathered signs destroyed due to vandalism and other criminal or tortious acts. 23 C.F.R. § 750.707(c) & (d). Grandfathered signs therefore lose their exemption once they are destroyed by non-criminal, non-tortious acts, and a state would violate the federal regulation and the Highway Beautification Act by permitting a nonconforming replacement sign.\(^{99}\)

Ultimately, the court determined that in order for the state to receive its entire federal funds, it would necessarily limit the reconstruction of “grandfathered” advertisements,

\(^{97}\) *Chancellor Media Whiteco Outdoor Corp. v. State, Dept. of Transp.*, 796 So.2d 547, 549 (1st DCA 2001).

\(^{98}\) Id.

\(^{99}\) Id.
whether these advertisements were destroyed by tortious conduct or by Mother Nature. Thus, the limitations placed on the grandfather clause are determined by the state’s need for federal funding of the roads.

Further the court discussed three issues pertinent to grandfathered advertisements. First, for states to receive the necessary federal funds under the Highway Beautification Act, the number of grandfathered billboard structures would necessarily be limited by the federal, not the state statute. Second, currently existing non-conforming signs would need to be destroyed prior to the state receiving federal funding for the creation of highways. Third, the court held that per the Federal statute, the advertisements were subject to a general limitation of reconstruction of grandfathered billboards. This limitation provided that new advertisements were limited to advertisements destroyed by deliberate acts of individuals, not acts of nature. As such, the court would find, as it did, that when these advertisements were destroyed by fire, as compared to “vandalism or criminal acts,” the advertisements are not to be grandfathered.

As Chancellor was a case decided in the Florida courts, its holding is essential to further the discussion in this essay. The final holding in Chancellor will certainly assist the reader in understanding critical issues determined by the Florida courts in relation to the aforementioned issue. The holding reads:

Florida has exerted considerable effort over the last 30 years in complying with the Highway Beautification Act in order to protect its full share of federal highway funds. The federal-state agreement has been executed, legislation required for compliance has been enacted, and comprehensive state administrative rules have been enacted. The legislature surely did not intend to cast aside these years of effort and imperil the state's share of future federal highway funds simply to allow

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100 Id. (citing 23 U.S.C. § 131 (c)).
101 Id.
102 Id. (citing 23 U.S.C. § 131 (d)).
erection of some nonconforming highway billboards. We instead conclude, as respecting highway signs, that the legislative intent was to authorize erection of new like-kind signs to replace grandfathered signs only if erection of the signs would not be contrary to the Highway Beautification Act and the federal regulations. 103

Simply put, the court held that the intention of the state legislator, and thus, the intent of the court, was to comply with the Federal statute. If the state desires its complete funding, it must maintain full compliance with the Federal Beautification Act.


To demonstrate the State’s desire to maintain compliance standards with the Federal Act, the State has enacted legislation treating beautification projects. Previously treated and enacted in 2006, Florida Statute §479.106 treated the issue of beautification projects, projects necessary to comply with the aforementioned Federal Statute. In (6) and (7) of the Florida statute, limitations were placed on the time, place, and manner of future “beautification projects.”

(6) Beautification projects, trees, or other vegetation shall not be planted or located in the view zone of legally erected and permitted outdoor advertising signs which have been permitted prior to the date of the beautification project or other planting, where such planting will, at the time of planting or after future growth, screen such sign from view. 104

Under this section of the statute, the place and manner are treated. According to this statute, no beautification project may be initiated once a conforming sign has been placed or permitted. This greatly limits ability of the private citizen groups who desire to bury the billboards.

As groups which oppose the construction of billboards would prefer to limit the creation of billboards, the statutory limitation does not present a great

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103 Chancellor Media Whiteco Outdoor Corp. v. State, Dept. of Transp., 796 So.2d 547, 549-50 (1st DCA 2001).
issue. Since these groups are determined to limit the future construction of billboards, it is necessary to determine why such opposition exists. Under (a) of Florida Statute § 479.106 (6), the trade-off of destruction of nature for the existence of a billboard is discussed in detail:

(a) View zones are established along the public rights-of-way of interstate highways, expressways, federal-aid primary highways, and the State Highway System in the state, excluding privately or other publicly owned property, as follows:

1. A view zone of 350 feet for posted speed limits of 35 miles per hour or less.
2. A view zone of 500 feet for posted speed limits of over 35 miles per hour.

(b) The established view zone shall be within the first 1,000 feet measured along the edge of the pavement in the direction of approaching traffic from a point on the edge of the pavement perpendicular to the edge of the sign facing nearest the highway and shall be continuous unless interrupted by existing, naturally occurring vegetation.

(7) Any person engaging in removal, cutting, or trimming of trees or vegetation in violation of this section or benefiting from such actions shall be subject to an administrative penalty of up to $1,000 and required to mitigate for the unauthorized removal, cutting, or trimming in such manner and in such amount as may be required under the rules of the department.105

The statute allows for the advertising company to cut as much as 500 feet of width of foliage for the existence of a billboard. Further, the statute allows for a view zone which is 1,000 feet deep. With each billboard allotted these dimensions of environmental destruction, a significant portion of our environment is depleted for the creation of advertising billboards. As such, it is necessary to create a scheme which will limit the diminution of our environment for the creation of billboards.

105 Id. at (6-7) (2006).
V. FIFTH ISSUE PRESENTED: PROTECTING NATURE, PROTECTING OUR FUTURE; WHERE DO WE GO FROM HERE? POTENTIAL SOLUTIONS TO THE ISSUES PRESENTED.

While the previous discussion demonstrates the existence of many local and federal limitations in regards to the regulation of billboards, there exist further methods of regulation yet to be treated. Each of these concepts may be presented on both the federal and local level, or will provide for federal relief which may be applied at the local level. The solutions to be discussed, though not an exhaustive list, are as follows: Federal funds means Federal regulations: Billboards and the NEPA environmental survey; Fresh, Clean Air as a fundamental Human right; the Local Injunctions for the Effect of Deforestation; Value of a tree as Weighed Against the Current Fines. Each issue will now be treated in turn.

A. Federal funds means Federal regulations: Billboards and the NEPA environmental survey.

NEPA is a federally created statutory regulation, which was passed in 1978, under section 40 of the Code of Federal Regulations. The government’s purpose of introducing NEPA was to ensure that persons and entities seeking to replace nature with structures would do so in such a manner that humans and nature could “exist in harmony.” The manner in which NEPA was to accomplish this “harmony” was via a creation of extensive, exhaustive research of each location in which a structure was to be placed. Once the entity has completed a survey, it is to submit the findings of the

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107 Id.
survey to the EPA (Environmental Protective Agency), who has the authority to determine whether survey is sufficiently conclusive.\(^{109}\)

As discussed, the NEPA survey is quite extensive. The issues to be treated by the entity and conveyed to the EPA are the following:

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.\(^{110}\)

As impacts and alternatives are to be treated, this discussion is to be complete yet concise. The code regulates the page lengths of the survey to range between 150 and 300 pages in an attempt to create an exhaustive list of research which is to treat issues such as cost benefit analysis, the affect on the environment, and the valuation of the project.\(^{111}\)

The central issue to NEPA surveys is the inclusion of the environmental impact statement, which is to describe the areas affected, data and analysis of the impact, alternatives to the project at issue, long and short term uses of the area, and commitments of resources necessary to complete the project. 40 C.F.R. §1502.2(b) (d) (2004). Further, the impact statements should discuss the following issues in a detailed manner:

(a) Direct effects and their significance (Sec. 1508.8).
(b) Indirect effects and their significance (Sec. 1508.8).
(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See Sec. 1506.2(d.).)

\(^{109}\) Id.
\(^{110}\) Protection of the Environment 40 C.F.R. §1502.2(b) (d) (2004).
\(^{111}\) Id. at (13), (15).
(d) The environmental effects of alternatives including the proposed action. The comparisons under Sec. 1502.14 will be based on this discussion.
(e) Energy requirements and conservation potential of various alternatives and mitigation measures.
(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.
(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.
(h) Means to mitigate adverse environmental impacts (if not fully covered under Sec. 1502.14(f)).

Each of the aforementioned issues must be completed for completion of the impact report, however; (c) and (g) of §1502.16 are the most crucial requirements regarding the application of the impact report to local billboards.

Under (c), the Federal regulation the state to weigh the local affect of the destruction of nature against the value of the structure for which the entity is seeking permission. Allotting the state the power to weigh concerns is essential to the issue presented in this essay treats the issue of the local concern of the private interests of construction of billboards as weighed against the value of maintaining nature is its intended state. Further, as the NEPA survey allows for the state concern to be weighed in the determination of a project, the survey has created room for state concern to weigh in a federal decision. Therefore, although NEPA is federally regulated, its guidelines allow for the implementation on a local level.

Not only does NEPA treat the local level of implementation and cooperation of the survey under §1502.16, but under §1506.2, NEPA is extended to the state level. Under this section, the EPA is to work with the local government to determine the best

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112 Id. at 40 C.F.R. 1502.15-16.
113 Elimination of duplication with State and local procedures 40 C.F.R. § 1506.2 (2004).
use of the land, or the misuse, depending on one’s view. The resolution of joint cooperation is not merely to limit unnecessary paperwork for the company desiring to create a structure, but also to ensure state, local, and national compliance. Further, if there exists an issue between the state and federal government, the federal agencies are to determine which rule would trump, after the company requesting permission to build has treated the compliance issues in its application process.114

Allowing NEPA surveys on the local level may be a great deterrence as these surveys are quite extensive and tend to consume a great amount time, finances, and other vital resources. It is my belief that were the state to determine that a NEPA survey is necessary for the construction of every billboard, the request for such permits would be greatly curbed.

B. Fresh, Clean Air as a fundamental Human right.

The second manner in which litigation for the right to construct a billboard may be increased is for the government to create a fundamental human right for fresh air. While this is quite a stretch, from our current state, it would severely curtail deforestation, especially when the deforestation occurs for a strictly commercial purpose. Though the right to clean air has yet to have been declared a fundamental right by the Supreme Court, many courts have weighed in on the issue.

Beginning in the 1970’s, public interest groups realized the need to create the fundamental right to fresh air. Many suits were brought under the Ninth amendment, but failed.115 While these suits have failed, they have opened doors for similar suits in a

114 Id.
new generation. Given the current circumstances of our nation, rampant with pollution, soaked with water wars, and struggling to breathe clean air, the right to clean air is a current interest which should be determined as a fundamental right.

As with other constitutionally founded rights, the right to clean air must begin somewhere. With vehicles such as the Clean Air Act, NEPA surveys, and the rise of citizen suits, individual suits will bring the power to the people to create a new fundamental right for clean air. If one city can sue another city to force the transfer of water, then why is it not possible for public interest groups to sue and enjoin the persons polluting and taking our precious air.

Finally, it is arguable that air is an exhaustible resource. Even though nature’s cycle provides a method for natural creation of oxygen, as we deplete forests, the amount of renewable oxygen will continue to dwindle. As such, mankind will be forced to recognize the existence of a fundamental right for all to breathe oxygen. This right will severely curtail the right of corporations to deforest to create structures.

A perfect example of the trade off of environment for structure is discussed in F.S.A. §479.106 and highlights the need to create a fundamental right to clean air. Under this statute, the zoning for a billboard adjacent to the highway is 1000 feet by 500 feet.\textsuperscript{116} Such an area creates a significant depletion of trees and other plant life necessary to nature’s cycle of oxygen production. As the requests for billboards increase, coupled with urban sprawl, nature will diminish along with its cycles. As nature, due to man’s effect on the environment, is unable to care for the planet, as intended, mankind will need to curb consumption and increase his “fundamental rights” in order to exist. These

newfound rights include the right to breathe fresh air. By declaring fresh air a fundamental right, those who opposed the construction of billboards would have the power to enjoin companies from constructing such structures.

C. The Local Injunctions for the Effect of Deforestation and Pollution of the Billboard.

As the previous section treated the importance of maintaining the stability of the environment to promote nature’s oxygen production cycle, this section will greatly parallel what was discussed. The reasons for which an individual or a group would desire to present an injunction to halt deforestation vary. One of the most powerful reasons for which a group may present an injunction is the environmental effect of deforestation. The previously discussed reason for which a party may seek an injunction was the right to fresh air. As the right to fresh air has already been treated, it is necessary to note that other issues of pollution, secondary effects of the construction of billboards exists. These secondary effects include the pollution of the construction crews, the pollution of the vessels used for construction, and the effect on the environment as a whole.

In 2007, a similar issue was treated in the Eleventh Circuit. In Black Warrior Riverkeeper, Inc. v. East Walker County Sewer Authority, the Alabama Civil Court of Appeals issued an injunction for a non-profit organization which sued to enjoin the acts of a company which caused the emission of pollutants into a local river.117 The necessary steps to obtain an injunction per Black Warrior Riverkeeper, was as follows: first, the party was to demonstrate that they had an interest which would be affected; this interest would provide standing for the parties to litigate in the court in which the controversy is being heard. Second, the court must have jurisdiction over the parties involved in the

litigation. Third, there must be an injury to Plaintiffs or to their interests.\textsuperscript{118} So long as these three inquiries are met, the parties may bring the controversy to the court to litigate the issue.

Were a private citizen group to bring suit, claiming standing for the destruction of the environment for the construction of a billboard, it would necessarily need to demonstrate a negative effect of an interest in land in their possession. Similar to Black Warrior, the group may prove standing through some indirect pollution and further an indirect effect, such as appalling odors or the loss/extinction of animals and plant life. Further, a group may have standing to enjoin a company from destroying the environment for the construction of a billboard, if the group providing construction is not in complete compliance with the NEPA or local statutory regulations of the structure.\textsuperscript{119}

Though the use of a court ordered injunction to limit the construction of a billboard is not the strongest way to combat the construction of these structures, it is a plausible means to do so as it is easily regulated and easier to obtain than the other issues previously discussed. As such, an injunction is another manner in which those in opposition of billboards may limit the construction of billboards, simply due to its feasibility.

\textbf{D. Value of a tree as Weighed Against the Current Fines.}

Under the current state statutory system of fines, the standard fine is, “up to $1,000 and [the company is] required to mitigate for the unauthorized removal, cutting, or trimming in such a manner and in such amount as may be required.”\textsuperscript{120} Though this

\textsuperscript{118} Id. citing: Friends of the Earth, Inc. v. Laidlaw Environmental Svcs., Inc., 528 U.S. 167, 181 (2000).
\textsuperscript{119} Id. at 74.
regulatory scheme appears sufficient, the ultimate question is whether the current fine is sufficient in weighing the value of a loss of a tree to the $1,000 fine and mitigation. Ultimately, the answer is, it depends.

If the mitigation itself is sufficient, it will provide a great deterrent. For example, if a company deforest an extra 100 feet of greenery, it would be necessary to force the company to purchase more than 100 feet of land to preserve for mitigation, so that the company may feel the “weight” of the punishment. Were to have a sliding scale of mitigation fees, it would successfully deter companies from over-clearing to create billboards. Returning to the 100 feet clearing example, were the state to regulate that per 100 feet unnecessarily cleared, that the company would have to purchase an acre of land to be donated to the state to be preserved, I believe this would severely curtail the amount of “accidentally” over-clearing.

Another option would be, as mentioned, the sliding scale of required mitigation efforts. If a company were a repeat offender, or if a company had offended the law in some manner other than over-cutting, such as dumping chemicals in land where a billboard existed so that the foliage could not grow back and overtake the view zone, the state could create a new manner of regulation of mitigation efforts. Under this new form, the government could require that the company purchase lands for mitigation efforts beyond cleaning the areas which they had destroyed in the construction project. Further, the government could require that as a company becomes a multiple offender, it would have to purchase more land than a company which is a single-time offender. For example, the company would have to purchase one acre of land, to be preserved, for the
first offense, but required to purchase five acres for the second. The mitigation efforts could continue exponentially per offense.

A regulatory sliding scale, as the aforementioned schemes, would allow the government to regulate the loss of lands as companies over-cut to “create” room for billboards. As the current regulation allows for limited mitigation, a company may offend the law without great concern. Were the government to create a more severe penalty for companies which over-cut, this issue would be severely curtailed. As discussed, I believe that were the government to force the companies purchase lands to mitigate over-cutting and were the government to create a severe sliding scale, companies would have greater incentive to comply with the statutory regulations.

VI. CONCLUSION: YOU BAD BILLBOARDS; CAN’T YOU JUST GO AWAY?

The issues presented have demonstrated that a strong distaste for billboards has been had by many, since their inception. Further, the cases cited have demonstrated that these structures have existed without a common law right, *per se*, to be seen. A billboard’s survival and success are inherently based upon the location and relation to adjacent lands. As the courts have determined from the beginning, there is no right to be seen from another’s land.

Though the right to be seen from another’s land has not existed via common law, the state statutes have created this right for advertising groups. As such, the current issue is whether the statutorily created right to be seen is sufficiently regulated by the local and federal governments. This paper has discussed manners in which both forms of government, working together, may more forcefully regulate billboard advertisements.
The discussion has declared that the federal government may force advertisers to participate in extensive research and surveys of the land, through NEPA. This is a plausible solution as interstate highways, the manner in which many billboards are seen, are federally funded. Further, this paper claimed that the state organizations would be have the ability to work in conjunction with the federal regulators, a solution which is truly plausible.

Another solution presented was to create the fundamental right to fresh air. As this right is created by the federal government, deforestation would necessarily be limited. Finally, this paper determined that were the state to create mitigation measures in which offending companies were required to purchase lands, which the government would protect, a new method of deterrence would occur. This scheme of regulation would be furthered were it to be accompanied by a sliding scale in which each offense carried more weight and greater fines.

Though the research and solutions presented are not exhaustive, this essay has presented the reader with a great understanding of the issues of billboard regulation, both by federal and state agencies. This paper has also demonstrated manners in which the construction of billboards may be limited and lands could be preserved, creating a more beautiful America. As public interest groups work together to present and enforce viable solutions, like the aforementioned, to curb the construction of billboards, nature will stay its course, and a more scenic America will be created.