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SIGN OR BILLBOARD—DIRECTOR OF HIGHWAYS—DEED OF EASEMENT OVER LAND FOR HIGHWAY PURPOSES:

1. LAND HAS SIGN OR BILLBOARD OVER IT TAKEN BY AGREEMENT BY PERSON NOT AN OWNER—INTEREST CREATED IN LAND TAKEN—DUTY OF DIRECTOR TO PAY FAIR MARKET VALUE OF LAND WITH LATER APPORTIONMENT OF AMOUNT AMONG SEVERAL OWNERS—IF AGREEMENT OF ALL PARTIES AS TO FAIR MARKET VALUE, DIRECTOR MAY PAY DIRECTLY TO EACH SEPARATE OWNER VALUE OF INTEREST TAKEN —SECTION 5501.11, RC.
2. RESIDUE OF PARCEL TAKEN HAS SIGN OR BILLBOARD ERECTED BY PERSON NOT LANDOWNER—AGREEMENT WITH LANDOWNER—INTEREST CREATED IN LAND TAKEN—DUTY OF DIRECTOR TO PAY DAMAGES, IF ANY, CAUSED TO SUCH RESIDUE—APPORTIONMENT TO OWNERS ACCORDING TO DAMAGES TO RESPECTIVE INTERESTS—AGREEMENT AS TO AMOUNT OF DAMAGES AND AMOUNT TO EACH SEPARATE INTEREST—DIRECTOR MAY PAY DIRECTLY TO EACH SEPARATE OWNER AMOUNT OF DAMAGE.
3. SIGN OR BILLBOARD—ERECTED BY PERSON OTHER THAN LANDOWNER—UNDER AGREEMENT—CONSTITUTES LICENSE TO ENTER UPON LAND—DIRECTOR NOT AUTHORIZED TO PAY DAMAGES TO LICENSEE FOR REASON LICENSE DOES NOT CREATE AN INTEREST IN LAND TAKEN.

SYLLABUS:

1. When the Director of Highways, pursuant to the provisions of Section 5501.11, Revised Code, takes a deed of easement over land for highway purposes, and the land so taken has upon it a sign or billboard erected by a person other than the landowner under an agreement with such landowner which creates an interest in the land taken, the duty of the Director is to pay the fair market value of the land taken with a later apportionment of said amount among the several owners according to their respective interests. If all of the parties agree as to such fair market value and as to the value of the separate interests, the Director of Highways may pay directly to each separate owner the value of his interest taken.

2. When the Director of Highways, pursuant to the provisions of Section 5501.11, Revised Code, takes a deed of easement over a portion of a parcel of land for highway purposes, and the residue of the parcel so taken has upon it a sign or billboard erected by a person other than the landowner under an agreement with such landowner which creates an interest in the land taken, the duty of the Director is to pay the damages, if any, caused to such residue with a later appointment of said damages among the several owners according to the damages to their respective interests. If all of the parties agree as to the amount of said damages and as to the amount of damage to each separate interest, the Director of Highways may pay directly to each separate owner the amount of his damage.

3. When the Director of Highways, pursuant to the provisions of Section 5501.11, Revised Code, takes a deed of easement over land for highway purposes, and the land so taken has upon it a sign or billboard erected by a person other than the landowner under an agreement which constitutes a license to enter upon such land, the Director is not authorized to pay damages to such licensee for the reason that said license does not create an interest in the land taken.

Columbus, Ohio, February 29, 1956

Hon. S. O. Linzell, Director, Department of Highways
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"In acquiring property for highway improvements by easement, warranty deed or appropriation for partial or total takings, the Department has found that billboards, under a written agreement between the property owner and the billboard company, are located upon the land acquired. These agreements are for periods of three years or less with options to renew. The Department has no record of having found that the agreements were recorded. Usually, the presence of the sign or billboard is the only evidence of the agreement until the property owner is contacted. I am attaching fourteen copies of various types of agreements used by the billboard companies.

"At the present time the Department is dealing with billboard companies on the basis of a percentage of the total relocation costs of a billboard, depending on the length of time that their agreement remained in force after notification to move. This procedure has varied over the years from assuming no cost to that as stated above. An example as follows:—an agreement for a one year period had been in effect for six months when the Department required the signboard to be relocated. We would assume 50% of the relocation cost under the terms of the agreement. If the agreement has an option for an additional year we would not consider the option period unless the time the

sign was removed involves the option period. If so, it was counted on the same basis as the original agreement as noted in the example.

"At the time the Department requires billboards to be relocated, we notify the companies in writing that the Department has acquired easement title and that the billboards must be relocated at a specific date, or that they may remain until the expiration of the agreement whichever is applicable. Others contain thirty day cancellation clauses and in these instances notification in writing is given the owners of the billboards, by the former land owners and the State. If the license expired between the time of acquisition of the easement and the time of the removal of the sign, we do not assume any obligation due to our belief that the landowner had no right to renew a license over property on which he had granted an easement to the State.

"I respectfully request your opinion on the following questions:

"1. If the entire property of an owner is taken by easement title by the Department of Highways, and there is located upon a part of the property a billboard under a written agreement, is the Department required to consider the agreement as an element of damages?

"2. If the answer is yes to question 1, is the Department required to pay the billboard company or is it an element of damages to be paid directly to the property owner?

"3. If only a part of the property of an owner is taken by easement title by the Department of Highways and there is located upon a part of the property a billboard under a written agreement, is the Department required to consider the agreement as an element of damages?

"4. If the answer is yes to question 3, is the Department required to pay the billboard company or is it an element of damages to be paid directly to the property owner?

"5. If the property, either partial or total, is appropriated by the Department of Highways, is the Department required to consider the agreement as an element of damages?

"6. If the answer to question 5 is yes, is the Department required to pay the billboard company or is it an element of damages to be paid directly to the property owner?

"7. If the determination is made in any of the above mentioned situations that the Department of Highways is liable for compensation and damages, what would be the measure of the compensation and damages in each situation where liability exists?"

Because the specific questions which you have presented to me appear to be based upon certain misconceptions, I will not attempt to answer them categorically in the form set out above. Rather, attention should first be directed to certain fundamentals, following which your questions can be answered in their proper context.

It should first be borne in mind, that when the Director of Highways acquires an easement over property upon which a billboard has been erected pursuant to an agreement with the property owner, which agreement creates an interest in the land condemned, the legal question presented is the same as in any case in which there are several interests in the parcel of real estate appropriated. One of the latest declarations by the Supreme Court of the law on that subject is found in the case of *Sowers, Supt. v. Schaeffer, et al.,* 155 Ohio St., 454, the syllabus of which provides as follows:

> "1. A land appropriation proceeding is essentially one in rem; it is not the taking of the rights of persons in the ordinary sense but an appropriation of physical property. In the event there are several interests or estates in the parcel of real estate appropriated, the proper method of fixing the value of each interest or estate is to determine the value of the property as a whole, with a later apportionment of the amount awarded among the several owners according to their respective interests, rather than to take each interest or estate as a unit and fix the value thereof separately. The separate interests or estates as between the condemner and the owners are regarded as one estate (In re Appropriation by Supt. of Public Works, 152 Ohio St., 65, approved and followed.)
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> "2. In a land appropriation proceeding, where there are several different interests or estates in the property, it is proper on direct examination to admit testimony as to the value of the individual structures, buildings and improvements on the property as well as the rental values thereof, the businesses conducted thereon and all special features relative to the property which may either enhance or lessen its value.
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> "3. * * *
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> "4. Ordinarily, in fixing compensation for property taken by appropriation proceedings, the total award should not be less than the fair market value of the property to be appropriated but it cannot exceed the fair market value of the property as a whole even though there are various interests or estates in the property."

Applying these principles to the basic question which you have presented, and assuming that the owner of the billboards has acquired an

interest in the land, it appears that the duty of the Director is to ascertain the fair value of the land taken and to pay that amount of money into court, with the money to be apportioned among the interested parties according to their respective interests. If the amount of money involved and the respective interests of the parties are resolved by negotiation, I see no reason why settlement could not be made directly with each party rather than by payment into court for a later division.

Turning now to the question of damages, we should again first consider basic principles. As was pointed out above, a taking by the Director is a proceeding in rem in which money is substituted for property; and the only damages which the Director pays are for damages inflicted on the residue of the parcel of property remaining after the appropriation of a part.

I can conceive of a situation in which a parcel of land might be well located in relation to a highway for the display of advertising signs, and in which it might actually be leased for such a purpose. If a portion of the land were to be condemned and put to such a use as to leave the residue unsuited for such display, there undoubtedly would be damage to that residue. And if advertising signs already in place under an agreement which created an interest in land were rendered useless, there would be damage to the lessee who had erected them. In such a case it would be the duty of the Director to ascertain the damage to the residue and to pay that amount into court to be divided among the interested parties. If the rights of all parties were settled by negotiation, I again can see no reason why the Director could not pay them directly.

It is apparent from reading your request, however, that this is not the type of damages which you had in mind. It is also apparent that in dealing with this problem you have confused the principles of compensating the owners of interests in land taken with paying damages to such owners. I direct your attention to my Opinion No. 4692, Opinions of the Attorney General for 1954, page 700, which was addressed to the Auditor of State, and which dealt with the question of crops growing on land taken by you for highway purposes. The following quotations from that opinion are apposite here:

at page 704:

"* * * I believe that this problem is one properly within that field [eminent domain], since all takings by the Director for

highway purposes are accomplished either by the exercise of the right of eminent domain or with knowledge by both parties that the right can be exercised in case a negotiated settlement is not arrived at. The amount paid by the Director for a right-of-way easement can generally be said to be the amount which both the Director and the landowner believe would probably be fixed by a jury in an eminent domain proceeding; and the items for which settlement is negotiated are the same ones which would be considered by a jury in such a proceeding."

at page 705:

"* * * Since the Director acts as a state officer in buying or condemning land, and since the state has not given its consent to be sued in such actions, damages for breach of an agreement to allow the removal of crops can be recovered only by the sundry claims procedure provided by Section 127.11, Revised Code. Since damages could not be recovered from the Director in an action at law, I know of no authority for him to agree to pay such damages voluntarily."

Applying that language to the instant case, it seems clear that in settling these matters with lessees who have erected signboards on land which has been appropriated, the Director is authorized only to ascertain the value of the interest in land taken and to make compensation accordingly.

I fully appreciate that in dealing with these matters you have certain practical problems which are hard to solve in the somewhat theoretical language of valuation of interests in land. From the documents which you have submitted to me, I note that you are often dealing with interests which run from one to three years; which were obtained on a yearly rental of ten or twenty dollars; and I can assume that the value of the billboards involved is often small. In those cases the efficient way of settling the rights of the parties without protracted litigation and without exposing the State to numerous sundry claims appears to be for the Director to assume some proportion of the cost of relocation of the signs on some arbitrary basis. I can only say that in such matters you are possessed of ordinary administrative discretion; but you must be guided by the rule that any costs which you so assume must be reasonably related to the value of the interest which you are—in theory, at least—appropriating.

One additional matter remains to be dealt with. You will note that in the above discussion I have referred only to those agreements which

create an interest in the land taken by you for highway purposes. From that it may be inferred that a different rule applies if the agreement between the landowner and the owner of the signs does not create an interest in land but constitutes a mere license to enter and erect the signs.

It is often difficult to determine whether an agreement creates an interest in land or a license. In each case the determination of that question must depend upon the intention of the parties, the wording of the instrument used, and the formalities with which it was executed. If in a given case it is determined that only a license was given, you are governed by the following rule:

It is settled law in Ohio that a license does not create an interest in land and is revocable at the will of the landowner. In such a case the licensee loses his right to enter upon the land and is confined to his remedy in damages for breach of the contract. It is my opinion that in interfering with such a relationship you are not taking an interest in land for which damages *in condemnation* should be paid.

This does not mean that no damage has been suffered by the licensee who thus loses his right to display signs on the land taken. Undoubtedly he had a right to display his signs or to collect damages for the breach of his agreement. By condemning the land the state has deprived him of that right. This may make the state liable in damages through the sundry claims procedure provided by Section 127.11, Revised Code, but it does not constitute the taking of an interest in land or a substantial interference with rights growing out of the ownership of property for which you are authorized to pay compensation.

In view of the above, it is therefore my opinion that:

1. When the Director of Highways, pursuant to the provisions of Section 5501.11, Revised Code, takes a deed of easement over land for highway purposes, and the land so taken has upon it a sign or billboard erected by a person other than the landowner under an agreement with such landowner which creates an interest in the land taken, the duty of the Director is to pay the fair market value of the land taken with a later apportionment of said amount among the several owners according to their respective interests. If all of the parties agree as to such fair market value and as to the value of the separate interests, the Director of Highways may pay directly to each separate owner the value of his interest taken.

2. When the Director of Highways, pursuant to the provisions of Section 5501.11, Revised Code, takes a deed of easement over a portion of a parcel of land for highway purposes, and the residue of the parcel so taken has upon it a sign or billboard erected by a person other than the landowner under an agreement with such landowner which creates an interest in the land taken, the duty of the Director is to pay the damages, if any, caused to such residue with a later apportionment of said damages among the several owners according to the damages to their respective interests. If all of the parties agree as to the amount of said damages and as to the amount of damage to each separate interest, the Director of Highways may pay directly to each separate owner the amount of his damage.

3. When the Director of Highways, pursuant to the provisions of Section 5501.11, Revised Code, takes a deed of easement over land for highway purposes, and the land so taken has upon it a sign or billboard erected by a person other than the landowner under an agreement which constitutes a license to enter upon such land, the Director is not authorized to pay damages to such licensee for the reason that said license does not create an interest in the land taken.

Respectfully,
C. WILLIAM O'NEILL
Attorney General