

1979

# Utah Department of Transportation v. Ira Hatch et al : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Thomas T. Billings; Attorneys for Defendants-Appellants;

Robert B. Hansen; Stephen J. Sorenson; Attorneys for Plaintiff-Respondent;

---

## Recommended Citation

Brief of Respondent, *Utah Dept of Transportation v. Hatch*, No. 16526 (Utah Supreme Court, 1979).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/1788](https://digitalcommons.law.byu.edu/uofu_sc2/1788)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT

STATE OF UTAH

---oo0oo---

UTAH DEPARTMENT OF  
TRANSPORTATION,

Plaintiff-Respondent,

vs.

IRA HATCH, dba Marble Motel;  
IRA HATCH, dba Sandman Motel;  
BERTHA C. JENSEN, dba Golden  
Spike Hotel, and HELEN  
REEDER, et al.,

Defendants-Appellants.

CASE NO. 16526

---oo0oo---

BRIEF OF RESPONDENT

---oo0oo---

APPEAL FROM THE ORDER OF  
THE FIRST JUDICIAL DISTRICT COURT FOR BOX ELDER COUNTY  
HONORABLE VENOVY CHRISTOFFERSON, JUDGE

---oo0oo---

ROBERT B. HANSEN  
Attorney General  
STEPHEN J. SORENSON  
Assistant Attorney General  
Attorneys for Plaintiff-  
Respondent  
115 State Capitol  
Salt Lake City, Utah 84114  
Telephone: 533-6684

THOMAS T. BILLINGS  
of and for  
PARSONS, BEHLE & LATIMER  
Attorneys for Defendants-  
Appellants  
79 South State Street  
Salt Lake City, Utah

FILED

DEC 24 1979

## TABLE OF CONTENTS

	Page
NATURE OF THE CASE . . . . .	1
DISPOSITION IN THE LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF FACTS . . . . .	2
ARGUMENT . . . . .	2

### I.

IMMEDIATE OCCUPANCY IS EXPRESSLY PROVIDED FOR UNDER THE UTAH OUTDOOR ADVERTISING ACT, AND IS AN APPROPRIATE MEASURE TO BE CONSIDERED IN CONDEMNATION ACTIONS BROUGHT PURSUANT TO THAT ACT . . . . .	3
---	---

### II.

RESPONDENT FULFILLED THE STATUTORY AND CASE LAW REQUIREMENTS FOR AN ORDER OF IM- MEDIATE OCCUPANCY, AND THE LOWER COURT COULD, THEREFORE, IN ITS DISCRETION, PROPERLY GRANT AN ORDER OF IMMEDIATE OCCUPANCY . . . . .	4
A. RESPONDENT MADE A CLEAR PRIMA FACIE SHOWING THAT, AS A MATTER OF LAW, IT HAS A VALID RIGHT TO CONDEMN APPELLANTS' NONCONFORMING SIGNS . . . . .	5
DUE PROCESS . . . . .	7
EQUAL PROTECTION . . . . .	12
FREEDOM OF SPEECH . . . . .	14
UTAH CONSTITUTION, ARTICLE XIII SECTION 13 . . . . .	17

ESTOPPEL . . . . .	21
23 U.S.C. 131(o) . . . . .	23
B. RESPONDENT MADE A PROPER SHOWING AS TO THE REASONS IN SUPPORT OF THE ORDERS OF IMMEDIATE OCCUPANCY, BASED UPON THE STATUTORY AIMS OF THE UTAH OUTDOOR AD- VERTISING ACT, AND IT WAS WELL WITHIN THE DISTRICT COURT'S DISCRETION TO GRANT THE ORDERS . . . . .	28
III	
THIS COURT HAS TRADITIONALLY DEFERRED TO THE DISTRICT COURTS' DISCRETION IN THE GRANTING OF ORDERS OF IMMEDIATE OCCUPANCY, PARTICULARLY WHERE, AS HERE, THE RECORD REVEALS NO OBVIOUS ABUSE OF THAT DISCRETION . . . . .	35
CONCLUSION . . . . .	36

### AUTHORITIES CITED

#### A. Statutes and Constitutional Provisions

Utah Constitution, Article XIII, Section 13 . . . . .	17,
Utah Code Annotated, 27-12-136.1 et seq. . . . .	1,
Utah Code Annotated, 27-12-136.2 . . . . .	8, 11, 29-31,
Utah Code Annotated, 27-12-136.3(1) . . . . .	3
Utah Code Annotated, 27-12-136.4 . . . . .	11
Utah Code Annotated, 27-12-136.7 . . . . .	22-
Utah Code Annotated, 27-12-136.10 . . . . .	30

	Page
Utah Code Annotated, 27-12-136.11 . . . . .	3-4, 11, 22-23, 36
Utah Code Annotated, 63-49-4(2)(a) . . . . .	3
Utah Code Annotated, 78-34-9 . . . . .	4-5, 27, 28, 34-37
23 U.S.C. 131 . . . . .	17
23 U.S.C. 131(b) . . . . .	3
23 U.S.C. 131(c) et seq. . . . .	3
23 U.S.C. 131(o) . . . . .	23-26
North Dakota Constitution, Article 56 . . . . .	19-20

#### B. Cases Cited

<u>Art Neon Company v. City and County of Denver</u> , 488 F.2d 118 (10th Cir.) <u>cert. den.</u> , 417 U.S. 972 (1973) . . . . .	10
<u>Bountiful v. Swift</u> , 535 P.2d 1236 (Utah, 1975) . . . . .	32, 35
<u>Buhler v. Stone</u> , 533 P.2d 292 (Utah, 1975) . . . . .	9
<u>Donnelly Advertising Corp. of Maryland v. City of Baltimore</u> , 279 Md. 660, 370 A.2s 1127 (1977) . . . . .	10
<u>Finks v. Maine State Highway Commission</u> , 328 A.2d 791 (Me., 1974) . . . . .	8
<u>Ghaster Properties, Inc. v. Preston</u> , 176 Ohio St. 425, 200 N.E.2d 328 (1964) . . . . .	10
<u>Hicks v. Miranda</u> , 422 U.S. 332, 95 S.Ct. 2281 (1975) . . . . .	15
<u>Howard v. State Department of Highways of Colorado</u> , 478 F.2d 581 (10th Cir., 1973) . . . . .	10, 17
<u>Iowa Department of Transportation v. Nebraska-Iowa Supply Company</u> , 272 N.W.2d 6 (Iowa, 1978) . . . . .	9

	Page
<u>John Donnelly &amp; Sons v. Mallar</u> , 453 F. Supp. 1272 (D. Me., 1978) . . . . .	9, 17, 22
<u>John Donnelly &amp; Sons, Inc. v. Outdoor Advertising Board</u> , 339 N.E. 2d 709 (Mass. 1975). . . . .	10
<u>Kamrowski v. State</u> , 31 Wis.2d 256, 142 N.W.2d 793 (1966) . . . . .	8-10
<u>Lubbock Poster Company v. City of Lubbock</u> , 569 S.W. 2d 935 (Tex. App., 1978), <u>cert. denied</u> , 100 S.Ct. 63 (1979) . . . . .	9
<u>Markham Advertising Company v. State</u> , 73 Wash.2d 405, 439 P.2d 248 (1968), <u>appeal dismissed</u> , 393 U.S. 316, <u>reh.den.</u> , 393 U.S. 1112 (1969) . . . . .	10
<u>Metromedia, Inc. v. City of San Diego</u> , 23 Cal.3d 762, 592 P.2d 728 (1979), <u>reh. granted</u> . . . . .	14-16
<u>Mississippi State Highway Commission v. Roberts Enterprises, Inc.</u> , 304 So. 2d 637 (Miss., 1974) . . . . .	10
<u>Modjeska Sign Studios, Inc. v. Berle</u> , 43 N.Y.2d 468, 373 N.E.2d 255 (1977), <u>appeal dismissed</u> , 99 S.Ct. 66 (1978) . . . . .	10
<u>Moore v. Ward</u> , 377 S.W.2d 881 (Ky. App., 1964) . . . . .	10
<u>Morgan v. Board of State Lands</u> , 549 P.2d 695 (Utah, 1976) . . . . .	22-23
<u>Naegele Outdoor Advertising Company of Minnesota v. Village of Minnetonka</u> , 281 Minn. 492, 162 N.W.2d 206 (1968) . . . . .	10
<u>Newman v. Hjelle</u> , 133 N.W.2d 549 (N.D., 1965). . . . .	19-20
<u>Newman Signs, Inc. v. Hjelle</u> , 268 N.W.2d 741 (N.D., 1978), <u>appeal dismissed</u> , 99 S.Ct. 1205 (1979) . . . . .	9, 15-17
<u>State v. Denver &amp; Rio Grande Western Railroad Company</u> , 8 Utah 2d 236, 332 P.2d 926 (1958) . . . . .	26-7, 28
<u>State v. Diamond Motors</u> , 50 Haw. 33, 429 P.2d 825 (1967) . . . . .	10

<u>State v. Lotze</u> , 92 Wash.2d 52, 593 P.2d 811, <u>appeal filed</u> , 48 U.S.L.W. 3250 (1979) . . . . .	16
<u>State v. National Advertising Company</u> , 356 So.2d 557 (La.App., 1978) . . . . .	9-10,17
<u>Suffolk Outdoor Advertising Company, Inc. v. Hulse</u> , 43 N.Y.2d 483, 373 N.E.2d 263 (1977), <u>appeal dis-</u> <u>missed</u> , 99 S.Ct. 66 (1978). . . . .	10,15
<u>Town of Boothbay v. National Advertising Company</u> , 347 A.2d 419 (Me., 1975) . . . . .	10
<u>Utah Copper Company v. Montana-Bingham Consolidated</u> <u>Mining Company</u> , 69 Utah 423, 255 P. 672 (1926) . . . . .	5
<u>Utah Department of Transportation v. Fuller</u> , docket no. 16404 (Utah, filed November 14, 1979) . . . . .	35-36
<u>Veterans of Foreign Wars, Post 4264 v. City of Steam-</u> <u>boat Springs</u> , 575 P.2d 835 (Colo.), <u>appeal dismissed</u> , 99 S.Ct. 66 (1978) . . . . .	9
<u>Wes Outdoor Advertising Company v. Goldberg</u> , 55 N.J. 347, 262 A.2d 199 (1970) . . . . .	7-8
<u>Westfield Motor Sales Company v. Town of Westfield</u> , 129 N.J. Super. 528, 324 A.2d 113 (1974) . . . . .	10
<u>Williamson v. Lee Optical of Oklahoma</u> , 348 U.S. 483, 75 S.Ct. 461 (1955) . . . . .	13

### C. Other Authorities

122 Cong. Rec. 10746 . . . . .	25
122 Cong. Rec. 10747 . . . . .	25
31 C.J.S., Estoppel 138, p. 675 . . . . .	21
2 Rathkopf, The Law of Zoning and Planning (3d ed.), ch. 62 . . . . .	30





IN THE SUPREME COURT

STATE OF UTAH

---oo0oo---

UTAH DEPARTMENT OF  
TRANSPORTATION,

Plaintiff-Respondent,

vs.

IRA HATCH, dba Marble Motel;  
IRA HATCH, dba Sandman  
Motel; BERTHA C. JENSEN, dba  
Golden Spike Hotel, and  
HELEN REEDER, et al.,

Defendants-Appellants.

CASE NO. 16526

---oo0oo---

BRIEF OF RESPONDENT

---oo0oo---

NATURE OF THE CASE

This is an interlocutory appeal from orders of immediate occupancy, granted in condemnation actions brought by the Utah Department of Transportation in regard to Appellants' nonconforming outdoor advertising signs, pursuant to the Utah Outdoor Advertising Act, section 27-12-136.1 et seq., Utah Code Annotated, 1953, as amended.

DISPOSITION IN THE LOWER COURT

The First District Court, the Honorable VeNoy

Christofferson, Judge, granted Respondent's Motions for Orders of Immediate Occupancy.

### RELIEF SOUGHT ON APPEAL

Respondent seeks a ruling of this Court affirming the decision of the District Court.

### STATEMENT OF FACTS

In June, July, and September, 1978, Respondent commenced condemnation actions against Appellants, seeking the removal of five outdoor advertising signs which have non-conforming status under the Utah Outdoor Advertising Act. Answers were filed in three of the actions on or about October 17 and 18, 1978, and Respondent's Motions for Orders of Immediate Occupancy were filed December 11, 1978. Extensive legal memoranda were filed by each side in February and March, 1979, and hearing was held on the Motions on March 26, 1979. The District Court, in its Memorandum Decision dated April 30, 1979, granted Respondent's Motions, and on May 23, signed Orders of Immediate Occupancy as to the five nonconforming signs in question.

### ARGUMENT

The instant actions were brought pursuant to the Utah Outdoor Advertising Act, U.C.A. 27-12-136.1 et seq., which provides for the regulation of outdoor advertising adjacent to interstate and primary highways. The Utah Act was promulgated in response to federal legislation which encouraged

states to provide for the "effective control" of such advertising, at the peril of losing up to ten percent of federal highway funding. 23 U.S.C. 131(b). The federal law also sets out guidelines for the effective control of outdoor advertising, and for the removal of illegal and nonconforming signs. 23 U.S.C. 131(c) et seq. Respondent is empowered to acquire nonconforming signs by eminent domain under U.C.A. 27-12-136.11, a section of the Utah Act.

I.

IMMEDIATE OCCUPANCY IS EXPRESSLY PROVIDED FOR UNDER THE UTAH OUTDOOR ADVERTISING ACT, AND IS AN APPROPRIATE MEASURE TO BE CONSIDERED IN CONDEMNATION ACTIONS BROUGHT PURSUANT TO THAT ACT.

As a threshold matter, it should be stressed that the provision which grants the State the right of eminent domain as to nonconforming advertising signs expressly incorporates the chapter which allows the granting of orders of immediate occupancy. U.C.A. 27-12-136.11 states:

The [transportation]<sup>1/</sup> commission is hereby empowered and authorized to acquire by gift, purchase, agreement, exchange or eminent domain, any existing outdoor advertising and all property rights pertaining to same which were lawfully in existence on May 9, 1967, and

---

<sup>1/</sup> U.C.A. 27-12-136.3(1) defines "commission" as "the state road commission of Utah." Under U.C.A. 63-49-4(2)(a), all "functions, powers, duties, rights and responsibilities" of the state road commission were subsequently transferred to the Utah Department of Transportation.

which by reason of this act become nonconforming.... Eminent domain shall be exercised in accordance with the provision of chapter 34 of Title 78. (Emphasis added.)

The statute which provides that orders of immediate occupancy may be obtained by condemning entities is U.C.A. 78-34-9, one of the provisions of chapter 34 of Title 78. It must be presumed that the clear language of the statute means what it says, and that the provisions of chapter 34 of Title 78, including section 78-34-9, govern exercises of the eminent domain power under U.C.A. 27-12-136.11.

It is thus apparent that the Legislature intended immediate occupancy to be available for the courts' consideration in condemnations of nonconforming signs, subject to the requirements set out in U.C.A. 78-34-9.

## II.

RESPONDENT FULFILLED THE STATUTORY AND CASE LAW REQUIREMENTS FOR AN ORDER OF IMMEDIATE OCCUPANCY, AND THE LOWER COURT COULD, THEREFORE, IN ITS DISCRETION, PROPERLY GRANT AN ORDER OF IMMEDIATE OCCUPANCY.

As to the proof to be considered in a trial court's consideration of a motion for an order of immediate occupancy, U.C.A. 78-34-9 provides:

The court or of judge thereof shall take proof by affidavit or otherwise of the value of the premises sought to be condemned and of the damages which will accrue from the condemnation,

and of the reasons for requiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damages which may accrue to the parties.

In addition, where a condemnor's right to take is controverted, this Court has previously stated that the condemnor may be required to make a prima facie showing of its right to take, prior to issuance of the order. Utah Copper Company v. Montana-Bingham Consolidated Mining Company, 69 Utah 423, 255 P. 672 (1926).

In the present cases, Respondent made a prima facie showing of its authority to take, a showing not seriously controverted by Appellants; and submitted proof of the value of the condemned signs and of the reasons for a speedy occupation. It was therefore well within the lower court's discretion to grant the orders of immediate occupancy, as it did.

A.

RESPONDENT MADE A CLEAR PRIMA FACIE SHOWING THAT, AS A MATTER OF LAW, IT HAS A VALID RIGHT TO CONDEMN APPELLANTS' NONCONFORMING SIGNS.

In the Answers filed in these cases, Appellants raised a number of constitutional and other legal objections to Respondent's right to condemn the subject signs. Mindful that it may be required to make a prima facie showing of its

authority to condemn, Respondent addressed each of the constitutional and legal objections at length in its Memorandum in Support of Motion for Order of Immediate Occupancy (hereinafter referred to as "Plaintiff's Memorandum,") and further responded to the Defendants' legal arguments in its Memorandum in Reply to Defendant's Memorandum in Opposition (hereinafter referred to as "Plaintiff's Reply Memorandum.") Appellants now argue that the hearing on the motion was not the proper forum for determination of the constitutional issues, and that evidence needs to be presented on these issues (Appellants' Brief, pp. 16f.). Respondent has some difficulty understanding the pertinency or timeliness of this argument, since any party was free to present whatever evidence or make whatever argument it wished in the hearing before the lower court. Respondent submits that, as a matter of law, Appellants' constitutional arguments are uniformly without merit and that the district court properly ruled that Respondent has the right to condemn the subject signs.

Respondent will briefly discuss the constitutional issues in the order in which they are mentioned in Appellants' Brief, pp. 16-22. If the Court has further questions regarding any other legal arguments raised in the Answers,

its attention is directed to the arguments made in Plaintiff's Memorandum and Plaintiff's Reply Memorandum.

#### DUE PROCESS

Appellants challenge the Utah Outdoor Advertising Act on the due process bases that aesthetic values do not justify an exercise of the eminent domain power, the Act is overbroad, and the condemnation of Appellants' signs is arbitrary (Appellants' Brief, pp. 17-18).

(1) Esthetic values justifying condemnation.

Although this Court has not yet had occasion to rule on the State's right to condemn billboards under the Utah Outdoor Advertising Act, other states have recognized that highway beautification is a proper basis for exercise of the eminent domain power.

In Wes Outdoor Advertising Company v. Goldberg, 55 N.J. 347, 262 A. 2d 199 (1970), the plaintiffs contested the State of New Jersey's right to condemn real or personal property adjacent to federal-aid highways, for the statutory purpose of "restoration, preservation and enhancement of scenic beauty along the highways." The Court stated:

We have no hesitancy in stating that the restoration, preservation and enhancement of scenic beauty adjacent to public highways is a public use for the public welfare, filling

a social need, of our times. Hence, the power to acquire lands for that purpose is beyond judicial interference. 262 A. 2d at 202.

Also the Wisconsin Supreme Court found that under a similar roadside beautification act, the State could constitutionally take a "scenic easement" which expressly provided for the discontinuance of nonconforming billboards within the restricted area; the court held this to be a proper public use of the land. Kamrowski v. State, 31 Wis. 2d 256, 142 N.W. 2d 793 (1966). And in Finks v. Maine State Highway Commission, 328 A. 2d 791 (Me. 1974), where the constitutionality of condemnation actions under the Maine Roadside Beautification Act was contested, the court cited language from the Wes Outdoor Advertising and Kamrowski cases dealing with the question, and simply stated, "We fully agree." 328 A. 2d at 794.

Of related interest are cases dealing with beautification and esthetic enhancement as valid bases for the exercise of the police power. It is rudimentary that the police power may be exercised to promote the public health, safety, and general welfare. The Utah Outdoor Advertising Act expressly seeks to serve these objectives, as well as to protect the public investment in highways and to preserve the scenic beauty of adjoining lands. U.C.A. 27-12-136.2.



In considering the constitutionality of a zoning ordinance requiring the removal of unsightly material from land, this Court has held that esthetic enhancement is a part of the general welfare for police power purposes:

Surely among the factors which may be considered in the general welfare, is the taking of reasonable measures to minimize discordant, unsightly and offensive surroundings; and to preserve the beauty as well as the usefulness of the environment. Buhler v. Stone, 533 P.2d 292, 294 (Utah, 1975).

Thus, the purposes of the Utah Outdoor Advertising Act would be sufficient to justify an exercise of the State's police power were that power involved here; a fortiori, they must be considered as justifying an exercise of the less harsh eminent domain power.<sup>2/</sup> As the court in Kamrowski v. State,

---

<sup>2/</sup> Numerous courts have upheld billboard statutes, where no compensation for removal of signs was offered, as valid exercises of the police power, on the bases of public safety, esthetic enhancement, furtherance of the public welfare, preservation of the public's right to privacy, economics, urban renewal, or a combination of these bases. E.g., Iowa Department of Transportation v. Nebraska-Iowa Supply Company, 272 N.W. 2d 6 (Iowa, 1978); John Donnelly & Sons v. Mallar, 453 F. Supp. 1272 (D. Me., 1978); Newman Signs, Inc. v. Hjelle, 268 N.W. 2d 741 (N.D., 1978) appeal dismissed, 99 S.Ct. 1205 (1979); Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 575 P. 2d 835 (Colo., 1978) appeal dismissed, 99 S.Ct. 66 (1978); Lubbock Poster Company v. City of Lubbock, 569 S.W. 2d 935 (Tex. App., 1978), cert. denied, 100 S.Ct. 63 (1979); State v. National Advertising Company, 356 So. 2d 557

supra, regarding a roadside beautification law, stated:

Whatever may be the law with respect to zoning restrictions based upon aesthetic considerations, a stronger argument can be made in support of the power to take property, in return for just compensation, in order to fulfill aesthetic concepts, than for the imposition of police power restrictions for such purposes. 142 N.W. 2d at 797. (Emphasis added.)

The Legislature has determined that valid public purposes will be served by the condemnation of nonconforming

---

2/ (continued)

(La. App., 1978); Modjeska Sign Studios, Inc. v. Berle, 43 N.Y. 2d 468, 373 N.E. 2d 255 (1977), appeal dismissed, 99 S.Ct. 66 (1978); Suffolk Outdoor Advertising Company, Inc. v. Hulse, 43 N.Y. 2d 483, 373 N.E. 2d 263 (1977), appeal dismissed, 99 S.Ct. 66 (1978); Donnelly Advertising Corp. of Maryland v. City of Baltimore, 279 Md. 660, 370 A.2d 1127 (1977); John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 339 N.E. 2d 709 (Mass., 1975); Town of Boothbay v. National Advertising Company, 347 A.2d 419 (Me., 1975); Mississippi State Highway Commission v. Roberts Enterprises, Inc., 304 So. 2d 637 (Miss., 1974); Westfield Motor Sales Company v. Town of Westfield, 129 N.J. Super. 528, 324 A.2d 113 (1974); Art Neon Company v. City and County of Denver, 448 F.2d 118 (10th Cir., 1973), cert. den., 417 U.S. 972 (1973); Howard v. State Department of Highways of Colorado, 478 F.2d 581 (10th Cir., 1973); Markham Advertising Company v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968), Appeal dismissed, 393 U.S. 316, reh. den., 393 U.S. 1112 (1969); Naegle Outdoor Advertising Company of Minnesota v. Village of Minnetonka, 281 Minn. 492, 162 N.W. 2d 206 (1968); State v. Diamond Motors, 50 Haw. 33, 429 P.2d 825 (1967); Moore v. Ward, 377 S.W.2d 881 (Ky. App., 1964); Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E. 2d 328 (1964)

signs under the Utah Outdoor Advertising Act, and that such an exercise of the eminent domain power is compatible with the greatest public good and least private injury. The district court properly refrained from substituting its judgment in the matter.

(2) Overbreadth, arbitrariness. Appellants' further due process arguments ignore the reasonable and orderly method of regulation set up by the Utah Outdoor Advertising Act, pursuant to and in furtherance of legislative findings that such regulation serves the public safety and welfare. U.C.A. 27-12-136.2, a section of the Act, states:

The purpose of this act is to provide the statutory basis for the regulation of outdoor advertising consistent with zoning principles and standards and the public policy of this state in providing public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, and to ensure that information in the specific interest of the traveling public is presented safely and effectively.

The Act then specifies what signs may and may not be permitted along controlled highways under the Act, U.C.A. 27-12-136.4, and provides for the removal of nonconforming signs by eminent domain or other lawful means, U.C.A. 27-12-136.11. Respondent submits that the Act, on its face, serves important, articulated goals of safety, welfare, and financial and esthetic preservation by means of a well-defined system

of regulation, and that Appellants suggested nothing which would have justified the lower court's acting as a super-legislature by ruling the statutory scheme unreasonable. No dispute exists in this case as to the fact that Appellants' signs are nonconforming under the Act.

Regarding Appellants' charge of arbitrariness, it is the Utah Legislature, and not Respondent, which promulgated the statutory criteria for nonconforming signs; also, evidence before the lower court indicated that more than 87% of nonconforming signs had been acquired for removal prior to hearing in these cases (Affidavit of Dean W. Holbrook, appended to Plaintiff's Reply Memorandum). There simply is no legal substance in Appellants' due process arguments. (See also Plaintiff's Memorandum, pp. 5-7, for decisions from other jurisdictions upholding outdoor advertising laws under due process attack.)

#### EQUAL PROTECTION

Appellants argue that the Act's distinction between the permissibility of signs in commercial and noncommercial areas may not be reasonable, and therefore violates the equal protection doctrine.

As to any legislative classification, including those pertaining to outdoor advertising, the equal protection

standard set out by the United States Supreme Court in Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489, 75 S.Ct. 461, 465 (1955), applies:

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think.... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.... The legislature may select one phase of one field and apply a remedy there, neglecting the others.... The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

In the present cases, it is perfectly reasonable to suppose that the Utah Legislature concluded that regulation of outdoor advertising along interstate and primary highways would serve the public safety and welfare, by protecting the public investment in such highways and preserving the scenic beauty of adjoining lands. The means adopted by the Utah Act are reasonably related to that purpose, and apply across-the-board to all who, like Appellants, own nonconforming signs. The district court properly refrained from second-guessing the Legislature's choice of statutory means in effectuating valid public purposes, and Appellants' argument on the basis of equal protection must also fail.

In addition, the Court's attention is drawn to pages 8-11 of Plaintiff's Memorandum, which discusses other states' outdoor advertising laws which have been upheld under equal protection attack.

#### FREEDOM OF SPEECH

Appellants also aver that the Utah Act violates free speech (Appellants' Brief, p. 19), and in support of this contention, cite one 1977 unpublished opinion from a California trial court. This argument ignores repeated holdings by state and federal courts, including the California Supreme Court, that billboard laws do not violate First Amendment guarantees. Most recently, in Metromedia, Inc. v. City of San Diego, 23 Cal.3d 762, 592 P.2d 728 (1979), the California Court upheld a city ordinance that, far more harshly than the Utah Act, would ban substantially all off-site billboards from an entire city. The Court reviewed other jurisdictions' decisions, and found that a "unanimity of published decisions supports the proposition that such an ordinance does not abridge freedom of speech." Id. at 742. While a rehearing has been granted in Metromedia, id. at 728, Respondent submits that the reasoning of the majority and concurring opinions is even more persuasive in the present case, where a less harsh regulatory scheme is at issue.

The Metromedia court cited Suffolk Outdoor Advertising Company v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263 (1977), in which a community-wide ban on off-site billboards was upheld under First Amendment attack. An appeal from that decision was dismissed for want of a substantial federal question by the U.S. Supreme Court, 99 S.Ct. 66 (1978). The Metromedia court stated:

Since the Supreme Court regards such a dismissal as a decision on the merits (Hicks v. Miranda (1975) 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 225), we conclude that the high court has resolved that its commercial speech cases are not inconsistent with ordinances prohibiting off-site billboards. The dismissal of the appeal in Suffolk Outdoor Advertising authoritatively establishes that such ordinances do not violate the First Amendment. 592 P.2d at 739 (emphasis added).

Precisely the same principle applies to the U.S. Supreme Court's dismissal on the merits of an appeal in Newman Signs, Inc. v. Hjelle, 268 N.W. 2d 741 (N.D., 1978), appeal dismissed, 99 S.Ct. 1205 (1979). In that case, the North Dakota Supreme Court upheld a state outdoor advertising act, identical in substance to the Utah Outdoor Advertising Act, and held that the act did not violate the First Amendment (see Plaintiff's Memorandum, pp. 15-16).

The Metromedia court also found that the ordinance did not seek to suppress the content of any advertiser's

message; served significant governmental interests (i.e., traffic safety and community esthetics) unrelated to the suppression of free speech; and left open adequate alternate means of communication; and therefore did not abridge freedom of speech. 592 P.2d at 740. Respondent submits that this analysis is of even greater validity when applied to the Utah Act, involving, as it does, the prohibition of billboards only in certain defined areas.

Also, in State v. Lotze, 92 Wash.2d, 52, 593 P.2d 811, appeal filed, 48 U.S.L.W. 3250 (1979), an opinion published since memoranda were filed with the district court in this case, the Washington Supreme Court held that the Washington outdoor advertising law, identical in all pertinent substantive aspects to the Utah Act, does not violate the First Amendment, even when applied to signs containing non-commercial, political messages. The Court found that the State's concern with traffic safety was sufficiently compelling to outweigh the "minimal restraint placed on advertising by the law," and that the "statutory scheme represents a reasonable place and manner limitation on speech leaving ample alternative channels of communication...." Id. at 815

Rather than providing a recitation here of the dozen



or so recent, well-reasoned state and federal court decisions which hold that billboard regulations do no violate freedom of speech, Respondent directs the Court's attention to the cases cited at pages 12-18 of Plaintiff's Memorandum. Of particular precedential value here are the decisions in John Donnelly & Sons v. Mallar, 453 F. Supp. 1272 (D.Me., 1978), Newman Signs, Inc. v. Hjelle, 268 N.W. 2d 741 (N.D., 1978), appeal dismissed, 99 S.Ct. 1205 (1979), State v. National Advertising Company, 356 So.2d 557 (La. App., 1978), and Howard v. State Department of Highways of Colorado, 478 F.2d 581 (10th Cir., 1973), in which beautification acts substantially the same as Utah's, enacted pursuant to the federal highway beautification statute (23 U.S.C. 131), have been uniformly upheld as not violative of freedom of speech.

UTAH CONSTITUTION, ARTICLE XIII, SECTION 13

Article XIII, Section 13 of the Utah Constitution state in pertinent part:

The proceeds from the imposition of any license tax, registration fee, driver education tax, or other charge related to the operation of any motor vehicle upon any public highway in this state, and the proceeds from the imposition of any excise tax on gasoline or other liquid motor fuel used for propelling such vehicles, except for statutory refunds and adjustments allowed thereunder and for costs of collection and

administration, shall be used exclusively for highway purposes as follows:

(1) The construction, improvement, repair and maintenance of city streets, county roads, and state highways, including but not restricted to payment for property taken for or damaged by rights of way, and for administrative costs necessarily incurred for said purposes....

Appellants have contended that expenditures under the Outdoor Advertising Act would constitute an unlawful diversion of state highway funds under this section (Appellants' Brief, p. 20; Eleventh Defense in Answer).

Appellants apparently overlook the fact that state highway funds may be expended for the "improvement ... and maintenance of ... state highways...." The clear purpose of this section is to prevent the diversion of highway funds to non-highway-related expenditures. On the other hand, expenditures authorized under the Utah Outdoor Advertising Act are intended to improve and maintain the safety and scenic beauty of Utah's highways. The breadth of the terms "improvement" and "maintenance" in the constitutional provision indicates that its purpose is not to prevent the Legislature from directing expenditures validly related to protecting the public investment in highways and enhancing the safety and enjoyment of highway travel.

The purposes of the Utah Outdoor Advertising Act, as enumerated in U.C.A. 27-12-136.2, are, inter alia, to

provide for the regulation of outdoor advertising in the interests of the public's safety, welfare, and convenience and enjoyment of public travel;"

... to protect the public investment in such highways, to preserve the natural scenic beauty of lands bordering on such highways, and to ensure that information in the specific interest of the traveling public is presented safely and effectively.

Plaintiff submits that these purposes clearly fall within the purview of highway "improvement and maintenance." It cannot be reasonably argued that Article XIII, Section 13 entirely prevents the Utah Department of Transportation from making expenditures for the safety, convenience, and enjoyment of highway users, or the preservation of the economic and scenic value of highways in the State.

In Newman v. Hjelle, 133 N.W.2d 549 (N.D., 1965), an argument substantially the same as Defendant's was rejected by the North Dakota Supreme Court. There, a taxpayer sought to enjoin the expenditure of state highway funds for the acquisition of outdoor advertising outside of the highway right-of-way, alleging that such an expenditure would violate Article 56 of the North Dakota Constitution. That provision, very similar to the Utah provision, states that proceeds from motor fuel taxes and from license and registration fees are to be expended "solely for construction,

repair and maintenance of public highways...." The Court stated:

It is clear the purpose of the amendment was to prevent any use of the earmarked revenues for anything but highway purposes and not to restrict the terms of the amendment by a narrow construction of the purpose for which the revenues may be used within the area designated. Id. at 557.

On its face, the Utah constitutional provision serves the same purpose, and a similar rule of construction should be applied to the Utah provision. It should further be stressed that, on the basis of the constitutional language alone, the Utah provision gives even stronger justification for the validity of the proposed condemnation expenditure than the North Dakota provision examined in Newman v. Hjelle. The latter section allowed expenditures only "for construction, reconstruction, repair and maintenance of public highways...." The Utah constitutional provision, on the other hand, allows expenditures of highway funds for the "construction, improvement, repair and maintenance of ... state highways...." As indicated above, it is evident that the purposes of the Utah Outdoor Advertising Act (traffic safety, convenience and enjoyment of travel, esthetic enhancement) fall well within the broad standard of highway "improvement." Expenditures under the Utah

Outdoor Advertising Act do not violate the constitutional provision, and the district court was fully justified in finding the state's right to condemn unimpaired on this basis.

#### ESTOPPEL

Appellants have also argued that Respondent should be estopped from condemning the subject signs by reason of the previous issuance of permits for the signs (Appellants' Brief, p. 20; Twelfth Defense in Answer). The district court properly rejected this argument as a matter of law.

First, the general rule regarding the application of equitable estoppel to governmental actions has been stated as follows:

An equitable estoppel ordinarily may not be invoked against a government or public agency functioning in its governmental capacity; but where the elements of an estoppel are present it may be asserted against the government when acting in its proprietary capacity. 31 C.J.S., Estoppel 138, p. 675.

An argument similar to Defendant's was advanced by the plaintiffs in John Donnelly & Sons v. Mallar, 453 F. Supp. 1272 (D. Me., 1978). There it was claimed that the State of Maine should be estopped from requiring removal of off-premise signs for which permits had been issued under previous legislation. Rejecting that argument, the court noted its adherence to "the general rule that when

the legislature acts in its governmental or sovereign capacity, as opposed to a business or proprietary role, the doctrine of estoppel is inapplicable." 453 F.Supp. at 1282.

In the present case, it is indisputable that the State is acting in its sovereign, and not in its proprietary, capacity. The simple fact that Plaintiff has been legislatively authorized to exercise the eminent domain power demonstrates that the State is performing a governmental function in regulating billboards, and not merely acting as a property owner.

Second, the mere fact that Appellants may have previously received permits for their signs, in accordance with the Utah Outdoor Advertising Act, provides no basis for invoking equitable estoppel. By renewing Appellants' permits, in accordance with statutory requirement (see U.C.A. 27-12-136.7), Respondent certainly made no representation that Appellants' billboards could remain in place forever. Appellants must be presumed to have known that their nonconforming signs were subject to condemnation at any time under U.C.A. 27-12-136.11.

This Court has previously stated:

The doctrine of equitable estoppel does not operate in favor of one who has knowledge of the essential facts or who has convenient

and available means of obtaining such knowledge. Morgan v. Board of State Lands, 549 P.2d 695, 697 n. 4 (Utah, 1976).

In the present case, Respondent has only followed the procedures dictated by statute in issuing licenses (U.C.A. 27-12-136.7) until such time that Appellants' nonconforming signs could be condemned (U.C.A. 27-12-136.10-11), and no suggestion has been made by Appellants that such procedure was not followed. Sign owners must be presumed to have available means of learning what the statutes on signs provide. In short, no basis has been suggested or exists for estopping these actions, and the lower court properly disregarded Appellants' argument on this score.

Other courts' decisions, rejecting efforts to estop enforcement of billboard laws, are discussed in Plaintiff's Memorandum, at page 28.

#### 23 U.S.C. 131(o)

Appellants seek to rely on 23 U.S.C. 131(o), a section of the federal highway beautification act, which states:

The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the time of their erection which do not conform to the requirements of subsection (c), where such signs, displays, and devices are in existence on the date of enactment of this subsection and where the State demonstrates that such signs, displays, and devices (1) provide directional

information about goods and services in the interest of the travelling public, and (2) are such that removal would work a substantial economic hardship in such defined area.

Appellants advance the peculiar argument that, by not making application under this section, the State has failed to exhaust its administrative remedies, and that this so-called failure somehow adversely affects Respondent's eminent domain power (Appellants' Brief, p. 20).

Respondent confesses itself at an utter loss to determine any way in which section 131(o) vitiates the State's authority to condemn nonconforming signs. The federal statute permits states to apply for hardship exemptions for certain signs, if the states choose to do so, but does not mandate such requests, or make the states' power to condemn nonconforming signs contingent upon exercise of the discretionary privilege granted in section 131(o).

That any application under 131(o) was intended to be left to the states' discretion is attested both by a reasonable reading of the statutory language itself and by the section's legislative history. In 1976, when the U.S. Senate considered the bill containing section 131(o), the following exchange occurred while Senator Bentsen, chairman of the Sub-Committee on Transportation of the Committee on Public Works, reported on the conference committee's consideration of the proposed amendments:



MR. STEVENSON. Section 122(b)(o) amends section 131 of title 23, United States Code, by adding that the Secretary of Transportation may approve the request of a State to permit retention in specific areas of directional signs providing information about goods and services.

Do I understand correctly that a State may, if it so chooses, elect not to permit such signs?

MR. BENTSEN. Yes, definitely. A State may choose not to permit such signs. 122 Cong. Rec. 10747 (1976) (emphasis added).

Senator Baker, the ranking minority member of the Public Works Committee, and a member of the conference committee which considered section 131(o), stated:

We also added a new provision to assist those areas in a State which may suffer severe economic hardship if all existing signs are required to be removed. This would permit States to define these areas and ask the Secretary of Transportation to permit retention of billboards which would otherwise be illegal. The measure is intended to relieve adverse economic impacts throughout an area. It is not designed to provide relief to individual businesses which claim possible economic detriment as a result of sign removal. Id. at 10746 (emphasis added).

Thus, it was clearly contemplated that section 131(o) would permit states to apply for a hardship exemption, but no mention is made of requiring states to take any action at all, including the promulgation of rules and regulations. No legislative history or statutory language of which

Respondent is aware would justify the interpretation of section 131(o) advanced by Appellants in this case.

Respondent has previously considered the exemption provided for in section 131(o), and has declined to apply for any such exemption. The federal statute makes no requirement of any affirmative action by the State, and has no effect on the State's power to condemn nonconforming outdoor advertising signs.

Finally, Appellants cite State v. Denver & Rio Grande Western Railroad Company, 8 Utah 2d 236, 332 P.2d 926 (1958), as supportive of the proposition that, "where challenges are made to the right to condemn, a condemnor will not be granted an order of immediate occupancy." (Defendant's Memorandum, p. 14). The D.&R.G.W. case is inapposite here for several reasons: (1) In that case, both condemnor and condemnee were empowered to exercise the right of eminent domain, and the case therefore centered on the question of highest and best use of the subject property. (2) However, the condemnor at the hearing on its motion for an order of immediate occupancy failed to request any determination as to whether the proposed improvement would constitute a higher and better use than the existing improvement. (3) The D.&R.G.W. Court indicated that questions of a right to condemn generally would not interfere with issuance of an order of immediate

occupancy. Summarizing that case, the Court stated:

Both plaintiff and defendant are empowered to exercise the right of eminent domain. This case, therefore, is somewhat of a rarity, requiring a determination as to whether the exercise of the one power or the other will better promote the public good, -- a situation not involved in substantially all condemnation cases in this state, where the sovereign is seeking condemnation of property belonging to one not enjoying such power. In the latter type of case it has been considered routine to grant motions for immediate occupancy, since generally it is quite obvious that no question of higher and better use will or can arise or that the right to condemn is debatable.

The granting of a motion for immediate occupancy has been held by this court primarily to be one directed to the sound discretion of the trial court, reversible only because of obvious abuse there; that the order resulting from such motion is interlocutory in nature, and that the matter of determining any right to condemn is one for consideration at the trial at which the issues generally are determined. 8 Utah 2d at 238 (emphasis added).

Respondent submits that the district court properly found Appellants' objections to be without foundation, and ruled as a matter of law that the State has the right to condemn the subject signs. Nevertheless, even assuming arguendo that Appellant's constitutional claims could be shown to have some viability, both U.C.A. 78-34-9, the statute governing orders of immediate occupancy, and the D.&R.G.W. case indicate that these issues may be determined at trial, and that an order of immediate occupancy may, in the trial court's discretion, be granted in the meantime.

In sum, the record indicates that the constitutional and legal objections raised by Appellants were fully briefed prior to argument on the motion for an order of immediate occupancy; that Appellants were free to offer whatever factual evidence they felt was pertinent to those issues at the hearing in the matter; and that, as a result, the district court could and did properly rule that the State had made out a prima facie showing of its right to take, and that the objections raised by Appellants were not sufficient to rebut that showing.

B.

RESPONDENT MADE A PROPER SHOWING AS TO THE REASONS IN SUPPORT OF THE ORDERS OF IMMEDIATE OCCUPANCY, BASED UPON THE STATUTORY AIMS OF THE UTAH OUTDOOR ADVERTISING ACT, AND IT WAS WELL WITHIN THE DISTRICT COURT'S DISCRETION TO GRANT THE ORDERS.

U.C.A. 78-34-9, as indicated above, requires a condemnor seeking an order of immediate occupancy to show, by affidavit or otherwise, the value of the property sought to be condemned, and the reasons for a speedy occupation. As to the first requirement, Respondent submitted the affidavits of Glenwood B. Larrabee and Ward C. Ragner, testifying to the value of the subject signs (see Plaintiff's Reply Memorandum in each case). No dispute exists between the parties as to this requirement having been

fulfilled.

As to the second requirement, that of showing the reasons for a speedy occupation, Respondent submits that the district court had before it ample showing as to the reasons for immediate occupancy to sustain its discretionary order granting occupancy.

First, it should be stressed that, unlike the large majority of condemnation actions, in the instant cases the necessity of condemning a certain specifically defined class of property for articulated public purposes is mandated by the statute which grants the eminent domain power. That is, the Utah Outdoor Advertising Act directs that nonconforming signs be removed, by purchase, condemnation, or other legal means, in furtherance of the purposes set out in U.C.A. 27-12-136.2; this is not a case in which a condemnor has discretion in planning the design, timing, and location of a public improvement, so that the necessity or design of the improvement would be validly open to judicial scrutiny. In this case, the Legislature has determined that the removal of defined nonconforming uses will further the public purposes set out in U.C.A. 27-12-136.2; Appellants have not disputed the fact that their signs are nonconforming, and given the legislative mandate involved, no question of the ultimate necessity of condemnation

viably exists in this case.

Thus, the Utah Outdoor Advertising Act is in the nature of a zoning regulation, requiring the removal of certain nonconforming uses after an amortization period (U.C.A. 27-12-136.10) in furtherance of the "public safety, health, [and] welfare" and "consistent with zoning principles and standards..." (U.C.A. 27-12-136.2). It is true that the Act provides for compensation to be paid for nonconforming signs, in addition to an amortization period, but this does not change the basic nature of the Act as a zoning law. The district court's order was fully consonant with the policy of the law to eliminate nonconforming uses as rapidly as is feasible under the law.

Because nonconforming uses and structures, so long as they exist, prevent the full realization of the zoning plan, the spirit of zoning is, and has been, to restrict, rather than increase, such nonconformities, and to eliminate such uses as speedily as possible.

2 Rathdopf, The Law of Zoning and Planning (3d ed.), ch. 62.

In short, in considering the need for immediate occupancy, the district court had before it a legislative determination that the removal of nonconforming signs would serve important public purposes. Appellants' implication that an order of immediate occupancy is only appropriate to avoid direct pecuniary loss (Appellants' Brief, pp. 4-8) ignores the other valid interests served by the Outdoor

Advertising Act -- i.e., the protection of public safety and of the public investment in interstate and primary highways; enhancement of the enjoyment of public travel; and preservation of the natural scenic beauty of the lands bordering on controlled highways. Extensive evidence that these aims are served by the removal of nonconforming signs would have been superfluous, since that determination has already been made by the Legislature and was binding upon the district court.

Second, the district court had before it in each case a resolution by the Utah Department of Transportation, whereby the Department found and determined:

...the public interest and necessity require that an outdoor advertising sign and the right to maintain the same upon the real property, hereinafter described, be terminated by removal of said sign structure.

The removal of said sign structure and the termination of the right to thereafter maintain a controlled outdoor advertising structure and sign on the site will be most compatible with the greatest public good and the least private injury and carries out and fulfills the requirements of the law as declared in Title 27, Chapter 12, Section 136.2, Paragraph No. 1, Utah Code Annotated 1953, as amended. (See Complaint in each case.)

In each resolution, the Department also requests that the Utah Attorney General's Office seek an order of immediate occupancy, "permitting said Department to ... take possession of and remove the outdoor advertising structure and

sign described in this Resolution."

The district court therefore had before it, not only a legislative determination that the removal of non-conforming signs serves certain public purposes, but also an administrative determination that the removal of Appellants' particular signs would serve the public interest and necessity, would be compatible with the greatest public good and the least private injury, would fulfill the purposes of U.C.A. 27-12-136.2, and should be effectuated by means of an order of immediate occupancy. It is well settled that substantial judicial deference will be shown to a governmental condemnor's determination of the necessity of taking property for a public improvement, properly expressed by resolution. Bountiful v. Swift, 535 P.2d 1236 (Utah, 1975). Respondent submits that the district court could and did properly consider the Department's administrative resolutions as probative of the need for removal of Appellants' signs by means of an order of immediate occupancy.

Finally, the district court had before it further evidence of the reasons for speedy occupation in the Affidavit of Dean W. Holbrook, appended to Plaintiff's Reply Memorandum in each case. Mr. Holbrook's Affidavit indicated that, as of January 15, 1979, two months prior to the



hearing on the orders, Respondent had acquired for removal 2,167 signs which were nonconforming and compensable under the Utah Outdoor Advertising Act, in addition to having removed some 7,550 illegal, noncompensable signs; 321 nonconforming signs remained as of that date. Of the nonconforming signs which remained standing, condemnation suits involving thirty-one signs had at that time been filed; orders of immediate occupancy had been granted as to sixteen of such signs, and denied as to six. Mr. Holbrook's Affidavit indicated that Respondent intended "to continue to seek removal of such [nonconforming] signs through condemnation in as expeditious a manner as possible." (In light of all this, Appellants' assertion that "Plaintiff has chosen to ignore more than two hundred and fifty (250) other nonconforming signs throughout the State" (Appellant's Brief, p. 10) is rather misleading, to say the least.)

The facts that Respondent had acquired for removal nearly 90% of the nonconforming signs which existed when the Utah Outdoor Advertising Act took effect, and nearly all of the illegal signs which had existed since that date, were thus before the district court. Based upon this, Respondent argued that orders of immediate occupancy in sign condemnation cases are appropriate means of ensuring that the removal of

nonconforming signs may continue in an orderly and reasonably expeditious way; and that this should hold true particularly where, as in the present cases, no viable objection as to the right to take or the nonconforming status of the signs has been raised, and the matter of compensation will be determined at trial. (Plaintiff's Reply Memorandum, p. 7).

Respondent also readily conceded that a sign owner may have or believe he has a legitimate dispute with the State as to the amount of compensation to which he is entitled for his condemned property. This fact alone, however, does not justify a denial of an order of immediate occupancy, which denial would allow nonconforming signs additional months and years in which to remain standing while a condemnation action languishes on through discovery a trial, and an appeal. Questions of compensation are reserved for trial and are not affected by the granting of an order of immediate occupancy. U.C.A. 78-34-9. The public has a valid interest in the removal of nonconforming signs, for the purposes enunciated in U.C.A. 27-12-136.2; in weighing the equities of the case, the public's interest in the protection of its highway investment and in the enhancement of safe automobile travel and of the state's scenic beauty could properly be deemed to outweigh

the interest of any private sign owner in delaying the removal of nonconforming signs for the duration of what may be a lengthy condemnation proceeding.

In sum, Respondent submits that the district court had before it adequate evidence, showing reasons for orders of immediate occupancy, and those orders should now be affirmed.

### III.

THIS COURT HAS TRADITIONALLY DEFERRED TO THE DISTRICT COURTS' DISCRETION IN THE GRANTING OF ORDERS OF IMMEDIATE OCCUPANCY, PARTICULARLY WHERE, AS HERE, THE RECORD REVEALS NO OBVIOUS ABUSE OF THAT DISCRETION.

As previously noted, the following standard governs the review by this Court of orders of immediate occupancy:

The granting of a motion for immediate occupancy has been held by this court primarily to be one directed to the sound discretion of the trial court, reversible only because of obvious abuse thereof; that the order resulting from such motion is interlocutory in nature, and that the matter of determining any right to condemn is one for consideration at the trial at which the issues generally are determined. State v. Denver & Rio Grande Western Railroad Company, supra, 8 Utah 2d at 238.

Based upon U.C.A. 78-34-9, the Court has also stated, "...on a motion for immediate occupancy the trial court is empowered to grant or deny the motion according to the equity of the case," Bountiful v. Swift, supra, 535 P.2d at 1238; and only recently, the Court reiterated, "Where such an order is supported by ample evidence it is not arbitrary and will not

be disturbed on appeal." Utah Department of Transportation v. Fuller, docket no. 16404 (Utah, filed November 14, 1979).

Respondent submits that, in weighing the equities in the present cases, the district court could reasonably conclude that the public's interest in safety, scenic preservation, and protection of its investment in public highways would outweigh the alleged monetary harm to be suffered by Appellants. In light of this, and the record and evidence before the district court, no abuse of discretion is manifest, and this Court should thus defer to the discretion of the district court in the matter.

#### CONCLUSION

Orders of immediate occupancy are appropriate for the courts' consideration in condemnation actions of this kind, as evidenced by the Utah Outdoor Advertising Act's incorporation of the provisions of Title 78, chapter 34 (U.C.A. 27-12-136.11, 78-34-9).

In the instant cases, because Respondent's right to take was controverted, Respondent made a prima facie showing on legal grounds of its right to take, a showing that was not successfully rebutted by Appellants. In addition, the district court had before it the Legislature's

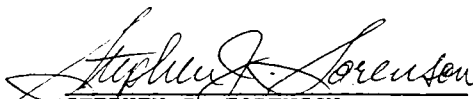
determination that the removal of nonconforming signs would serve important public purposes (U.C.A. 27-12-136.2); copies of valid administrative resolutions determining that removal of Appellants' signs would serve those public purposes, and requesting that orders of immediate occupancy be obtained; and affidavits evidencing (1) the value of Appellants' signs and (2) the fact that removal of Appellants' signs would be in furtherance of an orderly acquisition and removal scheme undertaken by Respondent, pursuant to which over 87% of nonconforming signs had been previously acquired, and which was continuing at that time. (These cases thus differ from the great majority of condemnation cases, since here, the statutory enactment was in the nature of a zoning ordinance, and the question of public necessity was conclusively determined by the Legislature, and was not subject to administrative discretion.) Given this record, all statutory and case law prerequisites for an order of immediate occupancy were fulfilled, and the district court had before it ample evidence of "the reasons for ... a speedy occupation." U.C.A., 78-34-9. In its weighing of the equities, the district court could well have concluded that the public good to be served by immediate removal of the signs outweighed any damages which would accrue to Appellants.

Motions for immediate occupancy have been held to be directed primarily to the discretion of the trial court. Respondent submits that no abuse of discretion is manifest in these cases, and respectfully requests that this Court affirm the orders of immediate occupancy granted by the district court.

DATED this 24th day of December, 1979.

Respectfully submitted,

ROBERT B. HANSEN  
Attorney General

  
STEPHEN J. SORENSON  
Assistant Attorney General  
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I personally delivered a true and correct copy of the foregoing BRIEF OF RESPONDENT to Thomas T. Billings, of and for PARSONS, BEHLE & LATIMER, Attorneys for Appellants, 79 South State Street, Salt Lake City, Utah 84111 on this 24th day of December, 1979.

