STATE OF MICHIGAN
IN THE SUPREME COURT

ADAMS OUTDOOR ADVERTISING
Plaintiff-Appellee
File No. 113674

vs.

CITY OF EAST LANSING
Defendant-Appellant.

CA File No. 200655

LC File No. 87-59541-CZ

John F. Rohe (P27954)
Counsel for *Amici Curiae*
438 East Lake Street
Petoskey, MI 49770
(616) 347-7327

Michael H. Perry (P20655)
Attorneys for Plaintiff
1000 Michigan National Tower
Lansing, MI 48933
(517) 482-5800

Thomas M. Hitch (P25558)
Attorney for Defendant-Appellant
601 Abbott Road
East Lansing, MI 48823
(517) 351-0280

John H. Bagg
Of Counsel for Amici Curiae
362 Jerris Avenue, S.E.
Salem, Oregon 97302
(503) 581-3056

Of Counsel:
John D. Echeverria *Amici Curiae*
Jon Zeidler
Environmental Policy Project
Georgetown University Law Center
600 New Jersey Avenue
Washington, D.C. 20003
(202) 662-9850

BRIEF IN SUPPORT OF APPELLANT CITY OF EAST LANSING BY AMICI CURIAE SCENIC AMERICA AND SCENIC MICHIGAN

By: John F. Rohe (P27954)
438 East Lake Street
Petoskey, Michigan 49770
(231)347-7327
Of Counsel:
John H. Bagg
John D. Echeverria

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STATE OF MICHIGAN

IN THE SUPREME COURT

ADAMS OUTDOOR ADVERTISING,

Plaintiff-Appellee,File No. 113674
CA File No. 200655
vLC File No.87-59541-CZ

CITY OF EAST LANSING,

Defendant-Appellant,

BRIEF OF AMICI CURIAE SCENIC MICHIGAN AND SCENIC AMERICA

INTEREST OF SCENIC MICHIGAN AND SCENIC AMERICA

Amicus Scenic Michigan is a non profit Michigan corporation dedicated to preserving and enhancing the scenic character of this state. The organization, with its 100 members, works with the public and elected officials to develop scenic preservation programs.

Amicus Scenic America is also a non profit corporation, incorporated in Pennsylvania, and is the only national group dedicated to preserving and enhancing this nation's scenic character. Scenic America has three thousand members across the country. Scenic Michigan is an affiliate of Scenic America.

Both organizations believe they can offer this court assistance in addressing the constitutional issues the case presents. They offer this assistance because they believe the Court of Appeals decision reflects both a mistaken understanding of the law and a misapplication of settled legal principles. Until reversed, the Court of Appeals decision will seriously undermine legitimate local government efforts to adopt and enforce reasonable measures to promote safety and reduce blight.

STATEMENT OF QUESTIONS PRESENTED

Amici adopt the questions presented by the City of East Lansing.

STATEMENT OF FACTS

Amici adopt the statement of facts and the procedural history offered by the City of East Lansing but wish to stress certain facts important to the points addressed in this brief. Unless otherwise noted, the facts recited below are taken from the city's "Application for Leave to Appeal" and its "Defendant-Appellant's Brief" in the Court of Appeals

The city's billboard ordinance was adopted on October 7, 1975. It initially set a deadline for compliance of October 7, 1983, eight years after the date of enactment. That deadline was extended on May 1, 1984 to the present deadline of May 1, 1987, or nearly twelve years after the original enactment date. The city's ordinance, then, provided a total of twelve years within which billboard enterprises could bring their signs into compliance with the ordinance or remove them.

By its terms, the city's ordinance restricts billboards to those meeting specific ordinance requirements. The ordinance renders certain billboards nonconforming by granting permission for a limited number and variety of signs in particular locations. Code of the City of East Lansing, Ch. 99, art. III, § 8.22. Signs not in compliance with ordinance provisions are not permitted after May 1, 1987 (unless exempted from regulation under § 8.37). *Id* art. VI § 8.39(8). The ordinance does

not address leases, rental agreements or other legal relationships that might be necessary in order to place and maintain permissible billboards.

The billboards at issue in this case are on buildings. Building owners granted permission to place and maintain the billboards subject to and in accordance with short term lease agreements. The record in this case reveals that the lease for one of the properties used to locate one of the billboards (the property at 1108 East Grand River) was for a period of five years.[1] Tr 37. The record is not clear on the initial lease for the property housing the second billboard, but the latest lease for this property is apparently for five years.[2] The lease periods, then, during the time of the amortization period, were apparently for less than half the time the city's ordinance provided continued permission to maintain nonconforming billboards. As amici understand the arrangements, at the close of the various lease periods, the billboards were to be removed (unless the leases were extended). Tr 36-40. Also, at the close of the lease periods, the tenancy could run from month to month unless terminated. [3] *Id*.

Plaintiff-appellee Adams acquired the billboards (and presumably the supporting leases) from Central Advertising in October of 1983, eight years after enactment of the city's billboard ordinance.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals erred in affirming a trial court determination that application of the city's billboard ordinance resulted in a taking of Adams Outdoor Advertising's property without compensation in violation of the United States and Michigan Constitutions.

The court's first error was in finding a taking of the leaseholds for the billboard locations. Enactment of the city's billboard ordinance did not interfere with the ability to exercise rights under the existing leases. As discussed above, the leases were apparently set for terms of five or ten years. The ordinance imposed no restriction on the billboard owner's ability to maintain the signs for initially eight years and later for twelve years following ordinance enactment. As a result, the ordinance did not interfere with or inhibit the exercise of rights under the leases. Absent some demonstration that the enactment of the billboard ordinance actually interfered with existing property interests, Adams has presented no valid takings claim.

Second, the court erred in concluding the twelve year amortization provision in the ordinance was not relevant for the purpose of the takings analysis. Contrary to the court's ruling, other courts around the country have unhesitatingly recognized the value of property use during a reasonable amortization period should be taken into account in a takings analysis. By concluding that the amortization period must be ignored, the court's ruling unnecessarily deprives Michigan communities of the ability to use a valuable land use regulatory tool. That tool serves to accommodate both the public's interest in a safe and attractive environment and property owners' interest in deriving economic gain from their property.

The Court of Appeals third error was in mistakenly treating this dispute as one over leaseholds. The city's billboard ordinance does not address leaseholds, and Adams' complaint in the trial court did not allege leaseholds were taken. The property interest at issue in this case are billboards that may be modified or moved to conform to city requirements. Because billboards are a type of personal property, not realty, the city had plenary authority to regulate them consistent with the takings clause.

Fourth, whether this case is about leaseholds or billboard structures, the Court of Appeals ignored the requirement that a takings claim be analyzed in relation to the entire unit of property at issue in the case. The proper unit of property in this case consists of all the billboards (or

leases) Adams held in the Lansing area because the company held and managed them as part of a single business enterprise.

Finally, this claim fails because at the time Adams apparently purchased the billboards and leases from Central Advertising in October of 1983, the city's ordinance had been in place for some eight years. Adams Outdoor Advertising knew or should have known that the existing city regulations prohibited it from continuing to operate its billboards after the end of the amortization period. A purchaser who acquired property with notice of legal restrictions in place (and, presumably at a price reflecting the regulations) is barred from challenging the restrictions as a taking.

ARGUMENT

I. The Court of Appeals erred in concluding that the amortization period was irrelevant to the question of whether the billboard ordinance effected a taking.

The Court of Appeals concluded that the twelve-year amortization period in the city's billboard ordinance should be disregarded for the purpose of deciding whether or not the ordinance effected a taking. The ruling was mistaken in two respects. First, because the amortization period was actually longer than the terms of the leases in place when the ordinance was adopted, the ordinance did not interfere with, and certainly did not effect a taking of, the leasehold rights. Second, in general, a reasonable amortization period in an ordinance designed to phase out a nonconforming use precludes a finding of a taking because it ensures the ordinance does not deny the owner all or substantially all economic use of the property.

A. The ordinance had no effect on and did not effect a taking of leasehold rights.

It is a basic prerequisite for a valid claim under the takings clause that the government action must in some fashion have affected or interfered with an actual, vested property interest. *See United States v Chandler-Dunbar Water Power Company*, 229 US 53, 76, 33 S Ct 667, 57 L Ed 1063 (1913) holding that riparian landowners cannot claim a taking of a river's power generation potential which they do not actually own, and *Board of Regents of State Colleges v Roth*, 403 US 388, 91 S Ct 1999, 29 L Ed2d 619 (1971) finding a teacher with a single year teaching contract with a public university had no property interest in continued employment that would support a due process claim. [4] The Court of Appeals' ruling in this case disregards this principle because it finds a taking in the absence of interference with a vested property right.

As discussed, during the amortization period (and presumably at the time the ordinance was enacted), the leases for the billboard locations apparently had (as far as amici understand the record) a term of five years.[5] The ordinance included a twelve-year amortization period. Consequently, the billboard ordinance had no impact on Adams' or Adams predecessor in interest's ability to exercise rights under the leases. By the time the billboard removal requirement came due at the close of the twelve year amortization period, any rights Adams had under the leases had expired. Thus, the ordinance could not have effected a taking of the original leasehold rights.

To be sure, the ordinance prohibited Adams from continuing to maintain the billboards after the close of the amortization period. But the ordinance cannot be viewed as having effected a taking of rights under leases that Adams entered into *after* the amortization period had begun. Because those leases were entered into with knowledge of the ordinance and the amortization period, any risk of loss incurred by Adams was entirely self inflicted and cannot support a valid takings claim. Takings doctrine limits financial recovery to those who can "demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Loveladies Harbor, Inc. v United States*, 28 F3d 1171, 1179 (DC Cir 1994).

> In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it.

Id. Adams has no plausible takings claim to assert based on an alleged taking of leases entered into after the ordinance was enacted. And since Adams also cannot claim a taking of the pre-existing leases, the rights under which were left unaffected by the ordinance, then there simply is no basis for the Court of Appeals' finding of a taking of the leases.

B. The city's twelve-year amortization period precludes a finding of a taking.

As discussed above, the twelve-year amortization period precludes a finding of a taking given the comparatively short duration of the leaseholds in this case. However, it is also true, as a general matter, that a reasonable amortization period precludes a finding of a taking in an ordinance designed to abate nonconforming uses. The Court of Appeals concluded, as a matter of law, that the amortization period had to be disregarded in the takings analysis, relying in significant part of the reasoning of Justice Levin in his separate opinion in *Adams Outdoor Advertising v East Lansing*, 439 Mich 209, 234-37; 483 NW2d 38 (1992), hereafter, *Adams I*.[6] *Adams Outdoor Advertising v City of East Lansing*, 232 Mich App 587; 591 NW2d 404 (1998), hereafter, *Adams II*. Amici respectfully urge the court to reject that viewpoint.

First, the Court of Appeals' analysis of the potential relevance of the amortization period too easily passes over basic principles about the constitutionality of government regulation.[7] U.S. Supreme Court decisions establish that a regulatory restriction can be held to effect a taking only if the regulation eliminates all or substantially all of a property's economic value. *See United States v Riverside Bayview Homes*, 474 US 121, 126; 106 S Ct 455; 88 L Ed2d 419 (1985) (regulatory takings occur only in "extreme circumstances"). *See also City of Monterey v Del Monte Dunes at Monterey, Ltd.*, 526 US 687; 119 S Ct 1624, 1634; 143 L Ed2d 882 (1999); *First English Evangelical Lutheran Church v Los Angeles,* 482 US 304, 312; 107 S Ct 2378; 96 L Ed2d 250 (1987). In accordance with this principle, the Court has repeatedly affirmed that its cases establish that "mere diminution in the value of property" is not sufficient to demonstrate a taking. *Concrete Pipe & Products v Construction Laborers Pension Trust,* 508 US 602, 645; 113 S Ct 2264; 124 L Ed2d 539 (1993).

The actual outcomes of U.S. Supreme Court takings cases confirm that only regulations eliminating all or substantially all economic value rise to the level of a compensable taking. *Compare Lucas v South Carolina Coastal Council*, 505 US 1003; 112 S Ct 2886; 120 L Ed2d 798 (1992), hereafter *Lucas*, (total elimination of value of two building lots effects a taking) and *Ruckelshaus v Monsanto*, 467 US 986; 104 S Ct 2862; 81 L Ed2d 815 (1984) (destruction of value of trade secrets results in a taking) with *Agins v City of Tiburon*, 447 US 254; 100 S Ct 2138; 65 L Ed2d 106 (1980) (rejecting takings challenge to zoning restrictions which allegedly reduced property value by 85%); *Village of Euclid v Ambler Co.*, 272 US 365, 384; 47 S Ct 114; 71 L Ed 303 (1926) (rejecting takings challenge based on 75% reduction in value); *Hadacheck v Sebastian*, 239 US 394, 405; 36 S Ct 143; 60 L Ed 348 (1915) (rejecting takings challenge based on 2.5% reduction in value).

This interpretation of the Takings Clause respects and comports with the language and original understanding of the clause. As Justice Antonin Scalia stated in *Lucas*, 505 US at 1028 n. 15, "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *See generally* Hart, John "Colonial Land Use Law and its Significance for Modern Takings Doctrine," 109 *Harvard Law Review* 1252, 1292 (1996); Treanor, William Michael, "The Original Understanding of the Takings Clause and the Political Process," 95 *Columbia Law Review* 782 (1995). Notwithstanding the drafters' original understanding, it has been clear, at least since the U.S. Supreme Court's decision in *Pennsylvania Coal Co v Mahon*, 260 U.S. 393;

43 S Ct 158; 67 L Ed 322 (1922), that the Takings Clause does extend to certain regulations that go "too far." Yet, in keeping with the drafters' original intentions, the courts have only applied the Takings Clause to regulations with such drastic economic effects that they are functionally equivalent to the physical appropriations that the drafters had in mind. Thus, in *Lucas*, for example, the U.S. Supreme Court explained its ruling in favor of the takings claimant by pointing to the fact that the alleged taking in that case was, "from the owner's point of view, the equivalent of a physical occupation." 505 U.S. at 1007. *See also Pennsylvania Coal Co. v Mahon*, 260 US at 415 (Holmes, J.) (the issue in regulatory takings case is whether the regulation "has nearly the same effect for constitutional purposes as appropriating or destroying it").[8]

Applying these basic principles to amortization statutes, courts across the country have, with virtual unanimity, rejected takings challenges to reasonable amortization provisions that do not eliminate all or substantially all of the value of the owner's property. *See, for example, AVR Inc. v City of St. Louis Park,* 585 NW2d 411 (Ct App, Minn 1998); *Outdoor Graphics, Inc. v Burlington*, 103 F3d 690 (8th Cir 1996); *Art Neon Co. v Denver*, 488 F2d 118 (10th Cir 1973), *cert. denied*, 417 US 932 (1973) and *Tahoe Regional Planning Agency v King*, 285 Cal Rptr 335, 352 (Cal App 1991). A consistent theme in the cases cited is that the value of property use during the amortization period is highly relevant to the takings analysis. These decisions recognize that while the use must eventually end, a reasonable amortization period leaves the property owner with a substantial portion of the value of his or her investment. Stated another way, the amortization period means income for the property owner, and "[w]hat is the land but the profits thereof?" *Lucas*, 505 US at 1017 quoting E Coke, *Institutes,* Ch 1, '1 (1st American Ed, 1812).

This common sense analysis is particularly apt in a business context. If the issue in a taking claim is the effect of regulation on the value of business property, then amortization provides a means to secure value and thus answer the takings complaint. That is, if it is income producing property that is affected, then an ordinance provision permitting an owner to gain significant income from the property precludes a finding of a taking.

Amortization provisions represent a means to terminate nonconforming uses without doing so abruptly and with the benefit to the property owner of allowing, at least for a time, continued use of the nonconforming property. Admittedly, amortization is predicated on the eventual cessation of the nonconforming use. It does offer, however, a reasonable accommodation between the potentially competing public interest in a safe, healthful and scenic environment and the landowner's interest in using property for economic gain.[9] The constitution does not stand in the way of considered legislative judgments by elected officials that this type of accommodation is reasonable and appropriate.

The Supreme Court of Arkansas, for example, recognized the need for accommodation between the public welfare and private ownership and characterized amortization as "[t]he most successful solution" to the problem. *City of Fayetteville v McIlroy Bank & Trust Co*, 278 Ark 500; 647 SW2d 439, 441 (1983). The court cited with approval an American Law Institute statement that amortization regulations "were established on the principle that a property owner should be able to recoup his investment in an existing land use within a particular period of time, but that after that time he could reasonably be forced to discontinue the use without payment of compensation." *Id*.

Revenue from the billboards during the amortization period means the billboard owner retains a significant part of the billboard enterprise value. At most, the owner suffers a loss of the income that might have been generated from use of the property after the amortization period. That loss does not rise to the level of a compensable taking. Mere reduction in value as a result of government regulation is not a taking. *Bevan v Brandon Township*, 438 Mich 385, 402-403; 475 NW2d 37, 46 (1991), *cert. denied*; 502 US 1060 (1992); *Concrete Pipe & Products, Inc. v Construction Laborers' Pension Trust*, 508 US at 645.

In addition to permitting valuable continued use of the property, an amortization provision confers significant benefits on owners under such provisions. In this case, because new billboards were prohibited, Adams was subject to only limited competition in the sale of billboard advertising space. Further, Adams presumably could charge a fee for its advertising services that reflected this "monopoly" effect.[10]

The benefit to the owner in freedom from competition was recognized as a significant factor in *Outdoor Graphics, Inc. v Burlington*, 103 F3d at 695. In that case, the Circuit Court of Appeals found a regulation granting a reasonable amortization period before elimination of existing billboards did not support a taking claim. The court relied, in part, on the fact the plaintiff enjoyed a monopoly on billboard advertising in the area affected, as did Adams in this case.

In sum, amortization fairly balances competing interests and provides the citizens of this state with a means to maintain a safe and attractive environment while at the same time recognizing businesses' legitimate interest in realizing a fair return on their property.

II. Billboards are a variety of personal property, and, therefore, government regulation of billboards is subject to deferential review under the takings clause.

The Court of Appeals in *Adams II* identified the relevant property interest subject to analysis for possible taking to be the plaintiff's leaseholds. But the ordinance is directed at and operates on billboards, which are a form of personal property, not realty. Because judicial review of regulation of personal property is particularly deferential under the takings clause, the Court of Appeals' failure to recognize that this case involves personal property, not real property, led the court to apply the wrong standard.

The Court of Appeals addressed the ordinance as if it directly affected leases, but the provisions of the ordinance do not support this premise. By its terms, the city's ordinance renders certain billboards nonconforming uses. It does so by granting permission for a limited number and variety of signs in particular locations. Code of the City of East Lansing, Ch. 99, art. III, § 8.22. Signs not in compliance with ordinance provisions are not permitted after May 1, 1987 (unless exempted from regulation under § 8.37). *Id.* art. VI, § 8.39(8). The ordinance simply does not address leases, rental agreements or other legal relationship that might be necessary in order to erect and maintain billboards in any permitted location.

The Court of Appeals also cited *In re Acquisition of Billboard Leases & Easements*, 205 Mich App 659, 661; 517 NW2d 872 (1994), but that decision does not support the conclusion that this case is about leaseholds. In that case, the defendant governmental entities condemned not only billboards but also leaseholds on which the billboards were located. The Court of Appeals quoted a portion of this earlier opinion in which it said, "Regardless of whether a billboard is classified as personal property or a fixture, the leaseholds and air rights that were taken from defendants are real property." *Adams II*, 232 Mich App at 595; 591 NW2d at 408 citing *In re Acquisition of Billboard Leases & Easements*, 205 Mich at 661; 517 NW2d at 873. The court added that Adams relied on this case for its claim that this case involved income-producing real property. *Id*. The case simply does not support that conclusion.

Amici urges a reexamination of the Court of Appeals' failure to focus its analysis on the billboards because it caused the court to apply the wrong legal standard. Regulation of billboards should not be analyzed in the same fashion as regulation of real property under the Takings Clause. The billboards, under the facts of this case, are personal property. As the United States Supreme Court said in *Lucas*, in the case of personal property, by reason of the states' traditionally high degree of control over commercial dealings, judicial review of government action under the Takings Clause is particularly deferential. *See Lucas*, 505 US at 1027-28.

Amici understand the billboards at issue, while resting upon the property, are not an adjunct to the realty. Because Adams may remove the billboards at the end of the various lease periods, there does not appear to be an intention to make the billboards a permanent accession to the realty. The result is that the billboards should be considered personal property for the purposes of a takings analysis and not real property. *See Wayne County v William G*, 454 Mich 608, 614-620; 563 NW2d 674, 678-81 (1997) wherein this court discussed the three part test for determining whether an item was a fixture, relying on *Morris v Alexander*, 208 Mich 387; 175 NW 264 (1919). Viewed as personal property, the fact the city's ordinance causes their removal in certain areas does not result in a taking because personal property used in business is not generally "taken" as a result of governmental regulation.

In a footnote in *Lucas* in which the court sought to explain the distinction between regulations aimed a real property and regulations directed at other subjects, the court suggested that a law not aimed at land, even if it indirectly destroys the value of land, could not constitute a compensable taking. *Lucas*, 505 US 1028 n 14. The Supreme Court cited *Mugler v Kansas*, 123 US 623; 8 S Ct 273; 31 L Ed 205 (1887) in which a state prohibition on manufacture of intoxicating liquor did not result in a taking of the property upon which the manufacture depended. The defendant brewery owners were not entitled to compensation because the factory was rendered useless. *See, also*, *Powell v Pennsylvania*, 127 US 678; 8 S Ct 992, 1257; 32 L Ed 253 (1888) in which a prohibition on manufacture of oleomargarine was upheld in spite of the plaintiff's assertion that if it were prevented from continuing in this business, the value of its property employed in manufacture would be entirely lost.

Similarly, in *Burns Harbor Fish Co. v Ralston*, 800 F Supp 722, 726 (SD Ind 1992) the District Court found that a purchaser of personal property for business use assumes the risk that government regulation will diminish the value of that property. Adams' billboards, whether considered separately or collectively, should not be viewed as if they were a parcel of real property for the purpose of a takings analysis. The city's regulation is of a business activity, not real property; as such, it does not take property so that compensation is payable under the constitution. The city's ordinance may have an incidental effect on real property (the leaseholds), but the leaseholds are not the subject of the regulation.

III. This billboard enterprise must be considered as a whole and not as a collection of severable parts, each of which is entitled to consideration under Adams' takings complaint.

Whether this case is understood to be about leaseholds or billboards separate from leaseholds, the Court of Appeals ignored the requirement that a taking claim be analyzed in relation to the entire unit of property at issue in the case. This court said in *Bevan v Brandon Township*, 438 Mich at 393; 475 NW2d at 42 that since "for the purposes of a taking analysis it is necessary to compare the value `taken' with the value that remains, `one of the critical questions is determining how to define the unit of property `whose value is to furnish the denominator of the fraction'" (quoting *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 497; 107 S Ct 1232; 94 L Ed2d 472 (1987).

More recently, this court said in *K & K Construction, Inc. v Dep't of Natural Resources*, 456 Mich 570, 583; 575 NW2d 531, 538 (1998), *cert denied*; ----- US ------; 142 L Ed2d 47 (1998) that where a property owner treats a series of properties (in that case, individual parcels) as one income producing unit, the value lost is not simply the loss of the segregated parcel affected by the government action but the loss as it relates to the value of the entire unit. Importantly for the instant case, Adams' billboards are not contiguous to each other but they are part of what apparently is treated as a single commercial enterprise, that is, they are part of a single income producing enterprise in the Lansing area. Adams' property, therefore, is like that considered in *Naegele Outdoor Advertising v City of Durham*, 803 F Supp 1068, 1073-74 (MDNC 1992), *aff'd*; 19 F3d 11 (4th Cir), *cert. denied*, 513 US 928 (1994) in which the court refused to follow

Naegele's demand it consider each sign and leasehold as an individual unit for takings analysis but said that the unit of property to be considered for takings purposes is the combined group of Neagele's signs within the City of Durham.[11]

The rule that the individual pieces of an enterprise are to be regarded as part of a whole for takings purposes is basic and firmly held. The United States Supreme Court in *Penn Central*, 438 US at 130-31 said

> [t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.[12]

In the instant case, the allegedly "taken" property, whether it be billboards or leaseholds, is part of a single enterprise, and it is the whole of that enterprise that must be examined to see if property has been taken by the city's ordinance. To say otherwise is to ignore both this state's and the United State's Supreme Courts' opinions telling those seeking compensation for a taking that their claims must assert a taking of the whole of the property, not just a slice of it.[13]

The Court of Appeals' view would create a new rule permitting compensation for individual bits and pieces of a whole. This result would be a gift to plaintiffs because it gives a means to secure public money for a regulation that merely reduces the value of the enterprise without actually taking it. Recovery is not available for mere diminution in value.Amici urge this court to reject the Court of Appeals' disruptive view of the proper understanding of the unit of property subject to takings analysis. The relevant unit of Adams' property is and should remain the whole of its signs in the Lansing market. So considered, the city's ordinance as applied does not result in a taking of Adams' property, it merely results in a diminution of the value of the property.[14]

IV. Adams is not entitled to base a claim its property is taken on an unreasonable expectation of future business income.

As discussed earlier, Adams acquired the billboards at issue in this case in 1983, well after the 1975 city passage of its billboard ordinance. Given the city's regulation was in place and operating, the only reasonable expectation Adams could have formed both when it purchased enterprise and during the time of its operation was that its ability to use the billboards was limited to the amortization period set out in the ordinance. Adams is not entitled to base a claim on an unreasonable expectation of freedom from regulation. *See, generally, Penn Central*, 438 US at 124 discussing the rule that an investor's "reasonable investment backed expectations" are a critical factor in a takings analysis.

Adams' circumstance is not unlike that considered in *Board of Zoning Appeals v Leisz*, 702 NE2d 1026 (Ind 1998). In that case, the Indiana Supreme Court considered the property owners' complaint that their property, purchased after enactment of a city ordinance limiting its use, resulted in a taking. The court noted that when plaintiffs purchased the property, the ordinance was in effect and the use was nonconforming.

> Both the ordinance and the prior owners' failure to register [the nonconforming use] were matters of public record at the time the Leiszs bought their property. Property owners are charged with knowledge of ordinances that affect their property. [Citations Omitted] *** Their reasonable expectation was that the city might show up at their properties at any time and demand termination of their unregistered nonconforming use. Any investment-backed expectation they harbored out of ignorance of the ordinance is entitled to no weight.

Board of Zoning Appeals v Leisz, 702 NE2d at 1030-31.

Similarly, in *Good v U.S.*, 189 F3d 1355, the developer brought a takings claim based on a denial of a request to fill a wetland to facilitate a residential development. The denial was issued because the proposal posed a threat to certain wildlife. The Federal Circuit Court of Appeals affirmed rejection of the claim because, when the property was purchased, the regulatory agency (the Army Corps of Engineers) took the public position that it would consider wildlife and other environmental factors in permitting decisions. Because the developer had notice of the regulatory restrictions in place on the date of purchase, the court said the developer "lacked the reasonable investment-backed expectations that are necessary to establish that a government action effects a regulatory taking." *Good v U.S.*, 189 F3d at 1362.

As in the cited cases, absent a reasonable investment backed expectation that the business would continue without restriction, Adams has no valid claim its property has been taken. "For any regulatory takings claim to succeed, the claimant must show that the government's regulatory restraint interfered with his investment backed expectations in a manner that requires the government to compensate him." *Loveladies Harbor, Inc. v United States*, 28 F3d at 1179. The claimant's expectations must be reasonable, and one who buys with knowledge of a restraint could be said to have no reliance interest or to have assumed the risk of loss. *Id*., at 1177. *See generally, Good v U.S.*, 189 F3d at 1360-61 summarizing cases addressing this issue.

This principle has been applied repeatedly in other cases. In *Outdoor Graphics Inc. v Burlington*, 103 F3d at 694-95, the court denied compensation to a billboard enterprise that purchased billboards at a bargain price after an ordinance prohibiting billboards in certain areas and establishing an amortization period took effect. The court said the plaintiff was not entitled to relief because it bought the business with knowledge that the uses were nonconforming.[15]

In *M & J Coal Co. v U.S.*, 47 F 3d 1148, 1153 (Fed Cir 1995), the Federal Circuit Court of Appeals found certain mining rights were acquired subject to standards in the Surface Mining Control and Reclamation Act. In discussing the considerations relevant to the claim before it, the court relied on the comment in *Lucas* that the state may avoid paying compensation if the owner's estate did not include the proscribed interests to begin with.

In *California Housing Securities, Inc. v U.S.*, 959 F2d 955, 958 (Fed Cir 1992) *cert*. *denied;* 506 US 916 (1992), federal regulations in place at the time a savings and loan obtained federal deposit insurance precluded plaintiff's (a savings and loan) claim that its property was occupied and physically taken as a result of acts of the conservator and receiver, Resolution Trust Corporation. The existing regulatory scheme was such that the savings and loan could not complain about Resolution Trust Corporation's entry on the land and seizure of the property. The right to exclude the conservator and receiver was not part of the plaintiff's property to begin with.

In short, Adams lacks the investment backed expectations necessary to support a valid claim that the city's billboard ordinance results in a taking of its property.

CONCLUSION

Amici requests this court reverse the decisions rendered below and affirm the city's ability to amortize a nonconforming use.

Respectfully submitted,

Date: January 25, 2000
John F. Rohe (P27954)
438 East Lake Street

Petoskey, MI 49770
(231) 347-7327

Of Counsel
John T. Bagg (OSB No. 74021)
362 Jerris Ave. S.E.
Salem, Or. 97302
(503) 581-3056

John D. Echeverria
Environmental Policy Project
Georgetown University Law Center
600 New Jersey Ave. N.W.
Washington, D.C. 20003
(202) 662-9850

End Notes:

[1]Amici understand the current lease for this property was executed in July of 1996 for a period of 10 years.

[2] A lease for the "North Harrison" property was executed in April of 1993 and ran for a period of five years. See the City of East Lansing's brief filed in the Court of Appeals at pp 3-4. Amici are not aware of the terms of any more recent leases.

[3]The transcript references to lease terms suggest the leases were for a five year period. Tr 36-37. The speaker appears to be talking about the leases in 1991 and earlier, but the testimony does not address the full lease history.

[4] A property interest must be more than "an abstract need or desire," Roth, 408 US at 577, and it must be more than a "unilateral hope." Connecticut Board of Pardons v Dumschat, 452 US 458, 465; 101 S Ct 2460; 69 L Ed2d 158 (1981).

[5] Even if the initial leases were for a ten-year term, as is one of the present leases, the result would be the same: the amortization period exceeded the lease term.

[6] In Adams I, this court upheld the city's authority to enact the ordinance but did not reach the question of whether the amortization period resulted in a taking of Adams' property such that compensation must be paid under the United States and Michigan constitutions.

[7] The complaint in this case asked for an injunction against enforcement of the ordinance. This prayer comports with the remedies discussed in Electro-Tech, Inc. v H.F. Campbell Co., 433 Mich 57, 445 NW2d 61, 76 (1998). But see the discussion of remedies under the Fifth Amendment in Ruckelshaus v Monsanto, 467 US 986, 1016, 104 S Ct 2862, 81 L Ed2d 815 (1984).

[8] The Court of Appeals' opinion, adopting as it does Justice Levin's discussion rejecting amortization as a legitimate accommodation, constitutes a blanket condemnation of amortization that, in future, may be used to attack any such balancing between public and private interests in land use and other contexts. It is reasonable to predict that Michigan governmental entities would be reluctant to seek removal of uses that may be found to pose threats to public safety and other public concerns if they must expect a successful takings claim whenever such efforts are attempted. The Court of Appeals opinion places private property interests well ahead of the

government's right to act for the public and closes a means of accommodating public and private rights.

[9] A few courts have articulated the notion that a taking can occur when a regulation effects a "partial" taking of the property. See, e.g., Florida Rock Industries, Inc v United States, 18 F3d 1560 (Fed Cir 1994), cert. denied, 513 US 1109 (1995). In keeping with the U.S. Supreme Court precedent, most other lower federal and state courts have rejected this theory. See., e.g., Front Royal v Town of Front Royal, 135 F3d 275, 286 (4th Cir 1998); Clajon Production Corp. v Petera, 70 F3d 1566, 1577 (10th Cir 1995).

[10] The city's authority to declare a use nonconforming is not in question. Also not in question is whether the city's action represents an exercise of its police power for a legitimate public purpose. Indeed, in Adams I, this court reviewed the history of the city's ordinance and said the city undertook a study of sign regulations and traffic ordinances "after recognizing that the inordinate number of signs and billboards on the main thoroughfares were contributing to a number of traffic accidents, and were also aesthetically unattractive." Adams I, 439 Mich at 212. It may be assumed, therefore, that the resulting city zoning ordinance declaring the billboards nonconforming serves to promote a legitimate public safety purpose.

[11] As a result of this protracted litigation, the billboards have been permitted to remain and have earned revenue for twenty-five years since the billboard ordinance was enacted.

[12] In K & K Construction, Inc. v Dep't of Natural Resources, 456 Mich 570, this court cited with approval Ciampitti v United States, 22 Cl Ct 310, 318-19 (1991). In that case, the issue was whether a landowner subject to a wetlands regulation prohibiting fill had suffered a taking. The court found there was no taking because not all economically viable use had been taken. The court rejected the owner's argument that the only relevant property was that subject to the rejected fill permit, and it treated the relevant property as the whole of the real estate development enterprise which included noncontiguous lots acquired at differing times. Similarly, it is error to ignore the noncontiguous elements of the billboard enterprise Adams maintains in the Lansing area.

[13] See also, Keystone Bituminous Coal Ass'n v DeBenedictis, 480 US at 495, 498; and Tabb Lakes Ltd. v U.S., 10 F3d 796 (Fed Cir 1993).

[14] See also, Concrete Pipe & Prods. Inc. v Construction Laborers Pension Trust, 508 US at 644.

[15] Further, focusing solely on the restricted portion of property may help plaintiffs assert a loss of all value, but the focus skews the nature of the property interest and may open the door to mischief. As the Federal Court of Claims advised:

[16]This Court must be wary of focusing solely on the particulars of a transaction. Such a myopic approach would allow sophisticated real estate investors to design a transaction so as to segregate those parts of a parcel which could run afoul of regulations, such as the Clean Water Act, and maximize the possibility of a successful taking claim. As noted in Ciampitti, `a taking can appear to emerge if the property is viewed too narrowly.'

[17] Forest Properties, Inc. v U.S., 39 Fed Cl 56, 73 (1997).

[18] Furthermore, assuming it were appropriate to disregard the parcel as a whole rule and to consider each individual billboard in isolation, there still would be no taking, even if the claim were otherwise viable. As reflected in the terms of Adams' leases for the billboard locations, billboards are portable structures that can be moved from one place to another. Thus, even a total,

immediate prohibition against the use of a billboard at one particular location would not result in a taking of that billboard.

[19] In Suess Builders Co. v City of Beaverton, 294 Or 254, 259; 656 P2d 306, 309 (1982), the Oregon Supreme Court treated business complaints about existing regulation as a matter for political, not judicial resolution. It said: "Business invests with knowledge of such governmental power to make laws for its conduct, and the balancing of regulatory goals against their economic consequences is the daily stuff of politics rather than of litigation for 'just compensation."