STATE OF MICHIGAN
IN THE SUPREME COURT

ADAMS OUTDOOR ADVERTISING
Plaintiff-Appellee

vs.

CITY OF EAST LANSING
Defendant-Appellant.

File No._____

CA File No. 200655

LC File No. 87-59541-CZ

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BRIEF OF *AMICUS CURIAE* SCENIC MICHIGAN AND SCENIC AMERICA IN SUPPORT OF DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Scenic Michigan and Scenic America respectfully submit this brief amicus curiae in support of the application of the City of East Lansing ("City") for leave to appeal to this Court from the decision of the Court of Appeals in the above-captioned case. The Court of Appeals' decision striking down the City's billboard ordinance as unconstitutional flatly contradicts sound and well established principles of regulatory takings doctrine enunciated by this Court and the U.S. Supreme Court. Accordingly, this case plainly satisfies several of the Court's criteria for the exercise of its authority to review decisions of the courts of appeal. The Court should grant the City's application for leave to appeal and, following full briefing on the merits, reverse this erroneous decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from the City of East Lansing's balanced effort to control the proliferation of unsightly and unsafe billboards and at the same time respect the property interests of owners of billboards that violate the community's policies. Based on a study and analysis of the effects of unregulated billboards on traffic safety and community aesthetics, the City adopted a new billboard ordinance in 1975. In addition to establishing a permitting process for new billboards, the ordinance provided that existing billboards which do not conform to the new ordinance could be maintained for an additional twelve (originally eight) years. *See Adams Outdoor Advertising v East Lansing*, 439 Mich 209, 483 NW2d 38 (1998) (reversing Court of Appeals, and upholding City's billboard ordinance against a statutory challenge). The City adopted this so-called "amortization" process -- in accordance with widely accepted practice across the country -- to ensure both that community standards will eventually be realized, and that billboard investors can achieve a reasonable return on their investments. Notwithstanding the City's good faith effort to strike a reasonable balance, the Court of Appeals declared the ordinance an unconstitutional taking. That result is wrong, both as a matter of law and sound public policy, and should be reversed.

This brief *amicus curiae* in support of the City's application for leave to appeal focuses on three aspects of the decision of the Court of Appeals: (1) the Court's refusal to consider the relevance of the amortization period in deciding whether or not the ordinance effected a taking; (2) the Court's erroneous definition of the relevant unit of property for the purpose of takings analysis; and (3) the Court's failure to apply the deferential standard of review appropriate in takings challenges to regulations of personal property used in business. On all three of these issues, the Court of Appeals departed from well established precedent, greatly increasing the potential liability of local governments for alleged takings resulting from reasonable business regulation, and undermining the ability of local communities to protect public health, safety and welfare. Each issue provides an independent basis for reversing the decision below.

Given the issues presented, this case plainly satisfies several different criteria for this Court's exercise of its discretionary authority to review decisions of the Courts of Appeals. *See* MCR 7.302(B). First, the "issue has significant public interest" and the case is one by or against one of the subdivisions of the state. MCR 7.302(B)(2). Second, the "issue involves legal principles of

major significance to the state's jurisprudence." MCR 7.302(B)(3). Finally, the decision of the Court of Appeals is "clearly erroneous and will cause material injustice." MCR 7.302(B)(5). For each and all of these reasons, the Court should grant the City's motion for leave to appeal.

ARGUMENT

I. The Court of Appeals Erred in Refusing to Consider the Use and Value of the Property During the Amortization Period in its Takings Calculus.

The Court of Appeals erred, first, in concluding that an allowance of an amortization period is irrelevant in regulatory takings analysis.

By authorizing the owner of billboards to maintain the billboards for an additional twelve (originally eight) years after they were declared a nonconforming use, the City's ordinance permitted a billboard owner to make significant economic use and derive significant revenue from this now illegal use. While the ordinance obviously limits a billboard owner's ability to exploit the economic value of its property, "a mere diminution in property value which results from regulation does not amount to a taking." *Bevan v Brandon Township*, 438 Mich 485, 402-3, 475 NW2d 37, 46 (1991), *cert denied*, 502 US 1060 (1992); *see also Concrete Pipe and Products, Inc v Construction Laborers' Pension Trust Fund*, 508 US 602, 645 (1993) ("[A] mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."). The ample amortization period included in the City's ordinance precludes a finding of a taking in this case.

As the Court of Appeals implicitly acknowledged, the overwhelming weight of authority is against the ruling below. Indeed, "[t]here can be no doubt that the principle of amortization is firmly embedded in the law." *Fayetteville v McIlroy Bank & Trust Co*, 647 SW2d 439, 441 (Ark 1983). Although this Court has never specifically addressed the issue, dozens of other state appellate courts as well as numerous federal circuit courts have ruled that the use of reasonable amortization provisions to phase out non-conforming uses precludes a finding of a taking. *See e.g.*, *Art Neon Co v Denver*, 488 F2d 118 (10th Cir), *cert denied*, 417 US 932 (1973) (upholding amortization as proper method of terminating billboards); *University Park v Benners*, 485 SW2d 773, 777-778 (Tex 1972), *appeal dismissed*, 411 US 901 (1973) (termination of existing land use with "allowance for recoupment" does not constitute a taking but is a legitimate exercise of the police power); *Tahoe Regional Planning Agency v King*, 285 CalRptr 335, 352 (CalApp 1991) ("[the principle that] legislation may validly provide for termination of nonconforming property uses without compensation if it provides a reasonable amortization period commensurate with the investment involved is well established"); *Lone v Montgomery County*, 584 A2d 142, 152 (MdApp 1991) ("The constitutionality of terminating nonconforming uses by amortization after a reasonable and appropriate specified time has long been established in Maryland."); *Outdoor Graphics, Inc v Burlington*, 103 F3d 690, 695 n 7 (8th Cir1996) ("the elimination of existing uses within a reasonable time does not amount to a taking of proeprty"); *Rhod-A-Zalea & 35th, Inc v Snohomish County*, 959 P2d 1024, 1028 (Wash 1998) ("zoning ordinances may provide for termination of nonconforming uses by... reasonable amortization provisions"). *See generally*, Jay M. Zitter, Annotation, Validity of Provisions for Amortization of Nonconforming Uses, 8 ALR 5th 391, 412-422 (1992) (collecting cases).

Moreover, in stark contrast to the ruling of the Court of Appeals in this case, the clear trend of judicial opinion is in favor of broader acceptance of amortization as a valid means of eliminating nonconforming uses without effecting a taking. In a very recent decision, the Supreme Court of Indiana, overturning a fifteen year-old precedent, held that amortization of nonconforming uses does not violate the takings clause of the U.S. Constitution. *Board of Zoning Appeals v Leisz*, 1998 WL 865107, 7 (Ind 1998) ("*Leisz*"). In light of this recent ruling by the Indiana Supreme Court, *amici* are aware of no state or federal court which currently maintains that an amortization period for a nonconforming use can be disregarded in a regulatory takings challenge under the

federal takings clause. *See Leisz*, *supra*, at 7 (noting that the few state courts which have found amortization provisions unconstitutional have done so on the basis of their state constitutions).

As many courts have recognized, the substantial value to the owner of the ability to use property during a reasonable amortization period precludes a finding of the kind of drastic impact on property value necessary to support a successful regulatory taking claim. As one court has stated, "The principle of amortization rests on the reasonable exercise of the police power, and the financial detriment imposed upon a property owner by the reasonable exercise of police power does not constitute the taking of private property within the inhibition of the constitution." *Dorney Communications Co, Inc v Fayetteville*, 660 SW2d 900, 905 (Ark), *cert denied*, 466 US 959 (1983). *See also Modjeska Sign Studio, Inc v Berle*, 373 NE2d 255, 262 (NY 1977), *appeal dismissed*, 439 US 809 (1978) ("As a general rule, most regulations requiring the removal of nonconforming billboards and providing a reasonable amortization period should pass constitutional muster.").

Amortization provisions, such as the one at issue in the present case, are designed to further legitimate public policies while allowing the affected "property owner, if he cannot make his use of the property conform to the ordinance, to recover all or part of the value of the property before the use is forbidden at the end of the period." *Naegele Outdoor Advertising v Durham*, 803 F Supp 1068, 1077 (MDNC 1992), *aff'd*, 19 F3d 11 (4th Cir), *cert denied*, 513 US 928 (1994). To be reasonable, an amortization period "does not necessarily depend on the recovery of all value of the property during the allotted time." *Id.* at 1078. Further, "the failure of the amortization period to allow [plaintiff"s] recovery of the present value of the income stream it could expect from the signs over their remaining useful lives does not render it unreasonable." *Id. See also Lubbock Poster Co v Lubbock*, 569 SW 2d 935, 942 (Tex Civ App 1978), *cert denied*, 444 US 833 (1979) (recovery of "the market value or any conformity costs" are not "essential considerations" in determining the reasonableness of an amortization period).

The constitutional fairness of amortization provisions is reinforced by the economic "monopoly" effect created by enactment of an ordinance restricting new billboard construction coupled with an amortization period for pre-existing nonconforming billboards. As number of courts have observed, the value of the ability to maintain billboards during the amortization period is enhanced because the operator is granted the valuable privilege to maintain a use denied to other similarly situated operators in the community. *See*, *e.g. Outdoor Graphics*, 103 F3d at 695 (benefit of monopoly during amortization period is one of factors that precludes finding of a taking); *Art Neon*, 488 F2d at 122 (monopoly benefit should be considered when evaluating economic impact of amortization provision). In the present case, plaintiff was not only granted a substantial period over which to recoup its investment, but it also received the benefit of a virtual monopoly in rooftop and rotary billboard sales in East Lansing for over a decade. Awarding Adams compensation for this alleged taking would confer yet another unjustified windfall on Adams at public expense.[1]

II. The Court of Appeals Incorrectly Defined the Relevant Property Unit for Purposes of Takings Analysis.

The Court of Appeals incorrectly concluded that the relevant unit of property was each individual leasehold owned by Adams, resulting in a flawed analysis of the economic impact of the City's billboard ordinance. Instead, the relevant unit for the purpose of this case is the single "income producing unit" represented by all of Adams' billboards in the Lansing metro area. Judging the taking claim based on the proper unit of property, there clearly is no taking, even assuming for the sake of argument (contrary to the argument presented in Section I) that the amortization period is irrelevant to the takings analysis.

As the Court recognized in *Bevan*, *supra*, "[s]ince 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.'" *Bevan*, 438 Mich at 393, 475 NW2d at 42, citing *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 497 (1987). This Court's recent ruling in *K&K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570, 575 NW2d 531, *cert denied*, 119 S Ct 60 (1998), explains how the relevant unit of property should be defined. In that case, plaintiffs were prevented from building on one of four parcels of land which they owned. The trial court and court of appeals concluded that the takings analysis should focus only on the one parcel of land on which plaintiffs were prevented from building. This Court reversed, holding that the relevant unit of property for the takings analysis included at least three of the four parcels owned by the plaintiffs. The Court did not consider it significant that the parcels were zoned differently, but instead focused on the fact that the plaintiffs "proposed a comprehensive development, using parts of parcels one, two and four of the property." *Id* at 583, 575 NW2d 531,538. The Court stated:

Where "a property owner treats a series of properties as one income-producing unit, the value lost to the claimant is not simply the loss of the segregated parcel affected by the government action," rather it is the loss as it relates to the value of the entire unit.

Id at 582, 575 NW2d 531,537, citing *Forest Properties, Inc v United States*, 39 Fed Cl 56, 73 (1997) (emphases added).

A similar analysis was used in *Ciampitti v United States*, 22 Cl Ct 310 (1991), cited with approval in *K&K Construction, Inc*, 456 Mich at 580, 575 NW2d at 537. In *Ciampitti*, plaintiff had acquired two large, non-contiguous parcels of land, one on the west side of the community and one on the east side. Plaintiff was primarily interested in development of the west side parcel, but as a condition of the sale he was required to buy the east side parcel. Most of the west side parcel was located in designated wetlands. When plaintiff was barred from filling and grading the west side parcel for development, he claimed a taking, asserting that the relevant unit of property for the takings analysis was the west side parcel. The court disagreed, ruling that the entire acquisition, both west and east side parcels, must be considered in the taking analysis because the "western and eastern parts... were... inextricably linked in terms of purchase and financing. The eastern half was used by *Ciampitti* in order both to get permission to buy the western lots, and to pay for them." *Id* at 319. Acknowledging a lack of contiguity between the parcels, the court nonetheless declared: "Ciampitti treated all of [the purchase] ... as a single parcel for purposes of purchase and financing. It would be inappropriate to allow him now to sever the connection he forged when it assists in making a legal argument." *Id* at 320.

In *Naegele*, *supra*, the District Court was faced with a factual situation quite similar to the one in the present case. The plaintiff sign company claimed a taking when the defendant city passed an ordinance prohibiting commercial off-premise signs after a five and one half year amortization period. The court first determined the unit of property to be used in evaluating the takings claim. The court noted that each sign location involved a separately negotiated lease, that each location was separately taxed, and that each sign is recognized as "an individual structure by the City and is subject to separate inspection and permitting procedures." Nevertheless, pointing out that the ordinance "affects multiple properties owned by one entity," *id* at 1073, the court refused to treat individual leaseholds as the proper unit of analysis. Instead, the court concluded that the "unit of property to be considered for takings purposes is the combined group of Durham metro area signs," not each individual sign affected by the ordinance. *Id* at 1074.

As established by the City at trial, Adams advertises in the entire Lansing metro market, which includes hundreds of Adams' billboards. (Tr., p. 32). Adams, like the plaintiff in *Naegele*, treats the hundreds of billboards it owns in the Lansing metro market as components of a single business, or as "one income producing unit." Moreover, like the plaintiff in *Ciampitti*, *supra*, Adams acquired the billboards at issue as part of a single purchase from Central Advertising. Thus, the relevant unit of property in this case includes, at a minimum, all of Adams' signs in the

Lansing metro market. Adams should not, as the court stated in *Ciampitti*, be allowed to sever the connection between its billboard locations merely because it is now legally convenient to do so.

III. The Court of Appeals Failed to Recognize that this Case Involves Personal Property Devoted to a Commercial Use, Regulation of Which is Subject to Deferential Review Under the Takings Clause

Finally, the decision of the Court of Appeals must be reversed because the Court failed to apply the deferential standard of review appropriate in takings challenges to regulation of personal property used in business. This argument provides a third, independent reason why the decision of the Court of Appeals should be reversed.

Regulation of personal property devoted to commercial purposes is traditionally treated differently for the purpose of takings analysis than regulation of the uses of real property. The U.S. Supreme Court has made clear that states and local governments traditionally have a higher degree of control over personal property:

[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless.

Lucas v South Carolina Coastal Council, 505 US 1003, 1027 (1992) ("*Lucas*"). *See also Andrus v Allard*, 444 US 51, 66 (1979) ("Regulations that bar trade in certain goods have been upheld against claims of unconstitutional taking."); *Burns Harbor Fish Co v Ralston*, 800 FSupp 722, 726 (SD Ind 1992) ("When an individual or corporate entity purchases personal property (as opposed to real property) to engage in a commercial venture the purchaser is taking a risk that government regulation will diminish the value of that property.").

Applying this principle, the U.S. Supreme Court in *Lucas* identified a distinction between a regulation not aimed at land from one "specifically directed to land use." *Lucas*, 505 US at 1028, n 14. 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." *Id.* This conclusion is supported by a long line of U.S. Supreme Court precedent upholding stringent regulation of business property against takings challenges. *See Mugler v Kansas*, 123 US 623 (1887) (prohibition of manufacture of alcohol not a taking even though it effectively eliminated value of real property); *Powell v Pennsylvania*, 127 US 678 (1888) (prohibition on manufacture of oleomargarine upheld despite owner's allegation that "if prevented from continuing [in the manufacturing business], the value of his property employed therein would be entirely lost").

Contrary to the assertion of Adams and the conclusion of the Court of Appeals, the City's billboard ordinance is simply a regulation of billboards, not a regulation aimed at Adams' leaseholds. Thus, the ordinance should be treated with the deference due to valid regulations of personal property used in commerce. The reliance of Adams and the Court of Appeals on *In re Acquisition of Billboard Leases and Easements*, 205 Mich App 659, 517 NW2d 872 (1994) is misplaced. *In re Acquisition of Billboard Leases and Easements* involved a municipality's direct condemnation of leaseholds, not the regulation of billboards. The question addressed by the court in that case was whether or not income capitalization was the proper method to use in determining the value of the real property taken. *Id* at 662, 517 NW2d at 873. The court made no determination whether the billboards themselves were real property and in fact declared that issue irrelevant to the taking claim. *Id.* In the present case there has been no condemnation of leaseholds, but rather a regulation of personal property, i.e. billboards used in business. As in *Mugler*, *supra*, whatever impact the present regulation has on real property interests possessed by Adams is merely incidental to the valid regulation of the Billboard business. Accordingly, the

effort of Adams and the Court of Appeals to re-characterize the claim at issue in this case as a taking of Adams' leaseholds must be rejected.

Adams' billboards are personal property used in commerce, not real property. First, and as established by the City and conceded by Adams, Adams does not pay real property taxes on the billboards; rather Adams pays personal property taxes on the depreciated cost of the billboards. Appellee's Brief on Appeal, p 21. Second, under the terms of Adams' rooftop leases - which have generally been only five years in length -- Adams is apparently allowed to remove the billboards at the end of the lease term. In fact, Adams admitted at trial that it was in the company's practice to remove its billboards at the end of the lease period if it did not enter into a new lease agreement. The shortness of the leaseholds and Adams' practice of removing billboards supports the conclusion that the billboards are personal property used in commerce, not fixtures. *See Wayne County v William G*, 454 Mich 608, 610, 563 NW2d 674, 676 (1997) (one of the three tests for determining whether or not property is a fixture is whether "there is an intention to make the property a permanent accession to the realty"). Finally, this Court's ruling in *Adams v East Lansing*, in which the Court held that the City's power to regulate billboards was not limited to the same extent as its "power to zone with respect to nonconforming uses and structures," 439 Mich at 217, 483 NW2d 38, 41, implicitly recognizes that the City's ordinance is not aimed at real property.

Given that Adams treats its billboards as personal property, it is inconceivable that Adams should now be able to claim these billboards are real property. Accordingly, Adams, by virtue of the nature of its billboard business, should have been "aware of the possibility that" its business property would be subject to stringent regulation. *Lucas*, 505 US at 1027. The Court of Appeals should have applied a more deferential standard of review, focusing on the fact that East Lansing, in enacting its billboard ordinance, adopted a reasonable regulation of business property.[2]

CONCLUSION

For the forgoing reasons the Court should grant the City of East Lansing's application for leave to appeal from the Court of Appeals' erroneous decision.

Respectfully submitted,

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NOTES

[1] It would be especially inappropriate to disregard the amortization period in this case because Adams bought these billboards a full eight years after the City enacted the billboard ordinance, and Adams therefore knew or should have known when it purchased these billboards that it could

lawfully continue to maintain them for only one more year. (Tr, p. 30-35). It is well established that a property owner who acquires an interest in property subject to existing legal limitations on the permitted use of the property cannot legitimately challenge the restrictions as a taking. See Ruckelshaus v Monsanto Co, 467 US 986 (1984). See also Pro-Eco, Inc v Board of Comm'rs, 57 F3d 505, 511 (7th Cir 1995) (landowner who acquires property after a clearly applicable regulation already is in effect has "deliberately run into the [government's] fist" and therefore cannot challenge the regulation as a taking); Loveladies Harbor Inc v United States, 28 F3d 1171, 1177 (Fed Cir 1994) (where owner acquires property subject to existing regulations, owner presumably paid a discounted price commensurate with impact of regulations); Virginia Beach v Bell, 498 SE2d 414 (Va 1998) (landowner who acquired beachfront lots one year after enactment of coastal protection restrictions barred from claiming a taking).

Adams had no reasonable expectation of being able to maintain these billboards beyond the expiration of the amortization period and presumably paid a price which reflected an objective assessment of the likelihood that these non-conforming billboards would actually be terminated at the end of the amortization period. In fact, as a result of this protracted litigation, Adams has received an unexpected windfall by being able to maintain these billboards well beyond the amortization period in place when the billboards were purchased.

[2] In characterizing the incidental effect of the City's billboard regulation as a taking of real property, the Court of Appeals ignored this Court's recent statement that the billboard ordinance in this case was a reasonable exercise of the City's police power. *See Rental Property Owners Ass'n v Grand Rapids*, 45 Mich 246, 264, 566 NW2d 514, 522 (1997) (acknowledging that the Court in its earlier decision in this case concluded that it was a reasonable exercise of the police power to "forcibly terminate the nonconforming billboards").