MEMORANDUM

To: Tacoma Billboards Community Working Group Members and Moderator
From: Doug Schafer, CWG Member (Central Neighborhood Council; lawyer)
Date: January 21, 2015
Subject: Homework on Question 3: How Do We Get There From Here?

1. My Alternative Regulatory Approach to Billboards

Consistent with the CWG's mission, I proposed that the City substantially repeal its punitive 2011 billboard ordinance and absolutely enforce its quite reasonable 1997 billboard ordinance, with modest modifications as we've been discussing concerning permissible zones, buffering, and spacing. Under such a proposal, any billboard company (*e.g.*, Clear Channel, Lamar, CBS, Total) then could construct new conforming signs within the permissible zones.

2. False Premise Underlying Any Exchange Proposal

Our moderator's suggestion that we propose "exchange mechanisms" whereby Clear Channel Outdoor (CCO) would remove some of its unlawful billboards only if it is allowed to construct new oversized bulletin billboards in its "high priority zones" rests upon what I believe to be a false premise—that CCO has a right to retain its unlawful billboards. And since CCO owns all but a few of the billboards in Tacoma, an "exchange mechanism" would continue CCO's monopoly by preventing other billboard companies from entering the Tacoma market since they would have no unlawful billboards to offer in exchange.

The false premise (per page 2 of our moderator's Background sheet for Question 3) is the implicit acceptance of CCO mistaken claim that forced removal of nonconforming billboards after an amortization period (as in the 1997 ordinance) without compensation is an impermissible taking of property. For nearly 50 years, our Washington State and Federal courts have consistently rejected this claim, as explained below. Rulings in other states based on their state constitutions are not relevant.

Our City Council is now proposing to forcibly close dozens of medical marijuana dispensaries that have established themselves within our City in recent years. No responsible person is suggesting that the City needs to pay them "just compensation" nor offer them to relocate to "receiving areas." The City requires property owners to remove graffiti and other forms of blight from their properties without paying just compensation. Nonconforming billboards are blight! Cities do have a constitutional police power to enact and enforce laws for the public welfare, including promoting aesthetics and traffic safety.

A. In ***Markham Advertising v. Washington***, 73 Wash.2d 405, 439 P.2d 248 (1968), billboard companies challenged a 1961 Washington state law and regulations that required the removal of certain billboards within three years without any compensation. The state supreme court held that the apparent purposes for the billboard ban—traffic safety and aesthetics—were valid bases for the government's exercise of its police power to promote the public welfare. In

response to the billboard companies' contention that their property was being unconstitutionally taken without compensation, the Court stated, "When a court determines, as we have in this case, that the police power has been properly invoked, there is no basis for this contention." The Court upheld the law with its three-year amortization period, and with no requirement for compensation to the billboard companies for the removal of their signs.

The plaintiffs in the *Markham* case appealed the Washington State Supreme Court's ruling to the United States Supreme Court, urging the highest court to reverse the state court's decision that the billboard ban was a valid exercise of the police power and that no compensation was constitutionally required for the forced removal of their billboards. The U.S. Supreme Court dismissed the appeal for want of a substantial federal question. 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512, *rehearing denied*, 393 U.S. 1112, 89 S.Ct. 854, 21 L.Ed.2d 813 (1969).

"When the U.S. Supreme Court dismisses an appeal for want of a substantial federal question, such action is a decision on the merits, and lower courts are bound by such decisions "'until such time as the Court informs [them] that [they] are not."' *Hicks v. Miranda*, 422 U.S. 332, 345 (1975). Accordingly, **the *Markham* case is, and remains, precedent binding upon both Washington state and federal courts.** The *Markham* case was cited approvingly multiple times by the U.S. Supreme Court in its landmark billboard case of *Multimedia v. San Diego*, 453 U.S. 490 (1981). It remains "good law" that must be followed by all courts until it is overruled by the Washington State or U.S. Supreme Court.

B. The United States Governmental Accountability Office, at the request of members of the U.S. Congress, researched and published summaries of court cases and concluded, both in 1991 and in 2004, that courts consistently uphold laws requiring the removal of billboards after an amortization period without paying compensation. The November 12, 2004, summary remains available at http://www.gao.gov/decisions/other/302809.htm. Its introductory paragraph reads as follows:

> This responds to your request for an update of our February 6, 1991 opinion to Senator Chafee, B-239187 (Enclosure 1), summarizing case law regarding the permissibility of billboard amortization under the U.S. Constitution. At the time of our 1991 opinion, the vast majority of cases had upheld the general practice of amortization as constitutional; some courts also addressed, on a case-by-case basis, whether a particular amortization practice was constitutional. As discussed below and in Enclosure 2, the small number of additional cases involving billboard amortization decided since 1991 have likewise upheld this practice, ruling that billboard restrictions which provided for an amortization period did not rise to the level of a "taking" triggering constitutional compensation obligations.

C. In 2007, a Florida law school professor published a journal article that discussed the Washington State Supreme Court's 1968 *Markham* case and its summary affirmance by the

United States Supreme Court. Stephen Durden. "Sign Amortization Laws: Insight into Precedent, Property, and Public Policy" Capital University Law Review 35 (2007): 891-922. Available at: http://works.bepress.com/stephen_durden/2 . He wrote at pages 905-06:

> More than thirty years ago in *Markham Advertising Co. Inc. v. Washington*, the Supreme Court rejected, as insubstantial, a takings challenge to a typical Sign Amortization Code. In that case, as explained by the lower court, the state of Washington enacted a statute requiring removal of preexisting, lawfully erected signs. The statute provided no compensation, and the sign owners challenged the statute under the Fourteenth Amendment Takings Clause. The Washington statute was indistinguishable from a typical Sign Amortization Code. A use of land (*i.e.*, sign advertising that was once lawful) was declared unlawful at a future date certain, and the statute provided no compensation. The Washington Supreme Court denied the takings claim, and plaintiffs appealed to the United States Supreme Court. The Supreme Court dismissed the appeal for want of a substantial federal question. Even though this type of dismissal is relatively rare, it is a decision on the merits, and it is not readily distinguishable from a per curium affirmance or affirmance without opinion.
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> There is no doubt that in *Markham*, the Washington Supreme Court rejected the takings claim and the United States Supreme Court branded the takings claims as insubstantial. In presenting the constitutional issues to the Supreme Court, the jurisdictional statement in *Markham* included the claim that the Washington statute, which required preexisting billboards to be removed, constituted a due process claim for denial of just compensation. Even though this precedent seems, at best, weak, a plurality of the Court, in *Metromedia, Inc. v. City of San Diego*, described *Markham* as the Court's "own decision[]." Indeed, on at least four occasions within *Metromedia*, the plurality relied on *Markham* as authority for various propositions. Not only did the Court cite to *Markham*, both before and after *Markham*, the Court rejected takings challenges to laws requiring the removal of preexisting property four times.
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> Supreme Court precedent related to Takings Clause challenges to Sign Amortization Codes is very straightforward, but leaves interested persons (*e.g.*, lawyers, judges, commentators) a little uncomfortable. Those who rely on or attempt to predict application of law tend to prefer somewhat more concrete precedent that consists of decisions with opinions and analysis. That being said, **it remains true that the Supreme Court precedent, as indicated above, unquestionably supports the constitutionality of Typical Sign Amortization Codes**. [Footnotes omitted; emphasis added.]

D. In CCO's August 2007 lawsuit against Tacoma challenging enforcement of the 1997 ordinance, its complaint was basically on free speech grounds—with the hyper-technical arguments that under the 1997 ordinance a structure met the definition of "billboard" only if on July 22, 1997, it was actually advertising "goods, products, events, or services not necessarily

sold on the premises." In that case, CCO's lawyers never actually argued that the 1997 amortization provision was an unconstitutional taking without just compensation, though they asserted that without any supporting authority in its initial complaint. Nothing significant occurred in that lawsuit (except private settlement negotiations) until February 10, 2010, when CCO's lawyer filed a motion for partial summary judgment based chiefly on its hyper-technical claims that its structures were not "billboards" on July 22, 1997. The City's lawyers never filed any substantive arguments in opposition to CCO's claims, but on March 16, 2010, the lawyers formally reported to the court that their clients had reached an agreement in principle that was to be presented to the Tacoma City Council for approval.

The Settlement Agreement, approved by the City Council on July 27, 2010, inexplicably included a provision directly contrary to the well-established law described above—that the City would compensate CCO for the fair market value of any billboards that the City ever in the future requires CCO to remove. Since the *Markha*m case plainly recognizes that billboard-removal-by-amortization laws are a valid exercise of a jurisdiction's police power, it likely is "ultra vires" (beyond their authority) for the 2010 City Council to contract away that police power from future City Councils. That the City's lawyers (the City Attorney and contracted lawyers who formerly worked in the City's legal department) in 2010 would counsel City officials to include that "vested rights" language in the Settlement Agreement suggests, to me, a shocking level of incompetence.

When the CCO vs. Tacoma litigation resumed in August 2011, the City continued to use the very same lawyers to argue that the 2010 Settlement Agreement was not binding. Those lawyers made five arguments, but did not raise a number of other good arguments because doing so would have implicated the quality of their own previous work concerning the Settlement Agreement. CCO moved the court to dismiss all of the City's arguments. On December 5, 2011, the judge summarily dismissed three of the City's arguments but left the other two for later adjudication. Nothing significant (except private negotiations) happened thereafter until August 21, 2012, when the judge entered the parties' stipulated order of dismissal following their August 15, 2012, execution of the Standstill Agreement.

4. In defense of the fairness of enforcing the essence of the City's 1997 ordinance, I remind my CWG colleagues of the following facts.

a. The City Council by an 8-to-1 vote on July 22, 1997, adopted the 1997 ordinance with its mandated removal of nonconforming billboards after a 10-year amortization period. At that time, there were only two billboard companies with signs in Tacoma—Sun Outdoor Advertising (a/k/a Sun Media) and Ackerley Communications (a/k/a AK Media).

b. On June 1, 1998, Sun Media was acquired by Lamar Advertising.

c. On June 14, 2002, CCO acquired Ackerley Group, including its AK Media billboards in Tacoma. This was almost five years into the ten-year amortization period from the 1997 ordinance.

d. On March 31, 2003, CCO acquired from Lamar Advertising its Tacoma billboards as part of an exchange of billboards in various states. This was five years and eight months into the ten-year amortization period from the 1997 ordinance.

CCO is always represented by highly qualified lawyers, accountants, and other professionals, so it is a certainty that CCO knew full well of Tacoma's half-expired 10-year amortization period when it acquired its Tacoma billboards. The value it placed on that portfolio of billboards would have reflected their impending forced removal in four to five years. CCO's aggressive litigation in opposition to the 1997 ordinance is simply bad faith corporate bullying of a small city that lacks, or whose leaders decline to spend, the funds necessary to hire competent lawyers to advise and represent it.

In response to CCO's claim that it, or the prior owners, had made great capital investments in its Tacoma billboards, the facts are otherwise. Because billboard structures are subject to property taxes, their owners are required to report their cost of installation to the county assessor. In this state, billboard are assessed and taxed based on a depreciation schedule applied to their initial cost of installation. In response to my records request, the Pierce County Assessor-Treasurer's office provided me the total reported costs of billboards installed each year within Tacoma's boundaries since 1958. The total installation costs of those billboard was $1,382,119—hardly a great capital investment for a 56-year period. Attached to this memo is a table showing the year-by-year investments in billboards.

I shared substantially all this information with our CWG moderator weeks ago, but she has determined not to share it with each of you. I believe it is highly relevant to our mission.

2014 Property Tax Assessed Values of Billboards Reported as Being in Tacoma (Tax Code Area 005)

tca_number	category	item_description	appraised_value	purchase_year	purchase_amount	AV as % of PA
005	009-BILLBOARDS	BILLBOARDS	1,083.15	1958	7,221	15%
005	009-BILLBOARDS	BILLBOARDS	17,154.60	1960	114,364	15%
005	009-BILLBOARDS	BILLBOARDS	9,035.70	1960	60,238	15%
005	009-BILLBOARDS	BILLBOARDS	1,083.15	1962	7,221	15%
005	009-BILLBOARDS	BILLBOARDS	2,785.05	1964	18,567	15%
005	009-BILLBOARDS	BILLBOARDS	1,701.90	1965	11,346	15%
005	009-BILLBOARDS	BILLBOARDS	6,615.75	1966	44,105	15%
005	009-BILLBOARDS	BILLBOARDS	1,083.15	1967	7,221	15%
005	009-BILLBOARDS	BILLBOARDS	4,797.00	1968	31,980	15%
005	009-BILLBOARDS	BILLBOARDS	11,505.60	1969	76,704	15%
005	009-BILLBOARDS	BILLBOARDS	618.75	1969	4,125	15%
005	009-BILLBOARDS	BILLBOARDS	3,868.20	1972	25,788	15%
005	009-BILLBOARDS	BILLBOARDS	618.75	1972	4,125	15%
005	009-BILLBOARDS	BILLBOARDS	3,868.20	1973	25,788	15%
005	009-BILLBOARDS	BILLBOARDS	1,083.15	1975	7,221	15%
005	009-BILLBOARDS	BILLBOARDS	1,237.50	1975	8,250	15%
005	009-BILLBOARDS	BILLBOARDS	5,415.75	1977	36,105	15%
005	009-BILLBOARDS	BILLBOARDS	7,117.65	1979	47,451	15%
005	009-BILLBOARDS	BILLBOARDS	618.75	1979	4,125	15%
005	009-BILLBOARDS	BILLBOARDS	4,093.20	1980	27,288	15%
005	009-BILLBOARDS	BILLBOARDS	1,701.90	1981	11,346	15%
005	009-BILLBOARDS	BILLBOARDS	1,083.15	1981	7,221	15%
005	009-BILLBOARDS	BILLBOARDS	2,271.15	1982	15,141	15%
005	009-BILLBOARDS	BILLBOARDS	1,701.90	1983	11,346	15%
005	009-BILLBOARDS	BILLBOARDS	10,789.35	1984	71,929	15%
005	009-BILLBOARDS	BILLBOARDS	742.50	1984	4,950	15%
005	009-BILLBOARDS	BILLBOARDS	11,758.95	1985	78,393	15%
005	009-BILLBOARDS	BILLBOARDS	4,765.35	1985	31,769	15%
005	009-BILLBOARDS	BILLBOARDS	1,083.15	1986	7,221	15%
005	009-BILLBOARDS	BILLBOARDS	680.70	1986	4,538	15%
005	009-BILLBOARDS	BILLBOARDS	3,875.55	1987	25,837	15%
005	009-BILLBOARDS	BILLBOARDS	4,270.35	1987	28,469	15%
005	009-BILLBOARDS	BILLBOARDS	15,423.30	1988	102,822	15%
005	009-BILLBOARDS	BILLBOARDS	2,228.10	1988	14,854	15%
005	009-BILLBOARDS	BILLBOARDS	13,031.40	1989	86,876	15%
005	009-BILLBOARDS	BILLBOARDS	1,794.75	1989	11,965	15%
005	009-BILLBOARDS	BILLBOARDS	1,083.15	1990	7,221	15%
005	009-BILLBOARDS	BILLBOARDS	433.20	1990	2,888	15%
005	009-BILLBOARDS	BILLBOARDS	247.50	1991	1,650	15%
005	009-BILLBOARDS	BILLBOARDS	1,083.15	1992	7,221	15%
005	009-BILLBOARDS	BILLBOARDS	6,276.48	1996	22,416	28%
005	009-BILLBOARDS	BILLBOARDS	18,709.44	1997	58,467	32%
005	009-BILLBOARDS	BILLBOARDS	1,320.00	1997	4,125	32%
005	009-BILLBOARDS	BILLBOARDS	43,617.96	1998	121,161	36%
005	009-BILLBOARDS	BILLBOARDS	2,227.68	1998	6,188	36%
005	009-BILLBOARDS	BILLBOARDS	5,386.80	1999	13,467	40%
005	009-BILLBOARDS	BILLBOARDS	12,708.96	2000	28,884	44%
005	009-BILLBOARDS	BILLBOARDS	4,621.44	2005	7,221	64%
005	009-BILLBOARDS	BILLBOARDS	11,764.00	2006	17,300	68%
TOTALS			272,066.26		1,382,119	
2014 Taxes Paid by Clear Channel on its billboards listed in Tacoma, assessed at $267,731:						$4,775.26