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February 11, 2021

Electronically filed with RRC Staff

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RE: Written Comments to North Carolina Department of Transportation's Proposed Rules 19A NCAC 02E .0204, .0206, and .0225.

To Whom It May Concern:

I am General Counsel for and represent the North Carolina Outdoor Advertising Association ("NCOAA"), which organization consists of a large percentage of the outdoor advertising or billboard companies that will be regulated by the permanent rules proposed by the North Carolina Department of Transportation ("DOT"). Thank you for this opportunity to again offer comments to the revised version of the DOT rules submitted on February 8, 2021 ("2/8/21 Revised Rules").

"Groundhog Day". It is a very funny movie. Unfortunately, it is not so humorous when it involves rulemaking.[1] At its December 17, 2020 meeting, the Rules Review Commission ("Commission") objected to the above referenced rules for lack of statutory authority. Specifically, the Commission found that requiring local approval or transferring regulatory oversight to local governments is beyond the authority of the agency.

[1] I referenced in my last letter French writer Jean-Baptiste Alphonse Karr coining the saying: "The More Things Change, The More They Remain the Same." The new rules put window dressing on the same problems as before. The DOT is obviously reacting to a segment of the population that wants to maintain a confusing set of regulatory standards so as to preserve for them the argument that local rules matter in the face of state statutes that say the contrary in the limited areas where there is clear preemption.

Unfortunately, as more fully explained below, the DOT's 2/8/21 Revised Rules in several places continue to conflict with G.S. §150B-21.9(a) for being beyond "the authority delegated to the agency by the General Assembly", are not "clear and unambiguous" or are not "reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency."

I will try not to unduly repeat the information and arguments made in my written comments dated October 8, 2020 and December 10, 2020. We respectfully ask that the Commission again consider those comments; we intend to incorporate them herein by reference.

The revised rules hereinafter challenged continue to cover a consistent theme: the DOT improperly delegating or ceding regulatory authority to local governments, either by making local approval a condition of State approval or transferring regulatory oversight for billboards over to local governments. Even worse from where we left off, the DOT, through wordsmithing and ambiguous language, is still trying to achieve those objectives despite the objections made by the Commission.

SUMMARY OF OBJECTIONS

A. PROPOSED 19A NCAC 2E .0204 IS CONTRARY TO STATE LAW, IS UNDULY VAGUE AND IS NOT REASONABLY NECESSARY TO IMPLEMENT A STATE OR FEDERAL STATUTE OR FEDERAL REGULATION.

As mentioned before, two statutes declaring the will of the General Assembly expressly preempt local control over outdoor advertising signs falling within the jurisdiction of the DOT, G.S. §136-131.1 and §136.131.2. The RRC specifically found last time that the DOT was without statutory authority to adopt a rule allowing the transfer of regulatory oversight. The changes made by DOT are only cosmetic in nature; transfer of authority from the State to locals is still contemplated.

In the most recent draft, the DOT language again cites to a federal regulation that, if read, merely indicates that the feds do not care if it is the State or locals exercising regulatory control so long as federal minimum standards driven by the federal Highway Beautification Act are met. The opportunity of delegation to local governments is NOT a federal requirement, however. Chapter 150B's limitations on agency rule making authority is replete with examples of where agency authority must be grounded in State law, not something the federal government may allow, but not require. *See* e.g. G.S. §150B-21.9(a)(3) (A rule "is reasonably necessary to

implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal regulation."); G.S. §150B-19 (an agency may not adopt a rule that "implements or interprets a law unless that law or another law specifically authorizes the agency to do so."); G.S. §150B-19.1(g)(whenever an agency proposes a rule that is purported to implement a federal law, or required by or necessary for compliance with federal law, the agency must prepare a certification to that effect and post same on the agency Web site.); *See County of Wake v. North Carolina Department of Environment & Natural Resources*, 155 N.C. App. 225, 250, 573 S.E.2d 572, 589 (2002)(citing to G.S. §150B-19(1), the Court of Appeals held that DENR could not reject State landfill permit based on noncompliance with local requirements since enabling statute did not authorize that condition or implement that locally focused law). Federal law does not authorize proposed Rule .0204 nor is it required or necessary to implement federal law. Neither has the DOT prepared any certification of a federal mandate.

An additional problem with Rule .0204 is that is creates ambiguity over regulatory oversight. G.S. §136-131.1 and G.S. §136-131.2 clearly provide preemptive effect over the maintenance, repair and reconstruction of outdoor advertising signs that are lawfully existing and permitted. In those instances where an outdoor advertiser was to do an act of maintenance, repair or reconstruction, would the DOT reinsert itself with regulatory oversight since those statutes expressly exclude local authority? A program of this magnitude (i.e. all billboards along interstate and primary highways in areas zoned commercial and industrial) cannot be bifurcated in terms of implementation of State wide policy – where the DOT comes in and out of jurisdiction.[2]

B. PROPOSED 19A NCAC 02E .0225 IN CERTAIN PLACES CONFLICTS WITH THE STATE STATUTE IT PURPORTS TO IMPLEMENT, CREATES AMBIGUITIES, AND IS NOT REASONABLY NECESSARY TO IMPLEMENT A STATE OR FEDERAL STATUTE OR FEDERAL REGULATION

For about a month, we have been working with DOT to try to solve our and the Commission's objections. For Rule .0225, we are almost there. We saw drafts whereby in subsection (b)(2) the offending reference to "local rules, regulations or ordinances" was deleted. For the issue of changing a sign from a static face to digital or increasing sign height as part of reconstruction, the reference to local approval was deleted. Yesterday, a new draft was published undoing those efforts and making it more confusing.

[2] The prior draft rule before the Commission, as now, contained a citation to G.S. §136-138. The title of that statute is "**Agreements with United States authorized**." That statute must be read together with G.S. §136-140 as authorizing the DOT to enter into agreements with the federal highway administration in order to preserve the availability of federal funding tied to maintaining effective control.

1. Proposed Rule .0225(b)(2) now says: "Conforming sign structures may be reconstructed so long as the reconstruction does not conflict with any applicable rules or regulations."

All references to State, federal in addition to local are deleted. What does the above truly mean? Are the terms "rules or regulations" merely State or federal "rules" subject to agency rule making under Chapter 150B. See G.S. §150B-2(8a)'s definition of "rule" which is tied to state or federal agency rules, not local.

One objective of clarity of law is to avoid future litigation. In each of our written comments, we implored the DOT to avoid being dragged into the middle of disputes between our industry and local governments. Dragged into the middle means draining the coffers of all taxpayers. For local governments wanting to keep alive the argument of their involvement in regulating the "maintenance", "repair" or "reconstruction" of billboards despite the plain language of G.S. §§136-131.1 or 136-131.2, it is an obvious gift that the DOT has left it vague. What is the meaning of "applicable"? DOT will be asked to interpret that term and regardless of what side it chooses, that determination will result in the State being stuck in the tar pit of litigation. This draft creates for the sign owner an impossible test of knowing what "applicable" means; what rules or regulations matter when reconstruction is desired; and what regulations will the multitude of interested parties claim are involved. There is absolutely no point of deleting "State" or "federal" except to placate those in opposition to keep it so vague that it keeps everyone guessing. This is the anthesis of regulatory reform which prompted HB 74. The proposed language is devoid of any cogent meaning and adds nothing other than confusion. How is it necessary to implement or interpret a state or federal law if it does not even identify what is to be implemented or interpreted? The omission of language leaves "local" standards at play as equaling as "state" or "federal". As-is, Rule .0225(b)(2) should be stricken in its entirety.

2. Proposed Rule .0225(b)(4), second sentence reads in the context of reconstruction where a face is changed to digital or sign height is increased: "Local approval may also be required if required by the local government having jurisdiction over the sign location."

What does the above mean? Is local approval from DOT's standpoint a condition of reconstruction? The above language suggests so in the same vagaries apparent for issue no. 1. This language says that local approval is required "if required by the local government having jurisdiction over the sign location." So, local approval is up to a local government to require it. How is that any different that the language objected to in the prior draft? Wordsmithing to keep local control in place is not what should have happened. The battle with locals has been when they say their laws create a requirement. The draft rule is clearly in conflict with

the Commission's objection. To resolve the objection, the reference to local should have been deleted, period.

What is the point of carving out and mentioning digital or increasing height in any subdivision of subsection (b)? The answer is that is what the opposition complained the loudest about. The bottom line is that the entire subsection (b) is "subject to G.S. 136-131.2." If local governments have authority under that statute to regulate some aspect of reconstruction, then such authority exists independent of the DOT purporting to say so. The DOT cannot use rulemaking to eviscerate statutory benefits by exposing the act of repair or modernization of existing signs to the plethora of local standards. We respectfully suggest that .0225(b)(4) be stricken in its entirety. It is not necessary to implement state or federal law; as written, it lacks statutory authority especially in light of the preemptive provisions of G.S. §§136-131.1 and 136-131.2; and it is not clear.

CONCLUSION

Based on the above, and the administrative record, the undersigned respectfully requests that the Commission objects to the above identified DOT proposed rules.[3]

Sincerely,

VAN WINKLE, BUCK, WALL,
STARNES AND DAVIS, P.A.
Craig D. Justus
(Electronically Signed)
Craig D. Justus

cc: Client
Hannah Jernigan – via email
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[3] The DOT and the outdoor industry struck a compromise in the wording of newly proposed Rule 19A NCAC 2E .0206. For our side, we were concerned that a local permit requirement in an application process would be used to prohibit reconstruction, repair or maintenance of existing DOT-permitted locations. The industry has been transparent in stating that the State Outdoor Advertising Control Act, and regulations promulgated thereunder, do not preempt all local standards. The erection of a new sign at a new location can be controlled through local zoning. An increase in the number of signs is not the end game here. We simply want what G.S. §136-131.1 provided and G.S. §136-131.2 expounded upon, to wit: that for lawfully existing billboards, the DOT and its Statewide rules are a one-stop shop for acts of maintenance, repair or modernizing a sign.