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RE: Written Comments to North Carolina Department of Transportation's Proposed Permanent Rules Implementing HB 74

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 submit comments. My client and I strongly believe that several of the proposed rules, as more fully explained below, are not "within the authority delegated to the agency by the General Assembly," which is one of the criteria for consideration by the North Carolina Rules Review Commission in G.S. §150B-21.9(a). Additionally, several of the proposed rules are not "reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency" or are not "clear and unambiguous." Moreover, due to substantial changes made to the originally published text of the rules after public comment, and other errors in process, the proposed rules were not "adopted in accordance with the required procedure of Part 2" for permanent rule-making.

I have attached hereto as Exhibit "A" and Exhibit "B" NCOAA comments that I and Thomas Bugbee, NCOAA's Executive Director, provided to the DOT during the public comment process of the permanent rule-making, which I incorporate herein by reference. My comments attached as Exhibit "A" outlined in great detail the inherent legal defects and ambiguities in the DOT's proposed rules. Before I summarize our complaint and why the Commission should object to DOT's proposed rules for noncompliance with the standards in G.S. §150B-21.9(a), it is important to understand context for the regulatory environment surrounding outdoor advertising

before and after the adoption of the regulatory reform bill at issue – House Bill 74- in 2013.

BILLBOARD REGULATON PRIOR TO HB 74

The DOT regulates the erection and maintenance of outdoor advertising, including off-premise signs or billboards, within 660 feet of the right-of-way of interstates and major highways in this State. G.S. §136-129, G.S. §136-130. One impetus to State regulation is the need to comply with the federal Highway Beautification Act ("HBA"), 23 U.S.C. §131. In order to not jeopardize federal funding for highways, each state must develop and implement federal-state agreements detailing, among other things, size, lighting and spacing standards for billboards. *See Scenic America, Inc. v. United States Department of Transportation*, 836 F.3d 42, 45-46 (U.S. Ct. App., D.C. Cir. 2016).

Effective July 17, 1972, North Carolina adopted the Outdoor Advertising Control Act, G.S. §136-126 *et seq*. ("OACA"), in order to control the erection and maintenance of outdoor advertising signs along its major highways. *See Bracey Advertising Company, Inc. v. North Carolina Department of Transportation*, 35 N.C. App. 226, 241 S.E.2d 146 (1978). In G.S. §136-138 and G.S. §136-140, the General Assembly authorized the DOT to enter into an agreement with the U.S. Secretary of Transportation to satisfy the regulatory controls required by the HBA. Attached as Exhibit "C" is a copy of North Carolina's federal-state agreement for outdoor advertising, which establishes the standards for size, spacing and lighting of signs that this State must follow to avoid jeopardizing federal funding ("FSA Standards"). The DOT has essentially promulgated these FSA Standards into the administrative code at 19A NCAC 2E .0203.

To be an eligible location for the establishment of a new billboard, the property must be either zoned commercial or industrial or be in an unzoned commercial or industrial area. G.S. §136-129(3), (4). As a result, local governments retain some authority over the establishment or erection of a billboard by their classification of commercial or industrial zones.

Many cities and counties in North Carolina where billboards were once permitted to be established, now prohibit or severely limit any new off-premise signs. In fact, most billboards are today considered in the localities where they are situated to be "nonconforming" to local zoning.

As nonconforming signs, local zoning will oftentimes prohibit structural alterations or substantial changes to the billboards, including reconstruction. *See Appalachian Poster Advertising Co. v. Zoning Board of Adjustment of the City of*

Shelby, 52 N.C. App. 266, 278 S.E.2d 321 (1981)(an example of this restrictive regulatory environment).

Imagine a billboard that is blown down by a hurricane or other dramatic storm event. Imagine an older wooden sign that is desired to be upgraded to a more aesthetically pleasing modern sign. Imagine a billboard that must be moved to accommodate a State or local road improvement project. These are common scenarios. In these scenarios, in order to save or enhance the location, the sign would have to be reconstructed. Many local communities have regulations that prohibit this activity. As a result, the industry has been losing its sign assets at a steady pace over the years. The latter scenario matches the set of facts in the case of *Lamar OCI South Corp. v. Stanley County Zoning Board of Adjustment*, 186 N.C. App. 44, 650 S.E.2d 37, *aff'm per curiam*, 362 N.C. 670, 669 S.E.2d 322 (2008).

The *Lamar v. Stanly County* case involved the relocation of a DOT-permitted billboard caused by a State highway widening project. Lamar moved a sign deemed nonconforming to County standards off the new State right of way. In order to save the asset and avoid a condemnation battle with the DOT over just compensation for the taking, the sign was moved within the same "site/location", being 1/100 mile, as defined by current DOT regulations and such relocation was permitted by State law. *See* 19A NCAC 2E .0201(27); 19A NCAC 2E .0210.[1] After this happened, Stanly County claimed that since its regulations prohibited the moving of a sign nonconforming to local standards, Lamar lost its "grandfathering" protections when it relocated its billboard. More than four years of litigation ensued. Ultimately, the North Carolina Supreme Court held that Stanly County regulations, prohibiting the moving of the disputed sign in compliance with DOT regulations, were not enforceable for being in conflict with State law that permitted such activity. The *Lamar v. Stanly County* case referred to N.C. Gen. Stat. §136-131.1, which statute states that local laws cannot be used to "cause the removal" of a DOT-permitted billboard without the payment of just compensation.

Drive down any given highway in this State, and it will be obvious, that billboards take many shapes or forms of construction. There are signs with multiple wood pole supports. There are signs with multiple steel supports. There are signs with a single steel support or a monopole. There are signs with V-shape oriented faces. There are signs with back-to-back faces. There are signs with side by side faces. From the standpoint of the federal-state agreement under the HBA, signs can be upgraded so long as they continued to conform to the FSA Standards. However, because of restrictive local regulations, many billboards in this State prior to 2013 could not be modernized or upgraded through reconstruction. The wood signs could not be converted to steel; the multi-poles could not be converted to

[1] The DOT's Proposed Rules seek to change the "site/location" definition to GPS coordinates.

monopoles. While many businesses in this State are permitted to adapt and use the most current technology, local regulations forced the billboard industry to live in the 1970s with many signs being locked into their original forms and materials.

AFTER ADOPTION OF HB 74 IN 2013

HB 74 was a regulatory reform bill. I have attached pertinent sections for your convenience as Exhibit "D". It is titled: "AN ACT TO IMPROVE AND STREAMLINE THE REGULATORY PROCESS IN ORDER TO STIMULATE JOB CREATION, TO ELIMINATE UNNECESSARY REGULATION, TO MAKE VARIOUS OTHER STATUTORY CHANGES, AND TO AMEND CERTAIN ENVIRONMENTAL AND NATURAL RESOURCES LAWS." The clear purpose of this statute is to streamline agency rules, make them more business friendly and to eliminate rules which are "obsolete, redundant, or otherwise not needed." (G.S. §150B-21.3A(a)(6)). We believe that included within the latter category would be rules that are either without statutory authority or rules that conflict with statutory authority.

In Section 8(b) of HB 74, the General Assembly enacted G.S. §136-131.2. It reads:

> § 136-131.2 **Modernization of outdoor advertising devices**.
>
> No municipality, county, local or regional zoning authority, or other political subdivision shall, without the payment of just compensation as provided for in G.S. 136-131.1, regulate or prohibit the repair or reconstruction of any outdoor advertising for which there is in effect a valid permit issued by the Department of Transportation so long as the square footage of its advertising surface area is not increased. As used in this section, reconstruction includes the changing of an existing multipole outdoor advertising structure to a new monopole structure.

The whole point of G.S. §136-131.2 was to preempt *local governments* in the modernization of existing billboards through "repair or reconstruction" of DOT-permitted signs. *See* HB 74 Legislative Staff Report, Exhibit "E" ("prohibits local governments from restricting the repair or reconstruction of outdoor advertising, without just compensation, as long as the advertising surface area is not increased.")

Because HB 74's enactment of G.S. §136-131.2 essentially protected billboard locations when a sign blew down, or a sign had to be moved to accommodate a highway project, or when the industry sought to modernize a location, the outcry from local governments and environmentalists was huge. WLOS reported that

"opponents of the measure said it would allow billboard companies to maintain their signs in perpetuity, even when communities wanted to cut down on outdoor advertising." Scenic North Carolina and other environmentalist organizations lambasted the law as the "Billboards Forever" bill. *See* Scenic North Carolina press release attached as Exhibit "F".

Since 2013, the billboard industry has communicated with the DOT on multiple occasions to ensure that DOT would not, intentionally or unintentionally, undo the policy choices of the General Assembly and interfere with the clear preemptive effect of G.S. §136-131.2. (See correspondence with DOT attached as exhibits to Exhibit "A".)

As part of the correspondence with DOT, we pointed out, among other things, that current DOT rules which called for local approval of changes to billboards, conforming to State standards, had to be amended and stricken in keeping with G.S. §136-131.2. See 19A NCAC 2E .0225(b)(2) ("Conforming sign structures may be reconstructed so long as the reconstruction does not conflict with any applicable state, federal or local rules, regulations or ordinances.")

Attached as Exhibit "G" is a written statement with attachments from Robert Sykes, President of Capital Outdoor Advertising showing an illustration of how modernization worked in the City of Salisbury in cooperation with NCDOT.

On December 4, 2019, the DOT published its Notice of Text and proposed the "Readoption without substantive changes" of various rules pertaining to the regulation of outdoor advertising ("Originally Proposed Rules"). *See* Exhibit "H". The sole reason given for the Originally Proposed Rules was implementation of G.S. §150B-21.3A (periodic review and expiration of existing rules). These rules amended rules in place since 2000 and in many instances proposed additional substantial burdens on the industry without a clear explanation of why the changes. Ironically, HB 74 as a regulatory reform statute is clearly intended to lessen the burden on the regulated industry by eliminating rules which are redundant, obsolete, or otherwise unnecessary. The Notice of Text referred to a Fiscal Note adopted by the DOT, which is dated March 1, 2019. A copy is attached as Exhibit "I".

In the Fiscal Note, DOT describes "modernization" of billboards recognized by the new statute, to wit: "Modernization may entail a variety of changes to the sign, such as replacing wood poles with steel ones, billboard face upgrades, changes in the number of poles, etc. . ." After analyzing estimated construction costs to the industry of upgrading or modernizing a billboard, the DOT stated that the "industry would also clearly incur some benefits from being allowed to modernize their signs. The modernization would increase the value of a sign, and therefore, the amount of

revenues collected. The response to the NCDOT survey mentioned above indicate that in some cases, depending on the firm, the location of the sign, **increased height** and visibility, the revenue could increase by as much as 100%." (emphasis added).

The DOT goes on in the Fiscal Note to discuss the impacts of the statute on removing local government control as follows:

> More signs can be repaired and reconstructed that would have been prohibited under local rules or ordinances. Many local authorities have more stringent regulations than the State regarding outdoor advertising. Before GS 136-131.2, local municipal, town, and county governments had various controls over issues with billboards being modernized.
>
> Many types of alterations can be made to billboards through repair and reconstruction. **Any type of alteration can be made to a conforming billboard as long as the alteration adheres to the State and Federal Regulations.** Restrictions include: the square footage of the billboard cannot be increased; and the sign location cannot change. Examples of modernization include: static faces become digital; heights may be increased to the state maximum of 50' as measured from the edge of pavement; and wood multi-pole structures become steel mono-pole structures.

A review of the above highlighted language is critical for figuring out where we should have ended up with the DOT's rule making. The DOT regulations of outdoor advertising are required to comply with the FSA Standards, as noted above. The FSA Standards are not local standards. The State regulations also are not local standards, or at least should not be. DOT implements statutory directives at a State-wide basis without regard to the local preferences of 100 different counties and over 500 different municipalities.

It should be clear to all, and DOT even acknowledged at the time of preparing the Fiscal Note, that G.S. §136-131.2 expressly determined that local standards in zoning or other ordinances are not relevant when an existing DOT-permitted billboard was to be repaired or reconstructed. Again, the highlighted language: "**any type of alteration can be made to a conforming billboard as long as the alteration adheres to the State and Federal Regulations**."

DOT stated in the Fiscal Note: "This rule, which is consistent with G.S. 136-131.2, prohibits local communities from being able to restrict modifications **on state conforming signs**." (emphasis added). DOT further stated:

> GS 136-131.2 addresses modernization of outdoor advertising structures. Without clarifying 19A NCAC 02E .0225, locals and industry may not understand Department expectations with modernization, which could lead to inconsistencies with regulation. This rule without modification, currently requires local approval for alterations. **While GS 136-131.2 clearly removes local approval, an unmodified 19A NCAC 02E .0225 could create unnecessary confusion**. (emphasis added).

In the Fiscal Note, the DOT endorsed the process of re-writing "19A NCAC 02E .0225 to be consistent with G.S. 136-131.2". Unfortunately, this is not where we are. The DOT's proposed rules before this Commission do the opposite. In multiple ways, the DOT re-inserts local government standards as a limitation on the industry's ability to modernize its existing billboards, contrary to the clear intent of G.S. §136-131.2.

It would be a welcomed question from the Commission for a member to ask a DOT representative the following: "Where in the proposed rules do you implement G.S. §136-131.2, what section, what language?" – i.e. where does it say explicitly or implicitly that local government standards and approval are not relevant as the statute calls for?

In DOT's explanation given for the current form of the proposed rules, DOT admits to bowing to political pressure and unabashedly refers to input from "local governing authorities and special interest groups" for DOT's insertion in its rules of new limits to G.S. §136-131.2 that effectively gut the law, if allowed to stand, as more fully explained below. See Exhibit "J" [DOT's explanation of changes from the Originally Proposed Rule to the latest version of 19A NCAC 2E .0225.][2]

Before I summarize our specific objections, it is important to discuss the limits of DOT's or any State agencies' rule-making authority. An agency "may not, by its rules or order, forbid the exercise of a right expressly conferred by statute." *State of North Carolina ex rel. Utilities Commission v. Lumbee River Electric Membership Corp.*, 275 N.C. 250, 257, 166 S.E.2d 663, 668 (1969). A corollary provision of law is that a "statute which is being administered may not be altered or added to by the exercise of a power to make regulations thereunder." *States' Rights*

[2] Attached as Exhibit "K" is a chart compiling the identity of the givers of public comment from members of the General Assembly, local government representatives and environmentalists. It is important to note that the General Assembly commentators either voted in opposition to HB 74 or where not members of the North Carolina legislature at that time (shown by "N/A").

Democratic Party v. North Carolina State Board of Elections, 229 N.C. 179, 187, 49 S.E.2d 379, 398 (1948). An agency cannot create a "liability" or "duty" where the statutory law creates none. *Motzinger v. Perryman*, 218 N.C. 15, 20-21, 9 S.E.2d 511, 514-515 (1940). Agency rules in conflict with state statutes are beyond agency authority and invalid. *Charlotte-Mecklenburg Hosp. Authority v. North Carolina Industrial Commission*, 336 N.C. 200, 223, 443 S.E.2d 716, 730 (1994); *In re North Carolina Fire Ins. Rating Bureau*, 275 N.C. 15, 34, 165 S.E.2d 207, 220 (1969); *State of North Carolina v. Whittle Communications*, 328 N.C. 456, 466, 402 S.E.2d 556, 562 (1991).

SUMMARY OF OBJECTIONS

A. **PROPOSED 19A NCAC 02E .0225 CONFLICTS WITH THE STATE STATUTE IT PURPORTS TO IMPLEMENT, CREATES AMBIGUITIES THAT WILL MAKE IMPLEMENTATION PRACTICALLY IMPOSSIBLE, AND IS NOT REASONABLY NECESSARY TO IMPLEMENT A STATE OR FEDERAL STATUTE OR FEDERAL REGULATION**.

1. Subsection (a)(2) of proposed 19A NCAC 02E .0225 reads:

> Conforming sign structures may be reconstructed so long as the reconstruction does not conflict with any applicable state, federal **or local rules, regulations, or ordinances**. (emphasis added).

Local rules, regulations or ordinance are still considered in this version relevant to the act of reconstruction despite the clear statutory directives in G.S. §136-131.2. Because the DOT does not possess authority to adopt a rule in conflict with the statute, this rule violates G.S. §150B-21.9(a)(1).

2. Subsection (a)(3) of proposed 19A NCAC 02E .0225 reads:

> Conforming sign structures may be reconstructed by changing an existing multi-pole structure to a monopole structure so long as the square footage of the advertising surface is not increased.

Here, by limiting "reconstruction" to one example, the DOT conflicts with the plain meaning of G.S. §136-131.2 and thus the proposed rule violates G.S. §150B-21.9(a)(1). In its earlier Fiscal Note, the DOT acknowledges a litany of possible modernization examples. The proposed rule does not acknowledge the common occurrences where materials are changed – wood to steel; changes happen in form or shape; changes in height, etc. Moreover, subsection (a)(3) even appears to conflict with subsection (a)(2) in the instances where local governments reject going to a monopole structure.

The term "reconstruction" is not vague and does not invite DOT to roam afield in limiting its application. *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977)("When a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by administrative body or court under the guise of construction.").

According to standard dictionary definitions, "reconstruction" simply means "to construct again". Merriam-Webster's On-line Dictionary; *See Mildrex Technologies, Inc. v. N.C. Department of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016)(in determining the plain meaning of undefined terms, standard, nonlegal dictionaries are to be used as a guide); *See also Appalachian Outdoor Advertising Co., Inc. v. Town of Boone Board of Adjustment*, 128 N.C. App. 137, 141, 493 S.E.2d 789, 792 (1997)(defining "reconstruct" in the context of a zoning ordinance prohibiting such action). "Construct" means "to make or form by combining or arranging parts or elements." Merriam-Webster's On-line Dictionary.

The regulated thing in this case is an "outdoor advertising" sign. G.S. §136-128(3). An outdoor advertising sign comes in a variety of structural forms. To reconstruct an outdoor advertising sign, to start over with its construction, does not mean to replace with exactly what you saw before. Faced with a scenario of removal and starting over, an outdoor advertising sign owner would ask: "how should I build this sign in today's business and regulatory climates"? G.S. §136-131.2 instructs a person that local standards are preempted. That being the case, the next question that would follow would be: "What are the State standards?" The answer, of course, is found in 19A NCAC 2E .0203, which address sign size, spacing, height and lighting requirements. These State standards are established to meet the FSA Standards.

The only caveat in the HB 74 legislation is that the "square footage of the advertising surface" cannot be increased. That is the only limit to repair or reconstruction. The DOT's proposed rules improperly add limitations that do not exist in the statute. For example, the proposed rules, as written, would limit a multi-wood pole sign from being reconstructed as a multi-steel pole sign (especially without local approval).

If an outdoor advertising sign owner was precluded from changing the characteristics of a sign by the opposition's limited view of the term "reconstruction", what would be the point of the caveat or exception dealing with not increasing square footage, which is a characteristic of a sign? Would not the General Assembly have also mentioned other characteristics such as increased height or altered setbacks?

The well-established rule of statutory construction is that mentioning a specific exception implies the exclusion of others. *Morrison v. Sears, Roebuck & Co.,* 319 N.C. 298, 303, 354 S.E.2d 495, 498-499 (1987)(espousing the doctrine of *expressio unius est exclusion alterius*); *Granville Farms, Inc. v. County of Granville,* 170 N.C. App. 109, 114, 612 S.E.2d 156, 160 (2005). Notably, there are no additional exceptions in the statute related to height, setback, etc. Certainly, local standards are expressly preempted.

The DOT's narrow reading here is driven by the interest groups that the General Assembly respectfully disagreed with in 2013. DOT undoubtedly reads the last sentence of G.S. §136-131.2 as limiting the scope of reconstruction, to wit: "As used in this section, reconstruction **includes** the changing of an existing multipole outdoor advertising structure to a new monopole." (emphasis added). As the DOT's Fiscal Note suggests, there are a myriad of ways to modernize an existing sign and the General Assembly's failure to list all the possible examples cannot be seen as a limitation.

Another well-established statutory construction principle is that the term "includes" "is ordinarily a word of enlargement and not of limitation. "The statutory definition of a thing as 'including' certain things does not necessarily place thereon a meaning limited to the inclusions." *North Carolina Turnpike Authority v. Pine Island, Inc.*, 265 N.C. 109, 120, 143 S.E.2d 319, 327 (1965); *Jackson v. Charlotte-Mecklenburg Hosp. Authority*, 238 N.C. App. 351, 356-357, 768 S.E.2d 23, 27 (2014)(the phrase "shall include" indicates an intent to enlarge the statutory definition, not limit it).

Although the statute is clear, the title of the statute "**Modernization of outdoor advertising devices**" is informative. *See Colonial Pipeline Co. v. Neill*, 296 N.C. 503, 508, 251 S.E.2d 457, 461 (1979)(title of statute). The term "modernization" means "the act of modernizing" and modernizing means "to make modern (as in taste, style, or usage)." Webster's On-line Dictionary. Modernization is a broad concept; however, DOT's proposed rules funnel the act of modernizing through one example only and overrides the clear meaning of the term "includes" as illustrative and not exhaustive.

3. In subsection (a)(4) of 19A NCAC 2E .0225, the DOT makes the striking policy choice based on recent public comment that signs cannot be upgraded to digital technology to change the advertising messages, to wit: "Conforming sign structures may not be changed from a static face to an automatic changing face". With the placement of the comma here, this is so even with local approval. The DOT lacks the authority to add sign characteristic limits that simply do not exist in the statute where the General Assembly has expressly identified the only exception, i.e. square footage of advertising surface area. This

level of regulation to limit modernization is a policy choice best left to the General Assembly. This rule, therefore, conflicts with G.S. §150B-21.9(a)(1). Additionally, the DOT has inserted local control as a condition to raising a sign's height to the allowable State standards of 50 feet, which, again, is in excess of their authority.

Most of the public comments from local governments and environmentalists dealt with their concerns that existing signs will be modernized to include digital technology. The easiest solution to the DOT's efforts to address their concerns while avoiding conflict with the statute is to adopt language that signs not conforming to State standards cannot be converted to automatic changeable copy signs. Writing it this way in the negative does not address local standards at all.[3] If local governments believe that they have zoning authority or other police power authority to regulate digital signs, then they should rely on their own independent authority, not something purportedly delegated to them by the DOT.

The OACA delegates regulatory authority to the DOT and no other agency - State or local. The DOT speaks for the State in implementing the directives of the General Assembly. The DOT is without authority to delegate control over the repair or reconstruction of billboards to local governments through rule making. *See Kingston Tobacco Bd. of Trade v. Liggett & Myers Tobacco Co*., 235 N.C. 737, 741, 71 S.E.2d 21, 24 (1952) (regulatory agency exercises nondelegable power to "fill in the details" within the general scope and expressed purpose of the statute prescribing the standards); *Lake Isabella Development, Inc. v. Village of Lake Isabella*, 259 Mich. App. 393, 407-408, 675 N.W.2d 40, 48-49 (2003)(State Department of Environmental Quality has exclusive jurisdiction over authorizing new sewerage systems and its conditioning of a State permit on local government discretionary approval is unauthorized).

Moreover, G.S. §150B-19 states in pertinent part that an agency may not adopt a rule that does one or more of the following: "(1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so." With the proposed rules, as written, the DOT implements local standards as a condition of State approval in violation of G.S. § 150B-19(1). *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)(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).

The title of HB 74 is also informative: "AN ACT TO IMPROVE AND STREAMLINE THE REGULATORY PROCESS IN ORDER TO STIMULATE JOB

[3] This example of language style is also not directly permissive such as "conforming signs are permitted to be reconstructed to automatic changeable copy."

CREATION, TO ELIMINATE UNNECESSARY REGULATION, TO MAKE VARIOUS OTHER STATUTORY CHANGES, AND TO AMEND CERTAIN ENVIRONMENTAL AND NATURAL RESOURCES LAWS." By inserting local control as gatekeepers in order to modernize an existing sign, the regulatory process is far from streamlined and far from eliminating unnecessary regulation.

4. In subsection (a)(5) of 19A NCAC 2E .0225, the DOT mandates written notice be given any time a "conforming sign" is "altered". The problems with this rule change are several-fold:

a. The term "alteration" is not defined and by its very nature is vague. Since it is a term different than "reconstruction", it must include something else besides possibly "reconstruction". As stated in the written statement of Michael Mielke attached hereto as Exhibit "L", and applying common sense, examples of "altering" a sign are limitless, and can include innocuous acts of repair and maintenance and changing components of structure form. In subsection (c) of 19A NCAC 2E .0225, "repair" appears to be an exception to prohibited alterations, but it is not clear whether acts of repair would be allowed alterations that still require DOT notification and the proposed fee.[4] Due to its vagueness, this rule does not comply with G.S. §150B-21.9(a)(2).

b. G.S. §150B-21.2(a) compels an agency to comply with the requirements of G.S. §150B-19.1 before adopting a permanent rule. They include:

- An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule. (150B-19.1(a)(2)). In light of the historical course of conduct, where no permit or notification was required to alter a billboard, the DOT has significantly added to the regulatory burdens.
- Rules shall be designed to achieve the regulatory objectives in a cost-effective and timely manner. (150B-19.1(a)(6)). In its Fiscal Note, the DOT analyzed the benefits that would accrue to the industry offset by proposed new permitting fees. This is before the DOT accepted public comment and changed the Originally Proposed Rules to add local control that would effectively nullify the benefits of the statute. The Fiscal Note no longer hits the target.

[4] For decades, the DOT has not required any notice prior to any sign alteration; no permit; no fee. See Correspondence to DOT included as part of Exhibit "A".

c. In its explanation for making changes to the Originally Proposed Rules (Exhibit "J"), the DOT appeared to accept some notification process rather than a new permitting process whenever a sign was "reconstructed" (albeit now expanded to include all "alterations"). However, the proposed rule references the "issuance" of an alteration permit addendum, which seems to suggest that DOT permission is required for any "alteration". Due to its vagueness, this rule does not comply with G.S. §150B-21.9(a)(2).

d. The proposed fee for the alteration permit addendum does not appear to be authorized by statute. See G.S. §150B-19(5)(a statute must specifically authorize the charging of a fee); G.S. §12-3.1(a) (Only the General Assembly has the power to authorize an agency to establish or increase a fee for the rendering of a service to the public). G.S. §136-133 speaks to the initial fee for erecting a sign and an annual renewal fee. Even if G.S. §136-133 somehow applied, when added to the DOT's fees for initially erecting a sign and its renewal permit, the DOT exceeds the cap on fees in G.S. §136-133 (cap is $120 for initial fee and $60 fee for renewal).

5. Subsection (c) of 19A NCAC 02E .0225 states that "**nonconforming signs** shall not be altered or reconstructed." The problem with this rule is that the DOT failed to incorporate the clear message in G.S. §136-131.2 that local standards cannot be applied to regulate the outcome of repairs or reconstruction. The DOT acknowledges in its Fiscal Note that signs not conforming to State standards cannot be reconstructed, which the industry abides by. However, rather than clarifying this point in the rules, DOT uses the phrase "nonconforming signs" in such a way that billboards deemed nonconforming by local ordinances only are not allowed to be altered or reconstructed either. As stated earlier, most of the existing billboards in North Carolina are nonconforming under local ordinances. It would effectively gut the reconstruction preemption rights in G.S. §136-131.2 – i.e. a sign owner does not have to comply with local standards – by the DOT's back dooring of local standards into the meaning of "nonconforming signs".[5]

[5] Federal regulations implementing the HBA address "nonconforming signs" but only in relation to State law or standards and not local law or standards. 23 CFR 750.707(b); 23 CFR 705.703(j)("State law means a State constitutional provision or statute, or an ordinance, rule or regulation, enacted or adopted by a State."). In the OACA, the General Assembly currently defines "State law" to include the State and its political subdivisions. G.S. §136-128(6). However, the term "State law" is applied in only 2 other areas of the statute – in the definition of "nonconforming signs" and in the local authority to zone property commercial or industrial. G.S. §136-128(2a) and §136-129(4). The statutory term "nonconforming sign" is also used in only 2 places – in the requirement of just compensation in G.S. §136-131 and as a fee-in-lieu option remedy for vegetation removal in G.S. §136-

In summary, the proposed rules in 19A NCAC 2E .0225 do not satisfy G.S. §150B-21.9(a)(1), (a)(2) or (a)(3).

B. 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.

G.S. §136-131.1 and G.S. §136-131.2 preempt local control over any regulatory action that would cause the removal of an existing billboard that is conforming to State standards and all local efforts of regulation of the repair and reconstruction of outdoor advertising signs. G.S. §136-130 delegates only to the DOT authority to regulate the erection and maintenance of billboards. This proposed rule, allowing the DOT Chief Engineer the discretion to accept local standards in lieu of State standards, cites to G.S. §136-130 and no authority can be found there to purportedly allow an employee or officer of DOT to unilaterally delegate regulatory authority to a requesting local government unit. Moreover, there is no state or federal statute creating the impetus for this rule. G.S. §150B-19(1) is also triggered by the DOT implementing or interpreting local law without specific statutory authorization to do so.

This proposed rule is unclear and ambiguous for it assigns no standards for the exercise of judgment for establishing local "effective control", and fails to account for how a local government could ever exercise effective control when G.S. §§136-131.1 and 136-131.2 limit or preclude the exercise of their typical regulatory authority.

In summary, proposed 19A NCAC 2E .0204 does not satisfy G.S. §150B-21.9(a)(1), (a)(2) or (a)(3).

C. PROPOSED 19A NCAC 2E .0206(a)(5) IS CONTRARY TO STATE LAW AND IS NOT REASONABLY NECESSARY TO IMPLEMENT A STATE OR FEDERAL STATUTE OR FEDERAL REGULATION.

In proposed 19A NCAC 2E .0206(a)(5), the DOT conditions the issuance of a State outdoor advertising permit on local approval (e.g. sign or zoning permit).

133.1(d). The DOT has been aware of the need to clarify its use of terms for more than five (5) years. If the locals cannot directly regulate the repair or reconstruction of a billboard, how then can the DOT indirectly allow them to control this through regulation? The answer is the DOT lacks the authority to alter G.S. 136-131.2 which preempts local government ordinances with one exception as to the square footage of a sign.

Local government authority must exist independently of the DOT's exercise of authority, and the DOT cannot implement or carry out local rules in the absence of a statutory directive. G.S. §150B-19(1). The DOT lacks the authority to condition its exercise of delegated authority on the discretion of any other agency – State or local; therefore, G.S. §150B-21.9(a)(1) or (a)(3) support the Commission's objection.

D. PROPOSED 19A NCAC 2E .0207 ESTABLISHING A NEW FEE FOR ALTERATION ADDENDUMS IS CONTRARY TO THE STATUTORY LIMITATIONS ON THE IMPOSITION OF A FEE.

Subsection (a) of 19A NCAC 2E .0207 adds a fee for "each alteration permit addendum". In addition to the vagueness of what act triggers the need for an "alteration permit addendum" as mentioned above on page 11, there is no statutory authority for a new regulatory fee in this instance as stated on page 12.

HB 74 mentions no fee. Ironically, HB 74 was by its clear intent to lessen regulatory burdens. Here, we have a proposed fee every time a sign is "altered" even though alterations of signs have occurred since the beginning of the State's OACA in 1972 and no fee has been needed or required since then for any such activities, as stated repeatedly in this letter, nor has the DOT even required its involvement or pre-knowledge anytime an existing sign is repaired, reconstructed or otherwise "altered".

In summary, proposed 19A NCAC 2E .0207's new fee does not satisfy G.S. §150B-21.9(a)(1), (a)(2) or (a)(3).

E. PROPOSED 19A NCAC 2E .0201 CONTAINS SEVERAL AMBIGUITIES AND ADOPTS A DEFINITION FOR SIGN LOCATION THAT CONFLICTS WITH THE OACA.

1. The proposed definition of "Abandoned Sign" in subsection (1) of Section .0201 is vague.

The current definition of "Abandoned Sign" that has been in place since at least 2000 puts the qualifying phrase "for a period of 12 months" at the beginning of a list of acts or omissions (e.g. a sign without a message; a sign that contains obsolete advertising matter or a sign that is significantly damaged). The proposed rule moves this qualifying phrase to the end after "or is significantly damaged". According to the doctrine of last antecedent, the 12-month period would only apply to the immediately preceding words and not to the other clauses - a sign without a message or containing obsolete content. Therefore, a sign without a message for merely a second would instantaneously be considered "abandoned" under the newly

proposed rule. This vague definition, as written, does not satisfy G.S. §150B-21.9(a)(2).

2. The proposed definition of "Conforming Sign" in subsection (5) is vague and lacks statutory authority.

The proposed definition of Conforming Sign refers to G.S. §136-11, which has been repealed. Moreover, as stated above in Objection Section C, the proposed rules require a local sign or zoning permit to issue a State permit for the erection of a new sign. Legally, a "Conforming Sign" should be one that is lawfully erected and that continues to meet the State standards for erection of a new sign.

3. The proposed definition of "Nonconforming Sign" in subsection (16) is vague. As mentioned above in 2., the proposed rule states that nonconformity is judged by not meeting "all current standards for erecting a new sign at the site", which appears to incorporate local standards as stated in Objection Section C. Legally, a "Nonconforming Sign" should be one that was lawfully erected and that fails to meet the State standards for erection of a new sign.

4. The proposed definition of "Sign Location" in subsection (26) conflicts with State law and is otherwise vague.

Since 2000 at least, the definition of "sign location/site" in the DOT rules encompasses an area measured by the "closest 1/100th of a mile." 19A NCAC 2E .0201(27). DOT has applied this standard to create a box – 26 feet in either direction of the sign and within 660 feet of the State right of way. At regular intervals, outdoor advertising signs are displaced as a result of State highway projects. In the past, the above definition allowed billboards to be moved on the same site and within the "DOT-permitted box" without regard to local standards. This reality can be seen in the facts of the above-mentioned *Lamar v. Stanly County* case.

The proposed definition change is to set sign location by latitude and longitude as determined by recreational grade global position system (GPS) equipment. In the proposed rules, as written, any time a sign is moved for a myriad of reasons (e.g. at landowner's request; to accommodate a State or local highway project; to reconstruct) whether it conforms to State standards or not, a **new DOT permit** will have to be obtained, and currently as stated above in Objection Section C, an act that will trigger the need for local permission.

Because signs that are reconstructed are not put back into the exact same foundation hole, signs will physically move with any reconstruction. See Exhibit "L" Letter from Michael Mielke. This location change, together with the DOT rule

mandating a local permit with any new State permit, eviscerates the right of reconstruction without regard to local standards in G.S. §136-131.1 or G.S. §136-131.2 by making it effectively impossible to take advantage of either statute.

The explanation for this rule change has been some vague reference to what federal administrators desire or require. (See Exhibit "J"). G.S. §150B-19.1(c)(3) and (g) clearly state that if a State agency is proposing a rule "required by or necessary for compliance with federal law" the agency must prepare a certification following the substantive standards of subsection (g) and post same no later than the publication date of the notice of text. This was not done.[6]

As explained by Ernie Drake, a North Carolina licensed surveyor, in his written statement attached as Exhibit "M", a "recreational grade" GPS equipment is grossly unreliable and creates ambiguity in the measuring. If the DOT intended to lock in a sign to the exact geographical positioning on this Earth, the use of recreational grade GPS standards will not accomplish this. If the DOT did intend to so lock in a sign, then "reconstruction" becomes a nullity if new permitting is required that uses local approval as a condition.

Bear in mind that most of my client's billboards are conforming to State standards set forth in 19A NCAC 2E .0203 implementing the federal-state agreement for North Carolina. The federal highway administrators are not concerned with the moving of signs that conform to FSA Standards.

In summary, proposed 19A NCAC 2E .0201 does not satisfy G.S. §150B-21.9(a)(1), (a)(2) or (a)(3).

F. DOT FAILED TO COMPLY WITH THE PROCEDURES FOR PERMANENT RULE MAKING.

After publishing the Originally Proposed Rules, DOT made substantial changes based on the input of local governments and environmentalists to add local approval into proposed 19A NCAC 2E .0225 for reconstruction of billboards and prohibiting billboards using digital technology regardless of local government permission. In the Fiscal Note, the DOT stated this about digital technology: "NCDOT considered excluding digital faces as part of modernization. NCDOT chose not to make this exclusion since the state already allows digital billboards and that industry should be allowed to accommodate for technology enhancements." With

[6] The FSA Standards do not restrict the moving or relocation of a sign conforming to the FSA Standards or otherwise in conformity with State standards.

the current version of the proposed rules, the DOT has done a 180-degree flip to ban the use of digital. This was clearly not anticipated and is an overreach.

These changes to the Originally Proposed Rules require the DOT to jump over different procedures as set forth in G.S. §150B-21.2(g). That has not happened.

Moreover, G.S. §150B-19.1 is incorporated into G.S. §150B-21.2(a), and for the reasons stated in Objection Section A 4 on page 11, the DOT did not comply with §150B-19.1.

Finally, G.S. §150B-21.4 and G.S. §150B-21.2(a)(2) require a fiscal analysis whenever a proposed rule would trigger the expenditure or distribution of funds subject to the State Budget Act. As noted above, if the billboard owner, when facing a State highway project, is precluded from moving a sign back off a new right-of-way because DOT has set up in the proposed rules local approval as a pre-condition to the move, then more and more signs will have to be condemned rather than relocated on the same site, which is currently available as a possible option. This will clearly trigger the expenditure of a greater amount of State funds in condemnation battles and DOT has performed no fiscal analysis or note on this likely consequence. The above statutes also require a fiscal note when there is substantial economic impact on the regulated industry. The existing Fiscal Note does not address the lost opportunity costs of having modernization restricted as proposed by DOT, including the prohibition on digital technology upgrades. The existing Fiscal Note discusses the benefits of modernization as contemplated by the statute – BUT not the benefits to or impacts on the industry for the DOT restricting modernization in the ways discussed above in its current version of the propose rules. See G.S. §150B-21.4(b2)(3)(a fiscal note must contain "a description of the purpose and benefits of the proposed rule change").

Essentially, the DOT's existing Fiscal Note paints a rosy picture for the billboard industry based on a number of assumptions of the benefits of implementing G.S. § 136-131.2 back in March of 2019 (with an older draft of the rules) that now no longer exist due to DOT carrying out the wishes and goals of the very same special interest groups which the Legislature ultimately did not champion in 2013. With regulatory reform, the 2013 Legislature made policy choices in favor of businesses – the outdoor advertising industry, its small business advertisers and the viewing consumers and other people who benefit from the information communicated. The DOT has plainly exceeded its authority in trying to undo the rights inherent in the statute.

The DOT's 2019 Fiscal Note fails to address the substantial changes to the regulated outdoor advertising industry. It is based on the benefits of the statute with an older draft set of rules from 2019 in mind, rather than the impacts on the

industry from the currently proposed rules. As a result, we respectfully request the Commission to ask the Office of State Budget and Management for a determination pursuant to G.S. §150B-21.9(a) of fiscal note compliance.

CONCLUSION

Based on the above, and the administrative record, the undersigned respectfully requests that the Commission object to the above identified DOT proposed rules.

Thank you for your consideration of this very important topic. We look forward to answering any questions that you may have at the hearing scheduled for next week.

Sincerely,

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

CDJ/ca
Enclosures
cc: Client
Helen Landi – via email

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