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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 offer comments to the version of the DOT rules resubmitted on December 4, 2020 ("12/20 Revised Rules").

The DOT has put in a lot of effort in revising its prior rules originally before the Rules Review Commission ("Commission"). On behalf of the NCOAA, we thank the DOT for these revisions, which resolved several of our concerns expressed in my written comments to the Commission dated October 8, 2020 ("October 8th Letter"). The DOT representatives displayed a cooperative spirit that is much needed in the universe of regulator and regulatees. Special appreciation goes out to Ebony Pittman, DOT counsel.

Unfortunately, as more fully explained below, the DOT's 12/20 Revised Rules in several places continue to be beyond "the authority delegated to the agency by the General Assembly," which is one of the criteria for consideration by the Commission in G.S. §150B-21.9(a). Additionally, these challenged 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."

I will try not to unduly repeat the information and arguments made in my October 8th Letter. We respectfully ask that the Commission consider those comments; we intend to incorporate them herein by reference.

The revised rules hereinafter challenged 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.

As I mentioned in my October 8th Letter, the DOT cannot enact rules which conflict with the will of the General Assembly as reflected in various state statutes. Two statutes directly and plainly limit local government regulatory authority over previously erected outdoor advertising signs falling within the jurisdiction of the DOT; they are G.S. §136-131.1 and G.S. §136-131.2.

G.S.§ 136-131.1 reads as follows:

> No municipality, county, local or regional zoning authority, or other political subdivision, shall, without the payment of just compensation in accordance with the provisions that are applicable to the Department of Transportation as provided in paragraphs 2, 3, and 4 of G.S. 136-131, remove or cause to be removed any outdoor advertising adjacent to a highway on the National System of Interstate and Defense Highways or a highway on the Federal-aid Primary Highway System for which there is in effect a valid permit issued by the Department of Transportation pursuant to the provisions of Article 11 of Chapter 136 of the General Statutes and regulations promulgated pursuant thereto.

. The North Carolina Supreme Court in *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) held that the above statute applied to prevent a local government from using its regulatory authority to bar an action authorized under the DOT permit implementing State-wide standards. In *Lamar v. Stanley County*, the act being challenged by Stanley County was the moving of an existing billboard to accommodate a State highway project. Stanley County attempted to stop the move, claiming that zoning rules prohibited the act altogether or prohibited relocating a sign too close to a building on the property. Our courts held otherwise and rejected these claims.

As explained below, in the 12/20 Revised Rules, the DOT has in several instances added in local approval for certain acts, which is counterintuitive to the

statutory direction that local government standards cannot result in a billboard owner losing his or her right to maintain and operate its sign.

The DOT admits that its rule revisions stem from HB 74, a regulatory reform bill, entitled "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 rules affecting businesses, make them more business friendly and to eliminate rules which are "obsolete, redundant, or otherwise not needed." (G.S. §150B-21.3A(a)(6)).

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 piggy-back onto G.S. 136-131.1 and preempt *local governments* in the modernization of existing billboards through "repair or reconstruction" of DOT-permitted signs. The term "regulate" means "to govern or direct according to rule, . . . to bring under control of law or constituted authority." *State v. Gulledge*, 208 N.C. 204, 179 S.E. 883 (1935).

It is common knowledge that many local governments in this State either ban outdoor advertising or severely restrict their ability to operate. Having to get permission from both the State and locals usually meant that signs could not be altered due to the latter's strict regulations- that signs would languish in the past without opportunity to upgrade and improve with the times like most businesses. HB 74 changed this dynamic by eliminating local oversight for signs to be repaired or reconstructed under DOT's watch.

Prior to HB 74 and the section above, existing DOT rules spoke of the applicability of rules in order to reconstruct an outdoor advertising sign as follows: "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." 19A NCAC 2E .0225(b)(2).

As noted in my October 8th Letter, after HB 74, we promptly pointed out to DOT that the above stated rule and others conflicted with the streamlining objectives of G.S.§ 136-131.1 and the more recent G.S. §136-131.2 – to eliminate local governance of changes to lawfully erected signs under DOT's jurisdiction. Many years later, the proposed 12/20 Revised Rules still fall short of complying with these clear statutory directives.

SUMMARY OF OBJECTIONS

A. 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.

1. Subsection (b)(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).

A long time ago, French writer Jean-Baptiste Alphonse Karr coined the saying: "The More Things Change, The More They Remain the Same." The 12/20 Revised Rules despite their changes remain the same in several critical spots. Despite the plain language of G.S. §136-131.2 preempting local regulation of billboard reconstruction in areas under DOT jurisdiction, DOT has kept in place adherence to local rules when a sign is reconstructed. DOT appears to have added the phrase "subject to G.S. 136-131.2" to the beginning of subjection (b) as a placeholder for the preemptive effect of that statute. This phrase denotes that the sections to follow are contingent on, subordinate to and governed by the statute. *Wise v. Harrington Grove Community Ass'n, Inc.*, 357 N.C. 396, 403, 584 S.E.2d 731,737 (2003).

However, G.S. §136-131.2 specifically covers the topic of "reconstruction" and precludes the whole field of "regulation" by local governments. By leaving in "local rules, regulations or ordinances" in subparagraph (b)(2), the DOT has created an unnecessary ambiguity. The DOT reserves the authority to revoke a DOT issued permit to an outdoor advertiser for failing to conform to DOT rules. Does DOT make all "applicable local rules, regulations or ordinances" relevant to that call? Those in opposition would say so. Invariably, the DOT will be drawn into the

middle of contests involving local objections to acts of reconstruction, where the whole point of HB 74 was to streamline the process, making such objections moot.

In subparagraph (5) of subsection (b), a conforming sign (i.e. one complying with State standards) can be relocated within the same parcel for any reason, including as a result of road improvements taking the area where the sign was initially located. This ability to relocate off a new right of way is obviously necessary to mitigate against State funds being required to pay just compensation for a highway project taking. However, DOTs proposed rules create unnecessary confusion. Does subparagraph (b)(2)'s reference to "local" rules when a sign is reconstructed trump relocation on the same parcel that accompanies the act of reconstruction if the zoning does not allow moving a sign? Although the better argument is "no", why indulge an ambiguity here when G.S. §136-131.2 clearly says locals cannot regulate or prohibit reconstruction?[1]

Since the DOT does not possess authority to adopt a rule in conflict with a statute, this rule violates G.S. §150B-21.9(a)(1). The above rule is also not clear and unambiguous; it creates a circular argument of whether a local rule is appliable versus a local rule controlled by the statute. (G.S. §150B-21.9(a)(2)). Especially in light of G.S. §§136-131.1 and 136-131.2, there is no statutory authority for the DOT through rulemaking to make local standards part of the mix. It is clear that the General Assembly, as the policy-making branch of government, has determined that local rules cannot cause the removal of a DOT-permitted sign or otherwise are not applicable to the repair or reconstruction of existing DOT-permitted signs. The DOT cannot by rule say otherwise, which is the case here. The proposed rule is not reasonably necessary to implement a state statute; in fact, as presented, it gums up the statutory benefits with ambiguity. G.S. §150B-21.9(a)(3)(It is <u>not</u> "reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency.")

2. Subsection (b)(4) of proposed 19A NCAC 02E .0225 reads:

> Conforming sign structures shall not be changed from a static face to an automatic changing face, nor shall the sign height be increased without local approval.

This verbiage was added as a result of comments from "legislators" who did not vote in favor of HB 74 and special interest groups such as environmentalists and local government representatives who lamented the passing of HB 74.

[1] *Lamar v. Stanly County*, *supra.* presented this issue of relocation and found preemption. However, with the proposed rules, DOT has modified 19A NCAC 02E .0210(16), the rule at play in *Lamar,* and replaced it with the new subparagraph (5) of subsection (b) of Section .0225.

For the above proposed rule, in order to streamline this letter, I would respectfully request that the Commission review pages 10-12 of the October 8th Letter. I will, however, repeat the primary statutory construction argument as follows:

> The only caveat [to preemption] 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. . . .
>
> 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.
> ….
> 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), when the statutory directives say the opposite. *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).

With over 400 written objections from folks opposed to HB 74, the DOT has followed a politically expedient path. Those in opposition to the billboard industry have stated that DOT is simply respecting local control. Respectfully, the matter is decided by legislation that DOT must follow, which unambiguously preempts local regulation or prohibition of the repair or reconstruction of outdoor advertising. The

proposed rule is beyond the authority of the DOT, implements local regulation or prohibition of the repair or reconstruction of outdoor advertising without specific authority to do so and conflicts with the statutory directives.

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.

The NCOAA's objections to the above rule are discussed on page 14 of the October 8th Letter, which rule has undergone no revisions.

In a nutshell, G.S. §136-131.1 and G.S. §136-131.2 preempt local regulation over any 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. How then can a local government exercise effective control by way of transfer from the DOT and impose local standards when G.S. §§136-131.1 and 136-131.2 limit or preclude the exercise of their typical regulatory authority?

In the 12/20 Revised Rules, the DOT added G.S. §136-138 as alleged statutory basis for this rule. However, that statute simply authorizes the original State-Federal agreement in the 1970s (as described in the October 8th Letter). After that time in the 1970s, the above later-enacted statutes set the table for regulatory control, which precludes or limits local regulation of outdoor advertising that is compliant with State standards, and which would necessarily bar any delegation of control from the DOT to a requesting city or county.

As further evidence of the lack of statutory authority, the substitution of local government permitting for State permitting runs counter to all of the references to the "Department" in the North Carolina Outdoor Advertising Control Act, including G.S. §136-134.1 (establishing judicial review of final decisions of the Secretary of Transportation); G.S. §136-134 (establishing illegal advertising based on conflict with DOT rules); and G.S. §136-130 (regulation of advertising by DOT).

Moreover, a decision to transfer control by the "Chief Engineer" is devoid of the opportunity to be heard by an affected sign company, or any substantive standards for judging a qualifying local entity. It is a blanket rule giving carte blanche authority to one DOT employee to take an action not authorized by and in direct conflict with the State statutory scheme for regulating billboards along interstate and primary highways of this State.

Proposed 19A NCAC 2E .0204 continues to not satisfy G.S. §150B-21.9(a)(1), (a)(2) or (a)(3).

C. PROPOSED 19A NCAC 2E .0206(b)(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(b)(5), the DOT conditions the issuance of a State outdoor advertising permit on local approval (e.g. sign or zoning permit). The NCOAA's objections are discussed on pages 14-15 of the October 8th Letter.

CONCLUSION

The DOT has made great strides in addressing the concerns of the outdoor advertising industry as reflected in the 12/20 Revised Rules. However, there are several critical issues that remain. Based on the above, and the administrative record, the undersigned respectfully requests that the Commission object to the above identified DOT proposed rules.

Sincerely,

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