



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

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April 19, 2012

Helen Landi
NC Department of Transportation
1501 Mail Service Center
Raleigh, NC 27699-1501

Re: 19A NCAC 02D .0531, .0532

Dear Ms. Landi:

At its April 19, 2012 meeting the Rules Review Commission declined to approve the above-captioned temporary rules based on lack of statutory authority in accordance with G.S. 150B-21.1(b1).

G.S. 136-82 requires the Board of Transportation to establish tolls. Based on all notices and forms received about these rules, it appears that the rules were both proposed and adopted by the Department of Transportation without any formal action by the Board. It appears simply that the wrong agency has engaged in rulemaking and the correct agency has not even begun rulemaking. Without action by the Board, there is no way to know if these are the tolls the correct agency desires to establish.

Neither G.S. 143B-348 nor G.S. 143B-10(j) move the authority to adopt the rules from the Board to the Department. The last sentence in the first paragraph of G.S. 143B-348 gives the Secretary authority to promulgate rules and regulations concerning all transportation functions assigned to the Department. The problem is that the function of establishing tolls was not assigned to the Department, but to the Board, by the recent change to G.S. 136-82. The second sentence in the first paragraph says that all transportation matters assigned to the Department are the responsibility of the Secretary "except those reserved to the Board of Transportation by statute." The statute clearly gives the authority to establish tolls to the Board. This statute does not allow the Department to usurp the authority given to the Board by the General Assembly.

There is nothing in G.S. 143B-10(j) that would authorize the Department to establish tolls. Tolls are fees. G.S. 150B-19(5) prohibits an agency from adopting a rule

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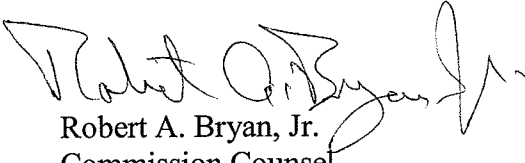
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that establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so with limited exceptions that are not relevant to these rules. G.S. 136-82 authorizes the Board, not the Department, to establish the tolls so G.S. 143B-10(j) is not relevant to this rulemaking.

In summary, there is no authority cited for the Department of Transportation to adopt these rules. That authority is given to the Board of Transportation and the Board has not engaged in rulemaking.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.1(b1) or (b2). If you have any questions regarding the Commission's action, please let me know.

Sincerely,



Robert A. Bryan, Jr.
Commission Counsel

RAB:tdc