COLORADO OUTDOOR ADVERTISING ASSOCIATION

10-5-2021

To Whom It May Concern,

The Colorado Outdoor Advertising Association is providing written comments in response to the recent Rule Making Hearing on October 1st, 2021. All comments are in reference to CDOT's effort to align its processes for permitting and enforcement of outdoor advertising devices with Senate Bill 21-263.

In summary, the Colorado Outdoor Advertising Association is in full support of the language discussed in detail on October 1st. We feel it will bring the Outdoor Advertising Rules 2 CCR 601-3 into alignment with the new Statute, and provide clarity for the industry moving forward.

Rule 3.2 Grounds for Noncompliance

A. **1. (b)** The Colorado Outdoor Advertising Association would like to see a shorter timeframe given to the property owner to conform. We believe that 60 days is far too long of a period since many advertising campaigns only run for 28 days. This would allow property owners the ability to take short term advertising programs on signs without an advertising device permit. We would encourage CDOT a cure period of 10 days, and believe that is plenty of time to remove the advertisement in order to bring the sign into conformance.

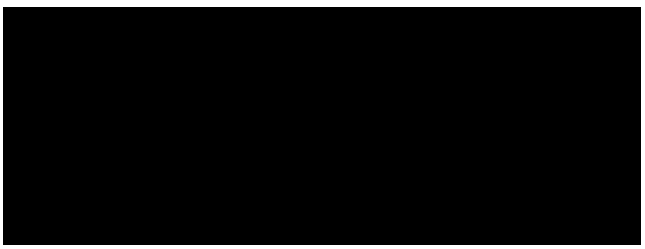
The Colorado Outdoor Advertising Association would also suggest CDOT look at language that further discourages individuals and/or companies from violating the regulations of the newly approved Outdoor Advertising Act. Below is an example of California's disgorgement language that would be recommended.

California Business Code § 5485

Annual permit fee for advertising displays; penalties for displays without valid permits; enforcement costs (a)(1) The annual permit fee for each advertising display shall be set by the director. (2) The fee shall not exceed the amount reasonably necessary to recover the cost of providing the service or enforcing the regulations for which the fee is charged, but in no event shall the fee exceed one hundred dollars ($100). This maximum fee shall be increased in the 2007–08 fiscal year and in the 2012–13 fiscal year by an amount equal to the increase in the California Consumer Price Index. (3) The fee may reflect the department's average cost, including the indirect costs, of providing the service or enforcing the regulations. (b) If a display is placed or maintained without a valid, unrevoked, and

unexpired permit, the following penalties shall be assessed: (1) If the advertising display is placed or maintained in a location that conforms to the provisions of this chapter, a penalty of one hundred dollars ($100) shall be assessed. (2) If the advertising display is placed or maintained in a location that does not conform to the provisions of this chapter or local ordinances, and is not removed within thirty days of written notice from the department or the city or the county with land use jurisdiction over the property upon which the advertising display is located, a penalty of ten thousand dollars ($10,000) plus one hundred dollars ($100) for each day the advertising display is placed or maintained after the department sends written notice shall be assessed. (c) In addition to the penalties set forth in subdivision (b), the gross revenues from the unauthorized advertising display that are received by, or owed to, the applicant and a person working in concert with the applicant shall be disgorged. (d) The department or a city or a county within the location upon which the advertising is located may enforce the provisions of this section. (e) Notwithstanding any other provision of law, if an action results in the successful enforcement of this section, the department may request the court to award the department its enforcement costs, including, but not limited to, its reasonable attorneys' fees for pursuing the action. (f) It is the intent of the Legislature in enacting this section to strengthen the ability of local governments to enforce zoning ordinances governing advertising displays.

Sincerely,



President – Colorado Outdoor Advertising Association

MILE HIGH
OUTDOOR ADVERTISING

10-5-2021

To Whom It May Concern,

Mile High Outdoor is providing written comments in response to the recent Rule Making Hearing on October 1st, 2021. All comments are in reference to CDOT's effort to align its processes for permitting and enforcement of outdoor advertising devices with Senate Bill 21-263.

In summary, Mile High Outdoor is in full support of the language discussed in detail on October 1st. We feel it will bring the Outdoor Advertising Rules 2 CCR 601-3 into alignment with the new Statute, and provide clarity for the industry moving forward.

Rule 3.2 Grounds for Noncompliance

A. **1. (b)** Mile High Outdoor would like to see a shorter timeframe given to the property owner to conform. We believe that 60 days is far too long of a period since many advertising campaigns only run for 28 days. This would allow property owners the ability to take short term advertising programs on signs without an advertising device permit. We would encourage CDOT a cure period of 10 days, and believe that is plenty of time to remove the advertisement in order to bring the sign into conformance.

Mile High Outdoor would also suggest CDOT look at language that further discourages individuals and/or companies from violating the regulations of the newly approved Outdoor Advertising Act. Below is an example of California's disgorgement language that would be recommended.

California Business Code § 5485

Annual permit fee for advertising displays; penalties for displays without valid permits; enforcement costs (a)(1) The annual permit fee for each advertising display shall be set by the director. (2) The fee shall not exceed the amount reasonably necessary to recover the cost of providing the service or enforcing the regulations for which the fee is charged, but in no event shall the fee exceed one hundred dollars ($100). This maximum fee shall be increased in the 2007–08 fiscal year and in the 2012–13 fiscal year by an amount equal to the increase in the California Consumer Price Index. (3) The fee may reflect the department's average cost, including the indirect costs, of providing the service or enforcing the regulations. (b) If a display is placed or maintained without a valid, unrevoked, and

unexpired permit, the following penalties shall be assessed: (1) If the advertising display is placed or maintained in a location that conforms to the provisions of this chapter, a penalty of one hundred dollars ($100) shall be assessed. (2) If the advertising display is placed or maintained in a location that does not conform to the provisions of this chapter or local ordinances, and is not removed within thirty days of written notice from the department or the city or the county with land use jurisdiction over the property upon which the advertising display is located, a penalty of ten thousand dollars ($10,000) plus one hundred dollars ($100) for each day the advertising display is placed or maintained after the department sends written notice shall be assessed. (c) In addition to the penalties set forth in subdivision (b), the gross revenues from the unauthorized advertising display that are received by, or owed to, the applicant and a person working in concert with the applicant shall be disgorged. (d) The department or a city or a county within the location upon which the advertising is located may enforce the provisions of this section. (e) Notwithstanding any other provision of law, if an action results in the successful enforcement of this section, the department may request the court to award the department its enforcement costs, including, but not limited to, its reasonable attorneys' fees for pursuing the action. (f) It is the intent of the Legislature in enacting this section to strengthen the ability of local governments to enforce zoning ordinances governing advertising displays.

Sincerely,

Vice President/General Manager – Mile High Outdoor

FAIRFIELD AND WOODS P.C.

[redacted]

October 5, 2021

Sent via E-Mail

Natalie Lutz, Rules Administrator
Colorado Department of Transportation
2829 West Howard Place
Denver, Colorado 80204-2305

Re: Comments on Proposed Rulemaking (2 CCR § 601-3)

Dear Ms. Lutz:

Thank you for the opportunity to provide post-hearing follow-up comments regarding the proposed permanent rulemaking to amend 2 CCR § 601-3 ("PROPOSED RULES"). Our firm represents StreetMediaGroup, LLC and Turnpike Media, LLC, both of which are Colorado limited liability companies. This letter incorporates and supplements all of our prior comments on the topic, which we entered into the record by letter (and email submittal) dated September 30, 2021.

At the hearing on October 1, 2021 and on the rulemaking record, Mr. Lovato stated that signs that are "advertising devices" require CDOT permits, and signs that are not "advertising devices" do not. As such, the administration and enforcement of the Proposed Rules in any given circumstance will turn on the critical definition of "advertising device." CDOT's guidance to-date on what constitutes an "advertising device" is alarmingly scant, and under these circumstances we are struck that CDOT does not use the opportunity created by the rulemaking process to address common circumstances and provide needed clarity.

Colorado residents cannot even look to other states to see how the new regulatory program may operate. That is because Colorado's definition of "advertising device" is entirely unique.[1] In its

[1] CDOT seems to suggest that its proposed definition follows the "compensation based" approach that was recently adopted in Tennessee and Kentucky. It does not. Yet even if it did, it is unlikely that Tennessee's and Kentucky's new definitions would survive a second round of constitutional scrutiny either, because their aims are also content-based.

By way of background, in 2020, after the Sixth Circuit Court of Appeals affirmed a District Court decision striking down Tennessee's Billboard Act as unconstitutional (*see Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019), *cert. den., Bright v. Thomas*, 141 S. Ct. 194 (Mem) (2020)) due to its content-based distinctions between on-premise and off-premise signs, Kentucky amended its definition of "outdoor advertising device." Likewise, after the Western District of Kentucky struck down Kentucky's Billboard Act as unconstitutionally content-based in *L.D. Management Company v. Thomas*, 456 F. Supp. 3d 873 (W.D. Ky. 2020), *aff'd L.D. Management Company v. Gray*, 988 F. 3d 836 (6th Cir. 2021), Kentucky also amended its definition of "advertising device." Kentucky and Tennessee, for the time being, regulate signs for which compensation is exchanged "for the placement of a message on the sign." They do not address whether compensation is given in exchange for a sign's "erection or existence." *Compare* TN ST § 54-21-102 and KRS § 177.830 *to* 2 CCR 601-3:1.00.1.2 (as proposed).

[redacted]

own right, uniqueness is not necessarily bad. However, the Proposed Rules are bad, because they are still content-based under *Reed v. Town of Gilbert, Ariz*., 576 U.S. 155 (2015),[2] and because they are incapable of consistent application. In addition to being presumptively unconstitutional, the Proposed Rules are without any basis in experience, fact, or law.

The Proposed Rules put Coloradans at risk of invasive investigations when they say things that the state does not like, and also put 10 percent of Colorado's federal highway funding at risk (because on their face, they are incapable of providing the "effective controls" required by the Federal Highway Beautification Act). That is an extremely high cost for Proposed Rules that this rulemaking record shows will not provide any perceptible public benefit at all.

The Proposed Rules are Unwise, Unprecedented, and Unconstitutional.

There is no basis on this rulemaking record or anywhere in the law to suggest that Colorado's definition of "advertising device" will ensure that the Roadside Advertising Permit program provides the "effective controls" that are required under 23 U.S.C. 131 and 23 CFR 750.705 if Colorado's full share of federal highway funding is to be preserved.[3] With no analysis whatsoever on this record to make that essential connection, CDOT increases the risk that Colorado will lose 10 percent of its federal highway funding allocation (other CDOT activities that place Colorado's

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CDOT has also called out Oregon as an example. Oregon changed its definition of "outdoor advertising sign" in 2007. Like Tennessee and Kentucky, Oregon regulates signs based on whether compensation is given "for the display of the sign" (and, like Tennessee and Kentucky, Oregon's approach is infected with a content-based purpose and will likely ultimately be struck down). The definition of outdoor advertising sign in Oregon also includes signs for which compensation is given "for the right to place the sign on another's property." OR ST § 377.710(21). Despite the tortured interpretations that CDOT has provided thus far, the Proposed Rules are not at all like Oregon's law, because they speak to neither the message on a sign nor the real property rights required to construct a sign.

[2] "Because strict scrutiny applies either when a law is content based on its face or *when the purpose and justification for the law are content based*, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." *Reed*, 576 U.S. at 166. A stated justification of the Proposed Rules is to implement the requirements for "effective controls" over advertising *content* that are set out in the Federal Highway Beautification Act and its implementing regulations.

[3] The Proposed Rules define advertising device as follows:

> "Advertising device" means any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other contrivance designed, intended, or used to advertise or inform, for which compensation is directly or indirectly paid or earned in exchange for its erection or existence by any person or entity, and having the capacity of being visible from the travel way of any state highway, except any advertising device on a vehicle using the highway or any advertising device that is part of a comprehensive development. The term "vehicle using the highway" does not include any vehicle parked near said highway for advertising purposes.

2 CCR § 601-3:1.00.1.2 (as proposed, substituting cross-reference for referenced text, emphasis added).

highway funding at risk, are documented in our prior correspondence in the record of this rulemaking). As such, promulgation of the Proposed Rules in their current form is unwise.

The Proposed Rules are also without precedent. We are aware of no other state that decides whether a permit is required for a sign based on whether compensation is exchanged for the sign's "erection or existence." Under the definition referenced in the Proposed Rules, the decision whether any individual sign is an "advertising device" or not can (and will) be made on an arbitrary basis.[4]

The Proposed Rules encourage the arbitrary application of Draconian enforcement procedures against people who say things that the state does not like. It is downright chilling to consider that, on mere suspicion (based on the message displayed on a sign), CDOT enforcement officials will be empowered to demand books and records from a sign owner, landowner, and business owner, pore over those books and records (and thereby open them to the public)[5]—*effectively punishing the sign owner using the investigation itself, making it irrelevant whether the sign at issue actually turns out to be an "advertising device."* Worse, history (and the rulemaking record) shows that members of the Colorado Outdoor Advertising Association ("COAA")—CDOT's co-author and lobbying partner with regard to SB21-263—are standing by, ready to use CDOT's complaint-driven process under the Proposed Rules to chill the free speech rights of all other sign owners in order to stop them from displaying content that used to be described as "off-premises."[6]

As detailed in our prior correspondence on this record, the Proposed Rules are unconstitutional because they are content-based by design (CDOT asserts that they are intended to implement the Federal Highway Beautification Act, which is a facially content-based law), cannot be consistently implemented (no one knows how to identify an "advertising device," so CDOT will likely do so on a case-by-case basis, where the whim of the enforcement official will control the outcome), and cannot be fairly enforced.

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[4] In its "Questions and Answer from Stakeholder Written Comments/Inquiries / CDOT Responses to Stakeholder Written Comments/Inquiries," dated September 1, 2021 (attached), CDOT represented that the most obvious case of compensation for the "erection or existence" of a sign, that is, a payments for the cost of materials and labor for the actual erection of a sign are not "compensation" for the purposes of determining whether a sign is an "advertising device." CDOT has represented that if a sign is financed through a lease from the sign maker to the business owner, then the sign is an "advertising device" because the lease "indicates an exchange of value is being made for the sign." CDOT will not answer the question "whether a commercial landlord who charges tenants for placement on an existing sign would need a CDOT permit," nor will CDOT answer the question of "whether a commercial landlord who charges a tenant for the erection of a new sign on that tenant's behalf would need a CDOT permit."

[5] There is nothing in the law to keep them private, so they will become public records under the Colorado Open Records Act.

[6] See comments in the rulemaking record by [redacted], of COAA and Mile High Outdoor Advertising during October 1, 2021 rulemaking hearing and in letters dated July 23, 2021 (seeking increased penalties for noncompliance).

The Proposed Rules, As Written, Exceed Statutory Authority.

Even if SB21-263 itself were constitutional (it is not), the Proposed Rules exceed statutory authority. Nothing in the statute authorizes the continued existence of 2 CCR 601-3:7.00.D.2. ("RAMP RULE"). Since the Ramp Rule is more restrictive than the provisions of the statute (which was amended this year), it cannot be allowed to remain in the implementing rules. *See* C.R.S. 43-1-415(4) ("The rules of the department must not impose any additional requirements or more strict requirements than those imposed by this part 4."). Consequently, the Proposed Rules should repeal the Ramp Rule. Short of that, as suggested in our prior correspondence, the Ramp Rule should be modified to reduce the arbitrary and irrational harm it inflicts upon property owners, thereby at least reducing the likelihood of legal challenge.

The Proposed Rules, As Written, Cannot Be Legally Adopted.

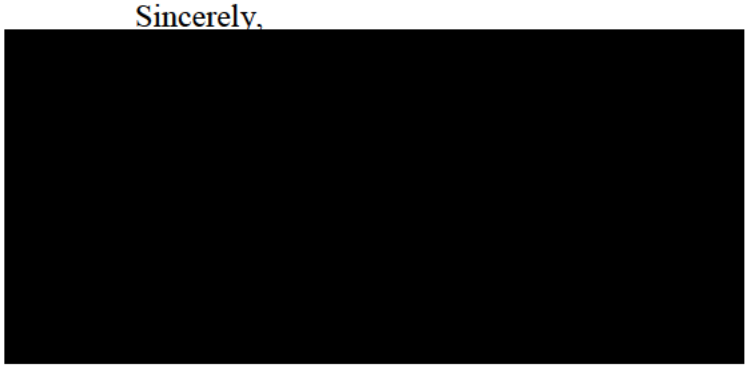
C.R.S. § 24-4-103(4)(b) sets out five different standards that must be satisfied prior to adoption of a new administrative rule. All of the standards must be met. None can be waived or ignored. As detailed in our prior correspondence, testimony on October 1, 2021, and in this letter—on this record, CDOT has not met each and every one of the applicable standards. As such, the Proposed Rules cannot be adopted in their current form as a matter of law.

The Proposed Rules, As Written, Would Not Survive Judicial Review.

C.R.S. § 24-4-106(7) sets out the standards a court must apply to administrative rules that are subjected to judicial review. The Proposed Rules, as written, cannot survive judicial scrutiny under C.R.S. § 24-4-106(7)(b).

As such, we respectfully submit that CDOT should either rewrite the Proposed Rules entirely (and in that process: (1) detail how the phrase "advertising device" will be applied in common circumstances, (2) create a written record showing how the rules will provide "effective control," and (3) detail how CDOT will determine that there is cause to investigate whether a sign is in violation of the rules, and what CDOT will thereafter do to investigate the matter and enforce the rules), or reduce the potential for legal conflict by repealing or modifying the Ramp Rule.

Sincerely,



COLORADO
Department of Transportation
Division of Project Support

2829 W. Howard Place
Denver, CO 80204-2305

Questions and Answers from Stakeholder Written Comments/Inquiries

CDOT Responses to Stakeholder Written Comments/Inquiries

The following discussion is intended to assist stakeholders who in good faith seek to better understand the new language within the rules. The following discussion should not be construed as a complete and final treatment of the topic and/or a complete position of CDOT as it applies to a specific factual scenario. CDOT reserves the right to clarify, modify, or expand upon these responses

Purpose and Intent

The purpose of the rules, 2 CCR 601-3 *et seq*., including these rules, is to carry out the provisions of the Outdoor Advertising Act, § 43-1-401, *et seq*., C.R.S., and the Highway Beautification Act of 1965, 23 U.S.C. 131, 23 C.F.R. 750.705(h) by establishing a statewide uniform program controlling the use of Advertising Devices in areas adjacent to the State Highway System. The intent of the rules, including these rules, is to protect and promote the health, safety, and welfare of the traveling public and the people of Colorado, and to promote the reasonable, orderly and effective display of outdoor advertising, while preserving and enhancing the natural and scenic beauty of Colorado.

Additional information on the purpose of the Outdoor Advertising Act can be found at § 43-1-402, C.R.S. The legislative intent behind SB21-263 can be found in the bill texts (https://leg.colorado.gov/bills/sb21-263) and in the legislative hearings on the bill.

The changes in the rules are to update the rules with the changes made to the Outdoor Advertising Act. The rules further update materials incorporated by reference and provide a section for declaratory orders.

Questions related to the terms "Advertising Device" and "Compensation":

1. **"When a payment of a fee is made to a local government (that is required) prior to erection of any sign/advertising device, will that be considered "compensation" by CDOT"?**

The payment of a permit fee required by either a relevant local government or CDOT is not considered "Compensation."

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Denver, CO 80204-2305

2. **"When a person or an entity pays a monetary sum to physically purchase a sign/advertising device to be erected, does that constitute an exchange of anything of value (compensation) for that signs existence"?**

CDOT's answer responds to the question to the extent the question is believed to ask about the actual act of the purchase of materials used in the erection of a sign or Advertising Device. No - the actual act of the purchase of materials used in the erection of a sign or Advertising Device is not considered "Compensation." The actual act of the purchase of materials is not regulated by CDOT."

3. **"When a sign/advertising device owner pays a monetary fee to have the sign/advertising device installed (responsible for the sign/advertising device's erection), does that create an advertising device under CDOT's regulatory authority?"**

CDOT's answer responds to the question to the extent the question is believed to ask about the cost of labor and materials used to erect a sign or Advertising Device structure. No - the cost of labor and materials used to erect a sign or Advertising Device structure are not considered "Compensation." The act of installation is not regulated by CDOT, though the sign structure must comply with other laws and rules (e.g., size).

4. **"Since memorandum of agreements must be legal (such as the ones issued for permit numbers 10685 and 10686 that have been operating for over 10 years under one) can [Mountain States Media, LLC] get CDOT to issue me one for the location [Mountain States Media, LLC] have in dispute with CDOT (I-25/highway 119 location)."**

This question is unrelated to the changes to the rules.

5. **"Whether a franchisee needs a CDOT permit for the display of its franchisor's signage along a state highway, where the franchisee pays compensation to the franchisor for the erection of such signage;"**

CDOT's answer responds to the question to the extent the question is believed to ask about the cost of labor and materials used to erect a sign or Advertising Device structure. No - the cost of labor and materials used to erect a sign or Advertising Device structure are not considered "Compensation." The act of installation is not

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2829 W. Howard Place
Denver, CO 80204-2305

regulated by CDOT, though the sign structure must comply with other laws and rules (e.g., size).

6. **"Whether a sign company that owns a client's sign and leases it to the client (as a financing mechanism) must obtain a CDOT permit as a result of the lease arrangement."**

This question suggests the sign is being used as a "financing mechanism", which indicates an exchange of value is being made for the sign. Therefore, in this question, the sign would be subject to CDOT's outdoor advertising permitting requirements, among other regulatory control.

7. **"Whether a commercial real estate broker needs a CDOT permit for the display of a sign on a client's property along a state highway, where the landowner pays compensation to the broker to market the property; []"**

This question suggests that with respect to the sign that compensation is not being paid or earned in exchange for the erection or existence of the sign, rather, earned as a result of the sale of the property. The sale of property is not regulated by CDOT.

8. **"If a property owner leases out their building/sign to another entity (landlord/tenant relationship) and part/all of the rent paid includes the use of a structure to advertise on, does that constitute the exchange of anything of value (compensation) thereby, creating an advertising device?"**

9. **"Whether a commercial landlord who charges tenants for placement on an existing sign would need a CDOT permit; []"**

10. **"Whether a commercial landlord who charges a tenant for the erection of a new sign on that tenant's behalf would need a CDOT permit."**

11. **Could "any retail or office tenant paying its lease to the owner of a building [] be considered as "indirectly paid" compensation for the display of the tenant's name or message on a wall sign or freestanding sign structure[?]"**

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2829 W. Howard Place
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In response to Questions 8 - 11 above, hypothetical sign sites and sign scenarios cannot be uniformly commented on by CDOT.

Because there are factual circumstances unique to a hypothetical sign site and sign scenario, this would be a case-by-case determination that CDOT cannot uniformly answer. Additionally, a hypothetical sign site and sign scenario may be impacted by relevant local government determinations.

The public should continue to operate on a presumption that if the exchange of anything of value is directly or indirectly paid or earned in exchange for the erection or existence of a sign designed, intended, or used to advertise or inform by any person or entity, that is considered "Compensation." In the event "Compensation" is paid or earned and other definitional elements are met, the sign would be considered an "Advertising Device" regulated by CDOT. In that event, a permit must be obtained. If "Compensation" is being exchanged, the applicant will need to apply for a CDOT permit. If there is any uncertainty as to whether a sign is an "Advertising Device" or not, the property owner or sign owner can access CDOT guidance online or submit a permit application to CDOT. During this transitional time, and to accommodate good faith questions there is no fee charged for processing a permit application.

Questions related to spacing:

12. **"Sign owners, businesses, governmental, civic, and religious organizations also need to know how CDOT will deal with spacing requirements as the number of signs subject to CDOT permit requirements mushrooms—that is, who will get to display (or continue to display) their signs and who will not, and who will get to build new signs and who will not."**

This question is unrelated to the changes to the rules. The rules do not contemplate changes to spacing rules.

Questions related to protecting the night sky:

13. **Can CDOT add language to the rules that would require shielding to protect the night sky?**

This question is unrelated to changes to the rules. The rules do not contemplate changes related to the topic of shielding the night sky.

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Department of Transportation
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2829 W. Howard Place
Denver, CO 80204-2305

Questions related to "Advertising Devices" on Scenic Byways:

14. Will signage for businesses be impacted along scenic byways?

Pursuant to § 43-1-419, C.R.S, no newly erected "Advertising Devices" will be permitted by CDOT along scenic byways. Only those signs for which "Compensation" is not being exchanged may remain in existence or be newly erected along scenic byways.

Questions related to Rule 12.00 Changeable Electronic Variable Message Sign ("CEVMS"):

15. What will become of CEVMS that were previously classified as "On-Premise" with respect to spacing and remote monitoring requirements?

The changes to the rules relating to CEVMS spacing (Rule 12.C.2.a) and remote monitoring (Rule 12.C.5(3)) apply only to "Advertising Devices". If "Compensation" is not being exchanged the sign is not considered an "Advertising Device" under the rules and, therefore, those CEVMS spacing and remote monitoring rules do not apply.

FAIRFIELD AND WOODS P.C.

[redacted]

September 30, 2021

Sent via E-Mail to dot_rules@state.co.us

Natalie Lutz, Rules Administrator
Colorado Department of Transportation
2829 West Howard Place
Denver, Colorado 80204-2305

Re: Comments on Proposed Permanent Rulemaking (2 CCR § 601-3)

Dear Ms. Lutz:

Thank you for the opportunity to provide comments on the proposed amendments to the Rules Governing Outdoor Advertising in Colorado (2 CCR § 601-3) ("PROPOSED RULES").[1] Our firm represents StreetMediaGroup, LLC and Turnpike Media, LLC, both of which are Colorado limited liability companies. On behalf of StreetMedia and Turnpike, we provided comments on SB21-263, on the proposed emergency rules, and on the Proposed Rules. Most of those comments have not been addressed, and they are incorporated by reference for inclusion on this record.

I. The Proposed Rules Neither Solve the Underlying Constitutional Problems Nor Provide "Effective Control."

SB21-263 and the Proposed Rules are intended to carry out the federal Highway Beautification Act ("HBA"). The HBA creates a penalty for states that do not provide "effective control" of outdoor advertising in certain areas.[2] That penalty is 10 percent of the amounts that would otherwise be apportioned to the state under 23 USC § 104. There is no evidence to suggest that SB21-263 and the Proposed Rules actually advance their other stated purposes of highway safety and aesthetics in any perceptible way.[3]

The HBA and its implementing rules (23 CFR § 750, subpart G) require the states to regulate signs based on their content. That is presumptively unconstitutional. Implementing the HBA by providing "effective controls" is a stated objective. It necessarily follows that the purpose of the Proposed Rules is content-based. As such, the Proposed Rules are presumptively unconstitutional. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 166 (2015) ("strict scrutiny applies either when

[1] The Colorado Department of Transportation ("CDOT") published four documents related to the rulemaking: (1) a redline of the Rules that shows the proposed changes ("REDLINE"); (2) a Notice of Proposed Rulemaking ("NOTICE"); (3) a Proposed Statement of Basis and Purpose and Statutory Authority ("STATEMENT"); and (4) Questions and Answers from Stakeholder Written Comments / Inquiries ("Q&A").

[2] 23 U.S.C. § 131(b)

[3] *See* Exhibits A and B. There are no studies in this record that suggest that "advertising devices" as defined by the Proposed Rules, pose any greater threat to public safety or aesthetics than signs that are not "advertising devices."

[redacted]

a law is content based on its face or when the purpose and justification for the law are content based . . . .").

StreetMedia and Turnpike respectfully submit that creating a constitutional regulatory framework to implement the HBA is, at best, profoundly difficult (and may be impossible). Rather than expending additional energy chasing an approach that will obviously not work, CDOT ought to create some breathing room and start over.[4]

II. CDOT Should Modify the Ramp Rule and Ask for Relief from the Secretary of Transportation.

The HBA provides in part, "Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of [the 10 percent funding penalty] to a State." StreetMedia and Turnpike submit that CDOT should ask the Secretary of Transportation for relief until it can develop and pass a constitutional regulatory system for signs in Colorado.[5]

In the meantime, CDOT should create some breathing room by modifying the Ramp Rule (a proposed amendment is provided in **Exhibit C**). As we have previously stated, modification of the Ramp Rule may alleviate some of the challenges CDOT will immediately face if it promulgates the Proposed Rules and tries to implement them.

By way of background for this record, in 2020, based on an extensive record and cogent analysis, CDOT noticed a hearing on modifications to 2 CCR § 601-3, including the changes to the Ramp Rule set out in Exhibit C. In CDOT's words:

> In light of developments in highway design principles, developments in outdoor advertising laws and regulations, and stakeholder feedback, the Department proposes to clarify the restriction against advertising devices being located within 500 feet of an interchange, intersection at-grade, or safety rest area adjacent to interstates and freeways in Rule 7.00(D)(2). This rule derives from a 1971 agreement between the Department and the United States Secretary of Transportation and sets forth the State's size, spacing and lighting criteria. The

[4] To provide "effective control," the state must also "[e]stablish enforcement procedures sufficient to discover illegally erected or maintained signs shortly after such occurrence and cause their prompt removal." 23 CFR 750.705(i). CDOT has not proposed enforcement procedures "sufficient to discover illegally erected or maintained signs." In fact, CDOT has refused to disclose *how* it will (as it said in its Q&A document from the July 19, 2021 workshop on the emergency rules amending 2 CCR § 601-3) "monitor interstates and highways to inventory signs that are permitted" (or not permitted); that is, what CDOT enforcement officials will be looking for in making that critical enforcement determination.

[5] CDOT could also ask a court for this relief.

> Department proposes a hybrid approach that advertising devices cannot be located adjacent to or within 500 feet of an interchange, intersection at grade, or safety Rest Area if the advertising device is located outside of an Urbanized Area and outside of the boundaries of an incorporated town or city. This hybrid approach contemplates changes in land use zoning and designations, such as unincorporated areas that are adjacent to or near the boundaries of incorporated towns or cities, by using the defined terms of "Urbanized Area". This change is consistent with the Highway Beautification Act's intent to preserve natural and scenic beauty. It also supports the consistent enforcement effort of advertising devices in control areas near interstates and freeway and promotes the reasonable, orderly and effective display of outdoor advertising while preserving and enhancing the natural and scenic beauty of Colorado. * * *[6]

As CDOT said, a change to the Ramp Rule would improve CDOT's performance with regard to "effective controls" under the HBA. It is notable that in order to provide "effective control," 23 CFR 750.705 requires the State to "remove illegal signs expeditiously." Examples of illegal signs that CDOT has never taken meaningful action against include, but are not limited to, permits numbered 8584, 10291, 10321, 10595, 10594, 10582, 10623, 10614/9754, 09690, 09786, 09826, 10581, 10580, 10643, 10686, 10685, 10852, and 10626. The changes to the Ramp Rule that CDOT considered back in 2020 would make many of these signs "legal." Otherwise, for so long as these signs remain standing, CDOT has not maintained, and is not maintaining, "effective control."

The proposed modification of the Ramp Rule will make a large number of currently illegal signs legal, while only opening up a handful of new locations near ramps for signs that require Roadside Advertising Permits.

III. The Proposed Rules, As Written, Create More Problems Than They Solve, and Will Invite Litigation.

StreetMedia and Turnpike submit that, as written, the Proposed Rules are: (1) contrary to constitutional right; (2) in excess of statutory jurisdiction, authority, purposes, or limitations; and (3) a clearly unwarranted exercise of discretion. Consequently, if promulgated as-is, they invite litigation under the authority of C.R.S. § 24-4-106.

With regard to constitutional rights, the Proposed Rules perpetuate irreparable injuries by chilling speech based on its content. Moreover, the Proposed Rules do not advance a legitimate governmental purpose, and they are in direct conflict with the State's intent with regard to

[6] Colorado Department of Transportation. STATEMENT OF BASIS, AUTHORITY, AND PURPOSE (regarding proposed permanent amendments to 2 CCR § 601-3 (Sept. 16, 2020), at 2 (emphasis added).

rulemaking as expressed in C.R.S. 24-4-101.5. The constitutional issues are well-known to CDOT and are outlined in Section I of these comments.

The Proposed Rules are also in excess of statutory jurisdiction because:

1. The Ramp Rule (2 CCR § 601-3:7.00.D.) is not authorized by Part 4 of Title 43, Colorado Revised Statutes (the Outdoor Advertising Act), which was recently amended by the legislature, and C.R.S. § 43-1-415(4) specifically states, "The rules of the department must not impose any additional requirements or more strict requirements than those imposed by this part 4"; and
2. C.R.S. § 24-4-103(4)(b) limits the authority of CDOT to promulgate rules as follows:

   No rule shall be adopted unless:

   (I) The record of the rule-making proceeding demonstrates the need for the regulation;

   (II) The proper statutory authority exists for the regulation;

   (III) To the extent practicable, the regulation is clearly and simply stated so that its meaning will be understood by any party required to comply with the regulation; [and]

   (IV) The regulation does not conflict with other provisions of law . . . .

The Proposed Rules cannot satisfy the requirement of C.R.S. § 24-4-103(4)(b)(I) because there is no record evidence that they are actually needed. As far as we are aware, the record of this rulemaking contains: (1) no evidence that the Proposed Rules will provide "effective control" over outdoor advertising as defined and required by the HBA, as there is no analysis that shows a link between the Proposed Rules and each of the required elements of "effective control"[7]; (2) no evidence that the Proposed Rules will actually advance highway safety by requiring permits for signs that the Proposed Rules define as "advertising devices," but not for other signs (this Letter provides record evidence that the Proposed Rules have nothing to do with highway safety); and (3) no evidence that the Proposed Rules will actually advance public aesthetic interests by requiring permits for signs that the Proposed Rules define as "advertising devices," but not for other signs (this Letter provides record evidence that the Proposed Rules have essentially no impact on aesthetics).

The Proposed Rules cannot satisfy the requirement of C.R.S. § 24-4-103(4)(b)(II) because, as described above, they exceed statutory authority by, among other things, not repealing (and by implication, including and affirming) the Ramp Rule.

[7] StreetMedia and Turnpike submit that CDOT is in a tough situation because "effective control" under the HBA is a presumptively unconstitutional standard anyway, as the HBA mandates that states regulate signs based on their content.

The Proposed Rules cannot satisfy the requirement of C.R.S. § 24-4-103(4)(b)(III) because even Jared Esquibel admits that the definition of "advertising device" is (in his words) "vague," and CDOT will not clarify how the definition of "advertising device" will be applied.[8] This is critical because the determination of whether 2 CCR § 601-3's permit requirements, substantive standards, and enforcement procedures will be applied turns on whether the particular sign at issue is or is not an "advertising device."

The Proposed Rules cannot satisfy the requirement of C.R.S. § 24-4-103(4)(b)(IV) because they conflict with C.R.S. § 43-1-415(4) (by not repealing the Ramp Rule) and they do not provide "effective control" as required by the HBA and C.R.S. § 43-1-402(1)(b).

Consequently, on this record, the Proposed Rules cannot be adopted as written as a matter of law.

Finally, the Proposed Rules are a "clearly unwarranted exercise of discretion" in that they vest virtually limitless discretion in the enforcement official to demand the books and records of a sign owner, just because (based upon standards CDOT will not disclose) the enforcement officer suspects the owner exchanged compensation for the erection or existence of the sign.

IV. The Proposed Rules Are Counter to Colorado's Stated Legislative Directions.

C.R.S. 24-4-101.5 sets out the "legislative declaration" with regard to rulemaking. It begins, "[A]n agency should not regulate or restrict the freedom of any person to conduct his or her affairs, use his or her property, or deal with others on mutually agreeable terms unless it finds, after a full consideration of the effects of the agency action, that the action would benefit the public interest and encourage the benefits of a free enterprise system for the citizens of this state."

There is no evidence on this rulemaking record that the Proposed Rules will benefit the public interest. The evidence is to the contrary—

- According to public records, CDOT's 2021 inventory of Roadside Advertising Permits consists of 1,664 permits. According to the U.S. Department of Transportation Bureau of Transportation Statistics, there were 88,975 miles of public road in Colorado. CDOT does not know how many signs there are along Colorado's public roads and there is no record evidence that it has even made a cursory attempt to find out.
- It is obvious that the 1,664 signs that have Roadside Advertising Permits constitute less than a "drop in the bucket" in terms of the impact of signs on Colorado's public roads (see **Exhibit B**). CDOT does not know how the Proposed Rules will impact the number of

[8] See Q&A, responses to questions 8 through 11, in which CDOT did not clarify whether, for example: (1) a commercial landlord that specifically includes sign usage as part of the rent charged in a lease is subject to permitting requirements; (2) whether a commercial landlord who charges a premium for sign usage is subject to permitting requirements; (3) whether a commercial landlord who charges a tenant for the erection of a new sign for the tenant is subject to permitting requirements.

Roadside Advertising Permits in Colorado. However, assuming that CDOT does not anticipate that the number of Roadside Advertising Permits will increase *geometrically* under the Proposed Rules, the actual "health and safety" benefits of the program to the public will not be perceptible.

The Proposed Rules undermine the free enterprise system in a number of ways—

- Based on public statements by CDOT, it appears that CDOT will only enforce the Proposed Rules against signs that display what was formerly known as "off-premise" content. Four companies (Lamar Outdoor Advertising Company, Outfront Media, Mile High Outdoor Advertising, and Elevation Outdoor Advertising) collectively control 55.4 percent of Colorado's Roadside Advertising Permits.
- Under the Proposed Rules, those four companies will continue to enjoy market hegemony. The Proposed Rules will not limit the overall number of signs in Colorado, but will continue to chill the speech of sign owners with regard to the display of certain content. Indeed, those who would dare display messages that may trigger a complaint by one of the four outdoor advertising companies listed above will risk invasive investigation by CDOT.

The legislative declaration continues, "[M]any government programs may be adopted without stating the direct and indirect costs to consumers and businesses and without consideration of such costs in relation to the benefits to be derived from the programs. . . . [A]gency action taken without evaluation of its economic impact may have unintended effects, which may include barriers to competition, reduced economic efficiency, reduced consumer choice, increased producer and consumer costs, and restrictions on employment."

- There is no evidence that CDOT has actually considered the impacts of the Proposed Rules on consumers and businesses.
- The Proposed Rules create barriers to competition in the outdoor advertising market, reducing economic efficiency.
- The barriers to competition reduce consumer choice in terms of those consumers who would choose to speak using a billboard, and those consumers who would be educated by messages (commercial and non-commercial) on billboards.
- The barriers to competition increase costs by reducing competition, and therefore stifle economic growth (not to mention public discourse on noncommercial issues).

The legislative declaration concludes, "[A]gency rules can negatively impact the state's business climate by impeding the ability of local businesses to compete with out-of-state businesses, by discouraging new or existing businesses from moving to this state, and by hindering economic competitiveness and job creation. Accordingly, it is the continuing responsibility of agencies to analyze the economic impact of agency actions and reevaluate the economic impact of continuing agency actions to determine whether the actions promote the public interest."

- Though the definitions in SB21-263 and the Proposed Rules with regard to what is an "advertising device" and what is not lack clarity, CDOT has repeatedly asserted that the Proposed Rules are intended to regulate outdoor advertising companies.
- As such, the Proposed Rules serve only to restrict competition against two giant national and international media companies[9] and two Colorado companies that are related to each other[10] at the expense of Colorado's small business community and their small business clients.
- The Proposed Rules do not limit the number of signs in Colorado. They simply prohibit certain speech on signs, under the cover of whether "compensation" was exchanged for the erection or existence of the sign.
- The only interests that the Proposed Rules advance are those of giant national and international companies and large statewide companies that seek to stifle the speech of Colorado's small outdoor advertising companies so that they do not interfere with their own hegemony—in terms of both the "marketplace of ideas" that is protected by the First Amendment and the marketplace for customers who want to display those ideas that is protected by Colorado law and public policy.

We urge CDOT to pause to consider the consequences of the Proposed Rules (whether those consequences are intended or not), to adopt changes to the Ramp Rule that are set out in **Exhibit C**, and to start over in its attempts to implement the HBA.

Sincerely,
Fairfield and Woods, P.C.

[redacted]

[9] Together, these companies hold 46.6 percent of all current Roadside Advertising Permits in Colorado

[10] Together, these companies hold 8.8 percent of all current Roadside Advertising Permits in Colorado.

EXHIBIT A

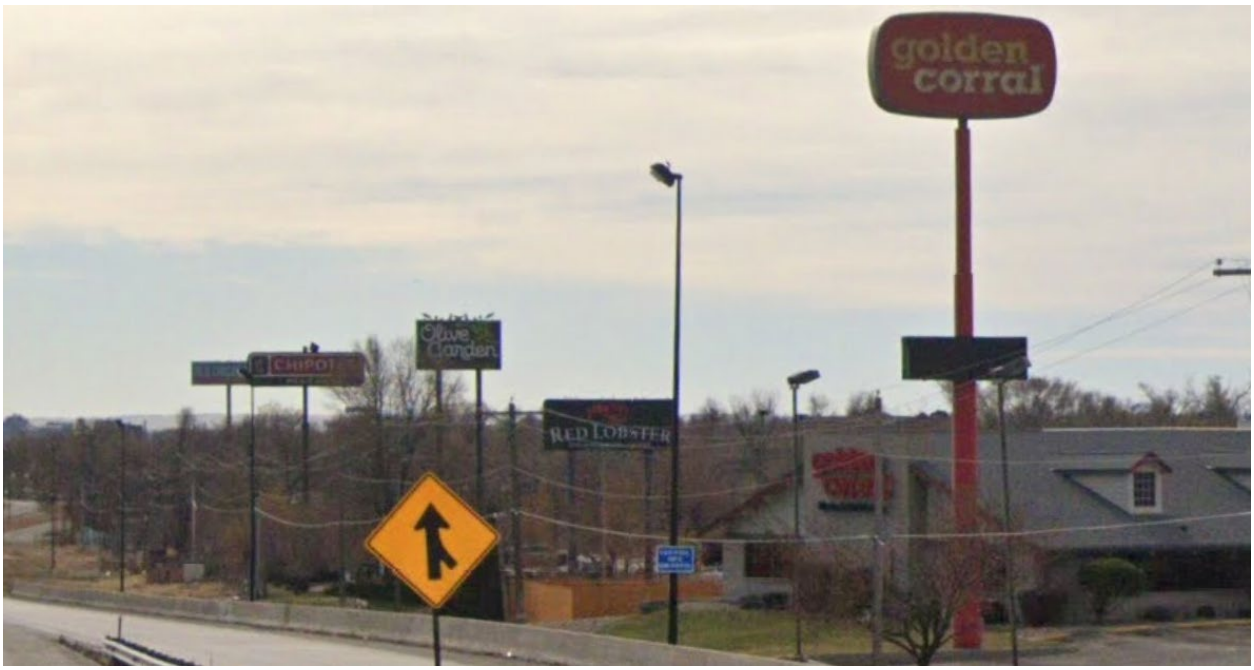
CDOT posts traffic safety messages on its own signs within Interstate rights-of-way, and on privately-owned billboards next to those right-of-way. This message, advising motorists not to drink and drive, is posted on an Outfront Media billboard at Wheatridge Industrial Park (the South side of I-70 at the Wadsworth interchange).

Under 2 CCR 601-3:7.00.D.2.b., if this billboard were outside of an "incorporated village or city," it would not be allowed. It is not serious to suggest that the safety impacts of billboards is affected by whether they are located in a city or not. City boundaries are not physically perceptible in their own right. CDOT understands this, and its regular use of signs to convey messages to motorists that are unrelated to traffic control or wayfinding (e.g., safety, job fairs, etc.) underscores the fact that neither the existing rules nor the Proposed Rules actually serve to advance highway safety.

Billboard Sign at Wheatridge Industrial Park displaying CDOT logo and CDOT-sponsored message

Location of Outfront Sign in Wheatridge Industrial Park.

I-25 at Exit 101, Pueblo, is another example of the Ramp Rule does not make any sense. There are at least six large pole signs at this location. Based on CDOT representations, it does not appear that any of them would be subject to the Proposed Rules.



Source: https://goo.gl/maps/88cxpbauUWeHLEGs9

EXHIBIT B

In 2021, there were 1,664 Roadside Advertising Permits in CDOT's inventory. That is a miniscule number of signs compared to the total number of signs along the approximately 9,100 centerline miles of state highways that traverse the State of Colorado. As StreetMedia and Turnpike understand it, CDOT has no plans to study, or to estimate, how many signs there are within its jurisdiction under the Outdoor Advertising Act.

To illustrate the imperceptible impact of the CDOT permitting program, *on just one property*, 5200 to 5270 Broadway, Denver, there are at least 20 signs that are visible from Interstate 25 (the Krav Maga wall sign on the south end of the building is cropped). Only one of them has a Roadside Advertising Permit. The density of signs on the 5200 to 5270 Broadway property is quite typical. Given the size of the State and the number of miles of state highways, it is not unreasonable to suggest that the number of signs could be in the tens of thousands to well over one hundred thousand on any given day.

Source: https://goo.gl/maps/CLntvV9J4vYgBzxM9

EXHIBIT C

Proposed changes to the Ramp Rule (set out in redline format):

1.31 "Urban Area" and "Urbanized Area" ~~"Urban Area" pursuant to 23 U.S.C. 101 (33) means an urbanized area designated by the Bureau of the Census having a population of 5,000 or more and not within any urbanized area (as defined by 23 U.S.C. 101 (34)), within boundaries to be fixed by responsible State and local officials.~~

A. "Urban Area" means an urbanized area or, in the case of an urbanized area encompassing more than one state, that part of the urbanized area in each state, or urban place as designated by the U.S. Bureau of the Census having a population of 5,000 or more and not within any urbanized area, within boundaries to be fixed by responsible state and local officials in cooperation with each other, subject to approval by the U.S. Secretary of Transportation. Such boundaries shall encompass, at a minimum, the entire urban place designated by the U.S. Bureau of the Census.

B. "Urbanized Area" means an area with a population of 50,000 or more designated by the U.S. Bureau of the Census, within boundaries to be fixed by responsible state and local officials in cooperation with each other, subject to approval by the U.S. Secretary of Transportation. Such boundaries shall encompass, at a minimum, the entire urbanized area within a state as designated by the U.S. Bureau of the Census. Urbanized Area designations may be viewed on the TIGERweb Decennial map provided on the U.S. Census Bureau's website at https://tigerweb.geo.census.gov/.

* * *

D. Spacing of Signs

1. Advertising Devices on Control Routes may not be located in such a manner as to obscure, or otherwise physically interfere with the effectiveness of any official traffic sign, signal, or device, obstruct or physically interfere with the driver's view of approaching, merging or intersecting traffic.

2. In the Control Area near Interstates ~~Highways~~ and Freeways:

a. No two Signs shall be spaced less than 500 feet apart.

b. ~~Outside of incorporated villages and cities, no~~ Advertising Devices may shall not be located adjacent to or within 500 feet of an interchange, intersection at grade, or safety Rest Area if the Advertising Device is located outside of an Urbanized Area and outside of the boundaries of an incorporated town or city. The 500 feet is to be measured along the

Interstate or Freeway from the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way.

i. This spacing limitation applies where the proposed location of the Sign is located outside of an Urbanized Area and outside of the boundaries of an incorporated town or city regardless of the location of the interchange, intersection at grade, or safety Rest Area.

ii. The limits of an interchange, intersection at grade, or safety Rest Area span from the beginning of pavement widening for an exit lane or ramp and continues through the interchange, intersection at grade, or safety Rest Area, to the point where pavement widening ends for an entrance lane or ramp.

iii. The 500-foot measurement is to be measured parallel to the highway. This prohibition applies to the entire 660-foot Control Area adjacent to the interchange, intersection at grade, or safety Rest Area along with the 500-foot measurement adjacent thereto.

iv. "Pavement widening" includes exit and entrance lanes and ramps, auxiliary lanes, and other lanes which terminate while allowing traffic to weave on or off the main-travelled way.

v. For those locations where a continuous auxiliary lane extends from the entrance ramp/lane of one interchange/intersection at grade/safety Rest Area and connects to the exit ramp/lane of another interchange/intersection at grade/safety Rest Area, such that there is no clear "beginning or ending of pavement widening at the exit from or entrance to the main-traveled way," this rule prohibits signs located within 2,250 feet from the physical gore of entrance ramps/lanes and within 1,600 feet from the physical gore of exit ramps/lanes.

3. All other Controlled Routes except Interstate and Freeways

a. Outside of Urbanized Areas and incorporated townsvillages and cities, no two structures Signs shall be spaced less than 300 feet apart.

b. Within Urbanized Areas and incorporated townsvillages and cities, no two structures Signs shall be spaced less than 100 feet apart.

* * *

FAIRFIELD AND WOODS P.C.

[redacted]

August 18, 2021

Sent via E-Mail

Natalie Lutz
Rules, Policies, and Procedures Administrator
Colorado Department of Transporation
2829 West Howard Place
Denver, Colorado 80204

Re: Comments on Proposed Permanent Rulemaking - 2 CCR § 601-3

Dear Ms. Lutz:

Thank you for the opportunity to provide comments on the proposed permanent rulemaking with regard to 2 CCR § 601-3. The proposed permanent rulemaking is in response to a new law, SB21-263, that potentially affects all signs along Colorado's extensive state highways. As the Colorado Department of Transportation ("CDOT") puts it, "Under the old law, to determine whether a sign needed a permit, CDOT arguably had to review the words and pictures of the sign to figure out the type of sign it was." According to CDOT, "under the new law only signs visible from the roadway that generate compensation require a CDOT permit."

Specifically, CDOT will require permits for *all signs* (not just pole signs, monument signs, or billboard signs) that are "advertising devices" as defined in SB21-263, and will not require permits for signs that are not "advertising devices." Simply obtaining a permit is not necessarily an easy solution for many sign owners (or would-be sign owners) because permits will not be issued for advertising devices in certain locations (including but not limited to locations within 500 feet of other signs, or within 500 feet of highway intersections that are not in municipalities),[1] or for advertising devices that have more than two panels facing in the same direction (as most shopping center signs have).[2]

Under the new law and the proposed regulations, "advertising device" is defined as:

> any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other contrivance designed, intended, or used to advertise

[1] *See* 2 CCR § 601-3:7.00.D.2.

[2] *See* C.R.S. § 43-1-411(1)(d).

[redacted]

> or inform, for which compensation[3] is directly or indirectly paid or earned in exchange for its erection or existence by any person or entity, and having the capacity of being visible from the travel way of any state highway, except any advertising device on a vehicle using the highway or any advertising device that is part of a comprehensive development.[4] The term "vehicle using the highway" does not include any vehicle parked near said highway for advertising purposes.[5]

Based on the plain language of the new law, it would appear that CDOT is expanding its reach to *all signs* along Colorado's highway corridors—imposing new annual permit requirements and onerous investigation and enforcement mechanisms on property owners and businesses that have never previously had to deal with CDOT at all, or at least not in this capacity.[6] In short, CDOT and its Colorado Outdoor Advertising Association ("COAA") lobbying partners (more on this *infra*, at page 6) took a constitutionally infirm outdoor advertising law and made it *much worse*.

The comments in this letter are respectfully submitted on behalf of our clients, StreetMediaGroup, LLC ("STREETMEDIA") and Turnpike Media, LLC ("TURNPIKE").[7,8] StreetMedia and Turnpike submit that SB21-263 (like its predecessor) is unconstitutional. CDOT is proposing permanent rules that do not remedy that situation. SB21-263 and the proposed rules put sign owners up and

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[3] "Compensation" is defined as "the exchange of anything of value, including money, securities, real property interests, personal property interests, goods or services, promise of future development, exchange of favor, or forbearance of debt." C.R.S. 43-1-403(1.3), after enactment of SB21-263 on June 30, 2021.

[4] "Comprehensive Development" is defined as "a group of two or more lots or parcels of land used primarily for multiple separate commercial or industrial activities that: (I) Is located entirely on one side of a highway; (II) Consists of lots or parcels that are contiguous except for public or private roadways or driveways that provide access to the development; (III) Has been approved by the relevant local government as a development with a common identity and plan for public and private improvements; (IV) Has common areas such as parking, amenities, and landscaping; and (V) Has an approved plan of common ownership in which the owners have recorded irrevocable rights to use common areas and that provides for the management and maintenance of common areas." A "'Comprehensive development' includes all land used or to be used or occupied for the activities of the development, including buildings, parking, storage and service areas, streets, driveways, and reasonably necessary landscaped areas. A comprehensive development includes only land that is used for a purpose reasonably related to the activities of the development." C.R.S. 43-1-401(1.5), after enactment of SB21-263 on June 30, 2021.

[5] C.R.S. 43-1-401(1), after enactment of SB21-263 on June 30, 2021.

[6] For example, enforcement may include forfeiture of the sign. *See* C.R.S. § 43-1-412(1).

[7] StreetMedia is an outdoor advertising company that displays commercial and noncommercial content on signs, sometimes for compensation and sometimes without charge. StreetMedia is also a licensed contractor that erects signs on its own behalf and on behalf of others (for compensation). Turnpike Media is an outdoor advertising company that displays commercial and noncommercial content on signs, sometimes for compensation and sometimes without charge.

[8] Our comments regarding SB21-263 are of record and apply with equal force to the proposed rulemaking. In addition, we stand by our statements, comments, and outstanding questions presented at the rulemaking workshop on July 19, 2021, as well as our prior written comments on the emergency rules, submitted by letter dated July 23, 2021.

down thousands of miles of Colorado's interstate and state highways at risk of invasive enforcement tactics (including thorough examinations of their books and records) if CDOT does not like what they say on their signs.

The "Compensation-Based Approach" Puts Unfettered Discretion in the CDOT Enforcement Official.

CDOT announced publicly that "[t]he new compensation-based approach makes it easier for landowners and sign owners to understand whether they need a CDOT permit."[9] But in recent sworn testimony, Jared Esquibel (a high-ranking CDOT employee who oversees the outdoor advertising program)[10] ("ESQUIBEL") could not explain "what it means to have compensation directly or indirectly paid or earned in exchange for its erection or existence by any person or entity."[11] During his deposition, Esquibel was asked, "Do you think it requires expertise to find out whether the sign is an advertising device under the statute?" He answered, "Yes."[12] Then he essentially admitted that even he—the person who oversees the Outdoor Advertising Program—does not have that expertise.

In his sworn deposition, Esquibel concluded that the definition of "advertising device" is "vague." That should be scary to both CDOT and the general public because the determination of whether any given sign is an "advertising device" (and therefore subject to CDOT standards, permit requirements, and enforcement procedures) is delegated to low-level CDOT enforcement officials who are apparently not carefully supervised. Since no one (including the person who oversees the Outdoor Advertising Program) knows what the definition of "advertising device" actually includes, SB21-263 and the proposed changes to 2 CCR § 601-3 give unfettered discretion to CDOT employees to harass and prosecute people for exercising their First Amendment rights.

Indeed, under the proposed 2 CCR § 601-3:3.2.A.1.b., a sign owner who CDOT accuses of violating the proposed rules may be forced to choose between the harsh (and in many cases, terribly expensive) penalty of removing its sign or taking a big risk and executing "an affidavit under penalty of perjury as evidence that the device is not an advertising device" (and then potentially facing a *perjury charge* if CDOT sees things differently).[13] Remarkably often, just applying for a CDOT permit will not be an available option. Indeed, a huge number of signs along Colorado's

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[9] CDOT. "Adoption of Emergency Rules Governing Outdoor Advertising in Colorado" (distributed by CDOT on June 22, 2021) at 2.

[10] Deposition of Jerad Esquibel, CDOT's Director of Project Support ("ESQUIBEL DEPO."), *StreetMedia et al. v. Stockinger*, D. Colo. Case No. 20-cv-3602-RBJ, July 13, 2021, at 78:23-25, 79:1.

[11] *Id*. at 73:10-16

[12] *Id*. at 75:4-7

[13] *See also* C.R.S. § 43-1-412(2)(a), after enactment of SB21-263 on June 30, 2021.

state highways will not comply with the spacing standards and design limitations (*e.g.*, not more than two panels per side) set out in SB21-263 and the proposed rules.

"The Best of Intentions, But Bad Judgment . . . ." [14]

In its notice of adoption of emergency rules, CDOT stated, "Under the old state law, to determine whether a sign needed a permit, CDOT arguably had to review the words and pictures of the sign to figure out the type of device it was." It then admitted that this could result in a "violation of free speech." CDOT continues, "Now, under the new state law only advertising devices visible from the roadway that generate compensation require a CDOT permit."[15]

Time and again, CDOT has proclaimed that SB21-263 and the proposed new regulations apply to signs that generate compensation to their owners. According to CDOT representatives, such signs require CDOT permits because they are "advertising devices." But the law does not say that an "advertising device" means a sign that generates compensation for its owner for the display of messages.[16] When pressed, Esquibel admitted that under oath.[17] Consequently, CDOT's public proclamations in this regard create far more confusion than clarity.

CDOT's refuses to institutionally acknowledge that the plain language of a law that it pushed through the legislature does not actually say what CDOT publicly claims it says, despite Esquibel's remarkably candid and cogent admission in the regard (see the second bullet point on the next page for details).

Notably, through the end of January of this year, CDOT strenuously argued to an administrative law judge that 2 CCR § 601-3 must be applied according to its "plain language."[18] CDOT even

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[14] This quote is attributed to a CDOT employee who admitted that he lied to tech companies about road closures on state highways. According to multiple recent reports based on Colorado Open Records Act requests, CDOT employees lied to the tech companies so that roads that were actually open would show up in GPS applications as closed. According to reports, CDOT employees did not want to come clean because they were concerned that telling the truth would "damage the agency's reputation," such that tech companies would not trust CDOT anymore. The bottom line, according to one of those responsible, was that the employees had "the best of intentions, but bad judgment." *See* https://www.thedenverchannel.com/news/local-news/did-cdot-lie-internal-cdot-emails-show-why-employees-decided-to-misinform-drivers.

[15] Department of Transportation Executive Director, Rules Governing Outdoor Advertising in Colorado 2 CCR 601-3. Notice of Adoption of Emergency Rules, Effective August 4, 2021 ("EMERGENCY RULE NOTICE") at 2.

[16] The full definition from the statute (and related definitions) is set out on pages 1 and 2 of this letter. It includes no language about payments for the display of messages.

[17] Esquibel Depo. at 99:8-12.

[18] *See* Response to Motion for Summary Judgment ("ADMINISTRATIVE CASE MSJ RESPONSE"), *Street Media Group, LLC v. Department of Transportation, State of Colorado*, Office of Administrative Courts Case No. HW-2019-1 through 4, at 8 (arguing, "a plain language application of the Interchange Rule precludes issuance of a permit."); Reporter's Transcript Remote Hearing Day 1 (January 25, 2021), *Street Media Group, LLC v. Department of*

suggested that such application was necessary because the agency has a history of interpreting and applying its laws in ways that do not comport with how they are written, creating uneven results.[19] Now, CDOT declares on multiple fronts that the plain language of the law does not mean what it says, and CDOT will apply and enforce its own construct—a construct that is unrelated to the actual text. By way of example and not limitation—

- Anthony Lovato, who is CDOT's "subject matter expert" as to the outdoor advertising program ("LOVATO"), stated at the recent rulemaking workshop that signs that exist because compensation was paid to a contractor to erect them, are exempt from the law—even though those signs are, in fact, "advertising devices" under the plain language of SB21-263 (which is incorporated into the proposed rules by reference).

- Similarly, Esquibel said in his sworn deposition that he did not interpret CDOT's new compensation model to require a permit for "the fabrication of a sign or the construction (sic) erection of the sign."[20] Instead, he said, "I interpret it on a first read as compensation for the actual message on the sign."[21] When asked whether the law said that, he responded, "no."[22] When pressed further, he confessed, "I would say this definition is vague."[23]

- Less than a month after Esquibel's deposition, and even though he admitted that the law did not actually say that a sign is an "advertising device" (subject to CDOT permitting requirements) if compensation was exchanged for displaying messages, CDOT adopted emergency rules and announced, "Now, under the new state law only advertising devices visible from the roadway that generate compensation require a CDOT permit."[24]

In sum, the proposed amendments to 2 CCR § 601-3 double-down on an unconstitutional approach that will ultimately hurt every sign owner and sign user along tens of thousands of miles of state and interstate highways in Colorado.

Transportation, State of Colorado, Office of Administrative Courts Case No. HW-2019-1 through 4 ("DAY 1 TRANSCRIPT"), at 43:4-5 ("CDOT staff firmly believe they're applying the plain language of the rule."); 224:7-10 ("Q. . . . is CDOT trying to apply the plain language in the rules in this instance? A. Yes, I believe so.")

[19] Administrative Case MSJ Response at 18 ("Current Department staff recognize that the Outdoor Advertising Program may have acted inconsistently in the past. This is unfortunate."). Examples of illegal signs that CDOT has never taken meaningful action against include, but are not limited to, permits numbered 8584, 10291, 10321, 10595, 10594, 10582, 10623, 10614/9754, 09690, 09786, 09826, 10581, 10580, 10643, 10686, 10685, 10852, and 10626.

[20] Esquibel Depo. at 97:22-23.

[21] *Id*. at 97:23-25.

[22] *Id*. at 98:1-3.

[23] *Id*. at 99:21.

[24] Emergency Rule Notice at 2.

The Company CDOT Keeps Matters.

CDOT's about-face on the issue of interpreting its rules according to their "plain language" is troubling, particularly given the larger context of this rulemaking process. Public records show that CDOT and its lobbying partner, the COAA, worked in close coordination to rush SB21-263 through the Colorado legislature.[25] CDOT's legislative liaison, Andrew Karsian, sold the COAA-endorsed bill to one of its ultimate sponsors, Senator Smallwood, as follows:

> The bill we would like to introduce is in partnership with the outdoor advertising industry [COAA] and will simplify the existing regulations we have, and it will protect the regulations needed to ensure bad actors do not install billboards that will be out of compliance with federal and state law.[26]

For context, according to CDOT's 2021 roadside advertising permit list, the three largest members of COAA (Lamar, Outfront, and Mile High), collectively hold well over half of the CDOT-issued outdoor advertising permits. Not less than 18 of those permits are for long-standing illegal signs. CDOT confessed to the administrative law judge that it is "wary" of reviewing or revoking the wrongfully issued permits for those illegal signs, but declined to offer any details as to why.[27] The company that CDOT keeps matters. CDOT should not ignore the optics. Its credibility is at stake.

SB21-263 and the proposed rules chill free speech—not by limiting the total number of signs along highways, but instead by preventing sign owners from using their signs in the way that COAA's members do (that is, for what was historically called "off-premises" advertising). This is a big deal because agency rules are not supposed to chill free speech (under the First Amendment) or stifle free markets (under C.R.S. § 24-4-101.5).

The Colorado Administrative Procedures Act provides:

> The general assembly finds that an agency should not regulate or restrict the freedom of any person to conduct his or her affairs, use his or her property, or deal with others on mutually agreeable terms unless it finds, after a full consideration of

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[25] The bill was introduced on May 5, 2021, passed through both houses of the legislature on June 11, 2021, and was signed into law on June 30, 2021. *See* https://leg.colorado.gov/bills/sb21-263. Correspondence showing the partnership between CDOT and COAA includes, among other things, an email from Andrew Karsian (CDOT's legislative liaison) to Representatives Bird and Van Winkle, cc to [redacted] (lobbyist for COAA), dated May 19, 2021 at 2:12 PM that touts the coordination between CDOT and COAA.

[26] Email from Andrew Karsian to Senator Smallwood, cc to [redacted] [lobbyist for COAA], dated March 30, 2021 at 10:39 AM.

[27] Administrative Case MSJ Response at 20. ("CDOT has historically been wary of attempting to revoke permits for signs which should not have been granted. For a variety of reasons – including legal reasons – the Department continues to be wary of doing so.")

> the effects of the agency action, that the action would benefit the public interest and encourage the benefits of a free enterprise system for the citizens of this state.[28]

Under the Proposed Regulations, CDOT Will Still Be "Looking at the Content," Chilling Speech, and Violating Constitutional Rights.

In the "Questions and Answers form the Stakeholder Workshop" document ("Q&A") related to the proposed permanent rules, CDOT claims, without support, that "CDOT will not be looking at the content of a sign in order to determine whether a CDOT permit is required, rather, CDOT will only regulate those signs for which Compensation is paid or earned in exchange for its erection or existence."[29] Since CDOT cannot look at the physical structure of a sign and determine whether "compensation is paid or earned in exchange for its erection or existence,"[30] CDOT enforcement officials will still be "looking at the content" of signs as they "monitor[] interstates and highways to inventory signs that are permitted."[31]

CDOT says that "Within the course of this monitoring, if CDOT comes upon a sign that is not permitted, CDOT will make contact with the property owner to determine if their sign is an Advertising Device."[32] Yet CDOT specifically will not answer the question of how it will conduct its monitoring and make the determination as to whether it believes a sign is subject to permitting requirements, nor will it give the public any idea what types of transactions implicate the "compensation model," turning a run-of-the-mill sign into a regulated "advertising device" for which a CDOT permit is required. Instead, it just amplifies the confusion by doubling-down on language that is unrelated to its other representations—

> Hypothetical sign sites or scenarios cannot be uniformly commented on by CDOT. The public should operate on a presumption that if the exchange of anything of value is directly or indirectly paid or earned in exchange for the erection or existence of a sign designed, intended, or used to advertise or inform by any person or entity, that is considered Compensation. In the event Compensation is paid or earned, the sign is considered an Advertising Device regulated by CDOT.[33]

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[28] C.R.S. § 24-4-101.5

[29] Q&A at 2.

[30] *See* Esquibel Depo. at 130:7-10.

[31] Q&A at 2.

[32] *Id*.

[33] Q&A at 1.

CDOT does not want to admit that the threshold enforcement question will arise only when a CDOT employee reads a sign[34] or a third party complains about a sign.[35] Yet ultimately CDOT will find that there is no other way to implement this law. CDOT does not have a statutory mandate to require all sign owners to periodically submit their books and records to CDOT for examination, and such a requirement, if enacted, would also be unconstitutional in its own right.

CDOT Still Needs to Answer the Fundamental Questions.

StreetMedia and Turnpike are not the only companies that are nervous about CDOT's lack of candor during this rulemaking process. A representative of Jeannie Gafford Signs (who is not a Fairfield and Woods client) pleaded with CDOT, "We have permitted signs and would like [to know] in plain English how this is going to effect (sic) our Company."[36] StreetMedia and Turnpike echo that sentiment. In fact, the "plain English" approach is required by the Colorado Administrative Procedures Act.

CDOT should also be troubled by the predicament that SB21-263 creates. CDOT's employees do not seem to know what the law is intended to do, or how the law will actually be administered and enforced. As to the latter point, Esquibel offered up some candor in his sworn testimony:

> Q: How would CDOT consistently enforce this 21-263 along 22,000 miles of highway corridor?
>
> A: I don't know.

To date, CDOT refuses to comment on how the proposed amendments to 2 CCR § 601-3 may apply in ubiquitous situations like:

- Whether a commercial landlord who charges tenants for placement on an existing sign would need a CDOT permit; or

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[34] In his sworn deposition, Esquibel viewed a picture of a sign for Nature's Herbs in Garden City, Colorado, which is located "on-premises." He was advised, "That billboard advertises a marijuana facility, and that marijuana facility is on the same site that the billboard is located," and then asked, "is that an advertising device?" His response was "I would say no," and continued, "You said it was advertising for the company on the existing site. So nobody's compensating them for that sign, right?" That question was met with, "how to you know that?" to which Mr. Esquibel answered, "I don't know." *Id*. at 90-91.

[35] For example, see email from [redacted] (Lamar Advertising Colorado) to Anthony Lovato, dated May 12, 2020 at 11:18 AM, complaining about a message from Coca Cola on a sign located at 7300 Broadway (owned by Turnpike Media), and response from Anthony Lovato, which was cc'd to [redacted] (COAA lobbyist), [redacted] [Mile High], [redacted] [Outfront], and others, dated May 14, 2020 at 9:18 AM.

[36] Comments on emergency rulemaking provided by Jeannie Gafford Signs via email to Ms. Lutz on July 22, 2021.

- Whether a commercial landlord who charges a tenant for the erection of a new sign on that tenant's behalf would need a CDOT permit.

Of course, there are a number of other common arrangements CDOT's regulations should address (or at least CDOT should offer some guidance on when it promulgates its new rules), including but not limited to:

- Whether a commercial real estate broker needs a CDOT permit for the display of a sign on a client's property along a state highway, where the landowner pays compensation to the broker to market the property; or

- Whether a franchisee needs a CDOT permit for the display of its franchisor's signage along a state highway, where the franchisee pays compensation to the franchisor for the erection of such signage; or

- Whether a sign company that owns a client's sign and leases it to the client (as a financing mechanism) must obtain a CDOT permit as a result of the lease arrangement.

Sign owners, businesses, governmental, civic, and religious organizations also need to know how CDOT will deal with spacing requirements as the number of signs subject to CDOT permit requirements mushrooms—that is, who will get to display (or continue to display) their signs and who will not, and who will get to build new signs and who will not.

Some Pressure Relief is Warranted as CDOT Sorts Out These Problems.

CDOT is not supposed to adopt rules that "negatively impact the state's business climate by impeding the ability of local businesses to compete with out-of-state businesses, by discouraging new or existing businesses from moving to this state, and by hindering economic competitiveness and job creation."[37] On this record, we question whether CDOT has committed appropriate resources to study the impact of its proposed rules in this regard, even though it has a "continuing responsibility" to do so.[38] We believe the record shows that implementation of SB21-263 using the proposed rules will inevitably inflict significant collateral damage statewide.[39] To help mitigate that collateral damage, we offer the following suggestions—

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[37] C.R.S. § 24-4-101.5.

[38] *Id*.

[39] This is just what the legislature warns agencies not to do: "The general assembly further recognizes that agency action taken without evaluation of its economic impact may have unintended effects, which may include barriers to competition, reduced economic efficiency, reduced consumer choice, increased producer and consumer costs, and restrictions on employment." *Id*.

First, CDOT should expansively interpret the definition of "comprehensive development" to include as many properties (and signs) as possible, instantly relieving at least those owners from unexpected and onerous new regulatory burdens. That is because signs within "comprehensive developments" are not "advertising devices" and are therefore not subject to CDOT permit requirements.

Second, CDOT should promptly provide clarity as to what signs are subject to permit requirements and what signs are not, answering the questions set out on page 9 of this letter, preferably in rule form in order to provide stability over time.

Third, CDOT should delete or modify 2 CCR § 601-3:7.00.D.2., commonly known as the "interchange rule." The interchange rule is not mandated by the statute. Property owners should not be silenced just because their land is located by an interchange in an urbanized yet unincorporated county.

The "interchange rule" did not make sense even before SB21-263. It makes even less sense now that the reach of CDOT's permitting requirement is, on its face, much different and much more extensive than it used to be. That is, billboards (formerly known as "off-premise signs") are no longer the stated target of the regulations, and based on the plain language of the phrase "advertising device" it would appear that many billboards may no longer be subject to CDOT permit requirements. Many other signs, which are commonly found (and indeed, necessary) around developed and developing interchanges, now appear to be in the regulatory crosshairs.

CDOT knows that Rule 7.00.D.2. does not work. In fact, CDOT has provided cogent analysis as to why it should be changed. In October 2020, CDOT was just days away from promulgating a change to 2 CCR § 601-3.D.2., along with updates to the definitions of "urbanized area" and "urban area" in 2 CCR § 601-3:1.31. The rationale for those amendments (which CDOT also acknowledged in administrative court)[40] has not materially changed, and if anything it is even more urgent today, given the total confusion about what CDOT intends to regulate and how CDOT will administer and enforce its new regulatory program.[41]

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[40] Administrative Case MSJ Response at 13 (acknowledging that a 1966 memo from the U.S. Department of Commerce regarding federal-state agreements regarding outdoor advertising acknowledged that by "maintaining strict spacing criteria in essentially rural areas, and permitting more signs in built-up or urban areas, we feel on[e] of the purposes of the Act has been served, i.e., the preservation of areas of natural beauty, and reflecting customary use.")

[41] One COAA member previously suggested that the 1971 Agreement does not allow changes to the interchange rule. We disagree for reasons we have articulated in our prior correspondence with CDOT. Moreover, we believe that whatever individual participants in this rulemaking process may think about the procedural requirements, this issue could simply be resolved by stipulation in federal court.

StreetMedia and Turnpike urge CDOT to either delete the interchange rule or make the following changes to 2 CCR § 601-3—changes that the agency supported less than a year ago—

1.31 "Urban Area" and "Urbanized Area" ~~"Urban Area" pursuant to 23 U.S.C. 101 (33) means an urbanized area designated by the Bureau of the Census having a population of 5,000 or more and not within any urbanized area (as defined by 23 U.S.C. 101 (34)), within boundaries to be fixed by responsible State and local officials.~~

A. "Urban Area" means an urbanized area or, in the case of an urbanized area encompassing more than one state, that part of the urbanized area in each state, or urban place as designated by the U.S. Bureau of the Census having a population of 5,000 or more and not within any urbanized area, within boundaries to be fixed by responsible state and local officials in cooperation with each other, subject to approval by the U.S. Secretary of Transportation. Such boundaries shall encompass, at a minimum, the entire urban place designated by the U.S. Bureau of the Census.

B. "Urbanized Area" means an area with a population of 50,000 or more designated by the U.S. Bureau of the Census, within boundaries to be fixed by responsible state and local officials in cooperation with each other, subject to approval by the U.S. Secretary of Transportation. Such boundaries shall encompass, at a minimum, the entire urbanized area within a state as designated by the U.S. Bureau of the Census. Urbanized Area designations may be viewed on the TIGERweb Decennial map provided on the U.S. Census Bureau's website at https://tigerweb.geo.census.gov/.

* * *

D. Spacing of Signs

1. Advertising Devices on Control Routes may not be located in such a manner as to obscure, or otherwise physically interfere with the effectiveness of any official traffic sign, signal, or device, obstruct or physically interfere with the driver's view of approaching, merging or intersecting traffic.

2. In the Control Area near Interstates ~~Highways~~ and Freeways:

a. No two Signs shall be spaced less than 500 feet apart.

b. ~~Outside of incorporated villages and cities, no~~ Advertising Devices may shall not be located adjacent to or within 500 feet of an interchange, intersection at grade, or safety Rest Area if the Advertising Device is located outside of an Urbanized Area and outside of the boundaries of an incorporated town or city. The 500 feet is to be measured along the Interstate or Freeway from the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way.

i. This spacing limitation applies where the proposed location of the Sign is located outside of an Urbanized Area and outside of the boundaries of an incorporated town or city regardless of the location of the interchange, intersection at grade, or safety Rest Area.

ii. The limits of an interchange, intersection at grade, or safety Rest Area span from the beginning of pavement widening for an exit lane or ramp and continues through the interchange, intersection at grade, or safety Rest Area, to the point where pavement widening ends for an entrance lane or ramp.

iii. The 500-foot measurement is to be measured parallel to the highway. This prohibition applies to the entire 660-foot Control Area adjacent to the interchange, intersection at grade, or safety Rest Area along with the 500-foot measurement adjacent thereto.

iv. "Pavement widening" includes exit and entrance lanes and ramps, auxiliary lanes, and other lanes which terminate while allowing traffic to weave on or off the main-travelled way.

v. For those locations where a continuous auxiliary lane extends from the entrance ramp/lane of one interchange/intersection at grade/safety Rest Area and connects to the exit ramp/lane of another interchange/intersection at grade/safety Rest Area, such that there is no clear "beginning or ending of pavement widening at the exit from or entrance to the main-traveled way," this rule prohibits signs located within 2,250 feet from the physical gore of entrance ramps/lanes and within 1,600 feet from the physical gore of exit ramps/lanes.

3. All other Controlled Routes except Interstate and Freeways

a. Outside of Urbanized Areas and incorporated townsvillages and cities, no two structures Signs shall be spaced less than 300 feet apart.

b. Within Urbanized Areas and incorporated townsvillages and cities, no two structures Signs shall be spaced less than 100 feet apart.

* * *

Conclusion.

The First Amendment requires clarity with respect to the purposes of the law, the standards that apply to the issuance of permits, and the standards that apply to the determination of who will be subject to a permitting requirement in the first place. Colorado statutes set out comparable requirements. Moreover, as a matter of public policy, everyone benefits when the law is clear.

It is CDOT's obligation to write rules in a manner that ordinary people can feel confident that they understand. Esquibel testified that he does not understand the most essential parts of the proposed rules. He oversees the Outdoor Advertising Program. CDOT has so far refused to provide clarity regarding how its proposed rules would be applied in commonplace scenarios. C.R.S. 24-4-103(4)(b) provides:

> No rule shall be adopted unless: . . . To the extent practicable, the regulation is clearly and simply stated so that its meaning will be understood by any party required to comply with the regulation.

CDOT will require compliance with these regulations. As such, CDOT is obligated to explain them. We hope that CDOT chooses to do so.

Thank you again for the opportunity to provide comments.

Sincerely,

[redacted]

Attachments

cc: Anthony Lovato
Pawan Nelson, Esq.
Patrick Sayas, Esq.

FAIRFIELD AND WOODS P.C.

[redacted]

July 23, 2021

Sent via E-Mail

Natalie Lutz,
Rules, Policies, and Procedures Administrator
Colorado Department of Transporation
2829 West Howard Place
Denver, Colorado 80204

Re: Proposed Rulemaking - 2 CCR § 601-3

Dear Ms. Lutz:

Thank you for the opportunity to provide comments on the proposed rulemaking to update 2 CCR § 601-3 in response to the recent passage of SB21-263. The purpose of this letter is to provide general comments about the proposed rules, and then to specifically address 2 CCR § 601-3:7.00.D. These comments are submitted on behalf of our client, StreetMediaGroup, LLC.

In General

Our comments on SB21-263 are of record and apply with equal force to the proposed rulemaking. In addition, we stand by our comments at the rulemaking workshop on July 19, 2021. CDOT's written summary says "[t]he new compensation-based approach makes it easier for landowners and sign owners to understand whether they need a CDOT permit." Yet, at the rulemaking workshop CDOT personnel were unable to answer basic questions about everyday scenarios in this regard, including:

- Whether a commercial landlord who charges tenants for placement on an existing sign would need a CDOT permit, or
- Whether a commercial landlord who charges a tenant for the erection of a new sign on that tenant's behalf would need a CDOT permit.

Mr. Lovato said that no permit would be required for the scenario in which a landowner pays a contractor to erect a sign, but there is nothing in the actual text of the law that supports that conclusion. CDOT has a history of interpreting and applying its laws with uneven results, as evidenced by the records of the protracted conflicts between CDOT and our clients.

CDOT and COAA cooperated to draft SB21-263 and push it through the legislature, yet CDOT personnel are not able to articulate the purpose of the law in public. The First Amendment requires clarity with respect to the purposes of the law, the standards that apply to the issuance of permits, and the standards that apply to the determination of who will be subject to a permitting requirement

[redacted]

in the first place. The public is entitled to know clearly which signs are subject to permitting requirements and which signs are not subject to permitting requirements. It is CDOT's legal obligation to provide that information in a manner that ordinary people can feel confident that they understand. We hope that CDOT can and will articulate that information in a manner that is useful and practical for the many thousands of sign owners along regulated highways in the State of Colorado who may be affected by this new regulation.

As we advised at the workshop, until CDOT articulates the purpose and specific objectives of the new law, it is very challenging to offer meaningful, substantive input regarding specific provisions of 2 CCR § 601-3 beyond what is included in the next part of this letter. Before promulgating any new rule, we think CDOT has an obligation to the people of Colorado to state very clearly on the record what it is actually trying to accomplish, as well as how the proposed rule advances or fulfills those objectives. CDOT did a much better job in this regard last year when it considered amendments to 2 CCR § 601-3. *See* **Exhibit A**.

The Interchange Rule

In October 2020, CDOT almost promulgated a change to 2 CCR § 601-3.D.2., along with updates to the definitions of "urbanized area" and "urban area" in 2 CCR § 601-3:1.31. We think the rationale for those amendments has not changed (*see* **Exhibit A**), and if anything it is even more urgent today. Modifications to the interchange rule would alleviate many existing and potential conflicts under the new law, would harmonize future practice with past practice, and would also thereby eliminate controversy surrounding a number of "illegal" permits held by three large COAA member companies.

One COAA member previously suggested that the 1971 Agreement does not allow changes to the interchange rule. We disagree for reasons we have previously articulated. Moreover, we believe that whatever individual participants in this rulemaking process may think about the procedural requirements, this issue could simply be resolved by stipulation in federal court.

We urge CDOT to make the following changes, which it supported less than a year ago--

> 1.31 "Urban Area" and "Urbanized Area" ~~"Urban Area" pursuant to 23 U.S.C. 101 (33) means an urbanized area designated by the Bureau of the Census having a population of 5,000 or more and not within any urbanized area (as defined by 23 U.S.C. 101 (34)), within boundaries to be fixed by responsible State and local officials.~~
>
> A. "Urban Area" means an urbanized area or, in the case of an urbanized area encompassing more than one state, that part of the urbanized area in each state, or urban place as designated by the U.S. Bureau of the Census having a population of 5,000 or more and not within any urbanized area, within boundaries to be fixed by responsible state and

local officials in cooperation with each other, subject to approval by the U.S. Secretary of Transportation. Such boundaries shall encompass, at a minimum, the entire urban place designated by the U.S. Bureau of the Census.

B. "Urbanized Area" means an area with a population of 50,000 or more designated by the U.S. Bureau of the Census, within boundaries to be fixed by responsible state and local officials in cooperation with each other, subject to approval by the U.S. Secretary of Transportation. Such boundaries shall encompass, at a minimum, the entire urbanized area within a state as designated by the U.S. Bureau of the Census. Urbanized Area designations may be viewed on the TIGERweb Decennial map provided on the U.S. Census Bureau's website at https://tigerweb.geo.census.gov/.

* * *

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i. This spacing limitation applies where the proposed location of the Sign is located outside of an Urbanized Area and outside of the boundaries of an incorporated town or city regardless of the location of the interchange, intersection at grade, or safety Rest Area.

ii. The limits of an interchange, intersection at grade, or safety Rest Area span from the beginning of pavement widening for an exit lane or ramp and continues through the interchange, intersection at grade, or safety Rest Area, to the point where pavement widening ends for an entrance lane or ramp.

iii. The 500-foot measurement is to be measured parallel to the highway. This prohibition applies to the entire 660-foot Control Area adjacent to the interchange, intersection at grade, or safety Rest Area along with the 500-foot measurement adjacent thereto.

iv. "Pavement widening" includes exit and entrance lanes and ramps, auxiliary lanes, and other lanes which terminate while allowing traffic to weave on or off the main-travelled way.

v. For those locations where a continuous auxiliary lane extends from the entrance ramp/lane of one interchange/intersection at grade/safety Rest Area and connects to the exit ramp/lane of another interchange/intersection at grade/safety Rest Area, such that there is no clear "beginning or ending of pavement widening at the exit from or entrance to the main-traveled way," this rule prohibits signs located within 2,250 feet from the physical gore of entrance ramps/lanes and within 1,600 feet from the physical gore of exit ramps/lanes.

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b. Within Urbanized Areas and incorporated townsvillages and cities, no two structures Signs shall be spaced less than 100 feet apart.

* * *

Thank you again for the opportunity to provide comments.

Sincerely,

[redacted]

cc: Anthony Lovato
Pawan Nelson, Esq.
Patrick Sayas, Esq.

COLORADO
Department of Transportation
Office of Policy and Government Relations

2829 W. Howard Place
Denver, CO 80204-2305

Summary of Rule 7.00(D)(2) in 2 CCR 601-3, Rules Governing Outdoor Advertising

- The purpose of the Outdoor Advertising Rules found in 2 CCR 601-3 is to control the use of billboards or other outdoor advertising signs in areas near the state highway system to protect and promote the health, safety, and welfare of the traveling public.
- The Outdoor Advertising Rules also promote the reasonable, orderly, and effective display of billboards while preserving and enhancing the natural and scenic beauty of Colorado in compliance with the Colorado Outdoor Advertising Act and the federal Highway Beautification Act.
- The Colorado Department of Transportation ("CDOT") proposes to clarify the restriction against billboards being located within 500 feet of an interchange, intersection at-grade, or safety rest area near interstates and freeways in Rule 7.00(D)(2).
- This administrative rule derives from a 1971 agreement between CDOT and the United States Secretary of Transportation and sets forth the State's size, spacing, and lighting criteria for billboards.
- CDOT proposes that signs cannot be located adjacent to or within 500 feet of an interchange, intersection at grade, or safety Rest Area if the billboard is located outside of an urbanized area and outside of the boundaries of an incorporated town or city.
- This proposed revision contemplates modern highway design principles, recent developments in outdoor advertising laws and regulations, and changes in land use zoning and designations, such as unincorporated areas that are near the boundaries of incorporated towns or cities.
- This proposed rule change is consistent with the Highway Beautification Act's intent to preserve natural and scenic beauty in rural and unincorporated areas.
- Local jurisdictions have the authority to regulate billboards and other outdoor advertising signs within their boundaries. This proposed rule change supports decision-making at the local or community level. Local jurisdictions are in a better position to determine whether or not billboards should be allowed in their communities rather than CDOT making that determination.
- This proposed revision will help to preserve public funds, as many of the CDOT's recent active and historical litigation has involved this rule.

FAIRFIELD AND WOODS P.C.

[redacted]

April 29, 2021

Sent via E-Mail

Andy Karsian
State Legislative Liaison
2829 West Howard Place, Suite 562
Denver, Colorado 80204

Re: Proposed CDOT Amendments to the Colorado Outdoor Advertising Act

Dear Mr. Karsian:

Thank you for the opportunity to provide comments on the draft language that CDOT proposing ("CDOT PROPOSAL") to amend the Colorado Outdoor Advertising Act ("ACT"). Our firm represents StreetMediaGroup and Turnpike Media, both of which are currently in litigation against CDOT. At the core of that litigation are allegations that the Act and its implementing rules are an unconstitutional prior restraint and a content-based restriction on free speech that cannot survive strict scrutiny review.

The CDOT Proposal does not change the underlying constitutional defects. As a practical (and legal) matter, the CDOT Proposal would actually make the problem much worse. As such, StreetMedia opposes this bill on both constitutional and practical grounds. We urge CDOT not to introduce this proposal, and if it is introduced and ultimately becomes law, we will challenge it on constitutional grounds. Our reasoning follows.

I. The Act Springs from a Federal Law That Essentially Bribes States to Violate the First Amendment Rights of their People, and It Cannot Easily Shake that Heritage.

The Act is a relic of the 20th Century, conceived at a time when free speech rights were not given the degree of protection that they now enjoy. Over the years, the Act has transmogrified into a law that does little more than protect the market hegemony of an oligarchy of publicly-traded outdoor advertising companies ("FAVORED COMPANIES"). It operates by violating the First Amendment rights of every other sign owner, deploying the enforcement power of CDOT to intimidate other sign owners so that they do not compete with the Favored Companies.

II. The Proposed Legislation Is Also Unconstitutional, and If It Is Adopted, StreetMedia Will Oppose Its Application in Federal Court.

StreetMedia respects CDOT's authority to regulate, but state legislation and CDOT regulations must operate within constitutional bounds. Legislation and regulations should also actually advance legitimate governmental interests. We hope that the following comments are helpful to CDOT as it evaluates whether proceeding with the CDOT Proposal is a good use of its resources.

[redacted]

A. *As a Constitutional Matter, Putting a "Content-Neutral" Mask on a "Content-Based" Law Does Not Help.*

On its face, the CDOT Proposal does nothing to correct any of the constitutionally fatal flaws of the Act. Instead, it appears to be a rushed attempt to cover up the fundamental content-based structure in a dressing of "content neutrality." It seems like the underlying notion is that if CDOT can fix the face of the law and then apply it in essentially the same way that it did before, then it can continue to protect the economic interests of the Favored Companies who benefit most from keeping others out of the outdoor advertising industry.

Of course, it is plain that the effort to regulate based on whether compensation is received for the use of the sign is a hasty effort to change the language so that it looks "content neutral" while achieving exactly the same content based result. In *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015), the U.S. Supreme Court held that determining whether a law is facially content-neutral is only the first step. The second step is to determine whether the government could justify the law without reference to the content of the sign. If not, the law is content based anyway:

> Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

Reed, 576 U.S. at 166. StreetMedia submits that if enacted and then challenged, the CDOT Proposal would be struck down as a violation of the First Amendment because CDOT cannot seriously claim that its motives are content-neutral, and the CDOT Proposal cannot survive strict scrutiny.

Take, for example, the proposed change to the definition of "Advertising Device." CDOT would propose to regulate only signs for "which compensation is directly or indirectly paid or earned in exchange for its erection or existence by any person or entity." Traditional billboards are the clear target of the law, and it would appear to us to follow that this attempt to regulate essentially only billboards means that the "purpose and justification for the law are content based."

As such, we predict that, if enacted, this proposed law would be subject to strict scrutiny under the second prong of the *Reed* analysis. Our depositions of CDOT personnel to date suggest that there is no way that the law would survive strict scrutiny review.

B. *The Changes Will Create an Unbearable Enforcement Mess Because They Will Sweep in Unsuspecting Sign Owners Who Are Currently Not Regulated, and Subject Them to Forfeitures and a Perjury Trap*

On the face of it, the CDOT Proposal takes a bad law and makes it much worse. Even if the purpose of the law were simply to reach all signs for which compensation is paid to the owner of the sign (without the intention of only affecting billboards), the proposal would still be unconstitutional. In order to put a thin "content-neutral" veneer over a program that is obviously intended to regulate billboards based on their off-premises content, CDOT would oppress vast numbers of commercial landowners in control areas—people and entities whose (currently "on-premises") signage has never previously been regulated.

1. CDOT Cannot Possibly Enforce Regulations that Require CDOT Personnel to Discover and Evaluate the Business Contracts of Every Sign Owner in the Control Area in a Fair and Consistent Manner

First, the enforcement of the law would involve the exercise of unconstitutionally high degrees of discretion. The person who is charged with enforcing the law on any given day will have to be given the power to demand and examine private business contracts, and then evaluate whether "compensation" has been given for the use of a sign. All up and down every corridor in the Control Area. That is a lot of power.

CDOT may claim (as it has when its officers were deposed) that its process is "complaint driven," so its enforcement officers would not simply walk into business establishments and demand to see their leases and examine their emails and checkbooks. However, StreetMedia knows from experience that the complaint-driven system is driven by complaints by the Favored Companies. So again, the law becomes a sword for the Favored Companies to defend their market hegemony, and not a carefully crafted tool to protect asserted governmental interests in safety and aesthetics.

2. The CDOT Proposal Will Have Massive Unintended Consequences Far Beyond the Plethora of Problems Created by the Current Law

The CDOT Proposal would clearly sweep in the signs at Empower Field,[1] as well as the signs at essentially every shopping center and multi-tenant office building that is within a Control Area in the State of Colorado. As to Empower Field, according to news reports Empower pays about $5 million annually to display its name at the home of the Denver Broncos, which is well within a Control Area. As to everyone else, signage is nearly universally addressed in commercial leases, so even if compensation is not "directly paid" for a place on a sign as a line item, it is certainly a

[1] StreetMedia has argued, we believe correctly, that they are already swept into the current "off-premise" definition.

consideration in the establishment of a rental rate, and therefore would be, *per force*, "indirectly paid."

StreetMedia submits that shopping center and office complex owners would be justifiably outraged by the application of the proposed C.R.S. § 43-1-411(1)(d) to their signs, as well as the Draconian measures set out in C.R.S. § 43-1-412(1)(a), either in its original form or, worse, as amended. We say "worse" because the amended version of C.R.S. § 43-1-412(1)(a) means that a shopping center owner, in order to save its valuable sign (which may represent a considerable investment, and which is obviously very important to the tenants) from a CDOT demand for forfeiture, will be put in the position of having to either sacrifice its sign or swear under oath that no "compensation" is paid by its tenants to use the sign. Consequently, the shopping center owner's price for saving its sign may well be a perjury trial.

Of course, CDOT may claim that the law is not intended to reach commercial property owners—only billboard owners. If that is the case, then we are back to square one. CDOT will be regulating billboards, based on their content, no matter what the law says. That is an unavoidable violation of the principles of First Amendment law set out in *Reed*.

C. *Sign Owners Have a First Amendment Right to Sell Space on Their Signs*

Under the proposed C.R.S. 43-1-417, a sign owner is subject to potential fines of up to $1,000.00 per day, just for taking money from someone else to display a message. Most sign owners will voluntarily chill their speech if threatened with such penalties (our clients have certainly experienced that), and most will not have the fortitude to sue the State of Colorado. While StreetMedia does not believe a court would impose such a fine (because it is so clearly unconstitutional), StreetMedia submits that it would be a huge problem for legislators who have sworn an oath to protect and defend the constitution to codify such a penalty into the law in 2021, six years after *Reed* was decided. It is well-established that the constitutional protections afforded to speech are not forfeited simply because it takes the form of a paid advertisement. *See New York Times v. Sullivan*, 376 U.S. 254, 266 (1964).

D. *The Proposed Law Does Nothing for Highway Safety or Aesthetics*

CDOT officers have confessed in sworn depositions that there is no difference between "on-premises" and "off-premises" signs with regard to impacts on highway safety and aesthetics. The CDOT Proposal suggests that maybe CDOT will take the position (in the future) that there is a safety or aesthetic difference between signs for which "compensation" is paid to the owner and signs for which no compensation is paid to the owner. Of course, that proposition is ridiculous and cannot be empirically supported.

No one who looks at a sign could possibly know (unless a transaction is announced on the sign itself, or as in the case of Empower Field, the transaction is publicly announced with fanfare)

whether money changed hands for any particular message to be displayed. As such, the CDOT Proposal does absolutely nothing to promote either highway safety or aesthetics. It simply punishes people for taking money to speak on behalf of others. That is a violation of the First Amendment.

E. *The Problem of Prior Restraint*

Finally, the First Amendment requires that the time between application and decision be "brief," and "stated." StreetMedia supports quick turnarounds for permits, having had to wait for prolonged periods simply to have permits denied. The proposed amendments would specify a time period, but a period of 60 to 90 days from application to decision is not a "brief" time period and StreetMedia submits it would still constitute an impermissible prior restraint.

III. Conclusion

In closing, thank you for the opportunity to comment on this proposed legislation. StreetMedia's bottom line is that highway beautification should not be (and does not have to be) at odds with First Amendment rights. StreetMedia urges CDOT not to proceed with this hasty proposal, but instead to start again and provide something for the next legislative session that the State can be proud of.

StreetMedia has retained a leading sign code expert, and, as we have advised CDOT on multiple occasions, is happy to consult with CDOT on the formulation of such legislation.

If you have any questions about the enclosed materials, or the responses in this letter, please do not hesitate to contact me.

Sincerely,

[redacted]

FAIRFIELD AND WOODS P.C.

[redacted]

October 9, 2020

Sent via E-Mail to DOT_Rules@state.co.us

Natalie Lutz and Anthony Lovato
Colorado Department of Transportation
2829 W. Howard Pl.
Denver, CO 80204

Re: Proposed Changes to 2 CCR 601-3
Second Round Comments

Dear Ms. Lutz and Mr. Lovato:

Our firm represents StreetMediaGroup, LLC ("STREETMEDIA"), a stakeholder in the rulemaking process that the Colorado Department of Transportation ("CDOT") has initiated with regard to proposed amendments to 2 CCR § 601-3 ("RULE"). This second round comments letter provides additional comments, suggestions, and perspective regarding the changes that were made after the first round of comments regarding the proposed Rule change. We are authorized to represent that another stakeholder, Turnpike Media, LLC, joins in this letter.

I. Introduction

This letter addresses mostly technical issues with regard to the second round draft of the proposed Rule. StreetMedia's prior letter, dated June 19, 2020 ("JUNE LETTER"), advised CDOT regarding the constitutional dimension of the proposed rule change. The proposed rules still include content-based and speaker-based provisions. A number of cases were decided since June 19, 2020 that further support the analysis of these issues that was set out in the June Letter.[1]

II. Rule 1.31

StreetMedia appreciates the proposed changes to Rule 1.31, which make the Rule consistent with its federal counterparts in 23 U.S.C. § 101(a)(33) and (34). However, the federal law is not consistent with 2020 Census Bureau vocabulary.

The federal rule refers to "Urban Place." "Urban Place" is a designation that is no longer used by the Census Bureau. Current terminology for the same concept appears to be "Urban Cluster" (TIGERweb maps show "Urbanized Areas" and "Urban Clusters"). StreetMedia recommends updating Rule 1.31 to replace the phrase "Urban Place" with "Urban Cluster" in order to facilitate accurate interpretation by end-users (or, at a minimum, to include the phrase "Urban Cluster" after the phrase "Urban Place").

[1] These cases include, by way of example, *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 2020 U.S. App. LEXIS 27276 (5th Cir. 2020) ; *Int'l Outdoor, Inc. v. City of Troy*, 2020 U.S. App. LEXIS 28244 (6th Cir. 2020); and *Outdoor v. City of Westfield*, 2020 U.S. Dist. LEXIS 180515 (S.D. Ind. 2020).

[redacted]

III. Rule 2.3

StreetMedia opposes the removal of the phrase "or renewing a" from Rule 2.3.A. StreetMedia acknowledges that Rule 2.3, as proposed, closely maps C.R.S. § 43-1-411. However, C.R.S. §§ 43-1-409 and 43-1-410 prohibit permit renewals for illegal signs, and the proposed Rule does not address those provisions at all. As such, the proposed Rule would appear to be in conflict with the statute (and therefore outside of CDOT's authority). StreetMedia submits that leaving the phrase "or renewing a" in Rule 2.3.A. makes the rule more reflective of all of the applicable statutes. A more detailed analysis of this provision is provided in the June Letter.

Nonconforming Signs[2] are controlled by C.R.S. § 43-1-404(2) and Rules 6.03.2 through 6.03.5, inclusive. If CDOT's intention regarding Rule 2.3 is to clarify that it may issue permit renewals for *Nonconforming Signs* (this is CDOT's stated intention), then a more direct approach is to add a subsection B. to Rule 2.3 that says, "Nonconforming Advertising Devices may be maintained, and permits therefor renewed, according to the standards set out in Sections 6.03.2 through 6.03.5, inclusive."

IV. Rule 6.02

StreetMedia relies on the June Letter for comments regarding Rule 6.02. Additional case law since June has reinforced the rationale provided in the June Letter.

The proposed Rule 6.02.D. and G. create a number of "content-based" and "speaker-based" exceptions and regulations that, on their face, appear to be carefully crafted to benefit and burden a relatively small group of identifiable parties. These provisions are constitutionally suspect.

V. Rule 7.00(D)(2) and (3)

StreetMedia appreciates the general direction CDOT has taken on this Rule. However, the proposed rule appears to misapply the phrase "Urbanized Area." In all instances in Rule 7.00(D)(2) and (3), the phrase "Urbanized Area" should be replaced with the phrase "Urban Area."

The proposed Rule 7.00(D)(2) currently provides, in part:

> Advertising Devices shall not be located adjacent to or within 500 feet of an interchange, intersection at grade, or safety Rest Area if the Advertising Device is located outside of an Urbanized Area and outside of the boundaries of an incorporated town or city.

[2] Rule 1.16 defines "Nonconforming Advertising Device" or "Nonconforming Sign" as:

> a Sign which was lawfully erected but which fails to conform to the sizing, lighting, spacing or location requirements of law enacted at a later date or because of changed conditions, except those advertising devices allowed by § 43-1-404(1), C.R.S.

The phrase "Urbanized Area" is also used in the proposed Rules 7.00(D)(2)(b)(i) and 7.00(D)(3)(a) and (b).

Figure 1, below, illustrates the impact. In this TIGERweb excerpt, the "interchange rule" in the form currently proposed (in proposed Rule 7.00(D)(2)(b)) would apply in the white and purple areas, because the phrase "Urbanized Area" does not include the phrase "Urban Cluster." If the phrase "Urbanized Area" is replaced with "Urban Area" in the rule (as StreetMedia suggests), then the interchange rule would apply only within areas of the map that are not shaded in blue or purple.[3]

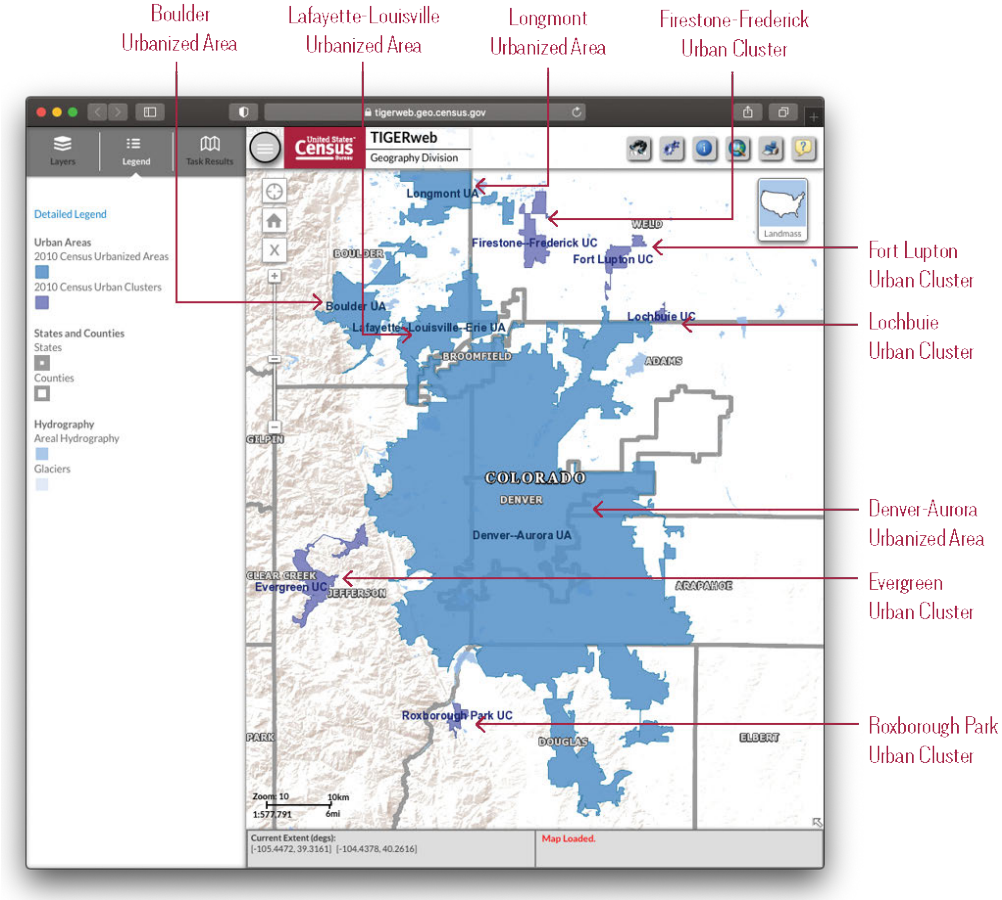

Figure 1: TIGERweb Map Showing Urbanized Areas and Urban Clusters in the vicinity of Denver, Colorado

[3] The Lochbuie Urban Cluster had a population of less than 5,000 in 2010, so it is possible that the Lochbuie Urban Cluster would be subject to the interchange rule, to the extent that the boundaries of the Lochbuie Urban Cluster extend beyond the corporate boundaries of the Town of Lochbuie. All of the other Urban Clusters that are shown in Figure 1 had 2010 populations greater than 5,000.

StreetMedia believes that the interchange rule is intended to apply only: (1) outside of "Urbanized Areas"; (2) outside of "Urban Clusters" that have a population of 5,000 people or more; and (3) outside of the boundaries of incorporated towns and cities. The use of the phrase "Urban Areas" instead of "Urbanized Areas" in Rule 7.00 would reflect that intent.

Unincorporated Urban Clusters are comparable to incorporated towns and cities in terms of their development patterns, and it follows that they should be treated like cities and towns for the purposes of the Rule. For example, the Evergreen Urban Cluster is not incorporated, but it has a population that exceeds approximately 225 of Colorado's incorporated towns and cities.

VI. Rule 13.00 and 14.00

StreetMedia does not have further comment on the proposed Rules 13.00 and 14.00.

Thank you for the opportunity to provide comments on the proposed Rules.

Sincerely,

FAIRFIELD AND WOODS P.C.

[redacted]

June 19, 2020

Sent via E-Mail to DOT_Rules@state.co.us

Natalie Lutz and Anthony Lovato
Colorado Department of Transportation
2829 W. Howard Pl.
Denver, CO 80204

Re: Proposed Changes to 2 CCR 601-3

Dear Ms. Lutz and Mr. Lovato:

Our firm represents StreetMediaGroup ("STREETMEDIA"), a stakeholder in the rulemaking process that the Colorado Department of Transportation ("CDOT") has initiated with regard to proposed amendments to 2 CCR § 601-3. On behalf of StreetMedia, we submit the following comments. We are authorized to represent that another stakeholder, Turnpike Media, LLC, joins in this letter.

I. Introduction

The introduction to 2 CCR § 601-3 ("RULES") provides an intent statement. It is:

> . . . to protect and promote the health, safety, and welfare of the traveling public and the people of Colorado, and to promote the reasonable, orderly and effective display of outdoor advertising, while preserving and enhancing the natural and scenic beauty of Colorado.

The stated intent of the Rules "provide[s] a reference point against which the validity of the rule can be measured."[1] When CDOT engages in rulemaking, it is obligated to stay within its constitutional and statutory limits.[2] Moreover, because the Rules implicate the First Amendment, the amended Rules that CDOT ultimately promulgates after these proceedings must—at a minimum—directly and materially advance permissible, stated purposes.[3]

It is obvious on the already established record (including testimony and comments received buy CDOT) that the stakeholders include favored outdoor advertising companies that derive economic benefits from excluding others from the competitive outdoor advertising field.[4] The stakeholders also include political subdivisions that do not appear to understand or appreciate constitutional

[1] *Citizens for Free Enterprise v. Department of Revenue*, 649 P.2d 1054, 1062 (Colo. 1982).

[2] *See* C.R.S. § 24-4-103(8)(a) and C.R.S. §§ 24-4-106(7)(b)(III) and (IV).

[3] *See Aptive Envtl., LLC v. Town of Castle Rock*, 2020 U.S. App. LEXIS 15660, *50 (10th Cir. 2020).

[4] Indeed, the comments from the favored outdoor advertising companies are strikingly similar, and appear to be singularly focused on maintaining their current competitive advantages, including the continuation of their Illegal Signs.

[redacted]

boundaries or the legal and financial risks that they are asking CDOT to assume on their behalf.[5] Both groups of stakeholders seek to push the rulemaking process in directions that significantly increase CDOT's litigation risks—and which likely will expose CDOT to significant damage awards, including awards of plaintiffs' attorneys fees.

StreetMedia offers the comments and analysis below in the interest of resolving existing and potential conflicts arising under the Rules, and in the interest of advancing the stated purposes of the Rules. StreetMedia urges CDOT to take care, and to recognize that protecting and advancing the anti-competitive interests of a select group of favored outdoor advertising companies and/or channeling the censorial instincts of other political subdivisions are objectives that are far beyond the stated intent of the Rules or the Outdoor Advertising Act ("ACT")[6] and CDOT's constitutional and statutory authority.

II. Rule 2.3

A. SUGGESTIONS

StreetMedia offers two suggestions for the proposed amendments to Rule 2.3. The rationale for these suggestions is presented in subsections B. and C. of this Part II:

1. Remove the proposed substantive changes to Rule 2.3. The capitalization of the word "Permit" and the deletion of the references to 23 C.F.R. § 750.108 are not "substantive changes."
2. Add a Subsection B., stating, "Nonconforming advertising devices may be maintained, and permits therefor renewed, according to the standards set out in Sections 6.03.2 through 6.03.5, inclusive."

B. STREETMEDIA OPPOSES THE PROPOSED SUBSTANTIVE CHANGES TO RULE 2.3 AS PRESENTED BECAUSE THEY DO NOT ADVANCE CDOT'S STATED PURPOSE AND THEY INCREASE THE RISK THAT THE RULE WILL BE MISINTERPRETED.

[5] Greenwood Village states, "There are no off-premises advertising signs along the I-25 corridor from Hampden South. We want to keep it this way." (Greenwood Village comments at 6). Its record objections are related only to the content of the signs and the fact that they are operated for a profit. Neither of those attributes directly relate to highway beautification in any way.

[6] C.R.S. § 43-1-401, *et seq.*

StreetMedia opposes the proposed substantive changes to Section 2.3.A.[7] CDOT's proposal states that the "Rational (sic) for Proposed Changes" is, in pertinent part, "to ensure CDOT is not prohibited from renewing permits for nonconforming signs, but still prohibits CDOT from renewing permits for signs that are damaged, unsafe, or unsightly by reason of lack of maintenance or repair."[8]

Rule 1.16 defines "Nonconforming Advertising Device" or "Nonconforming Sign" as:

> a Sign which was lawfully erected but which fails to conform to the sizing, lighting, spacing or location requirements of law enacted at a later date or because of changed conditions, except those advertising devices allowed by § 43-1-404(1), C.R.S.

Nonconforming Signs are controlled by C.R.S. § 43-1-404(2) and Rules 6.03.2 through 6.03.5, inclusive. If CDOT's intention regarding Section 2.3 is to clarify that it may issue permit renewals for Nonconforming Signs, then it should simply add a subsection B. to Rule 2.3 that says, "Nonconforming Advertising Devices may be maintained, and permits therefor renewed, according to the standards set out in Sections 6.03.2 through 6.03.5, inclusive."

No other changes are necessary to accomplish CDOT's stated objective.

C. THE PROPOSED CHANGES TO RULE 2.3 APPEAR TO ADVANCE AN UNSTATED PURPOSE; THAT IS, TO UNLAWFULLY COVER OVER PRIOR CDOT "MISTAKES" THAT CDOT IS "WARY" OF ADDRESSING DIRECTLY

Under Rule 1.13, an Illegal Sign is defined as "a Sign erected or maintained in violation of state or federal law, these Rules or local law or ordinance." This definition includes not only signs that violate the Rules, but also signs like the one owned by a favored outdoor advertising company on Colorado Boulevard / Hwy 2 (between Arizona Avenue and Mississippi Avenue, pictured at right), which (at least) between June 10, 2020 and the date of this letter, was

[7] StreetMedia does not object to the proposed capitalization of the word "Permit" in Rule 2.3.A.6., or the deletion of cross references to 23 C.F.R. 750.108, and does not consider these changes to be substantive.

[8] StreetMedia acknowledges that CDOT's proposed substantive changes conform the Rule 2.3, more or less, to C.R.S. § 43-1-411. However, the current text of Rule 2.3 better reflects the overall statutory framework (beyond C.R.S. § 43-1-411) surrounding both permits and permit renewals.

egregiously in violation of 1 CCR § 212-2 Rule 1111.B.'s prohibition on off-site advertising of marijuana establishments, as well as in violation of 21 U.S.C. § 843, which criminalizes advertising of Schedule I Controlled Substances (which still include marijuana).

CDOT has been known to ignore Illegal Signs that are owned by favored outdoor advertising companies, or to purport to reclassify them to Nonconforming Signs by executing agreements ("SIDE AGREEMENTS"), in order to issue and renew permits for them. Examples of Illegal Signs that CDOT has ignored or reclassified include, but are not limited to:

Lamar Advertising Company:

- Permit 8584
- Permit 10291
- Permit 10321

Outfront Media:

- Permit 10595
- Permit 10594
- Permit 10582
- Permit 10623
- Permit 10614/9754
- Permit 09690
- Permit 09786
- Permit 09826
- Permit 10581
- Permit 10580

Mile High Outdoor Advertising:

- Permit 10643
- Permit 10686
- Permit 10685
- Permit 10852
- Permit 10626

Over the course of administrative litigation with StreetMedia, CDOT has cast these Permits (and by implication, related Side Agreements) as "mistakes" that it is "wary" of correcting.[9] The proposed changes to Rule 2.3 appear to be an attempt to legitimize those "mistakes" by creating an argument that the Rules allow CDOT to continue to (unlawfully) renew permits for Illegal Signs owned by favored outdoor advertising companies that CDOT is wary of crossing.

By purporting to limit the range of permits that cannot be renewed to those that are specifically identified in Rule 2.3.A.9., the proposed changes tend to muddy what is a clear statutory command that prohibits the issuance—or renewal—of permits for unlawfully constructed signs. Specifically, under the Act, if an advertising device is constructed that "does not conform to size, lighting, and spacing standards" that "were adopted prior to the erection of said device," then CDOT cannot lawfully issue a permit for it.[10]

Illegal Signs cannot be transformed into "legal signs," "grandfathered signs," or Nonconforming Signs by Side Agreement, willful blindness, or mistake. There is only one path for Illegal Signs:

- If a permit cannot lawfully be issued, then the permit cannot be issued at all.
- In the absence of a lawfully issued permit, there is no permit to renew.
- A sign that cannot be lawfully permitted cannot be lawfully constructed.
- If a sign that cannot lawfully be constructed is constructed anyway, it is an Illegal Sign (by definition).
- The Act mandates that Illegal Signs be removed at the sign owner's expense.[11]

Further, no matter what it does with Rule 2.3, CDOT cannot bootstrap the legal authority to enter into agreements with favored outdoor advertising companies to issue or renew permits for Illegal Signs:

- First, the introduction to the Rules states, "[i]f these rules conflict with relevant federal or state law, the federal or state law shall govern."[12]

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[9] RESPONSE TO MOTION FOR SUMMARY JUDGMENT, *Street Media Group, LLC v. Department of Transportation, State of Colorado*, Case No. HW-2019-1 THROUGH 4 (March 27, 2020) at 18, 20 ("CDOT has historically been wary of attempting to revoke permits for signs which should not have been granted. For a variety of reasons—including legal reasons—the Department continues to be wary of doing so.")

[10] C.R.S. § 43-1-411.

[11] C.R.S. §§ 43-1-412 and 43-1-417.

[12] 2 CCR § 601-3 at p.1.

- Second, such side agreements are illegal—and therefore void and unenforceable.[13]
- Third, CDOT's Side Agreements are also against public policy, because they are designed to dodge applicable statutes and rules and place unbridled discretion in the hands of program officials to further unconstitutional, speaker-based preferences.[14]

The solution for CDOT with regard to most of these "mistakes" is not to simply pretend they do not exist and attempt to change the Rule to contravene the Act. Instead, it is to promulgate simple changes to Rule 7.00(D)(2)(b), as suggested in Section IV of these comments.

III. Rule 6.02

A. SUGGESTIONS

StreetMedia offers six suggestions for the proposed amendments to Rule 6.02. The rationale for these suggestions is presented in subsections B. and C. of this Part III:

1. Definitions and substantive regulatory provisions should not be mixed. If CDOT wants to redefine or clarify what types of signs are "off-premise" versus "on-premise" it should do so in Sections 1.18 (definition of "Off-Premise Sign") and 1.20 (definition of "On-Premise Sign").
2. If On-Premise Signs are excepted from regulation, then the Rules do not need to provide requirements to "Remain an Excepted On-Premise Sign." An "On-Premise" sign would no longer be excepted if and when it fails to meet the definition for "On-Premise Sign."
3. The On-Premise / Off-Premise distinction (however formulated) is not likely to be legally sustainable in the future, as emerging First Amendment case law calls into question prior cases that allowed for this distinction.[15]
4. If CDOT wants to maintain regulations that distinguish between On-Premise Signs and Off-Premise Signs, then CDOT should be much more careful about how it defines these

[13] *See Amedeus Corp. v. McAllister*, 232 P.3d 107, 109 (Colo. App. 2009) ("Contracts in violation of statutory provisions are void . . . ."); *Ridgeview Classical Sch. v. Poudre Sch. Dist. R-1*, 214 P.3d 476, 482-83 (Colo. App. 2008).

[14] *See Norton Frickey, P.C. v. James B. Turner, P.C.*, 94 P.3d 1266, 1267 (Colo. App. 2004) ("Courts will not enforce contracts or contract terms that are void as contrary to public policy. A contract provision is void if the interest in enforcing the provision is clearly outweighed by a contrary public policy.").

[15] *See, e.g., Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019); *L.D. Mgmt. Co. v. Thomas*, 2020 U.S. Dist. LEXIS 72593 (W.D. Ky. 2020).

categories. For even the most carefully drafted distinction, CDOT must be prepared to carry its evidentiary burden that, at a minimum:[16]

a. There is a meaningful "fit" between CDOT's regulatory objectives and the distinctions it makes based on content.[17]

b. The regulations affecting commercial speech address "real" harms *and* "will in fact alleviate them to a material degree."[18]

c. CDOT's interests cannot be served "as well by a more limited restriction on commercial speech."[19]

5. Appropriate changes to Rule 7.00(D)(2)(b) may reduce the risk of litigation regarding the On-Premise Sign / Off-Premise Sign distinction by reducing the number of potential plaintiffs.

B. StreetMedia opposes the proposed changes to Rule 6.02 because they do not advance CDOT's stated purpose and therefore cannot meet minimum constitutional requirements

CDOT's rationale for the proposed changes to Rule 6.02 is:

> On-Premise signs are largely excepted from outdoor advertising control. However, state and federal law do not clearly define when a sign is considered an On-Premise sign. CDOT recommends revising Rule 6.02 in an effort to provide more clarity concerning when a sign is On-Premise rather than Off-Premise.[20]

During rulemaking workshops, CDOT claimed that the proposed changes to Rule 6.02 help to advance the "spirit" of the rules. Due to the format of the workshop, CDOT declined the invitation

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[16] The "minimum" requirements that follow assume that CDOT is able to create a distinction that is ultimately is evaluated under a "commercial speech" test.

[17] *See Cincinnati v. Discovery Network*, 507 U.S. 410, 428 (1993).

[18] S*ee Aptive*, 2020 U.S. App. LEXIS 15660 at *50.

[19] *Id*. at *54.

[20] Anthony Lovato put it this way: "On-Premise Signs are largely excepted from outdoor advertising control. However, although state and federal law define when a Sign is considered an On-Premise sign, the definitions leave room for ambiguity in certain instances. This ambiguity allows persons to violate the spirit of the regulations while insisting that their conduct is not prohibited by law or regulation. CDOT recommends revising Rule 6.02 in an effort to provide more clarity concerning when a Sign is On-Premise rather than Off-Premise. This will promote certainty among On-Premise Sign owners who want to make sure that they are comporting with law and will help ensure the spirit of the law is maintained." A. Lovato, Recording of June 1, 2020 Local Government Stakeholder Webinar at 5:05 to 5:59.

to articulate what that "spirit" is. If it amounts to censorship, then CDOT will not be able to defend this work against inevitable litigation rooted in the First Amendment.

If the "spirit" of the rules relates at all to their stated purpose, then the proposed changes must be reviewed in light of that purpose:

> . . . to protect and promote the health, safety, and welfare of the traveling public and the people of Colorado, and to promote the reasonable, orderly and effective display of outdoor advertising, while preserving and enhancing the natural and scenic beauty of Colorado.

The proposed changes, as currently drafted, do not materially advance any of these stated purposes. The proposed distinctions have nothing to do with the physical nature of the regulated signs, but are instead based on message content and on business arrangements that are not visible to the public. As such, they do not materially advance the health, safety, and welfare of the traveling public, they do not materially advance the reasonable, orderly and effective display of outdoor advertising, and they do not materially advance the preservation or enhancement of the natural and scenic beauty of Colorado.

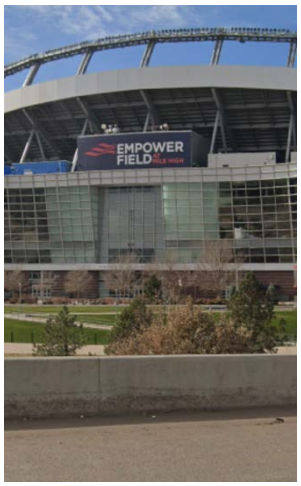
C. IF CDOT CHOOSES TO DISTINGUISH BETWEEN "ON-PREMISES" AND "OFF-PREMISES" SIGNS, IT SHOULD PROVIDE CLEAR AND CONCISE DEFINITIONS AND BE PREPARED TO SHOW THAT SUCH A DISTINCTION ADDRESSES "REAL HARMS" AND THAT THOSE HARMS ARE ALLEVIATED TO A MATERIAL DEGREE BY THE PROPOSED REGULATIONS.

The vast majority of the proposed changes to Rule 6.02 set out an internally inconsistent, and confusing definition of what an "On-Premise Sign" is. Instead of providing clarity, they create a rather stark illustration of the reason why the On-Premise / Off-Premise distinction is increasingly recognized by courts nationwide as an obsolete and useless proxy for the physicality of signs.

The Federal District Court for the Western District of Kentucky recently struck down the Kentucky Billboard Act, based on the state's failure to meet its burden of proving that its on-premise / off-premise distinction advanced its interests. The Kentucky Court's discussion in this regard is illustrative (and instructive) as to increasing judicial skepticism of content-based restrictions and the resulting trajectory of First Amendment law:

> Here, to justify the on-premises/off-premises distinction, Kentucky asserts public aesthetics, traffic safety, and protection of property owners' rights. Sound familiar?
>
> To be sure, the speech in *Thomas* was not commercial. But the First Amendment still subjects regulations of commercial speech to "heightened judicial scrutiny." That has sometimes looked a lot like intermediate scrutiny. Recently, it has arguably inched closer to strict scrutiny.

> In this case, the label doesn't matter. To survive either inquiry, Kentucky must provide proof in support of its asserted interests. Here, it has offered none. Instead, Kentucky admitted that it has no evidence that Lion's Den's billboard interfered with aesthetics along I-65 in a different manner than if it referred to on-premises activities. Kentucky also admitted it has no evidence that Lion's Den's billboard has distracted any driver. And rather than vindicating property owners' rights, Kentucky has undermined them by denying a landowner the right to continue leasing his property to Lion's Den.
>
> * * *
>
> The billboard for Lion's Den may remain where it stands. The Kentucky Billboard Act is unconstitutional in its entirety.[21]



If CDOT retains the distinction between "On-Premise" and "Off-Premise" Signs for the purposes of regulation, then CDOT should be very careful to support its decision with record evidence. CDOT should also be aware that the protections of the First Amendment extend with equal force to a sign owner who displays its own message and to a sign owner who would rent space or time on the sign to display messages on behalf of others.[22]

It is unlikely that a prior enforcement case at Unser Racing will be sufficient evidence to support the proposed Rule 6.02, particularly since: (a) the size and location of the Unser sign structures were permitted by Adams County; (b) the context of those signs is not scenic; and (c) the content of those signs can be modified electronically. Moreover, the prior use of the Unser sign is not meaningfully different from the use of the three giant "Empower Field" signs at the Broncos stadium that are visible from I-25.

[21] *L.D. Mgmt. Co.*, 2020 U.S. Dist. LEXIS 72593 at *4-5, *7 (citations omitted).

[22] *Compare Smith v. Cal.*, 361 U.S. 147, 150 (1959) ("[I]t also requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms. It is of course no matter that the dissemination takes place under commercial auspices."); *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501-02 (1952) ("It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.").

According to BroncosWire, Empower Retirement pays approximately $5 million per year for the "naming rights" of the Denver Broncos Stadium.[23] As such, the signs are not exempt On-Premises Signs under the current Rules or the proposed Rule 6.02.C.3. To be clear, under the proposed changes to Rule 6.02, the Denver Broncos would have to obtain permits for (at least) three Off-Premise Signs for their "Empower Field at Mile High" signs at the stadium. Further, if CDOT modifies its proposed Rules for the benefit of Empower Retirement (or for that matter, the Denver Broncos), it will have to do so in a way that does not create an unconstitutional "speaker-based" preference that provides further fodder for constitutional litigation.

IV. Rule 7.00(D)(2)(b)

A. SUGGESTIONS

CDOT presents three options for reform to Rule 7.00(D)(2)(b). StreetMedia offers four suggestions for the proposed amendments to Rule 7.00(D)(2)(b). The rationale for these suggestions is presented in subsections B., C., and D. of this Part IV:

1. In all options, the spacing rules must be clarified. The phrase "No two Signs shall be spaced less than 500 feet apart" relies upon a broad definition of "Sign" (which cross-references "Advertising Device") that is unworkable because it does not distinguish between:
    a. On-Premise and Off-Premise (assuming CDOT retains this distinction, spacing should be required only between Off-Premise Signs);
    b. Free-standing signs (*e.g.*, pole signs and monument signs) and signs that are attached to buildings (*e.g.*, projecting signs, wall signs, etc.);
    c. Big signs and little signs; or
    d. Temporary signs and permanent signs.
2. If the spacing rule is clarified, Option 3 makes the most sense in terms of serving CDOT's objective of avoiding unnecessary litigation.
3. If the spacing rule is clarified, Option 2 is a close second to Option 3, but only if the definition of "Urban Area" is revised for consistency with Federal Law, and to include incorporated municipalities (regardless of population), in recognition of the way the Rule has been interpreted in the past.

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[23] *See* https://broncoswire.usatoday.com/2019/09/06/how-much-is-denver-broncos-empower-field-at-mile-high-naming-rights-worth-per-year/. In fact, it would appear that, as Greenwood Village put it in its comments, the Empower Field sign is in place "for no other reason than making money . . . ." (Greenwood Village comments at 2).

4. Option 1 does not solve any of CDOT's current litigation problems. Moreover, under Option 1, the Illegal Signs that are discussed in Part II.D., above, will continue to be unlawful, and must be removed at their owners' expense.

B. StreetMedia opposes "Option 1" because it does not advance CDOT's stated objectives and is unlikely to withstand constitutional scrutiny.

StreetMedia opposes Option 1 because it does not provide clarification and does not advance the stated objectives of either the Act or the Rules. The classification of local political jurisdiction is not a proxy for physical character, scenic character, or differences in traffic safety due to driver distraction. Indeed, some incorporated areas are rural in character, and many unincorporated areas are urban in character (particularly within the Denver "Urbanized Area").

If CDOT adopts Rule 2.3 and 6.02 as proposed, and also adopts "Option 1" for Rule 7.00(D)(2)(b), it will worsen a legal situation that it has admitted on this record is already a problem. Put bluntly, if CDOT accepts the invitation to protect favored outdoor advertising companies and political subdivisions who simply do not like billboards, then on their behalf (but without their assistance, financial or otherwise), CDOT will provoke litigation during which it will be called upon to carry the burden and expense to defend the indefensible:

1. That its distinctions between "On-Premise" and "Off-Premise" signs actually advance its stated interests to a material degree, given the backdrop of existing local regulations and many thousands of signs (both on-premise and off-premise in terms of content) in the environment;
2. That its exceptions to the ramp rule within "incorporated villages and cities" actually advance its stated interests to a material degree, given that municipal incorporation is a useless proxy for physical character and that Colorado law has never provided for an "incorporated village"; and
3. That the safety interests CDOT has at times asserted are advanced by the ramp rule are more significant in unincorporated areas (where the rule applies) than in incorporated areas (where the rule does not apply).

StreetMedia submits that the odds are high that CDOT will not be able to carry its burden. Indeed, in this context, the *L.D. Mgmt. Co. v. Thomas* case from Kentucky may be irresistibly persuasive. Since such a case would be brought under 42 U.S.C. § 1983, CDOT could be put on the hook for the plaintiff's attorneys fees under 42 U.S.C. § 1988. StreetMedia submits that Option 1 is so flawed that it is simply not worth the risk.

C. STREETMEDIA SUPPORTS "OPTION 3" WITH MODIFICATIONS TO CLARIFY THE SPACING RULES.

"Option 3" is the simplest solution that could resolve not only StreetMedia's administrative litigation against CDOT, but also provide a legitimate path to legalize a number of Illegal Signs that are owned by favored outdoor advertising companies. Adoption of Option 3, with minor modifications, would avoid provoking a future litigation about the removal of Illegal Signs.

However, "Option 3" only works if clarifications as to the spacing rules are incorporated. That is, if CDOT retains the On-Premise / Off-Premise distinction, the spacing rule text could read, "No two Off-Premise Signs shall be spaced less than 500 feet apart." If CDOT creates another distinction, the text should reflect the distinction that requires spacing between billboards, and not between billboards and other types of signs.

StreetMedia supports "Option 3" (with the proposed modifications above) as a practical solution, but does not waive its constitutional rights if CDOT promulgates or enforces rules that put those rights at risk.

D. STREETMEDIA ALSO SUPPORTS "OPTION 2" WITH MODIFICATIONS TO CLARIFY THE SPACING RULES, AND TO UPDATE THE DEFINITION OF "URBAN AREA" TO BE CONSISTENT WITH ITS FEDERAL COUNTERPART (AS REQUIRED BY 2 CCR § 601-3[24]).

"Option 2" is not as good as "Option 3," but like Option 3 it could, with minor modifications, resolve not only StreetMedia's administrative litigation against CDOT, but also provide a path to legalize a number of Illegal Signs that are owned by favored outdoor advertising companies. Adoption of Option 2, with minor modifications described below, would similarly avoid provoking future litigation reading removal of Illegal Signs.

The first modification is to the spacing rules. Like "Option 3," "Option 2" only works if proposed clarifications as to the spacing rules that are set out in the second paragraph of Part IV.C., above, are incorporated.

The second modification is to the definition of "Urban Area." Rule 1.31 defines "Urban Area" as follows:

> "Urban Area" pursuant to 23 U.S.C. 101 (33) means an urbanized area designated by the Bureau of the Census having a population of 5,000 or more and not within any urbanized area (as defined by 23 U.S.C. 101 (34)), within boundaries to be fixed by responsible State and local officials.

[24] The introductory text to 2 CCR § 601-3 states, "If these Rules conflict with relevant federal or state law, the federal or state law shall govern." The current definition of "Urban Area" in Rule 1.31 is in conflict with federal law.

Rule 1.31 is internally inconsistent and currently in conflict with federal law.[25] Under Rule 1.31, an "Urban Area" is an "urbanized area" that is not within an "urbanized area (as defined by 23 U.S.C. 101 (34)." The referenced Federal law, 23 U.S.C. § 101(a)(34), defines "Urbanized Area" as an area "with a population of 50,000 or more designated by the Bureau of the Census, within boundaries to be fixed by responsible State and local officials in cooperation with each other, subject to approval by the Secretary," including, "at a minimum, the entire urbanized area within a State as designated by the Bureau of the Census."

In sum, the Federal law includes two types of places in the definition of "Urban Area":

- "Urban Places" of 5,000 or more population (outside of "urbanized areas"); and
- "Urbanized Areas" of 50,000 or more population.

By contrast, by specifically excluding federally-defined "urbanized areas" from its reach, CDOT's current definition of "Urban Areas" includes only areas with a population of 5,000 to 49,999. As such, Rule 1.31 is in conflict with Federal law and does not make sense in terms of advancing CDOT's regulatory program. If "Option 2" is implemented without the suggested change to Rule 1.31, then Rule 7.00(D)(2)(b) would extend into incorporated municipalities with populations over 50,000, transforming a huge number of existing lawfully permitted signs into Nonconforming Signs.

To correct this potential glitch, the definition in Rule 1.31 should be updated as follows (underline text is added):

> "Urban Area", pursuant to 23 U.S.C. 101(a)(33), means an urbanized area as defined in 23 U.S.C. 101(a)(34) or, in the case of an urbanized area encompassing more than one State, that part of the urbanized area in each such State, or urban place as designated by the Bureau of the Census having a population of 5,000 or more and not within any Urbanized Area, within boundaries to be fixed by responsible State and local officials in cooperation with each other, subject to approval by the Secretary. Such boundaries shall encompass, at a minimum, the entire urban place designated by the Bureau of the Census.

Additionally, in order to minimize unintended consequences of a transition from existing regulations to proposed regulations based on "Option 2," CDOT should append the following to the end of the definition of "Urban Area":

[25] StreetMedia submits that upon close examination, Greenwood Village's comments reflect a misunderstanding on the City's part as to how the definitions of "Urban Area" and "Urbanized Area" interrelate under federal law and CDOT's current Rules (Greenwood Village comments at 5). Moreover, the intersection of Belleview and I-25 illustrates why this should be addressed, in that it is highly "urban" in character—in Denver, Arapahoe County, and Greenwood Village.

> The phrase "Urban Area" also includes land within the corporate boundaries of an incorporated municipality, regardless of its population.

That way, existing lawful signs in smaller municipalities will not inadvertently become nonconforming. The proposed changes would not change the amount of signage in the region in any material way, as signs are still subject to local regulation—within appropriate constitutional boundaries.

IV. Enforcement

At the stakeholder meeting on June 2, 2020, a representative from Mile High Outdoor Advertising supported the proposed changes to Rule 6.02 and further, urged CDOT to adopt amendments that would put "teeth" in the enforcement of the On-Premises / Off-Premises distinction that is set out therein. Several others joined this idea in their written comments. While a transcript of that meeting will not be available until after these comments are due, the gist of the comments were that CDOT should explore fines and disgorgement of profits from any who would dare to display an "Off-Premise" message without a lawful Permit.

Perhaps more chilling than the "chilling effect" that Mile High Outdoor Advertising would like CDOT to put on its competitors' speech is the increased litigation exposure that such strict enforcement of such questionable standards would create (not to mention the fact that CDOT versus the Denver Broncos would be quite a spectacle). StreetMedia submits that it would appear that Mile High Outdoor Advertising's representative may be so blinded by his desire to maintain the anti-competitive protections his company enjoys under CDOT's current interpretation of the Rules that he would throw the home team (Denver Broncos) under the bus. Here it is worth noting (again) for the record that Mile High Outdoor Advertising has unclean hands due to the (at least) five Illegal Signs that are currently in its inventory.

In closing, CDOT has a critical transportation mission. Promulgating amended Rules to protect favored outdoor advertising companies and censorial political subdivisions at the expense of individual First Amendment rights and free markets will undoubtedly prove to be a costly diversion for CDOT. StreetMedia respectfully suggests that CDOT should avoid becoming the patsy of those stakeholders who would urge CDOT to break legal and constitutional limits (and risk difficult litigation) in order to protect their interests over the public interest.

Thank you for the opportunity to provide comments on the proposed Rules.

Sincerely,