August 18, 2021

COMMENTS ON CDOT'S EMERGENCY RULES

I want to thank CDOT for the opportunity to comment on its new emergency rules related to outdoor advertising, and in good faith, better understand how the new language will affect all sign/advertising device owners and to comply with the intent of the Highway Beautification Act of 1965. I am including 5 questions in this letter that I hope CDOT will provide comprehensive answers to so everyone will have a better understanding of how CDOT will interpret these new rules.

One area of concern that needs clarification for all sign/advertising device owners is how CDOT will now apply the term "compensation" as it relates to what now qualifies as an advertising device. In CDOT's "Responses to Stakeholder Comments/Inquiries" CDOT has stated that "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." CDOT needs to further clarify this position for all sign owners.

"Marrying" the two defined terms, "Advertising Device" and "Compensation" can be read in this manner:

"Advertising device means any outdoor sign intended, or used to advertise or inform for which the exchange of anything of value is directly or indirectly paid or earned in exchange for its erection or existence by any person or entity".

This language is very broad and could impact every sign/advertising device in existence or any new one that will be built in the future. The plain language would seem to suggest that if any "compensation" is paid by any person or entity for a sign's existence that the sign becomes an advertising device, which thus requires a permit from CDOT if that sign/advertising device can meet all of CDOT's rules, including size, spacing, lighting, and zoning requirements. Whenever any person or entity applies to a local government to erect a sign on their property a permit fee/plan review fee is almost always required to be paid to the local government for that privilege. This is a process almost universal to every local government and is required before a person or entity can erect a sign. This isn't hypothetical, but a fact. With this in mind, can CDOT clarify this question:

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"?**

From CDOT's answer in the "Responses to Stakeholder Comments/Inquiries" the public should presume it does. If it does, then probably almost all existing, and new signs will now be

required to obtain a permit from CDOT. This question is even more critical now that a sign owner can sign an affidavit stating their sign is not an advertising device under penalty of perjury. CDOT should be able to clarify up front what would constitute "perjury" and assure the sign owner that today, tomorrow, and every day in the future that CDOT will remain consistent with its determinations made today.

Another question that needs an answer today from CDOT is this:

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"?**

Both the above questions concern a person or entity that is DIRECTLY exchanging something of value (money) for that sign's erection and/or existence. According to the plain language of the new rules, and CDOT's answer in its "Responses to Stakeholder Comments/Inquiries" on this subject, any person or entity that signs an affidavit will probably be committing perjury if they paid a sign/permit review fee and/or physically was responsible for the purchase of that sign/advertising device.

Two other questions to answer:

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?**

4. **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?**

These aren't hypothetical questions but are real life instances that happen regularly in this State. CDOT needs to better define what conduct they regulate and what conduct they don't regulate within their "control zone" adjacent to State Highways. This will aid all sign owners, and will help ensure that CDOT will remain consistent on what constitutes "compensation" for each and every administration going forward. Everyone benefits!

Anyone who has been in the sign business any length of time knows that it is CDOT's lack of consistency in enforcing its rules in a non-biased manner is why CDOT has found itself having to change its rules. Specifically, it's all over CDOT's wavering on the 500' from an Interstate interchange rule (Rule 7.00 (D) (2)) that has led everyone to this point (CDOT ended up in a federal court). Sometimes CDOT will enforce the Federal Governments restrictions on this rule and sometimes they enforce their own more restrictive interpretation of this rule.

A question was raised by a Stakeholder if CDOT was going to include the urban area exemption from this rule. CDOT stated that it wasn't at this time. If CDOT would follow the words of The

Colorado Supreme Court there would be NO need to change this language, just adopt the Federal Governments restrictions on this rule as The Supreme Court of Colorado has stated that is what the State should be doing.

The Supreme Court of Colorado, in Pigg v. State Department of Highways (CDOT) (746 P.2d 961), stated:

"The Act, as it was originally enacted, followed the formal requirements and utilized the language of the Beautification Act. As the Act was amended over the years, the legislature ensured the statute's conformity with the Beautification Act by adopting those definitions and restrictions set out in federal regulations. The practice of the legislature in conforming the Act to the federal law with few substantial changes suggests both that the legislature's primary concern has remained the preservation of the state's share of federal highway funds, and that the legislature intended to prohibit only those signs that would conflict with federal law".

They go on to state:

"The Act was modeled on the Beautification Act and designed to permit the erection and maintenance of any sign consistent with the restrictions imposed by the federal law".

and continue with:

"We noted above that the scant legislative history available suggests only that the legislature intended to permit the maintenance of any sign not inconsistent with the Beautification Act".

An important point to what they said is that the state of Colorado has adopted the Federal Government's definitions and RESTRICTIONS! CDOT already knows that the Federal Government will allow signs within 500' of an Interstate interchange if the land where the sign sits is incorporated or in an URBAN AREA. CDOT proposed last year to amend its language in that Rule to include urban areas. One would like to think that CDOT had cleared this with the Federal Government before proposing this new language in order to make sure that the State would remain compliant with the HBA. They have also permitted many signs through the urban area exemption in the past but refuse to do it on a consistent basis. If you aren't one of their "favored" companies you don't get the urban area exemption. This inconsistent interpretation has directly led to this revision of rules!

CDOT is forbidden to permit any signs inconsistent with the Beautification Act and the terms agreed to in its July 9, 1971 HBA agreement with the federal government (including CDOT's rule 7.00 (D) (2), the 500' from an Interstate interchange rule). Both parties, State of Colorado and the Federal Government, agreed to the language contained in Rule 7.00(D) (2) in this agreement. The Supreme Court, in the Pigg case, had it right when they stated that The State of Colorado had adopted the Federal Government's definitions and restrictions. What better way to comply with this forced agreement than to adopt the Federal Government's definitions and restrictions to ensure Colorado isn't jeopardizing 10% of their rightful highway dollars from the

Federal Government. But CDOT doesn't always do that. Sometimes they will apply the Federal Government's restrictions on Rule 7.00(D) (2) and sometimes they apply a more restrictive interpretation. CDOT has received numerous complaints about signs that aren't located in an incorporated area (they are located within an urban area though) but are within 500' of an Interstate interchange (they were being asked to apply the same terms and restrictions as they were applying to other applicants that weren't allowed to use the urban area exemption). CDOT has continually refused to revoke these permits, and instead, continually reissues these permits year after year. Using the federal governments restrictions, they are all legal. Using CDOT's restrictions (no urban area exemption) they are all illegal.

Since CDOT refuses to revoke these permits, and it is forbidden by law from permitting or renewing any illegal signs, CDOT's continual renewing of these permits must mean they meet the restrictions imposed by law. Otherwise, CDOT is permitting illegal signs and allows them to proliferate throughout the State.

From the above discussion it is imperative that CDOT better define what constitutes "compensation". If it doesn't, one can safely assume that more inconsistent "rulings" will be made by CDOT. With this in mind, a solution that might be acceptable to any sign owner is that CDOT just issue "memorandums of agreements" to all sign/advertising device owners, whereby, CDOT allows any sign to continue to operate in this State until the federal government threatens to withhold any highway funds due to that sign (like what is stated in the already issued memorandum of agreements). This has been done in the past with CDOT's blessing and some signs have operated legally in this State for over 10 years under a memorandum of agreement (as an example, see permit files for permit numbers 10685, and 10686). This must be a legal option for signs to legally operate in this State or, once again, CDOT is willingly allowing signs to operate illegally in this State which is strictly against statute and the terms agreed to in the State's HBA agreement with the Federal Government.

For my fifth and final question I ask this:

5. **"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 I get CDOT to issue me one for the location I have in dispute with CDOT (I-25/highway 119 location)".**

I will take it and take my chances, as I know the location is legal under the Federal Government's restrictions on this issue. But so does CDOT or they wouldn't have proposed amending the language on this rule last year! Hopefully CDOT will show some consistency on this matter and issue memorandum of agreements for any, and all, sign/advertising device owners who desire to operate this way.

Lastly, I just want to reiterate, that the only reason these rules are having to be changed is because of CDOT's inconsistent enforcement of its rules (specifically, Rule 7.00 (D) (2)). All this time and effort is because CDOT fails to follow the words of the Supreme Court of Colorado and consistently apply the Federal Government's definitions and restrictions on that Rule.

Thanks for allowing me to opine in this matter and I look forward to getting answers to these very important questions so all sign/advertising device owners can be assured that moving forward CDOT will apply its Rules in a consistent manner and everyone will be treated equally under the law! Thanks!

[redacted]

Mountain States Media, LLC.

Colorado Department of Transportation
Rules, Policies, and Procedures Administrator
2829 West Howard Place
Denver, Colorado 80204

18 August 2021

Administrator Natalie Lutz,

On behalf of the International Sign Association and the Colorado Sign Association, I would like to submit our organizations' comments on the August 2021 Outdoor Advertising Permanent Rule Rulemaking. The International Sign Association (ISA) is a 2000-member trade association, the members of which are manufacturers, users and suppliers of on-premises signs and other visual communications products from the 50 United States and 60 countries around the world. ISA's in-state affiliate, the Colorado Sign Association includes 71 member sign companies and suppliers headquartered or with significant operational facilities in Colorado. On behalf of our 71 Colorado member companies, ISA and CSA support, promote and improve the visual communications industry, which sustains the nation's retail, distribution, service and manufacturing industries.

Thank you to the Colorado Department of Transportation (TDOT) for engaging in an open process with significant stakeholder participation. As difficult as it has been to keep up with the changing direction of the rulemaking process through its interruption in 2020 and restart in 2021, the Department has done an admirable job of notification of stakeholders and invitation to participate in public forums.

ISA and CSA generally support the rulemaking, both in its intent and in the specific language of the provisions being added to Colorado Administrative Code (2 CCR 601-3). ISA and CSA recognize that CDOT's rulemaking is a result of the recent changes in Colorado law (Senate Bill 21-263). As such, the Department is obligated to defer to the language and policy aims contained within that legislation. However, we have some limited concerns about the definition language that was adopted in SB 21-263 and how CDOT may enforce these new rules.

Definitions of "Advertising Device" and "Compensation"

Under SB 21-263, the amended definition of "Advertising device" is:

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 THATIS PART OF A COMPREHENSIVE DEVELOPMENT**. The term "vehicle using the highway" does not include any vehicle parked near said highway for advertising purposes.

And the definition of "Compensation" is:

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.

Under these definitions, ISA and CSA are concerned that any retail or office tenant paying its lease to the owner of a building could be considered as "indirectly paid" compensation for the display of the tenant's name or message on a wall sign or freestanding sign structure.

We recognize that CDOT's answers during the July 9, 2021 workshop describe the process under 3.2.A.1.b for a property owner to execute an affidavit as evidence that a sign is not an Advertising Device. Perhaps the Department's intent is not to require permits or enforce spacing requirements against what CDOT currently calls "on-premises signs"; however, the new process for Declaratory Orders (14.00) allows for any person to petition CDOT concerning an Advertising Device.

A search of current commercial office space shows a Denver building marketed with "*Opportunity for spec suites, full floors, collaborative work space, exceptional views, and building signage*". Another current listing in Greenwood Village notes "*The property is immediately adjacent to I-25 with building parapet signage available on each tower*." When a tenant signs a lease for one of those spaces (or the hundreds of others that are or will be marketed in a similar manner) and pays extra for that signage at the roofline or on the large top panel on a multitenant pylon, any person can petition CDOT to have the sign declared an Advertising Device. Perhaps an individual dislikes all illuminated signs or has a direct view of a sign that disturbs their view-shed. In those scenarios, "the exchange of anything of value" for that signage could lead to (on-premises) building or freestanding signs being determined to be Advertising Devices by the language enacted through SB 21-263.

While CDOT is unlikely to return to the draft regulations from 2020, that earlier language contained a means test that would make the on-premises sign industry more comfortable that signs containing messages related to the activities conducted on the property would not be regulated in the same manner as a billboard. From the 2020 draft rulemaking:

i) The Property or Sign owner, or their lessee or agent, markets the Sign to third parties as a device that can be used to advertise products or services;
ii) The Property or Sign owner, or their lessee or agent, receives money or Value that derives from the act of advertising on the Sign, and not merely from increased profits derived from displaying the availability of the activity, good or service on the Property;
iii) The Property or Sign owner, or their or agent, has one or more contracts concerning the Sign with third parties who are engaged in the business of outdoor advertising and such contracts concern outdoor advertising; or
iv) The Property or Sign owner, or their lessee or agent, have one or more contracts which contain provisions that suggests a substantial portion of the Value exchanged in the contract is for advertising, rather than profits from sales on the Property.

These provisions would avoid the concerns that on-premises signs could be challenged and regulated as if they were Advertising Devices.

Advertising Devices on Scenic Byways

Colorado law long has prohibited Advertising Devices on Scenic Byways. ISA and CSA agree with this prohibition. However, the current proposal eliminates the exceptions (9.00.B.2) that allow for new on-premises signs. Under the Declaratory Orders process (14.00) discussed above, we are concerned that on-premises signs located along the route of several Colorado scenic byways could be subject to challenge from individuals who don't want ANY signs along a scenic byway, even one for a business located there.

In particular, we are concerned about the potential impacts to businesses located on these scenic byways:

Frontier Pathways (Pueblo city center)

Top of the Rockies (Leadville, new extension to Aspen)

Colorado River Headwaters (Kremmling, Hot Sulphur Springs, Green Ridge, Grand Lake)

South Platte River Trail (Julesberg)

Pawnee Pioneer Trails (Fort Morgan, Sterling, Briggsdale, Ault)

CEVMS Advertising Devices

As discussed above, the Declaratory Orders process could be used by individuals to challenge the presence of any new sign. As it pertains to CEVMS, our concerns are with the provisions of 12.C.2.a and 12.C.5(3). While it may be appropriate for 1000' spacing between digital billboards, applying this type of spacing requirement to on-premises signs would be very harmful to retail businesses that own on-premises electronic message centers.

In addition, the threat of an on-premises CEVMS being classified as an Advertising Device (through the Declaratory Orders process) necessitates a mention of an existing Colorado regulation that could take on new degree of significance. Existing 12.C.5(3) requires that a CEVMS "shall be capable of being remotely monitored to ensure

conformance with these Rules and state and federal laws". While this monitoring capability is common for digital billboards, in part because the billboard operator needs to ensure that advertisers' messages are being displayed properly and on schedule, it is rare to nonexistent for on-premises message centers. If an on-premises message center is reclassified as an CEVMS advertising device, it almost certainly will be in violation of 12.C.5(3) without any easy way to bring the sign into conformance.

ISA and CSA believe that CDOT's draft regulations will be beneficial to the state by better protecting the rules from a challenge on the basis of content neutrality. However, we are concerned that the definitions contained within the former Senate Bill 21-263 could be problematic as interpreted by CDOT staff or within the court system. And we are concerned that the Declaratory Orders process could be used to threaten the exemption that most on-premises signs (or "signs other than Advertising Devices") receive from CDOT permitting requirements.

Sincerely,

[redacted]

Director, Industry Programs

[redacted]

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.