NO.: COA 24-915 DISTRICT TEN

NORTH CAROLINA COURT OF APPEALS

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GREY OUTDOOR, LLC, Petitioner/Plaintiff/Appellant, vs. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; J. ERIC BOYETTE, in his official capacity as Secretary of Transportation of the North Carolina Department of Transportation; ROBBY L. TAYLOR, in his official capacity as District Engineer; and STEPHEN M. GARDNER, in his official capacity as North Carolina Department of Transportation Outdoor Advertising Coordinator, Respondents/Defendants/Appellees.	FROM WAKE COUNTY 23CV028880-910

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PETITIONER/PLAINTIFF/APPELLANT'S BRIEF (AMENDED)

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INDEX

APPENDIX

TABLE OF CASES AND AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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PETITIONER/PLAINTIFF/APPELLANT'S BRIEF AMENDED

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ISSUES PRESENTED

I. Did the trial court err in granting defendants' cross motion for summary judgment as to Grey's claims related to damages?

II. Did the trial court err in denying Grey's motion for partial summary judgment seeking damages?

III. Did the trial court err in determining that each party will bear their own costs and fees?

INTRODUCTION

At our state's beginning, our founders "inserted in the basic law a declaration of rights designed chiefly to protect the individual from the State." *State v. Ballance*, 229 N.C. 764, 768 (1949). Our State Constitution is the bulwark protecting our individual personal and property rights against abuse of power by any department of the government. *Corum v. University of North Carolina,* 330 N.C. 761, 788 (1992). The right of property, including its free use and enjoyment, is "as old as our state" and it is a fundamental right of all citizens. *Kirby v. N.C. DOT*, 368 N.C. 847, 852-53 (2016). Neither the legislature nor any state agency "exercising delegated police powers may arbitrarily and capriciously restrict an owner's right to use his property for a lawful

purpose." *In re Ellis*, 277 N.C. 419, 424 (1970).

Every citizen is entitled to the preservation of his or her liberties or property under the "protection of the general rules which govern society." *Parish v. East Coast Cedar Co.*, 133 N.C. 478, 484 (1903). The "rule of law" applies equally to protect us from government bureaucrats exercising "arbitrary power." *Brown v. Elec. Co.*, 138 N.C. 533, 544 (1905).

Rules of law are foremost decided by our State legislature which speaks for the people of this State. *Holmes v. Moore*, 384 N.C. 426, 460 (2023). Pursuant to its constitutional role, the North Carolina General Assembly enacted N.C.G.S. §136-129.2 ("Controlling Statute"), which sets separation requirements between new billboards and well-known places such as National or State parks that the legislature deemed deserving of extra protection. The Controlling Statute contains a finite list of these known places but plainly omits National Forests. The legislature's public policy decisions naturally exclude an infinite list of other places. It is a bedrock principle of our government that changes in law must come from elected representatives in government. Courts or agencies cannot under the "guise of construction" usurp that role. *State*

ex. rel. Utilities Com. v. Edmisten, 291 N.C. 451, 465 (1977).

In this case, the defendants, believing themselves better situated to determine public policy than the legislature, denied plaintiffs' applications for state permits to erect four billboards in Carteret County due to proximity to the Croatan National Forest without a cogent rationale as to how the Controlling Statute was violated. The trial court ultimately held that the Controlling Statute was clear in excluding a national forest and that the defendants exceeded their authority and exercised arbitrary power. The defendants did not appeal this aspect of the lower court's ruling.

While the state permits were ordered to be issued, the trial court denied plaintiff's request for damages, fees and costs. The right to use and enjoy property in North Carolina is a natural right and not a privilege bestowed by the government. Issuing permits long after the battle had begun does not restore the past deprivation of rights and account for plaintiff's uncontested damages. The trial court erred in its judicial "duty" to protect Grey's property rights. *High Rock Lake Partners, LLC v. N.C. DOT*, 366 N.C. 315, 321 (2012).

STATEMENT OF THE CASE

On May 18, 2023, defendants Robby L. Taylor ("Taylor"), District Engineer, and Stephen M. Gardner ("Gardner"), Outdoor Advertising Coordinator for the Department of Transportation ("DOT"), denied ("Permit Denials") Grey Outdoor, LLC's ("Grey") applications for state permits ("State Permits") to erect four billboards ("Billboards") on property in Carteret County. (R pp 6-45). On June 15, 2023, Grey appealed to the then Secretary J. Eric Boyette ("Boyette"). (R pp 46-343). On September 18, 2023, Boyette affirmed the Permit Denials. (R pp 344-404).

On October 13, 2023, Grey filed a Petition for Judicial Review and Complaint for Damages.[1] (R pp 405-433). On December 15, 2023, the defendants served their Answer. (R p 456).

Both parties moved for summary judgment. (R pp 472, 954). In an order entered and served on June 24, 2024, the trial court granted Grey's motion related to the Permit Denials and ordered their issuance but denied Grey's motion for damages, attorney fees and costs. (R pp 1204-

[1] A corresponding Memorandum of Action was filed in Carteret County regarding the taking or deprivation of Grey's property rights. (R p 442).

1209) (App 1-6). In the same order, the lower court granted the DOT's cross motion to dismiss the claims for damages and fees. (R p 1209). On July 19, 2024, Grey appealed to this Court the denial of damages, fees and costs. (R p 1218). The DOT did not appeal the trial court's decision to reverse the Permit Denials. The record was settled by agreement and docketed with this Court.

GROUNDS FOR APPELLATE REVIEW

The trial court's order is a final judgment; therefore, an appeal lies to this Court pursuant to N.C.G.S. §7A-27(b)(1).

STATEMENT OF THE FACTS

Grey owns a lease ("Lease") for 25 years over a tract of land located along US Highway 70 in the Town of Newport and located within Carteret County ("Site"). (R pp 694, 701-704; Grey Vick Affidavit, "Vick Aff.", ¶7; App 7-11). The Lease provides Grey with the right to use and develop the Site for four (4) billboards with a corresponding right to earn substantial revenues from advertisers renting space on the signs. *Id*. The Lease is a single purpose instrument – meaning Grey only has the right to use the Site for billboards, nothing else. (*Id*., ¶8). The US 70 corridor where the Site is located is commercially zoned or commercially

used. (R p 705). The Site is adjacent to a boundary of the Croatan National Forest. (R p 118).

The DOT is delegated responsibility under the North Carolina Outdoor Advertising Control Act ("OACA") (N.C.G.S. §136-126 *et seq*.) to manage the erection and maintenance of billboards along the interstates and major highways in the State, which includes US 70 bordering the Site. Specific State development standards for billboards are found in 19A NCAC 2E .0203 that are objective in nature, mandating commercial or industrial zoning or use, size of signs, spacing between billboards, height and lighting considerations. (R pp 392-395). All these standards were met with Grey's applications. (R p 695; Vick Aff., ¶14-15).

The DOT denied the State Permits. The Site's proximity to the Croatan National Forest was the singular reason for the Permit Denials. (R pp 6, 148 (¶5), 345-347).

For the Permit Denials, the three individual defendants conducted no investigations into the facts or law behind the Controlling Statute. Taylor never reviewed the permit applications or the appeal submittals. The totality of Gardner and Boyette's efforts were to call their respective attorneys in the Department of Justice to determine "policy" or what was

"best" for the DOT. (R pp 1103-1107).

On multiple occasions, Grey begged the defendants to not deny the State Permits since a national forest is not listed in the Controlling Statute. (R pp 696-697, 756, 758-761; Vick Aff., ¶21-22, 27; App 12-18). The DOT's position did not change. (*Id*.).

STANDARD OF REVIEW

This Court's review of a summary judgment order is *de novo*. *In re Will of Jones*, 362 N.C. 569, 573 (2008). The core of this case involves constitutional rights, including governmental deprivations or takings of private property, which issues are reviewable *de novo*. *Town of Matthews v. Wright*, 240 N.C. App. 584, 591 (2015) (citing *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338 (2001)). The scope of the applicable inverse condemnation statute, N.C.G.S. §136-111, ultimately is a question of law reviewable *de novo*. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547 (2018).[2]

The parties filed cross motions for summary judgment. (R pp 472, 954). "Summary judgment may be granted . . . where the pleadings, depositions, answers to interrogatories, and admissions on file, together

[2] The standard of review for attorney's fees and costs are discussed in Section II.

with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *McKinney v. Richitelli*, 357 N.C. 483, 486 (2003) (quoting N.C. Gen. Stat. §1A-1, Rule 56(c)).

ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING DAMAGES.

For the taking of its property interests, Grey moved for relief under N.C.G.S. §136-111 and Articles I, Sec. I and Sec. 19 of the North Carolina Constitution. (R p 472). For the latter constitutional protections, an analysis of a "fruits of their own labor" claim under Article I, Sec. 1 and the "law of the land clause" under Article I, Sec. 19 are basically the same. *Treants Enterprises, Inc. v. Onslow County*, 320 N.C. 776, 778-79 (1987). The test is essentially whether the State action is rationally related to a valid State objective. *Id*.

An inverse condemnation cause of action under N.C.G.S. §136-111 requires (1) a taking, (2) by an entity with condemning authority, (3) where there has not been a formal exercise of the power of eminent domain attempted by the taking agency. *Wilkie*, 370 N.C. at 552.

In the seminal case of *Kirby v. N.C. DOT,* the North Carolina Supreme Court held that when the DOT acts in a regulatory context "outside the scope" of a legitimate exercise of police power to substantially interfere with property rights, a taking of property has occurred, triggering the constitutional guarantees of just compensation under Article I, Sec. 19 and the monetary remedies afforded by N.C.G.S. §136-111. 368 N.C. 847, 854 (2016) (citing *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 261-62 (1983)).

In *Kirby*, the Court, in holding that the Map Act statute did not support a valid, regulatory exercise of police power, determined that the objective of "economic savings" for the State by freezing development within future planned highway corridors was not a proper government objective contemplated by the general police power of preventing injury or protecting public health, safety, or welfare. *Id*. at 852, 855. Moreover, the *Kirby* Court was disturbed by the Map Act's substantial restraint on fundamental property rights associated with developing and using real estate. *Id.*

The case at bar satisfies *Kirby*, as hereinafter discussed.

A. Grey possessed fundamental property rights harmed by the defendants' actions.

Only those with a "property interest under the [Constitution]," may claim constitutional protections. *Tully v. City of Wilmington*, 370 N.C. 527, 538 (2018) (cite omitted). From the undisputed evidence, Grey's property interests in this case are multi-fold.

First, as a long-term lease holder, Grey's interest in land was constitutionally protected. (R p 701); *Durham v. Eastern Realty Co.*, 270 N.C. 631, 634 (1967). With its billboard lease, Grey had the right to earn substantial rental revenues. *DOT v. Adams Outdoor Adver. of Charlotte Ltd P'ship*, 370 N.C. 101, 109-11 (2017).

Second, Grey's right to use and enjoy its property is a fundamental one, *Kirby*, 368 N.C. at 852-53, and serves a "foundational" piece in "our constitutional order." *Schooldev E., LLC v. Town of Wake Forest*, 2024 N.C. LEXIS 974, *24 (December 13, 2024). As a sibling to the free use of land, the right to earn a living or to conduct a private business free from arbitrary interference is also fundamental. *King v. Town of Chapel Hill*, 367 N.C. 400, 408-09 (2014).

Grey had a right to the protections of law as the use of property for a billboard is a "legitimate commercial use" of property and not a

nuisance *per se*. N.C.G.S. §136-127; *Ace-Hi, Inc. v. Department of Transp*., 70 N.C. App. 214, 219-20 (1984); *State v. Whitlock*, 149 N.C. 542, 543 (1908) ("[Y]et it is fundamental law that the owner of land has the right to erect [billboard] structures upon it as he may see fit.").[3]

A legitimate claim of entitlement triggering constitutional protections often arises from published laws, including statutes or ordinances. *Debruhl v. Mecklenburg Cty. Sheriff's Office*, 259 N.C. App. 50, 56 (2019). When a statute or ordinance sets forth specific standards precedent to the issuance of development approval, and those standards are met, then the rule of law itself recognizes a right established by such statute or ordinance. *Jackson v. Guilford County Bd. of Adj*., 275 N.C. 155, 165 (1969); *Application of Rea Constr. Co.*, 272 N.C. 715,717 (1968).

Grey complied with the substantive objective standards for new billboards promulgated in 19A NCAC 2E .0203 and the trial court so found. (R p 695; Grey Aff. ¶14-15; R p 1205, ¶5). The defendants denied the State Permits based only on their vacuous reading of the Controlling Statute, which states in pertinent part:

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[3] It is also a land use protected under Article I, Section 14's free speech guarantees (and the First Amendment to the U.S. Constitution). *County of Cumberland v. Eastern Federal Corp.*, 48 N.C. App. 518, 522 (1980).

> (a) . . . , in order to further the purposes set forth in Article 10 of this Chapter and to promote the reasonable, orderly, and effective display of outdoor advertising devices along highways adjacent to scenic historical areas, while protecting the public investment in these highways and promoting the safety and recreational value of public travel, and to preserve natural beauty, no outdoor advertising sign shall be erected adjacent to any highway which is either:
>
> (1)
>
> a. A scenic highway or scenic byway designated by the Board of Transportation;
>
> b. Within 1,200 feet, on the same side of the highway, of the boundary line of a ***North Carolina State Park, a National Park, a State or national wildlife refuge, or a designated wild and scenic river***, or
>
> . . . .

N.C.G.S. § 136-129.2 (emphasis added).

The trial court determined that the language of the Controlling Statute was plain, excluded a national forest, and that the DOT lacked the authority to deny the State Permits based on the signs' proximity to the Croatan National Forest. (R p 1207; ¶ 2, 4, 6; App 4). The trial court also agreed with Grey that the State Permits were "erroneously denied" for the reasons set forth in Grey's motion for partial summary judgment and supporting brief, which included that the defendants had acted arbitrarily and capriciously. (R p 1208, ¶8, App 5; R pp 473, 1148-1151, App 19-23). The trial court's conclusions, not being challenged in an

appeal by defendants, are binding on this Court. *Mann Contrs., Inc. v. Flair with Goldsmith Consultants-II, Inc.,* 135 N.C. App. 772, 775-76 (1999).

B. The defendants' actions were an improper exercise of police power for failing to serve a valid state objective.

The test for an improper exercise of police power for taking purposes is two-fold: (1) in regulating property, is the government serving a proper State objective? and (2) if so, are the means chosen to regulate reasonable? *Responsible Citizens*, 308 N.C. App. at 261-62. To determine the latter, the court looks at the overall impact of the government action to determine whether it is reasonable in degree. *Id.*

Although typically the analysis involves legislative action, the same test has been applied to State *agency* action administering law. *Eastern Appraisal Servs. v. State*, 118 N.C. App. 692, 696 (1995); *Weeks v. N.C. Dept. of Nat. Resources & Comm. Dev.*, 97 N.C. App. 215, 225 (1990).[4]

It is axiomatic that *arbitrary* interference with property rights is anemic to and outside the legitimate boundaries of police power and,

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[4] Our highest court has held that a higher evidentiary burden for government may be warranted when lawful businesses are deprived. *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 550 (1973). Here the defendants violated clear legislative guardrails to deprive Grey of its property interests without any cognizable basis; as a result, they would fail the higher or lesser evidentiary burden.

therefore, fails to serve a proper State objective. *State v. Williams*, 253 N.C. 337, 344 (1960); *In re Ellis*, 277 N.C. at 425-26; *King*, 367 N.C. at 408-09 ("A state cannot under guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.").

"An act is arbitrary when it is done without adequate determining principle; not done according to reason or judgment, but depending upon the will alone, -- absolute in power, tyrannical, despotic, nonrational, -- implying either a lack of understanding of or a disregard for the fundamental nature of things." *In re Housing Authority of Salisbury*, 235 N.C. 463, 468 (1952). "Capricious" is synonymous with "arbitrary" and denotes a "disregard for the surrounding facts and settled controlling principles." *Id.* The arbitrary or capricious standard is not easily satisfied by the mere fact that a government actor may have erred. *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 16 (2002).

Property rights are not absolute but can be regulated, and thus limited by the rule of law, in the furtherance of the common good or public welfare. *King*, 367 N.C. at 407; *State v. Whitaker*, 228 N.C. 352, 360 (1947). In the constitutional order, "the Legislative Department is the

judge, within reasonable limits, of what the public welfare requires." *State v. Williams*, 253 N.C. at 345. The legislative branch exercises the political power of the people to establish rules or laws for the conduct of members of our society, invoking the public policy for the entire State. *Harper v. Hall*, 284 N.C. 292, 322 (2023).

Agencies as part of the executive branch are assigned the constitutional lane of administering law; they do not make law. *Motsinger v. Perryman*, 218 N.C. 15, 20 (1940); N.C. Const. Art. III, Sec. 5(4) ("laws to faithfully execute"). Within that constitutional lane, liability to the government does not arise from the mere fact of an agency making reasonable mistakes in the administration of law. Reasonable mistakes would include a wrong choice in administering an unclear statute or a complex set of laws if the agency can demonstrate a reasonable, albeit incorrect, interpretation. *See City-Wide Asphalt Paving, Inc. v. Alamance County*, 132 N.C. App. 533, 540 (1999) (in exercising discretion in awarding government contract via bids, defendant officials acted reasonably in performing investigations and stating reasons for rejecting bid).

The term "law of the land" is synonymous with "due process of law." *Ballance*, 229 N.C. at 768. Due process is ultimately judged by a "standard of reasonableness." *State v. Smith*, 265 N.C. 173, 180-81 (1965).[5] In support of the ruling of the trial court that defendants did not appeal, Grey presented uncontroverted facts demonstrating several indicia of arbitrary exertion of power by the defendants, described below.

1. The applicable law was plain, eschewing discretion.

It is axiomatic that "an act of the Legislature, which speaks for the people in making its laws, is 'the law of the land' unless there is a provision of the Constitution which forbids it to enact such law." *Daniels v. Homer*, 139 N.C. 219, 228 (1905). It is well-established that a state agency is "a creature of the Legislature" and cannot deny a right provided by statute nor add to or modify a statute. *State ex rel. Utilities Com. v. Lumbee River Electric Membership Corp.*, 275 N.C. 250, 257, 260 (1969). Separation of power principles "is the rock upon which rests the fabric of our government" with a "marked jealousy of encroachment" by one branch upon another. *Person v. Board of State Tax Comm'rs*, 184 N.C.

[5] "Reasonableness" is a question of law for the Court. *Barger v. Smith,* 156 N.C. 323, 325 (1911).

499, 502 (1922).

When a government board or agency is delegated responsibility to administer a statute or ordinance, and its directives, including its promulgated regulations, are clear and satisfied, it acts arbitrarily and capriciously and fails to serve a valid State objective when it disregards the law. *Woodhouse v. Board of Comm'rs of Nags Head*, 299 N.C. 211, 219 (1980); *Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 64 (2010), *aff'm per an equally divided opinion*, 365 N.C. 305 (2011).

Here, the General Assembly, balancing the public interests, safety, scenic or recreational values, and the right of outdoor advertisers to use land, enacted the Controlling Statute and determined some but not all government owned places in the State would trigger billboard separation requirements. National or state forests, State game lands, city or county parks were, for example, excluded in the exercise of State law-making. This statute represents the State objective. Blatantly disregarding it can neither be "rationally related" nor serve a "valid State objective". *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 459 (2016), *aff'm per curiam*, 369 N.C. 722 (2017).

In implementing the OACA, the defendants performed

administrative functions, being routine, nondiscretionary decision-making involving objective facts. *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 507 (1993). Upon satisfying the objective standards, a property owner such as Grey possessed a "right" to a permit, and any unreasonable refusal to grant same, was arbitrary and capricious and a violation of due process. *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 966-67 (1998); *Bateson v. Geisse*, 857 F.2d 1300, 1305 (9th Cir. 1988).[6]

2. By ignoring statutes and rules, adopting conflicting positions and eschewing a deliberate process, the defendants failed to show a reasoned analysis.

Although the defendants were tasked with execution of law, they demonstrated a complete lack of care to find the relevant facts and law. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 634-35, 240 S.E.2d 460, 469 (1977) (Commission Secretary's inadequate review of appeal record demonstrated that he acted arbitrarily and capriciously in rejecting petitioner's plan). As the trial court determined, a national

[6] In subsection (a)(1)a. of the Controlling Statute, the General Assembly had provided the DOT with the authority to protect highway corridors that the DOT believed were sufficiently pretty by classifying - through rule-making - a road as a "scenic highway or byway." This was admittedly not done for the Site along U.S. 70. (Boyette Depos. 55, 100; R p 1206, ¶8).

forest "is a different place or location from" a "national park" or any other place listed in the Controlling Statute. (R p 1206, ¶7).[7] This finding was supported by abundant and uncontroverted evidence. (e.g., R pp 55-58, 329-331, 333-334, 762-886, 1087-1088). During oral argument, DOT's counsel officially admitted to that fact. (Transcript, pp 95-96, App 24-25).

Taylor eschewed any responsibility for reviewing Grey's applications contrary to the role he was required to uphold via statutory and DOT regulations that mandated his involvement. N.C.G.S. § 136-133.5; 19A NCAC 2E. 0206; 19A NCAC 2E .0213 (Taylor Depos., pp 11-24).

Gardner conducted no investigations to determine the facts or meaning of the various terms in the Controlling Statute. (Gardner Depos., pp 26-27, 29, 35, App 26-29). He simply called the Attorney General's office for that office to determine "policy". (*Id*. pp 9, 21, 26, 29-30, App 30-31, 26, 28, 32).

Boyette also conducted no investigations; he simply deferred to the

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[7] Initially, the DOT egregiously used the term "parkland" in its regulation of directional signs to superimpose onto the Controlling Statute as having the same meaning as "national park". (R p 6). Directional signs are not billboards and have a different set of regulations. The trial court rejected that initial DOT contention. (Boyette Depos., p 39; R p 1207, ¶5, 7).

General Counsel to establish what was "best for the Department." (Boyette Depos., pp 32-34, App 33-35).

The individual defendants took conflicting positions on the meaning of the Controlling Statute in relation to the Croatan National Forest. Taylor had no opinion. Gardner believed a national forest was a national park because you can camp in both. (Gardner Depos, pp 78, 113, App 36-37). Boyette did not "thoroughly review" the Appeal Submittal but admitted that the Croatan National Forest was not the same place or location as a State Park, National Park, State or national wildlife refuge, or designated wild and scenic river. (Boyette Depos., pp 30, 32-34, App 38, 33-35). Boyette instead contended that the DOT had the authority to extrapolate from the broad goals of subsection (a) of N.C.G.S. §136-129.2 to add an infinite number of places or locations that may be preserved by a billboard separation requirement simply if they had sufficient scenic or recreational values, a standard judged by the eye of the bureaucrat administering the permits. (*Id.* pp 46-58).

Effectively, defendants converted a clear statute into a constitutionally defective one, subject to the vagaries of human subjectiveness and passions of what is desirable or beneficial – usurping

the rule of law and the legislative role. *Hart Book Stores, Inc. v. Raleigh*, 53 N.C. App. 753, 758 (1981).

3. The defendants did not offer any rational explanation to rebut the evidence and law submitted by Grey.

The record clearly shows that the defendants gave no, much less due, consideration to the evidence and contentions before the agency presented by Grey, demonstrating capricious behavior or "a disregard for the surrounding facts and settled controlling principles." *In re Housing*, 235 N.C. at 468. An agency's action is arbitrary and capricious if the agency failed to consider the known facts and the applicable law and to present a reasoned rationale when it runs counter to the evidence before the agency. *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto*. Ins. Co., 463 U.S. 29, 43 (1983).

When the State encroaches on property rights, it naturally can only occur via the actions of "individuals clothed with the authority of the State." *Corum*, 330 N.C. at 783.[8] When a government actor, in purporting to exercise police power, invades or encroaches upon the property rights of our State citizens "in disregard of law", then our

[8] A suit against individual defendants in their official capacities as public officials or employees is a suit against the State. *Harwood v. Johnson*, 326 N.C. 231, 238 (1990).

Constitution affords a remedy against the government, where an adequate one does not already exist. *Corum*, 330 N.C. at 786. *Corum* cited to *Pue v. Hood*, 222 N.C. 310 (1942), which held that: "When an officer acts capriciously, or in bad faith, or in disregard of law, and such action affects personal or property rights, the courts will not hesitate to afford prompt and adequate relief." *Id.* at 315. "Disregard" denotes the lack of care or respect for something. Cambridge On-Line Dictionary (2024).[9]

Disregard of law in the constitutional sense dealing with property rights is not equivalent to simple negligence, where liability is triggered by a slight crossing over some standard of care line. Our case law speaks of "arbitrary" government action triggering constitutional protection. *Bizzell*, 192 N.C. at 358 (administration of a police regulation "must not be unreasonable or arbitrary"); *Keiger v. Winston-Salem Bd. of Adj.*, 281 N.C. 715 (1972); ("arbitrary and unduly discriminating interference with property rights"); *Gunter v. Sanford*, 186 N.C. 452, 456 (1923) (the "law of the land" clause is 'intended to secure the individual from the arbitrary

[9] Our Supreme Court has noted the phrase "deliberate indifference" to rights of persons as a basis for a constitutional claim. *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 414 (2021). Indifference and disregard are synonymous terms.

exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'")

In today's modern world, knowledge of each of the places or locations in the Controlling Statute is available in the time it takes to type into a phone or computer. (R pp 758, 771-773). None of the defendants attempted to discover the truth and instead, beside themselves doing nothing, ran to the Department of Justice for outcome determinative relief.

The record reflects without variance a complete and blatant disregard or deliberate indifference to the rights of Grey – the fundamental right to use land, the fundamental right to conduct a private business and the rights reflected from the clear and objective mandates of the OACA, including the Controlling Statute, to promote the reasonably and orderly display of billboards along our major State highways without restraint due to proximity to national forests.

Repeatedly, during oral argument, defendants' counsel contended that Grey was not deprived of anything; simply that Grey needed "to pick a different location." (Transcript, pp 97-98, 101-102, App 39-42). That comment itself shows indifference to law and property rights.

Defendants wielded the cloak of authority to deny Grey its right to develop a billboard and use a lawful location of Grey's choosing based on the subjective feelings or impressions of defendants that the chosen location was too pretty or scenic for a billboard. The result was to substitute the rule of law for arbitrary power, depriving Grey of its property rights, which compels an award of damages.

C. Grey was deprived of all use of its property or its property rights were substantially interfered with.

It is uncontroverted that Grey's lease was for a singular purpose- the erection of four (4) billboards – and that the consequence of the Permit Denials was to deny Grey the complete use of its property. (R p 694, Vick Aff., ¶¶7-8). Effectively, this is the second part of the "ends-means" test, which examines the impact of the government regulatory action: Did such action taken deprive the property owner of "all practical uses or the only use which it is reasonably adapted"? *Responsible Citizens*, 308 N.C. at 263, (citing *Helms v. City of Charlotte*, 255 N.C. 647 (1961)). Rather than all practical uses being eliminated, the *Kirby* Court speaks of "a substantial interference with elemental rights growing out of the ownership of property", which includes unlawful restraints on development and use rights. *Kirby*, 368 N.C. at 855.

Deprivation of all practical use of Grey's leasehold interest in the land or "substantial interference" with Grey's property rights are uncontroverted and borne out by the Affidavits of Vick, Soule and Newstreet, in terms of property use impacts and value diminution. (R pp 693, 695-698, Vick Aff., ¶¶16, 18-19, 25-26, 28, App 43-47, R pp 949-951, Soule Aff., ¶¶4-9, App 48-50, R pp 906, 910-912, Newstreet, Ex. 1 report, App 51-54).

D. The trial court's reasoning in granting defendants' motion to deny damages and fees was flawed.

The trial court stated that damages and attorney's fees should be denied based upon the reasons stated in defendants' motion and brief. (R p 1208, ¶9). The trial court erred for several reasons when considering the paucity and vagueness of claims raised in defendants' motion for summary judgment and brief. (R pp 954-970).

First, defendants' primary defense in their motion was that they were right in applying the Controlling Statute and therefore, Grey was not deprived of "their (sic) liberty interests." (R p 955). The trial court's ruling against them on this point guts this argument. (R p 1207).

Second, defendants claim that Grey had "no protected property interest in maintaining outdoor structures which violate the law,

practice, or public policy" (R p 955) is refuted by the fundamental and foundational rights that Grey had in its property that was blatantly disregarded by defendants. See Arguments, Section 1A, *supra*.

In their trial brief, defendants claim that Grey had no property right in the State Permits, citing *DOT v. Adams*, supra. (R pp 968-969). This argument grossly misrepresents our constitutionally protected rights.

Property rights, being natural rights, existed before State government regulation and are, therefore, not dependent on government for their creation. *State v. Avent*, 253 N.C. 580, 588 (1961), *vacated for other reasons*, 373 U.S. 375 (1963) (right of property is "not *ex gratia* from the legislature, but *ex debito* from the Constitution."). While government can regulate private property for the common interest, a development permit does not bestow some privilege; it simply checks the box that regulation has been followed.

The *DOT v. Adams* case relied upon by defendants at page 111 of that opinion cited in *dicta* the case of *Hursey v. Town of Gibsonsville*, 284 N.C. 522, 529 (1974). The *Hursey* case merely held in the unique context of the historically rigid regulation of intoxicating beverages in this State

that an ABC permit to distribute alcohol was a privilege that could be revoked for noncompliance with the applicable regulations. *Id*. at 526, 530-31.

The *DOT v. Adams* court held that the billboard permit did add value to a billboard leasehold interest for just compensation purposes. *Adams*, 370 N.C. at 112. The *dicta* citation did not nullify two hundred years of law converting the rights to property into a benefit that one must wait in line at some bureaucratic office to receive to use property or pursue a lawful calling. *See Nollan v. Cal. Coastal Com*., 483 U.S. 825, 833 fn2 (1987) ("[The right to build on one's property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a 'government benefit.'").

In their trial brief, defendants also made conclusory contentions that Grey could not show damages. (R p 969). The affidavits of Grey Vick, Robert Soule and Harry Newstreet rebut that claim. (R pp 693, 906, 949).

The trial court announced in its order that it did not "reach" Grey's constitutional issues "as such issues were unnecessary." (R p 1208). Besides being alarming based on the significant constitutional issues at

stake, this Court can disregard that gaff since the claim was properly preserved, *M.E. v. T.J.*, 380 N.C. 539, 560 (2022), and resolve the matter *de novo* since the record is complete and the questions presented are ones of law. *Morris Communications Corp.*, 365 N.C. at 158-59. The trial court had a duty to address the constitutional claims to make the law of the land and fruits of labor provisions of value and to protect citizens. *State v. Williams*, 146 N.C. 618, 622 (1908).

E. Our constitution requires compensation for temporary takings.

A "temporary" taking occurs when there is a substantial interference with property rights for a nonpermanent length of time. *Brown v. Power Co.*, 140 N.C. 333, 341 (1905). Our highest Court has held that "when a person has been deprived of his private property" "nothing short of actual payment, or its equivalent, constitutes just compensation. The entry of a judgment is not sufficient." *Sales v. State Highway & Public Works Com.*, 242 N.C. 612, 618 (1955). For deprivations of property rights, compensation or damages is required to ensure an adequate remedy to the person harmed. *McKinney v. Deneen*, 231 N.C. 540, 542 (1950) ("That a citizen may not be deprived of his property, even for public use, without compensation is fundamental.").

When government takes private property, it is an "integral part of the 'law of the land'" that government pays just compensation. *Debruhl v. State Highway and Public Works Com.*, 247 N.C. 671, 675 (1958). Article I, Sec. 19 is a "self-executing" constitutional guaranty that cannot be impaired by legislative enactment. *Sales*, 242 N.C. at 617.

This Court has held that a "temporary" taking is compensable in North Carolina. *City of Charlotte v. Combs*, 216 N.C. App. 258, 261 (2011) (A temporary taking denies a property owner of the use of property for a finite period and requires compensation during the period of the taking) (citing *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318-19 (1987)).[10]

As noted by the *Kirby* Court, N.C.G.S. §136-111, backed by Article I. Sec. 19, provides a monetary remedy when the DOT unlawfully

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[10] *Corum* allows constitutional remedies to fill the void in the absence of an adequate alternative remedy. *Corum*, 330 N.C. at 785. The adequacy of an alternative remedy to monetary relief is a moot point considering our longstanding jurisprudence that compensation is mandated as part of our fundamental law for deprivations of property rights and the availability of N.C.G.S. §136-111 for a DOT taking. See also *City-Wide Asphalt*, 132 N.C. App. at 539, (Plaintiff's only *adequate* legal remedy includes the pursuit of monetary damages). The denial of compensation or damages in this case would be the denial of an adequate remedy and thus "the denial of the right itself." *Phillips v. Postal Tel. Cable Co.*, 130 N.C. 513, 522 (1902); See *Corrigan v. Scottsdale*, 149 Ariz. 538, 540-43 (1986) (without a damages remedy, invalidation alone is a "toothless tiger.").

exercises police power and thereby takes private property rights. The fact that issuance of the State Permits was also requested in this action and subsequently granted by the trial court merely ends, upon issuance, the period of deprivation; it cannot make Grey whole for the losses suffered while they were unlawfully withheld. It is not uncommon that mandamus or injunctive relief is sought with damages where a condemning authority instigates an unlawful action that deprives an owner of property rights. *Crawford v. Marion*, 154 N.C. 73, 75 (1910); *Anderson v. Waynesville*, 203 N.C. 37, 46 (1932).

F. The measure of damages for a temporary taking is diminution in property value over the period of deprivation or fair rental value.

The proper measure of damages presents a question of law. *Botts v. Tibbens*, 232 N.C. App. 537, 542 (2014) (citing *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 548 (1987)). For temporary takings in a regulatory context, the North Carolina Supreme Court laid out several available ways to measure damages. *Finch v. Durham*, 325 N.C. 352, 372 n.1 (1989). The *Finch* Court opined that the available measures included a diminution in property value test incorporating a market rate of return factor as espoused by the 11th Circuit case of *Wheeler v. City of*

Pleasant Grove, 833 F.2d 267 (11th Cir. 1987). *Id.* This methodology was applied to this case in the Affidavit of Harry Newstreet (R pp 906-948). According to *Finch*, another acceptable method is the fair rental value test, which was proffered by Grey through the affidavits of Grey Vick and Robert Soule. (R pp 693, 949).

The market rate of return measure is explained in the *Wheeler* case as the difference in the fair market value of the property in question before the deprivation and immediately after multiplied by a market rate of return as applied to the period of deprivation. 896 F.2d 1347, 1351-52 (1990). This approach accounts for the "equity interest", or anticipated costs to construct if the development was erroneously stopped short of actual construction. *Id.*

A fair rental value is the amount "that probably could have been obtained" in a hypothetical setting where Grey's property rights were rented out to a third party. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6-7 (1949). In calculating rental value, lost rents, or profits "can be recoverable" as a component of damages. *Primetime Hospitality, Inc. v. City of Albuquerque*, 146 N.M. 1, 13 (2009).

This Court has taken conflicting positions as to measuring damages for "temporary takings". This Court in *Combs* settled on a fair rental value test during the period of the taking. *Combs*, 216 N.C. App. at 261-62. In a recent opinion, this Court held that a temporary taking from an improper exercise of regulatory authority (i.e., the Map Act) triggered compensation based on a diminution in property value test. *Mata v. N.C. DOT*, 2024 N.C. App. LEXIS 584, *11-12 (2024).[11]

Grey satisfied its burden for summary judgment by offering proof as to either measure of damages, which evidence was not contradicted by the defendants nor discussed at all in any of the defendants' filings or arguments before the trial court. *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 366 N.C. 43, 47-48 (2012) (party cannot rest on mere denials or conclusory assertions at summary judgment).

If this Court agrees that a taking occurred, then it would simply declare the law so that the trial court can, upon remand, determine the end of the deprivation period and calculate the sum of damages.

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[11] According to *Finch*, each measure offered by Grey in the record should be available. Because the *Mata* case follows Supreme Court opinion on the topic of compensation for a temporary taking resulting from an unlawful exercise of regulatory authority (i.e., Map Act), it is more on point and the most recent opinion that appears to control over *Combs*. *Mata* is in line with the *Wheeler* case as reflected by Harry Newstreet's appraisal.

G. Article I, Sec. 1 "fruits of labor" claim also supports liability and damages.

As noted on page 9, *Treants Enterprises* informs us that the analysis for Article I, Sec. 1 claims is the same as Article I, Sec. 19. The former insulates private businesses from "arbitrary government actions." *Tully*, 370 N.C. at 535. Injunctive relief against unlawful government action interfering with business is not automatically the only necessary remedy for Article I, Sec. 1 constitutional violations. *Howell v. Cooper*, 290 N.C. App. 287, 293 (2023). Unlike the long judicial track record of mandating compensation for deprivations under Article I, Sec. 19, the undersigned has not found a similar case directly on point for Article I, Sec. 1 violations. In the recent Supreme Court opinion in *Kinsley v. Ace Speedway Racing, Ltd*, the Court remanded a well-plead Article I, Sec. 1 complaint to the trial court to "craft a remedy." 386 N.C. 418, 429 (2024).

The essential point of remedying business interruptions is to compensate the victim for all pecuniary losses, which may include lost revenues or lost profits. *Champs Convenience Stores, Inc. v. United Chemical Co.*, 329 N.C. 446, 462 (1991); *Steffan v. Meiselman*, 223 N.C. 154, 159 (1943).

For Grey, billboard rental revenues were forecasted with great certainty, and that proof was submitted to the trial court (and went uncontested by DOT). (R pp 697, 950; App 46, 49).[12]

II. THE TRIAL COURT ERRED IN DENYING ATTORNEY'S FEES AND COSTS TO GREY.

In its Order, the trial court denied attorney's fees and costs to Grey for the sole reason that Grey and defendants were "both prevailing parties." (R p 1208, ¶11). This constitutes a misapprehension of law or an error of law.

A. N.C.G.S. §136-119.

N.C.G.S. §136-119 provides that a trial court "**shall** determine and award" fees in cases brought under N.C.G.S. §136-111 for a taking of plaintiff's property at such sum that will "in the opinion of the judge reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding." (emphasis added). If Grey prevails in its inverse condemnation claim, then the fees and costs are mandatory, which triggers *de novo* review by this Court of the trial court's

[12] Ultimately, Grey should be provided a choice of available remedies. *Stanley v. Moore*, 339 N.C. 717, 724 (1995).

decision to deny same. *Redevelopment Com. of Hendersonville v. Hyder*, 20 N.C. App. 241, 245-46 (1973); *TAC Stafford, LLC v. Town of Mooresville*, 282 N.C. App. 686, 694 (2022).

The amount of the award of fees and costs by the terms of N.C.G.S. §113-119 must be "reasonable", which would ultimately be a discretionary call by the court, reviewable under an abuse of discretion standard. *Reynolds-Douglass v. Terhark*, 381 N.C. 477, 487 (2022).

In the case at bar, if this Court determines that the trial court erred and a taking of property has occurred for purposes of N.C.G.S. §136-111, then the lower court's ruling on attorney's fees and costs[13] would also be in error and must be reversed.[14]

B. N.C.G.S. §6-19.1, 6-21.5 and Rule 11.

In reviewing a trial court's decision regarding fees under N.C.G.S. §§6-19.1 and 6-21.5, this Court applies an abuse of discretion standard.

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[13] Grey is entitled per N.C.G.S. §136-119 to reasonable attorney's fees, including those incurred on appeal, as well as costs and expenses, including the appraisal fee of Harry Newstreet, the engineering fee of Mark Teague and deposition transcript expenses. *See* Craig Justus Affidavit of Attorney's Fees, Witness Fees and Costs (R pp 1008-1010, 1043).

[14] Even if the trial court's ruling on attorney fees and costs under N.C.G.S. §113-119 was judged by an abuse of discretion standard, such abuse is shown when the court "makes an error of law." *In re Custodial Law Enf't Recording Sought by Greensboro*, 383 N.C. 261, 268 (2022).

Early v. County of Durham, 193 N.C. App. 334, 349 (2008) (N.C.G.S. §6-19.1); *Persis Nova Constr. v. Edwards*, 195 N.C. App. 55, 65 (2009) (N.C.G.S. §6-21.5). For N.C.G.S. §1A-1, Rule 11, this Court's review is *de novo* on whether to impose Rule 11 sanctions with the amount being considered under an abuse of discretion standard. *Page v. Roscoe, LLC*, 128 N.C. App. 678, 680 (1998).

In determining that fees and costs should be denied "since Grey and respondents/defendants are both prevailing parties," (R p 1208), the trial court misapprehended the law and thus abused its discretion. *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 204 (2010). Attorney fees are authorized under the above sources regardless of the prevailing party status or whether only one party prevails. *H.B.S. Contrs. v. Cumberland County Bd. of Educ.*, 122 N.C. App. 49, 57 (1996); *Persis Nova Constr.*, 195 N.C. App. at 66 (lack of justiciable issue standard for G.S. 6-21.5 is specific to any issue raised with absence of law or fact); *Bryson v. Sullivan*, 330 N.C. 644, 655 (1992) (Rule 11 is focused on "pleadings" being well grounded in fact or law or offered for an improper purpose, not who prevailed in the action).

Grey prevailed on the claim of the Permit Denials and, therefore, was a prevailing party (and should prevail also on the taking claims). Moreover, the defendants presented numerous issues in their answer, motion, responses to discovery and other offerings to the trial court that demonstrated a total lack of law or fact to support them[15], including: (1) Whether a national forest was a national park or any of the other clear places identified in the Controlling Statute; (2) whether the term "parkland" applied to billboards when it was only found in regulations of directional signs; (3) and whether the defendants were entitled to "deference" when the Controlling Statute was clear, eschewing any discretion.[16]

Because the trial court either acted under a misapprehension of law or committed an error of law, and thus abused its discretion, in the event

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[15] For purposes of fees under N.C.G.S. §6-19.1, the agency has the burden to show "substantial justification" for its actions, which presents a conclusion of law. *Early*, 193 N.C. App. at 346. A state agency lacks substantial justification when it violates clear law. *Table Rock Chapter of Trout Unlimited v. Environmental Management Commission*, 191 N.C. App. 362, 365 (2008); *Walker v. North Carolina Coastal Resources Commission*, 124 N.C. App. 1, 7 (1996). Here, the defendants failed to meet their burden or address attorney's fees in their pleadings, brief or oral arguments.

[16] In reviewing the denial of a motion for sanctions under Rule 11, the trial court is required to make findings and conclusions to show its deliberative process. *Turner v. Duke University*, 325 N.C. 152, 165 (1989). The only reason given here is that both parties prevailed, which is another basis for a remand.

this Court does not moot the issue by awarding fees and costs under N.C.G.S. §136-119, the matter should be remanded to the lower court "for reconsideration in light of the correct law" as to all the above attorney fee sources. *Free Spirit Aviation, Inc.*, 206 N.C. App. at 204.

C. Rule 37(c).

Rule 37(c) of the North Carolina Rules of Civil Procedure provides that the court "shall tax sanctions and expenses against a party who has failed to make admissions if the other party subsequently proves the truth of the matter," unless one of four exceptions apply, including the reasonableness of the denial. *Watkins v. Hellings*, 321 N.C. 78, 81 (1987). Because this rule employs the mandatory "shall", whether an award is warranted should be reviewed *de novo* with the amount determined based on an abuse of discretion standard. *Reynolds-Douglass*, 381 N.C. at 487.

In the case at bar, the defendants repeatedly denied in response to Request for Admissions that the Croatan National Forest was not a "national park" or one of the other places listed in the Controlling Statute. (R pp 488-490, 526-527, App 55-59). Grey, via counsel, notified them of their deficiencies to no avail. (R pp 974, ¶¶9-10, 1038, 1042, App

60-62). At the hearing, DOT's counsel belatedly admitted to these facts. (Transcript, pp 95-96; App 19-20). By that time, Grey had gone to great expense via attorney's fees and the testimony of Mark Teague to prove the obvious fact that a national forest is not a national park or the other identified places. (R pp 974-975, ¶11, App 60, 63, 1043, App-64).

D. Deposition expenses as costs.

Whether a trial court erred in considering a statutory award of costs presents a question of law, reviewable *de novo* with the amount judged for abuse of discretion. *Peters v. Pennington*, 210 N.C. App. 1, 25 (2011).

N.C.G.S. §7A-305(d)(10) provides the trial court with authority to award costs for the "reasonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts." For items listed in N.C.G.S. §7A-305(d), this Court has stated that the "trial court is required to assess the items [including deposition transcript expenses] as costs." *Khomyak v. Meek*, 214 N.C. App. 54, 67-68 (2011) (citing *Springs v. City of Charlotte*, 222 N.C. App. 132 (2011)).[17] The trial court erred in failing to do so. (R pp 1008-1010).

[17] Both *Khomyak* and *Springs* note a conflicting line of cases from this Court on the question of whether costs are mandatory or discretionary with the trial court. Even

E. Grey's proof of reasonableness and fees for appellate review.

Grey supported its motion for fees and costs with multiple affidavits and detailed billing statements. (R pp 973-1047; Craig Justus Affidavit of Attorneys Fees, Witness Fees, and Costs, R pp 1048-1050; Affidavit of Tobias R. Coleman, R pp 1051-1053; Affidavit of Francis J. Gordon). *See Northhampton County Drainage Dist. Number One v. Bailey*, 326 N.C. 742, 751 (1990) (discussing sufficiency of affidavits to support fee award). During the proceedings, the defendants never objected to the reasonableness or amount of the attorney's fees or costs sought; it should, therefore, be precluded from raising this issue anew. *See West Through Farris v. Tilley*, 120 N.C. App. 145, 152 (1995) (failing to object, opposing party cannot challenge reasonableness of fees).

Grey is also entitled, and moves in this Court accordingly, for attorney's fees to be awarded during the pendency of this appeal, to be determined upon remand to the trial court. *Early,* 193 N.C. App. at 349 (allowing appellate fees under N.C.G.S. §6-19.1); N.C.G.S. §§113-119 and 6-19.1 are both remedial statutes and should be liberally construed to

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if the standard was abuse of discretion, the trial court acted under a misapprehension of law or committed an error of law for its prevailing party rationale.

authorize attorney fees for an appeal. *Davis v. Kelly*, 147 N.C. App. 102, 106 (2001). Private property owners facing government encroachment would have their rights diluted if attorney fees were capped at the trial court level. *See Bandy v. Charlotte*, 72 N.C. App. 604, 609 (1985) (citing *Hyder*, 20 N.C. App. at 246) (holding that the purpose of attorney's fees pursuant to inverse condemnation statute is to allow the owner "to receive the award for his property, even after legal action, without having it reduced by the payment of attorney fees").

CONCLUSION

"The admonition of the Constitution requiring frequent recurrence to fundamental principles is politically sound." *State v. Harris*, 216 N.C. 746, 762 (1940) (discussing Art. I, Sec. 35). Our constitutional history championed by the *State v. Harris* case should inform this Court that the abuse of power presented by this case is the reason for constitutional protections that enforce on government a duty to remit compensation when a property owner is forced to give up, even temporarily, property rights at the mere whims of bureaucrats and outside the lawful exercise of the police power.

This Court should reverse the trial court's granting of defendants' motion for summary judgment as to damages, fees and costs and grant Grey's motions related thereto. This Court should then remand the matter to the trial court for further proceedings to determine the total amount of damages or compensation based on the instructions given as to the proper methodology for the period of deprivation. This Court should also remand for the trial court to grant reasonable attorney's fees, appraiser and engineer fees, and costs. This Court should also instruct the trial court to award attorney's fees incurred in pursuit of this appeal.

Respectfully submitted, this the 17th day of January 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the **Petitioner/Plaintiff/Appellant** certifies that the foregoing brief, contains less than 8,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendices).

This the 17th day of January 2025.

VAN WINKLE, BUCK, WALL, STARNES & DAVIS, P.A.

/s/ Craig D. Justus
Craig D. Justus

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **Petitioner/Plaintiff/Appellant's Brief (Amended)** was served upon all other parties to the above-cited actions via email and by depositing a copy of same in a postpaid wrapper, in an official depository under the exclusive care and custody of the United States Postal Service, properly addressed to the attorney(s) of record for all other parties as follows:

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This the 17th day of January 2025.

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By: */s/ Craig D. Justus*
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Petitioner/Plaintiff/Appellants

STATE OF NORTH CAROLINA COUNTY OF WAKE GREY OUTDOOR, LLC, Petitioner/Plaintiff, vs. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; J. ERIC BOYETTE, in his official capacity as Secretary of Transportation of the North Carolina Department of Transportation; ROBBY L. TAYLOR, in his official capacity as District Engineer; and STEPHEN M. GARDNER, in his official capacity as North Carolina Department of Transportation Outdoor Advertising Coordinator, Respondents/Defendants.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO: 23CV028880-910 **ORDER**

THIS CAUSE coming on to be heard and being heard before the Honorable Hoyt G. Tessener presiding over the June 3, 2024, term of Wake County Civil Superior Court upon Petitioner/Plaintiff's Motion for Partial Summary Judgment and Motion for Attorney's Fees and Respondents/Defendants' Cross Motion for Summary Judgment. The Petitioner/Plaintiff was represented by their attorney Craig D. Justus. The Respondents/Defendants were represented by their attorneys, Jessica N. Price and Miranda Holley.

Based on the record, the following are undisputed FINDINGS OF FACT:

1. Grey Outdoor, LLC (hereinafter "Grey") is a North Carolina limited liability company that is in the business of developing, constructing, or operating outdoor advertising signs or billboards. Grey constructs and operates billboards for renting space to advertisers to display their messages related to matters or things not being conducted on the property where the sign is located or for off-premises purposes.

2. Grey owns and possesses a lease (hereinafter "Lease") over property located along US Highway 70 in Carteret County with Parcel Identification Number 633915538404000 (hereinafter "Site"). The Lease, spanning an original term of 15 years with one 10-year renewal, provides Grey with the right to use and develop the Site for the extended period with four (4) billboards (hereinafter "Billboards").

3. Billboard signs are regulated along interstates and major highways in this State under the North Carolina Outdoor Advertising Control Act (hereinafter "OACA"). N.C.G.S. §136-126 *et seq*. The Respondent North Carolina Department of Transportation (hereinafter "DOT") is the agency responsible for administering the OACA.

4. US Highway 70 is a major highway that falls under the OACA's scheme of regulation. Pursuant thereto, Grey submitted to the DOT four applications (hereinafter "Applications") for four (4) State permits to erect the Billboards on the Site (hereinafter "State Permits").

5. The four (4) applications for State Permits were complete and contained the required information under the OACA and the related DOT regulations.

6. The Respondents/Defendants denied the State Permits on the grounds that the Billboards would be located within 1200 feet of the Croatan National Forest, which abutted the Site. Specifically, the Respondents/Defendants denied the Applications for the Billboards on the following grounds:

a. N.C. Admin. Code t. 19A, s. 2E .0201 (19) stating definition of park (parkland): and

b. N.C. General Statute §136-129.2(a)(1) b. This statute states that "no outdoor advertising sign shall be erected adjacent to any highway which is either:

(1) . . .

b. Within 1,200 feet, on the same side of the highway, of the boundary line of a North Carolina State Park, a National Park, a State or national wildlife refuge, or a designated wild and scenic river."

7. N.C.G.S. §136-129.2(a)(1) b. does not include the term "National Forest." A National Forest is a different place or location from a North Carolina State Park, a National Park, a State or national wildlife refuge, or a designated wild and scenic river. Among other things, a national forest is established pursuant to different legislation or governmental decrees, is operated, or managed by different agencies, serves different purposes and has different land uses and regulations.

8. DOT has not designated US Highway 70 as a "scenic highway or scenic byway" as allowed by N.C.G.S. §136-129.2(a)(1) a.

BASED ON THE ABOVE FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. Grey exhausted its administrative remedies and timely appealed the permit denials pursuant to N.C.G.S. §136-134.1.

2. The proposed Billboards are not located within 1,200 feet of a North Carolina State Park, a National Park, a State or national wildlife refuge, or a designated wild and scenic river as referred to in N.C.G.S. §136-129.2(a)(1) b.

3. US Highway 70 is not designated as a "scenic highway or scenic byway" by the DOT as allowed by N.C.G.S. §136-129.2(a)(1) a.

4. The Croatan National Forest is a different place or location from a North Carolina State Park, a National Park, a State or national wildlife refuge, or a designated wild and scenic river.

5. N.C. Admin. Code t. 19A, s. 2E .0201 (19)'s definition of "parkland" relates only to the regulation of directional signs in 19A NCAC 2E .0214(d)(3), and a billboard is not a directional sign.

6. By the plain language of N.C.G.S. §136-129.2, as a matter of law, the Respondents/Defendants lacked the authority to deny a billboard application due to proximity to a national forest. A National Forest is clearly excluded from the list of known places or locations set forth in the statute.

7. By the plain language of the DOT regulations, the term "parkland" in the regulations does not apply to billboards.

8. The Respondents/Defendants erroneously denied the State Permits related to the Billboards for the reasons stated in Grey's motion for partial summary judgment and supporting memorandum: as a result. Grey's motion for partial summary judgment should be granted.

9. Grey's request for damages and attorney's fees should be denied based upon the reasons stated in Respondents/Defendants' cross motion and supporting memorandum for summary judgment.

10. The Court did not reach any of Grey's constitutional issues as such issues were unnecessary.

11. Since Grey and Respondents/Defendants are both prevailing parties. each side should bear their own costs and attorney's fees. and Grey's motion related to same under N.C.G.S. §6-19.1. Rule 11. N.C.G.S. §6-21.5. Rule 37(c) of the North Carolina Rules of Civil Procedure and N.C.G.S. §136-119 should be denied.

BASED on the undisputed findings of fact and the above conclusions of law. it is hereby ORDERED. ADJUDGED AND DECREED as follows:

1. The Petitioner/Plaintiff's motion for partial summary judgment is GRANTED as to the invalidity of Respondents/Defendants' decision to deny the Applications for the four (4) State Permits related to the Billboards: and the corresponding motion for summary judgment of Respondents/Defendants is DENIED. The Respondents/Defendants' decision to deny Grey's Applications for the four (4) State Permits is REVERSED and the Department of Transportation is

ORDERED to issue the four (4) State Permits to Grey immediately, being within five (5) business days of the entry of this Order.

2. Petitioner/Plaintiff's Motion for Partial Summary Judgment seeking damages and attorney fees is DENIED.

3. Respondent/Defendants' Cross Motion for Summary Judgment is GRANTED as to Grey's claims related to damages and fees.

4. The Court did not reach any constitutional issues as such issues were unnecessary.

5. Each party will bear their own costs and fees.

IT IS SO ORDERED.

6/20/2024 1:48:17 PM

6/20/2024

This the ___ day of _____ 2024.

Hoyt G. Tessener

The Honorable Hoyt G. Tessener
Superior Court Judge Presiding

5. Based on my experiences since 2007-2008 and as the owner of my own billboard company, I am very knowledgeable about virtually every facet of the outdoor advertising/billboard business, including, but not limited to, sales, management, operations, acquisitions, real estate leasing, permitting, construction, administration, etc.

6. Billboards are a well-established medium of communication used to convey a broad range of different kinds of messages. Billboards are used, among other things, to communicate messages from candidates for local, state, and national offices, to seek employment, to encourage public service good deeds such as wearing seatbelts, supporting education or other worthy causes, to hunt down criminals, to find lost children or adults, to facilitate political or social speech, and to provide branding to businesses. Billboards are a cost-effective way for local businesses and nonprofits to advertise their messages to the public at rates typically lower than most other mediums of communications. Many businesses, politicians and other people rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive.

7. Grey owns and possesses a lease (hereinafter "Lease") over property located along US Highway 70 with Parcel Identification Number 633915538404000 in the Town of Newport and located within Carteret County (hereinafter "Site"). A true and accurate copy of the Lease is attached hereto as Exhibit "1" and incorporated herein by reference. The Lease, spanning an original term of 15 years with at least one 10-year renewal, provides Grey with the right to use and develop the Site for the extended period with four (4) billboards (hereinafter "Billboards"). The ability to earn rental revenue from advertisers displaying messages on the Billboards over that lengthy period is substantial.

8. The Lease is for a single purpose, the erection and use of the Site for four (4) billboard structures. Grey is not allowed to use the Site for any other purpose.

9. Upon procuring the Lease in late 2022, Grey applied for and obtained in early April 2023 from the Town of Newport zoning approval for the Billboards at an expense of over $3,200.00. A true and accurate copy of the Town issued sign permit for the Billboards is attached hereto as Exhibit "2" and incorporated herein by reference. Since Grey obtained sign permits, the Town of Newport has enacted changes to its zoning regulations purporting to prohibit billboards.

10. The Site is zoned Commercial Highway by the Town of Newport. The road corridor where the Site is located is commercially zoned or used. A true and accurate copy of an aerial of US Highway 70 near the Site is attached hereto as Exhibit "3" and incorporated herein by reference. US Highway 70 in the area of the Site is not fully controlled access.

-701-

FILE # 1788488

FOR REGISTRATION REGISTER OF DEEDS
Karen S. Hardesty
Carteret County, NC
January 9, 2023 11:31 AM
IWW AGMT 4 P
FEE: $26.00
FILE # 1788488

Lease Agreement – Cover Sheet

Return To:

Grey Outdoor LLC

P.O. Box 1591 Wrightsville Beach NC 28480

910-620-5168

EXHIBIT 1

-702-

SIGN LOCATION LEASE

Mailing Address:
P. O. Box 1591
Wrightsville Beach, NC 28480
Date 9-21-2022

Telephone (910) 620-5168

Structure Number

Name (Lessor) Mattie D Mason

Phone 252-398-4250

Social Security/Federal ID Number ___ ___ ___ ___

FOR AND IN CONSIDERATION of One dollar ($1), and the mutual covenants contained in the Agreement, the receipt of which is hereby acknowledged, the parties agree as follows:

Lessor hereby leases and demises to Lessee the following described property ("Property") for the purpose of erecting, operating, maintaining, repairing, modifying, and reconstructing outdoor advertising structure (s), together with any advertising, equipment, and accessories that Lessee may desire to place thereon (Structure (s)"), and Lessor covenants and warrants to Lessee: a) the quiet enjoyment of the property during the time of this Lease; that Lessor shall ensure, and be responsible for maintaining, an unobstructed view of the Structure (s) from conditions present or arising on or around the property, now or in the future; and c) that Lessor shall not enter into any agreement for or conditioned upon removal of Lessee's Structure (s). The Lessor of the hereinafter described real estate (Lessor) hereby leases and demises to **Grey Outdoor, LLC**, (Lessee) 4 site (s) for the exclusive purpose of constructing and maintaining 4 outdoor advertising structure(s) on Lessor's property located on US70 in Newport North Carolina and as described in the Carteret County Register of Deeds office in Book 0601 on Page 00463 and by Carteret County Parcel number 633915538404000.

For a period of Fifteen (15) years effective upon completion of construction. Lesse shall pay Lessor $3000 per outdoor advertising structure payable annually in advance / monthly.

Special Provisions:

1) Lessor grants to Lessee the right to record a memorandum of this agreement at the local register of deeds office. Lessee agrees to maintain the signage and billboard structure in like new condition at no cost to lessor.

2) Lessor shall not cause or permit any advertising sign structure other than Lessee's to be erected or placed on the above-described property, or cause or permit Lessee's sign structure(s) to be or become obscured from the highway.

3) It is agreed that all structures, equipment, materials and fixtures placed upon the site(s) shall remain property of Lessee and Lessee is granted 90 (ninety) days to remove the sign structure(s) after the termination of this agreement. It is further agreed that Lessee is entitled to just compensation in connection with any legal action proceeding or compromise settlement made pursuant to any governmental agency requirement for the removal of the sign structure(s).

Initials

4) Lessor warrants that he is the owner or the authorized agent of the owner of the site(s) and that he has full authority to enter into this agreement. Lessor warrants that if Lessee shall pay the rent provided for herein, Lessee shall and may peaceably and quietly have, hold and enjoy the use of the site(s) for the term(s) of this agreement.

5) In the event all or any of the Property is acquired or sought to be acquired by any entity or person possessing or acting on behalf of any entity possessing the power of eminent domain, whether by condemnation or the sale in lieu thereof, Lessee shall be entitled, in it's sole discretion, to: a) contest the acquisition; b) reconstruct any of its Structures on the remaining portion of the property of the Lessor; and/or, c) recover damages and compensation for the fair market value of it'd leasehold and Structures taken or impacted by the acquisition.

6) This shall not obligate Lessee in any way until it is accepted and signed by an executive officer of Grey Outdoor, LLC. This agreement may not be modified except in writing signed by Lessor and an executive officer of Lessee.

7) Lessor grants to Lessee the right to renew this agreement for one additional renewal term of (10) TEN years with the same terms and conditions as contained herein.

8) Neither Lessor nor Lessee shall be bound by any agreement or representation, expressed or implied, not contained herein. This agreement shall be binding upon the heirs, executors, personal representatives, successors and assigns for the parties hereto and Lessor agrees to notify Lessee by certified mail of any change of ownership of the real estate or of Lessor's mailing address within (30) days of such change.

9) Lessor consents and grants to Lessee a right of ingress and egress to and from the site(s): the right to provide or establish electrical power to the site(s) and place incidental equipment thereon: the right to sublet the site(s) or sign structure(s) or to assign this agreement: and the right to relocate the sign structure(s) to lawful site(s) satisfactory to Lessee on Lessor's property if the maintenance of sign structure on the site(s) described herein is proscribed by federal, state, or local statute, ordinance or regulation. Lessee shall maintain structure for the term of this agreement.

10) It is the understanding of the parties that visibility of the sign structure(s) to the traveling public is of the essence of this agreement and forms a significant element of consideration. Lessor grants to Lessee the right to reasonably locate the sign structure(s) on the site(s) to achieve optimum visibility to the traveling public. Lessor grants to Lessee and its authorized agents, the right of ingress and egress to and from the site(s) over property owned or controlled by Lessor for all purposes reasonably necessary for the proper erecting, placing, maintaining and removing of the sign structure(s), including but not limited to the trimming, cutting, or removing of brush, trees, shrubs, or any vegetation or of the removing of obstructions of any kind which limit the visibility of the sign structure(s) to the traveling public.

11) In the event that (a) Lessee is unable to secure or maintain a required permit or license from any appropriate governmental authority, (b) federal, state, or local statue, ordinance, regulation or other governmental action shall preclude or materially limit the use of the site(s) for advertising purposes, (c) the visibility of the sign structure(s) to the traveling public is obstructed or obscured, (d) the advertising value of the sign structure(s) is impaired or diminished, or (e) if there is a diversion of traffic from or a change in direction of traffic past the sign structure(s). (f) Lessee, at his sole discretion, shall at its option have the right to terminate this agreement, or reduce and abate the land rent in proportion of the loss upon fifteen (15) days notice in writing to Lessor, and Lessor shall refund to Lessee any rental payment paid in advance for the remainder of the unexpired term.

12) Lessee agrees to save Lessor harmless from claims or demands on account of bodily injury or physical property damage caused by or resulting from the negligent or willful acts of Lessee in erecting, maintaining, or removing the sign structure (s) on or from the site(s) and agrees to carry, at its own cost and expense, adequate public liability insurance covering any such contingencies so long as this agreement remains in effect. Lessor agrees to save Lessee harmless from claims or demand on account of bodily

Initials

injury or physical property caused by or resulting from the negligent or willful acts of Lessor or its agents.

13) In the event Lessee fails to perform under the terms of this agreement, Lessor shall provide written notice to Lessee of such failure and Lessee may cure such failure within ninety (90) days from the date of such written notice.

14) Lessor must provide access to the leased sign locations. Lessor grants to Lessee first right of refusal to purchase a perpetual sign easement.

15) Lease will continue year to year upon expiration of the initial and/or renewal terms.

The parties hereto acknowledge and agree that they read and understand this agreement and are bound by the terms contained herein.

By: M. Bivins, Manager
Grey Outdoor, LLC, Lessee

12-9-22
Date

By: Mattie D Mason
Lessor

By: _____
Lessor

Oct. 4, 2022
Date

701 Edgewood Dr
Address
Murfreesboro, NC 27855
(252) 398-4250
Phone #

I, Elaine E Wynn, a Notary Public of Hertford County, State of Carolina, do hereby certify that Mattie D Mason and _____ personally appeared before me this day and acknowledged the due execution of the foregoing instrument.
Witness my hand and official seal, this the 4th day of October, 2022
(Official Seal)
My commission expires June 2, 2024

Elaine E Wynn
Notary Public

ELAINE E. WYNN NOTARY PUBLIC HERTFORD COUNTY, NC

I, Janet Patterson, a Notary Public of New Hanover County, State of Carolina, do hereby certify that M. Brey Vick and n/a personally appeared before me this day and acknowledged the due execution of the foregoing instrument.
Witness my hand and official seal, this the 9th day of December, 2022
(Official Seal)
My commission expires Aug. 11, 2024

Janet Patterson
Notary Public

JANET PATTERSON
NOTARY PUBLIC
NEW HANOVER CO., NC
My Commission Expires 8-11-2024

Initials

permits, the Town of Newport has enacted changes to its zoning regulations purporting to prohibit billboards. The only contingency remaining to enable the outdoor advertising use of the Site was the procuring of the State Permits. Based on my decades of experience, it is my opinion that, but for the State's permit denials, the Billboards would have been operational and earning revenue in less than 2 months.

18. In the billboard industry, most of the laboring oar to commence a billboard operation on land is the securing of an appropriate location with a lease in terms of visibility, having adjoining roads with high traffic counts for recipients of advertising messages, buildable land and being in a market with good advertising rates. Obtaining local development permits is also part of the heavy lifting. It is very difficult to find localities which zone in a way to be inclusive of new billboards. It is high premium to find a great location like the Site with proper zoning along a major State highway.

19. Building a billboard after securing a lease and permits is relatively simple. There are many vendors of supplies and companies which will construct. In Grey's case, we typically do the building ourselves. The costs are depreciated over time. Once erected, obtaining advertisers is also typically easy. The work in discovering a likely pool of consistent advertisers is mainly done prior to selecting the location to lease, like in the case with the Billboards. Once erected, the billboard basically is self-operating with little maintenance.

20. By letter dated May 18, 2023, the DOT by and through Robby Taylor, District Engineer and Stephen Taylor, DOT Outdoor Advertising Coordinator and Gardner notified Grey that the four (4) applications for the State Permits were denied (hereinafter "Denial Letter"). A true and accurate copy of the Denial Letter (with attachments) is attached hereto as Exhibit "6" and incorporated herein by reference.

21. Prior to the Denial Letter, my real estate manager, Guy Williamson, and I were told by Robert Parker that the State Permits would not be issued due to the Site's proximity to the Croatan National Forest. Robert Parker is employed by Volkert, a company which provides inspection and management services to the DOT related to outdoor advertising. On May 8, 2023, Robert Parker informed us via email that North Carolina General Statute §136-129.2 was being used to deny the applications due to the Site's adjacency to the Croatan National Forest. Mr. Parker highlighted subsection (a)(1)b of the statute and emailed the statute and a copy of a map he prepared to us. A true and accurate copy of this email with the two referenced attachments is attached hereto as Exhibit "7" and incorporated herein by reference.

22. On May 10, 2023, we responded to Mr. Parker with an email explaining that the Croatan National Forest is not designated as a state or federal park, state or federal wildlife refuge, or a designated river; the four places or locations highlighted by Mr. Parker in the statute. We provided him links to official

government websites to inform him what was readily available from the relevant state or federal agencies to show that the Croatan National Forest was not one of the listed places or locations in the statute. A true and accurate copy of our email is attached hereto as Exhibit "8" and incorporated herein by reference.

23. When we did not hear from Mr. Parker after our email, I called Stephen Gardner, who is the DOT's Outdoor Advertising Coordinator in Raleigh, to discuss the matter with him. I asked him to review the email we had sent showing the difference between a national forest and a national park, etc. His response was that "you could go camping at a national forest." Mr. Gardner further stated that "it wasn't his call to deny the permits and the attorney general's office had told him to deny the permits." He said he was "sorry but there was nothing he could do about it." He provided no information or facts that would lead one to conclude that the Croatan National Forest is a state park, national park, state or federal wildlife refuge or a designated wild and scenic river.

24. I am very familiar with scenic highways or byways in the State where outdoor advertising billboards are not allowed. US Highway 70 along and near the Site is not a designated scenic highway or byway.

25. Over the years, Grey has operated multiple billboards in the Carteret County market and from those experiences of owning and operating outdoor advertising, I am knowledgeable about appropriate rental rates for advertising messages on signs. From my experiences, I have prepared a pro forma attached as Exhibit "9" that reflects the anticipated monthly rental income that would have been obtained and expenses incurred from the use and operation of the Billboards but for the State's permit denials. The net monthly revenue from the Billboards would have been at least $5,140.00.

26. The effect of the DOT's decisions to deny the State Permits is to interrupt Grey's ability to earn rental revenue from the previous efforts that Grey made in securing a lease, obtaining local permits and otherwise being ready and prepared to mobilize to construct the signs in question but for the interference by the State actors. It is a rare, if not a non-existent thing, in the outdoor advertising industry to have one outdoor advertising party secure a long-term lease and applicable permits like Grey and then sublet that package of rights to a third party, such as a competing outdoor advertising company. Most of the value in the labor, time, and expense of securing a lease of real estate, permits and mobilizing resources to complete the erection of the signs is to have a location that earns substantial rental revenue. Since most of the labor in commencing the operation of a billboard is in the securing of the proper location and permits, to be made whole for an interruption in crossing the goal line, the typical sign owner and operator in the billboard industry would expect as a fair rental value to forgo moving forward for a temporary period would be to replicate what would be expected to be earned from rental revenues.

-756-

From: **Guy Williamson** <guymwilliamson7@gmail.com>
Date: Wed, May 10, 2023 at 10:22 AM
Subject: Re: MASON;1200' RULE
To: Robert Parker <robert.parker@volkert.com>, Gardner, Stephen M <smgardner2@ncdot.gov>
Cc: Craig Justus <cjustus@vwlawfirm.com>, Grey Vick <greyoutdoor@gmail.com>

Good morning,

After collectively reviewing section 136-129.2. (b) cited in your email, we can not agree with the department's findings. I am providing the below links from official government websites to support our findings. You will see in those links that the Croatan Forest is not designated as a state or federal park, state of federal wildlife refuge, or a designated river.

We have consulted our attorneys and they agree with our findings. We hope you will agree as well and if not please clarify the facts that would support a denial. Our intention would be to appeal a denial and proceed through the courts, if necessary, a lot of effort will be spent in depositions and discovery so before we all end up there please plainly explain why you believe this separation standard for parks, etc. is triggered. Hopefully, you won't determine that in the end.

We look forward to your timely response. Thanks so much.

North Carolina State Parks (ncparks.gov) NC Parks Listings

National Parks National Parks Listings

North Carolina (rivers.gov) Wild and Scenic Rivers Listings

U.S. Fish and Wildlife Service (fws.gov) Wildlife Refuge Listing

Best regards,

Guy M Williamson

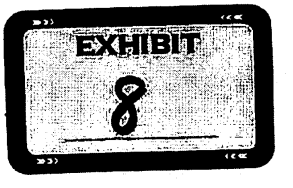
Vice President Real Estate & New Development

Grey Outdoor, LLC

252-521-5555

guymwilliamson7@gmail.com

www.greyoutdoor.com



THE VAN WINKLE LAW FIRM

Writer's Extension: 2404
Writer's Facsimile: 828-257-2767
Writer's E-mail: cjustus@vwlawfirm.com

October 5, 2023

Via email

Jessica N. Price, Assistant Attorney General
Transportation Division
jprice@ncdoj.gov

RE: Grey Outdoor, LLC v. NCDOT (Croatan National Forest)

Dear Ms. Price:

I hope you are doing well.

We are in receipt of the Secretary's decision to affirm the District Engineer's denial of my client's four (4) applications for State permits to erect four (4) billboards on one parcel in Carteret County. We are extremely flabbergasted by this result which flies in the face of the plain language of the applicable statute.

As you know, Grey Outdoor owns a recorded lease that gives it the right to use and enjoy property and earn substantial revenues from the planned billboards in question. Under the North Carolina Outdoor Advertising Control Act (N.C.G.S. §136-126 *et seq.*), law is established which provides to my client a right to erect a valuable sign upon compliance with objective standards. One such objective standard is that a billboard must be sufficiently spaced (2,000 feet) from a National or State Park. As we pointed out in our appeal to the Secretary and which he acknowledges in his decision, the excuse by the District Engineer to deny the permits was based on proximity to the Croatan National Forest. Even the very youngest of us should know through education and common knowledge that a National or State Park is not a National Forest.

The DOT ignores the plain language of the statute (G.S. 136-129.2(a)(1)b.) and adds to the statute a limitation that does not exist. The DOT is in this instance usurping the role of the General Assembly and violating separation of powers, a bedrock principle of our constitution.

In my practice, I am too often reminded that State agencies will from time to time do things for political expediency and ignore the laws set by the General Assembly that frame in their responsibilities. Maybe it is human nature to take a

EXHIBIT
10a

modicum of authority and seek to stretch it to greater lengths. I would hope our government officials take more measured steps to resist those voices to push the boundaries of reason and right. Most of us are taught early on why laws or rules matter and that despite our emotions and desires for things not to be a certain way, that laws or rules must be followed. By ignoring clear laws, our society breaks down into chaos and along the way property rights are infringed upon and investments in North Carolina dry up because of government overreach. The DOT had no discretion in this matter to reject the requested permits. Clear and objective standards were met; the DOT simply ignored them for political expediency. I begged you earlier on the phone to have your client do the right thing. The DOT did not. As a result, my client is not only deprived of the ability to take advantage of its leasehold interest but also the right to earn substantial rental revenues from its planned signs. The fair net rental value of the signs in question would be approximately $5,000 or more a month. Each month that goes by with DOT's intransigence is another month of loss to my client.

We will ask the judiciary branch to fix the clear statutory and constitutional violations in this case. Along the way, we will ask the Court to make Grey Outdoor whole by awarding Grey from the DOT coffers its attorney's fees under Rule 11 and G.S. 6-19.1 (*see Able Outdoor v. Harrelson*, 341 N.C. 167, 459 S.E.2d 626 (1995)) as well as damages or just compensation afforded with constitutional remedies under Articles I, Secs. 1 and 19 of our State Constitution. (*See Cedarbrook Residential Ctr., Inc. v. N.C. HHS*, 383 N.C. 31, 78, 881 S.E.2d 558, 591 fn1 (2022) (Chief Justice Newby dissenting)).

While I understand the caselaw in North Carolina is sparse concerning an award of monetary relief for property deprivation by regulatory efforts, we believe firmly in the ability of the judiciary branch to protect Grey Outdoor from the DOT's overreach in this case. *See High Rock Lake Partners, LLC v. NCDOT*, 366 N.C. 315, 735 S.E.2d 300 (2012); *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). The actions here by DOT officials expose each of them to being named in the forthcoming civil proceeding. *Corum, supra.*; *Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975).

We will file next week the necessary documents to commence civil proceedings in Wake County. If that occurs, Grey Outdoor will seek all available remedies, including compensation for property deprivation and attorney's fees. There is no justification for the DOT to ignore clear language. It may be easy for your folks to wield so-called authority that doesn't truly exist. The use of land may not matter to them. But people's businesses and livelihood are real things and not to be trampled upon willy nilly. Enough is enough.

Your folks have until next Monday, October 8th at 5:00 p.m. to make this right and reverse the Secretary's blatantly wrong decision.

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

CDJ/ca

cc. Client – via email

Cynthia Arrowood

From: Price, Jessica <jprice@ncdoj.gov>
Sent: Thursday, October 5, 2023 3:23 PM
To: Cynthia Arrowood
Cc: Craig D. Justus; Valerie Christian; Chelsea Barry; Holley, Miranda
Subject: RE: Grey Outdoor, LLC v. NCDOT (Croatan National Forest)

Good afternoon,

We appreciate your recent communication regarding your disagreement with the denial in the above referenced matter. However, after careful consideration, the Secretary's decision is final and DOT will not be reversing the decision.

Kind regards,

Jessica Price

Jessica N. Price
Assistant Attorney General
Transportation Division
Phone: (919) 707- 4534
Email: Jprice@ncdoj.gov
1505 Mail Service Center, Raleigh, NC 27699-1505
ncdoj.gov

From: Cynthia Arrowood <carrowood@vwlawfirm.com>
Sent: Thursday, October 5, 2023 2:19 PM
To: Price, Jessica <jprice@ncdoj.gov>
Cc: Craig D. Justus <cjustus@vwlawfirm.com>; Valerie Christian <vchristian@vwlawfirm.com>; Chelsea Barry <cbarry@vwlawfirm.com>
Subject: Grey Outdoor, LLC v. NCDOT (Croatan National Forest)

Ms. Price,

Attached please find a letter from Craig Justus regarding the above referenced matter. Please let us know if you have any questions.

Thank you,

Cynthia Arrowood
Paralegal to
Craig D. Justus, Esq. and Brian D. Gulden, Esq.

The Van Winkle Law Firm
11 North Market Street
Asheville, NC 28801
(828) 258-2991

3. That Grey is entitled to have the State Permits immediately issued.

4. That Respondents/Defendants' denial of Grey's applications for the State Permits, including the initial Denial Letter[2] and Boyette's Decision, was arbitrary and capricious, as provided in Count Three of the Petition/Complaint.

5. That Respondents/Defendants' denial of Grey's applications for the State Permits, including the initial Denial Letter and Boyette's Decision, violated the separation of powers principles in the North Carolina Constitution (e.g., Article I, Sec. 6, Article II, Sec. 1 and Article III, Sec. 1), as provided in Count Three of the Petition/Complaint.

6. That Respondents/Defendants violated Grey's constitutional rights under Article I, Section 1 of the North Carolina Constitution, as provided in Count Three of the Petition/Complaint.

7. That Respondents/Defendants violated Grey's constitutional rights under Article I, Section 19 of the North Carolina Constitution, as provided in Count Three of the Petition/Complaint.

8. That the defenses of the Respondents/Defendants are without merit.

9. That, because of constitutional violations, Respondents/Defendants are liable to Grey for damages or just compensation during the period of Grey's property deprivation as provided in Count Three of the Petition/Complaint. Alternatively, that Respondents/Defendants have taken Grey's property interests without the filing of a formal declaration of taking and liable to Grey for just compensation under the inverse condemnation statute of N.C.G.S. §136-111, as well as liable to Grey for costs and fees under N.C.G.S. §136-119.

10. That the applicable measure or measures of damages for Grey's deprivation by Respondents/Defendants is the greater of either: (1) **market rate of return method**, See *Finch v. City of Durham*, 325 N.C. 352, 372, 384 S.E.2d 8, 19 fn1 (1989) (citing *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987)); or (2) **fair rental value that accounts for lost revenue to Grey**, See *Primetime Hospitality, Inc. v. City of Albuquerque*, 146 N.M. 1, 206 P.3d 112 (2009); *Flores v. Pierce*, 617 F.2d 1386, 1392 (1980) (lost profits recoverable in constitutional tort case) (citing *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042 (1978)); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307, 106 S. Ct. 2537, 2543 (1986) (damages for constitutional torts); *Champs Convenience Store, Inc. v. United Chemical Co.*, 329 N.C. 446, 462, 406 S.E.2d 856, 866 (1991) (lost profits); *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 356 S.E.2d 578

[2] Capitalized terms have the same meaning as stated in the Petition/Complaint.

to see what the DOT records said about the conformity of each location. The DOT has turned the Petitioner's own bit of information around with Gardner's affidavit to say that there are only 9-10 locations in the whole State with billboards near National Forests and that they are all "grandfathered." Gardner testified in his deposition that he did not know why the DOT records in fact showed the locations to be conforming. His affidavit not only misleads the Court as to how the 9-10 locations came about but it is in district contradiction of the DOT responses to discovery and his deposition testimony); See objections to Garnder affidavit submitted contemporaneously herein.

- The State Respondents are entitled to "deference." (Note: Even the Respondents' cases hold that no deference is given when the law is clear).

II. THE RESPONDENTS EXERCISED ARBITRARY POWER.

When a permit applicant fully complies with specified standards, a denial of the permit is "arbitrary as a matter of law." *Woodhouse v. Board*

of Com'rs, 299 N.C. 211, 219, 261 S.E.2d 882, 887 (1980).

Our courts have said that "an administrative ruling is deemed arbitrary and capricious when it is whimsical, willful, and an unreasonable action without consideration or in disregard of facts or law or without determining principle." *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 580, 710 S.E.2d 350, 354 (2011). Disregard of law would include where an agency, an inferior body to the Legislature, attempts to "make, modify, and abrogate the law at their pleasure . . ." *Attorney Gen. ex. rel. Gillaspie v. Justices of Guilford Co*., 27 N.C. 315, 325 (1844).

Arbitrariness is shown where the agency decisions "amount to a willful disregard of statutory purposes." *Lenoir Memorial Hosp., Inc. v. N.C. Dep't of Human Resources*, 98 N.C. App. 178, 184, 390 S.E.2d 448, 451(1990); *North Carolina Real Estate Licensing Board v. Woodard*, 27 N.C. App. 398, 400, 219 S.E.2d 271, 272 (1975) (agency determination must be "made in accordance with the legal meaning of the terms of the statute.").

Actions speak louder than words. The Respondents gloss over their gross misconduct in this case by blanket statements in their brief of "good faith" and "reasonable" acts. These conclusory assertions are refuted by

the actual record in this case.

Each State witness had vastly different opinions on their reading of the terms in the Controlling Statute. (Taylor Depos., pp 28-29; Boyette, pp 32-36; Gardner, pp 59-67).

District Engineer Taylor eschewed any responsibility for reviewing Grey's Applications despite what the statutory and DOT regulations required in terms of process. (Taylor Depos., pp 11-24).

Boyette actually admitted that the Croatan National Forest was not the same place or location as a State Park, National Park, State or national wildlife refuge, or designated wild and scenic river. (Boyette Depos., pp 32-34). He deferred, however, to the opinion of General Counsel to establish what was "best for the Department." (*Id.*, pp 13, 67-68). Desperate to find some rationale to support the Permit Denials, Boyette erroneously referred to some of the broad goals of subsection (a) of N.C.G.S. §136-129.2 without acknowledging that, after espousing goals that included promoting the use of land for billboards, the General Assembly then clearly struck a balance by listing a finite set of places to judge billboard separation by. (Id., pp 46-57)

Boyette's standard of saying something was pretty enough or had

enough recreational value to block a billboard opened the statute to an infinite number of possibilities that turned an otherwise clear law into the vagaries of human subjectiveness and passions – the opposite of the rule of law. He also admitted to not "thoroughly reviewing" the Appeal Submittal. *See Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 634-635, 240 S.E.2d 460, 469 (1977) (Commission Secretary's inadequate review of appeal record demonstrated that he acted arbitrarily and capriciously in rejecting petitioner's plan) (*Id.*, p 30).

Gardner, the Rule 30(b)(6) witness was even worse in demonstrating arbitrariness and capriciousness (if that is possible). He did zero investigations other than talking with the Attorney General's office and was all over the place in his deposition with opinions of what is or is not a National Forest, a National Park or a national wildlife refuge. (Gardner Depos., pp 18-21, 26-27, 29-30, 34-35). He admitted that the "directional signs" were different than "billboards" and that the regulations were not the same (Id., pp 39-43), but he steadfastly refused to move off the contention that the term "parkland", which only applied to directional signs, could be superimposed into the Controlling Statute to block the Billboards. (*Id.*, pp 37, 39, 46). He believed that a National

property. However, the erection and maintenance of outdoor advertising signs and devices in areas in the vicinity of a right-of-way or maintenance of outdoor advertising signs within the state should be controlled and regulated in order to promote the safety, health, welfare and convenience and enjoyment of travel. The statute goes on to say, and to attract tourists and promote the prosperity, economic well-being and general welfare of the state, and to preserve and enhance the natural scenic beauty of highways and areas in the vicinity of the state highways.

Now, Your Honor, the statute further goes on to say in regards to the one that he's referencing here, the one that we used in regards to -- four permits, 136-129.2 "Limitations of outdoor advertising devices adjacent to scenic highways, State and National Parks, historic areas and other places." And then, yes, proceeds to go on and list more locations.

We're not arguing that the Croatan National Forest is a scenic river, or we're

not arguing that it's not a national park. We're not arguing that it's a historical area. We're not arguing any of that. We're arguing the fact that the Croatan National Forest offers similar natural and scenic and recreational value as the four places that Mr. Justus is referencing in this particular statute.

Now, in regards to deference to our interpretation of the statute, there is case law after case law after case law, and even some of the case law that Mr. Justus gave to us the courts say, they say things that, let's see, there it is. We give great weight to an agency's interpretation of a statute it is charged with administering. And then it goes on to say, and under no circumstances will the Court follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under the construction of the statute. All we're simply saying is the fact that the Croatan National Forest and the other three national forests that are within the state of North Carolina offer the same scenic, natural

A. I mean, they're pretty clear. So I don't know.
Q. So do you know that a national forest is not the same thing as a national park?
A. I wouldn't -- I would have to see definitions, I guess, of both, but I mean --
Q. Did you look up a definition?
A. No.
Q. Did you, at any point in time, did you get out a computer or your phone or anything that could reach out into the world and research whether a national forest is the same thing as a national park?
A. Well, like I said, I don't determine the policy for the DOT.
Q. Who does? The AG's office?
A. When it comes to General Statute and admin code, yes.
Q. So you're telling me the attorney general's office is the one that establishes the policy of the state law?
A. Not the policy of state law, but they determine what the state law says and how we have to act under it.
Q. So --
A. I mean, if we just did things that the attorney general's office told us not to do, that wouldn't be very good. Right?
Q. Well, it depends, like in this case. It depends.
So do you know -- ultimately, you deny the permit

applications. They go up to the Secretary of Transportation. He does what he does, and we are in Superior Court right now, and you're at a deposition. At any point in time, have you looked up whether or not the Croatan National Forest is a national park, whether they're the same thing at any point in time?

A. No.

Q. Have you at any point in time looked up whether Croatan National Forest is a state park?

A. Isn't that the same question you just asked me?

Q. A National park is what I think I asked you a second ago.

A. Oh. No.

Q. At any point in time, you see in that -- in b, so the statute in (a)(1)b, there's a finite list of places and things that are noted there, right?

A. Uh-huh.

Q. Yes?

A. Yes. Sorry.

Q. Did you ever research whether or not the Croatan National Forest is the same thing as one of those finite list of places or things?

A. Well, considering the forest is a park, just, you know, I did not look it up.

Q. So your testimony here is you believe a forest is a

Q. So that was a yes or no. Is this, the terminology U.S. owned, protected land mentioned in the Statute?
A. No.
Q. Okay. And again, in terms of the meaning of the things that are listed, the finite list, you didn't look up a dictionary definition, right?
A. No.
Q. Do you know if the AG's office provided you a dictionary definition?
A. I don't know.
Q. Yes or no?
A. No, I don't know.
Q. So you didn't investigate at all the meaning of those terms, other than calling the AG's office and asking them what they think? Yes?
A. On whether denying these signs would fall under this General Statute or not.
Q. Now, one of the, one of the defenses that the department has asserted in this case is that the department has acted reasonably in this case.
A. Okay. You didn't ask a question.
Q. So about that -- so the process I'm hearing so far that you followed was you independently didn't look up anything to determine whether or not the Croatan National Forest fit under the list of items that are

national forest is different than a national park or any of the things listed there in the statute? Reach out to talk to anybody like that?

A. I reached out to the AG's office. That's who I have to contact on policy or law. Sorry.

Q. No, it's policy. Did you talk to anybody with the town of Newport?

A. No.

Q. All right. Let me show you what I'll mark as Exhibit Number 7.

(WHEREUPON, Exhibit Number 7 was marked for identification and passed to the witness for review)

Q. Exhibit 7, this is the Denial of Permit, right?

A. The top page is our letter. Yes.

Q. And then with the denial --

A. Admin code, yeah. General Statute.

Q. So you included with the denial the applications, the admin code, and of course, you have your denial. So this Exhibit 7 is a copy of the denial that you submitted for the four applications, Grey Outdoor, right?

A. Uh-huh.

Q. Yes?

A. Yes. I see a copy of the OA-1. Oh, there it is.

regulation, but ultimately the state has a set of rules for the location of outdoor advertising in the state. Right?

A. Uh-huh.

Q. That's a yes?

A. Yes, yes. Sorry.

Q. That's okay. I'll try to remind you. And so what is -- talk about the outdoor advertising law from the state standpoint. There is a statute, right?

A. Yes. We have General Statutes and admin code that were created per the federal/state agreement.

Q. And your responsibility was to supervise the regulation of the state laws that were on the books, either the state statute or the admin code, as you mentioned?

A. Uh-huh.

Q. Is that yes?

A. Yes.

Q. Okay. Before being the outdoor advertising coordinator, what were you?

A. Regional coordinator. I actually worked for Volkert.

Q. What is Volkert?

A. It's a consultant and engineering firm.

Q. They're under contract with the state of North Carolina?

A. Yeah, they're under contract with the state right now

Q. I understand. But if the law was straightforward, right, you wouldn't need to call somebody else to figure that out, would you, if it was straightforward?
A. Well, I don't interpret the law, so I have to.
Q. You don't have to interpret the spacing requirement? You do that every time you apply?
A. No, I was operating off of precedence at that point.
Q. Okay. Has there been a situation where you -- was the first time, other than this situation, where you had to do something for the first time in addressing an application for a billboard permit?
A. Oh, yeah. I mean, I've spoken to the AG's office numerous times on things.
Q. So you call up the AG's office, and I think what you said is that you don't determine policy. So you call up the AG's office to determine what the policy should be for this particular case?
A. Yeah. Well, for the distance of the signs from the forest.
Q. Understand. I'm just using your words that you call them up to determine what the policy should be.
A. Well, I was just determining whether we were denying these signs correctly or not.
Q. So the applications come in and -- and why don't we look at the Notice of Deposition, has you as the Rule

specifically covered in that Statute. Right? You yourself, didn't do any investigation, right?

A. Well, I called the AG's office. I already told you that.

Q. I get it. Other than calling the AG's office?

A. Well, I don't make any other decisions, so why would I? I don't understand your question.

Q. So at the end of the day, it is mind boggling to understand why we're here. So I'm not going to be able to answer any question you have. So if you don't understand a question I asked, please ask me to repeat it or I can rephrase it.

So at the end of the day, the only thing you did was call the AG's office. So what did the AG's office, since you're relying on that as a defense that you acted reasonably, what is it they told you?

A. That told me what?

Q. What did they tell you to say? Deny these permits?

A. That we could deny them for them being within 1200 feet of the Croatan National Forest.

Q. Why?

A. (No response)

Q. Are they saying because it's a national park?

A. Because it fell under General Statute 136-129.2.

Q. How?

(1)b. So, if you look at Exhibit 1 in your final decision, you do refer to a (a)(1)b as the specific statute in question.

All right. you see in (a)(1)b, there are four places or things that are mentioned in terms of judging proximity for outdoor advertising?

A. Correct.

Q. They are basically an outdoor advertising sign can't be within 1,200 feet of a national -- a North Carolina State Park. Do you see that?

A. I do.

Q. The thing or place in question here is the Croatan National Forest, right?

A. That's correct.

Q. So, is the Croatan National Forest a North Carolina state park?

A. No.

Q. All right; moving on. The second item, or place or thing that the Statute mentions is a national park.

A. Uh-huh.

Q. Is the Croatan National Forest a national park?

A. No.

Q. The third thing that's a place or location that's mentioned is a state or national wildlife refuge.

A. Uh-huh.

Q. Is the Croatan National Forest a state or national wildlife refuge?
A. No.
Q. And the final thing the statute mentions is of a place or location is designated wild and scenic river. Is the Croatan National Forest a designated wild and scenic river?
A. No.
Q. So, Eric, obviously, under oath, you're sitting here telling me that although 129.2, so this is 136-129.2(a)(1)b is the statute that you're claiming my client did not comply with?
A. Right.
Q. You've said here that the Croatan National Forest, which is the thing or place that you said was relevant to my client's outdoor advertising signs, was not one of the four places or locations mentioned in the Statute? Yes?
A. That's correct.
Q. All right. So, why doesn't that settle the question? Meaning, why would you deny my client a permit based on that Statute if the Croatan National Forest is not one of the four listed things there?
A. The site itself is not a state park, a national park or a national refuge, but it still -- it still is a

designated area in our opinion.
Q. So, when you say designated area, you understand how broad the concept of designated area is. My front yard is a designated area. It's called my front yard.
A. Very true.
Q. This building is a designated area. It's where you are sitting.
A. That's true. That's true.
Q. So I've asked you to explain the rationale --
A. I can do that.
Q. -- to having admitted the Croatan National Forests are not one of the four things listed expressly in the Statute --
A. Uh-huh.
Q. -- why then you would deny my permit? You said, well, Croatan National Forest is a designated area. So please explain your logic there.
A. I can do that. So if you look at that park and the area.
Q. Look at what park?
A. The Croatan National Park, the one we're talking about. Right?
Q. Croatan National Forest.
A. So, if you look at it and compare it to other areas that we have designated to do the same, the same type

Q. Do you know the reasons for the creation of a national forest?
A. I do not.
Q. Do you know if, how a national park is created? You know if it's by legislation?
A. I think it's through legislation, but I don't know for a fact.
Q. Do you know how a national forest is created?
A. I would assume through legislation as well.
Q. Do you know for sure?
A. I do not.
Q. Okay. So of the things that tell someone whether or not a national park is the same thing as a national forest, what is it that you would say that are the characteristics that make them the same if you don't know how they're set up, who administers them, or what their purposes are?
A. And how would you think they're the same?
Q. I'm asking you. Ycu said they were the same in today's testimony.
A. Yeah, I mean, I've been camping in both of them, so --
Q. Is that the criteria, is that you can camp in both of them?
A. I mean, it's a park. There's scenic walking areas, hiking trails. I mean, it's protected, federally-

A. Yeah.
Q. And I asked you if there was anything else and you said no. So is that the totality of -- I'm trying to get the answer to five. Is that the totality of your answer then?
A. Sorry, you jumped again. Five in which one?
Q. This is the Exhibit 6. This is the topics for the Notice of Deposition. This is Exhibit 6.
A. Because we were on 11.
Q. Yep, that's it. We're on topic five. The topic being "The meaning of the term 'National Forest' as compared to the meaning of the places or items listed" in the statute, i.e., North Carolina State Park, National Park, etcetera.

So I believe, and I'm just trying to summarize because we touched on this previously, your testimony is that you believe a national park is the same thing as a national -- a national forest is the same thing as a national park because both are federally-owned, protected lands that have similar characteristics.
A. Yeah.
Q. And the specific characteristic that you mentioned was you can camp in both.
A. Yeah. Camping could be one example.
Q. So from that, again, summarizing, your position is that

You did review Item A?
A. I did. I apologize. I didn't read Item A thoroughly. I thought that was something different. My apologies. Yeah, I remember. I do remember reading, and I do remember the testimonies from both Robert and Stephen.
Q. When you say the testimony, what do you -- what do you --
A. The statement.
Q. The statements?
A. Yeah; their written statements.
Q. So, according to Exhibit 1, your decision is that my client's applications for permits to erect outdoor advertising signs, did not comply with a Statute 136-129.2, correct?
A. That's correct.
Q. So the sole reason for you believing that we were not entitled to the permits was because of noncompliance with that one Statute, right?
A. That's correct.
Q. So did you read that Statute?
A. Yes.
Q. All right. I'll show you what a mark a Exhibit 2.

(WHEREUPON, Exhibit Number 2 was marked for identification and passed to the witness for review.)

beauty and recreational value of the items listed here. That is all we're saying. We're not going above and beyond. There's no plan or attack of Mr. Justus or his client behind closed doors. There's no nefarious actions. That's just simply our interpretation as NCDOT and our responsibility to regulate these outdoor advertisings in an orderly and effective manner.

The interesting part about this, Your Honor, is the fact that we're not saying that Mr. Justus and Grey Outdoor advertising can't have their signs. We're just simply saying pick a different location. There are over 8300 billboards in the state of North Carolina and there are over 80,000 miles of state highway roads in this state. All we're simply saying is pick a different location. That's all we're asking. We're not taking anything from them. We're not keeping them from doing anything else in regards to the way they handle their business and apply for permits, anything of that nature. We're just simply saying choose a different location

because we're trying to maintain that the natural and scenic value that not only the Highway Beautification Act was passed in order to mandate us to regulate this in order to enhance the natural beauty of America's roadways. That is the Highway Beautification Act. That is the federal mandate that they have placed onto every state to ensure that we control things that consider either a nuisance or an eyesore.

We have no issue with outdoor advertising and signs, Your Honor, from the NCDOT. If we did, we wouldn't have 8300 of them around the state of North Carolina. We have no problem issuing permits so long as they're in proper locations. Which is why we have the 660 feet requirement and the 1200 feet requirement in regards to the national forest. Go 1300 feet, go 1400 feet. We're just simply asking to not be right up against the national forest because it distracts. In relation to those ten signs that Mr. Justus is referencing, eight of them, the leases date back to 1972, Your Honor. And to be honest with you, in our opinion, if we did

will take them under advisement, but I will say there have been some things that were said to be said that weren't said.

And so as far as the issue in this case, it's the simple question of whether or not we were correct in our interpretation of the statute in denying those four permits. And, Your Honor, to be honest, if you determine that we are wrong, we'll give the four permits. But the simple fact is we're not trying to open floodgates here next to these national forests, because the four permits in which they're looking dual-sided, and they're the types that are electronic. So they're going to be bright, they're going to be bold, they're going to be big, and they're going to be in the middle of, or next to, excuse me, next to the Croatan National Forest. And that's all we're simply saying. We're just simply saying we prefer to try and maintain the natural and scenic beauty in which the declaration of the policy of the statute says is part of our regulatory function.

So pick a different location. That's all we're simply asking. That's our only

argument is just pick a different location. No one's taking anything from you. And in fact, as part of these four permit applications, they also submitted their leases to us. And the lease includes a literal paragraph that says if permits cannot be attained by state because of state, federal, or other type of regulation, then we can back out of this lease.

So again, Mr. Justus and Grey Outdoor advertising has the ability to simply pick a different location. So this idea that we are keeping them from getting these permits and that we're going to bankrupt them because we're the big bad North Carolina Department of Transportation is just simply not true. We're just simply saying, pick a different location. That's it.

And as far as damages, the courts have said that a permit does not create a constitutional right and it does not create a property right. It's simply a privilege. And if the whole concept of our job as a regulatory function, if according to what Mr. Justus is saying, then we would be moot. We

STATE OF NORTH CAROLINA COUNTY OF WAKE GREY OUTDOOR, LLC, Petitioner/Plaintiff, vs. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; J. ERIC BOYETTE, in his official capacity as Secretary of Transportation of the North Carolina Department of Transportation; ROBBY L. TAYLOR, in his official capacity as District Engineer; and STEPHEN M. GARDNER, in his official capacity as North Carolina Department of Transportation Outdoor Advertising Coordinator, Respondents/Defendants.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO: 23CV028880-910 **AFFIDAVIT OF M. GREY VICK**

The undersigned, M. Grey Vick, being first duly sworn, certifies as follows:

1. I am over the age of eighteen and give this affidavit upon my own personal knowledge.

2. I am the Manager and sole Member of Grey Outdoor, LLC (hereinafter "Grey"), a North Carolina limited liability company, which is located at 1601 S. College Road, Wilmington, NC 28403.

3. I started working in the outdoor advertising or billboard business with a company named Waterway Outdoor in 2007, with the first sign being erected in 2008. I started Grey in May 2014. Grey is in the business of developing and operating outdoor advertising signs or billboards in the Carolinas. Grey constructs and operates billboards for renting space to advertisers to display commercial or noncommercial messages that relate to matters or things not being conducted on the property where the sign is located or for off-premises purposes.

4. Grey owns and operates more than 335 billboard structures with more than 675 faces, including 34 digital faces across North and South Carolina.

11. The Billboards were proposed to be constructed with two (2) sign face panels of approximately 378 square feet each with the structure being at approximately forty (40) feet in height.

12. Around April 20, 2023, Grey submitted applications with the applicable District Engineer's Office for the North Carolina Department of Transportation (hereinafter "DOT") for four (4) permits (hereinafter "State Permits") to erect the Billboards on the Site. True and accurate copies of the applications without attachments are attached hereto as Exhibit "4" and incorporated herein by reference.

13. The DOT is delegated responsibility in the North Carolina Outdoor Advertising Control Act (N.C.G.S. §136-126 et seq.) (hereinafter "OACA") to manage the erection and maintenance of billboards along interstates and major State highways in the State known as federal aid primary highways. US Highway 70 along the Site is a major highway that falls under the OACA's scheme of regulation.

14. The standards under the OACA for the erection of billboards are very objective. They require property to be commercially or industrially zoned or used. The Site is commercially zoned. Additionally, the State standards in 19A NCAC 2E .0203 regulate the size of a billboard, spacing between billboards and lighting considerations. All of these objective standards are met with Grey's applications for State Permits.

15. The applications for State Permits for the Billboards complied in all respects with the standards imposed by the OACA and DOT regulations for the erection of billboards in this State. The only reason that DOT ultimately rejected the State Permits was the allegation that N.C.G.S. §136-129.2(a)(1)b.'s 1200-foot spacing from a State Park, National Park, State or National Wildlife Refuge or a designated wild and scenic river was triggered due to the Site's proximity to the Croatan National Forest. A National Forest such as the Croatan National Forest is not on the statutory list of places or locations.

16. In anticipation of receiving the State Permits, Grey bought steel equipment for the Billboards for a price exceeding $30,000.00. A true and accurate copy of the applicable invoice is attached hereto as Exhibit "5" and incorporated herein by reference.

17. To erect a billboard structure, Grey obtains structural components or equipment, mobilizes them to the property, and physically builds the sign. Grey typically handles the construction in-house. For a billboard, the approximate mobilization and construction time to completion is 10 to 14 days. For the Billboards, upon obtaining the State Permits, and applying economies of scale, Grey would have mobilized and constructed the signs in approximately 6 weeks. They would have been ready to rent to advertisers at the conclusion of that period. Since Grey obtained sign

permits, the Town of Newport has enacted changes to its zoning regulations purporting to prohibit billboards. The only contingency remaining to enable the outdoor advertising use of the Site was the procuring of the State Permits. Based on my decades of experience, it is my opinion that, but for the State's permit denials, the Billboards would have been operational and earning revenue in less than 2 months.

18. In the billboard industry, most of the laboring oar to commence a billboard operation on land is the securing of an appropriate location with a lease in terms of visibility, having adjoining roads with high traffic counts for recipients of advertising messages, buildable land and being in a market with good advertising rates. Obtaining local development permits is also part of the heavy lifting. It is very difficult to find localities which zone in a way to be inclusive of new billboards. It is high premium to find a great location like the Site with proper zoning along a major State highway.

19. Building a billboard after securing a lease and permits is relatively simple. There are many vendors of supplies and companies which will construct. In Grey's case, we typically do the building ourselves. The costs are depreciated over time. Once erected, obtaining advertisers is also typically easy. The work in discovering a likely pool of consistent advertisers is mainly done prior to selecting the location to lease, like in the case with the Billboards. Once erected, the billboard basically is self-operating with little maintenance.

20. By letter dated May 18, 2023, the DOT by and through Robby Taylor, District Engineer and Stephen Taylor, DOT Outdoor Advertising Coordinator and Gardner notified Grey that the four (4) applications for the State Permits were denied (hereinafter "Denial Letter"). A true and accurate copy of the Denial Letter (with attachments) is attached hereto as Exhibit "6" and incorporated herein by reference.

21. Prior to the Denial Letter, my real estate manager, Guy Williamson, and I were told by Robert Parker that the State Permits would not be issued due to the Site's proximity to the Croatan National Forest. Robert Parker is employed by Volkert, a company which provides inspection and management services to the DOT related to outdoor advertising. On May 8, 2023, Robert Parker informed us via email that North Carolina General Statute §136-129.2 was being used to deny the applications due to the Site's adjacency to the Croatan National Forest. Mr. Parker highlighted subsection (a)(1)b of the statute and emailed the statute and a copy of a map he prepared to us. A true and accurate copy of this email with the two referenced attachments is attached hereto as Exhibit "7" and incorporated herein by reference.

22. On May 10, 2023, we responded to Mr. Parker with an email explaining that the Croatan National Forest is not designated as a state or federal park, state or federal wildlife refuge, or a designated river; the four places or locations highlighted by Mr. Parker in the statute. We provided him links to official

government websites to inform him what was readily available from the relevant state or federal agencies to show that the Croatan National Forest was not one of the listed places or locations in the statute. A true and accurate copy of our email is attached hereto as Exhibit "8" and incorporated herein by reference.

23. When we did not hear from Mr. Parker after our email, I called Stephen Gardner, who is the DOT's Outdoor Advertising Coordinator in Raleigh, to discuss the matter with him. I asked him to review the email we had sent showing the difference between a national forest and a national park, etc. His response was that "you could go camping at a national forest." Mr. Gardner further stated that "it wasn't his call to deny the permits and the attorney general's office had told him to deny the permits." He said he was "sorry but there was nothing he could do about it." He provided no information or facts that would lead one to conclude that the Croatan National Forest is a state park, national park, state or federal wildlife refuge or a designated wild and scenic river.

24. I am very familiar with scenic highways or byways in the State where outdoor advertising billboards are not allowed. US Highway 70 along and near the Site is not a designated scenic highway or byway.

25. Over the years, Grey has operated multiple billboards in the Carteret County market and from those experiences of owning and operating outdoor advertising, I am knowledgeable about appropriate rental rates for advertising messages on signs. From my experiences, I have prepared a pro forma attached as Exhibit "9" that reflects the anticipated monthly rental income that would have been obtained and expenses incurred from the use and operation of the Billboards but for the State's permit denials. The net monthly revenue from the Billboards would have been at least $5,140.00.

26. The effect of the DOT's decisions to deny the State Permits is to interrupt Grey's ability to earn rental revenue from the previous efforts that Grey made in securing a lease, obtaining local permits and otherwise being ready and prepared to mobilize to construct the signs in question but for the interference by the State actors. It is a rare, if not a non-existent thing, in the outdoor advertising industry to have one outdoor advertising party secure a long-term lease and applicable permits like Grey and then sublet that package of rights to a third party, such as a competing outdoor advertising company. Most of the value in the labor, time, and expense of securing a lease of real estate, permits and mobilizing resources to complete the erection of the signs is to have a location that earns substantial rental revenue. Since most of the labor in commencing the operation of a billboard is in the securing of the proper location and permits, to be made whole for an interruption in crossing the goal line, the typical sign owner and operator in the billboard industry would expect as a fair rental value to forgo moving forward for a temporary period would be to replicate what would be expected to be earned from rental revenues.

Based on my knowledge of the marketplace for the Site, I am very aware of what the Billboards would have earned in terms of rental revenue. An analogy presented in this case would be asking one to stop at the 5-yard line where the goal is so close and most of the hard work has already been done. The highest and best use of the Site, and the only use of pursuant to the Lease, is outdoor advertising. An owner of a lease authorizing the use of a good location for outdoor advertising for a finite length of time who holds permits that allow said use would not sublet the dirt as simply vacant land. The fruits of the labor of securing a location with proper zoning and permits is the ability to earn substantial rental revenue from advertisers and the fair rental value to a property owner like Grey would account for deferred or lost rental revenue.

27. After receiving Secretary Boyette's decision to continue to deny the State Permits, we sent to the Attorney General's office a plea to have the DOT retract from its indefensible position to deny our ability to construct and operate our signs based on proximity to a National Forest, which is not listed in the statute stated. True and accurate copies of that correspondence and the Attorney General's reply are attached hereto as Exhibits "10a" and "10b" and incorporated herein by reference.

28. Based on my experiences in providing advertising services to the public and my knowledge of the advertising rates generally applicable to the marketplace of Carteret County and the costs of operations at the time of and continuing through the period of the State's permit denials, it is my opinion that Grey is damaged at least by $61,680.00 every year that the permits continue to be withheld by the DOT.

[Signature on next page]

STATE OF NORTH CAROLINA COUNTY OF WAKE GREY OUTDOOR, LLC, Petitioner/Plaintiff, vs. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; J. ERIC BOYETTE, in his official capacity as Secretary of Transportation of the North Carolina Department of Transportation; ROBBY L. TAYLOR, in his official capacity as District Engineer; and STEPHEN M. GARDNER, in his official capacity as North Carolina Department of Transportation Outdoor Advertising Coordinator, Respondents/Defendants.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO: 23CV028880-910 **AFFIDAVIT OF ROBERT M. SOULE**

The undersigned, Robert M. Soule, being first duly sworn, certifies as follows:

1. I am over the age of eighteen and give this affidavit upon my own personal knowledge.

2. I have thirty-three (33) years' experience in the billboard business, twenty (20) of which were in the state of North Carolina. I have overseen all aspects of the billboard industry in North Carolina, including but not limited to sales, leasing, operations, governmental affairs, development, construction and acquisitions. I was a SR/VP with the largest billboard company in the state of North Carolina for over ten (10) years, and I am past President of the North Carolina Outdoor Advertising Association.

3. I have reviewed the affidavit of M. Grey Vick in this matter. In this particular matter, I was asked to prepare an analysis based on my experiences in the billboard industry of the likely approach to determine a fair price to be exchanged between a party who holds a lease for the location of the four billboards in question in this case and the proper governmental permits and a party willing to pay a

property owner such as Grey to forgo moving forward with his property interests for a temporary period of time.

4. I have studied the proposed sign locations on the west side of Highway 70, north of Tom Mann Road, Carteret County, North Carolina. and the site plan for the four proposed billboards on this property. I have reviewed rental history showing advertising revenues for comparable locations of Grey in the marketplace of Carteret County. Based on my thirty plus years of experience, I am familiar with the likely rental rates from advertisers of the four billboards in question. It is my opinion that each sign face will generate $1,000.00 per month. In order to be conservative and ensure that the eight (8) faces (two on each billboard) stay occupied, I reduced that amount to $900.00 per face per month. The four (4) structures with eight (8) total faces would generate a minimum of $7,200.00 per month.

5. Realistic expenses are limited to lease payments to the landowner, illumination of the sign faces, and annual permits to the county and/or state. All other expenses will be passed on to the advertiser such as vinyl production and installation of the copy. The monthly lease expense would be $1,000.00, monthly electric bill $200.00 ($50.00 each board), and the permits monthly at $100. Total monthly expenses for the operation of the four billboards would be $1,300.00.

6. First year net cash flow and/or operating income from these four (4) signs would be $5,900.00 a month. This number would increase each year as the increase in advertising cost to the advertiser would surpass the expense increase. If everything goes up five percent (5%) each year, the revenue will increase by over $500.00 per month, but the expenses would go up less than $100.00 per month. In year two, the monthly cash flow could easily be $6,400.00 or more.

7. Grey Outdoor, LLC has not built the structures because the permits have yet to be issued by North Carolina Department of Transportation. Based upon my thirty-plus experiences in the billboard industry, including acquisitions of billboard properties where my company would end up building the signs, once the permits are issued, Grey Outdoor, LLC holds paper (the permits) that has a value of at least $450,000.00. This is calculated at 7.5 times annual net cash flow less construction cost. $72,000.00 annual CFFO x 7.5 times = $540,000 less $90,000.00 construction cost to build all four (4) signs = $450,000.00. Grey Outdoor, LLC could sell the permits prior to construction, have the buyer assume the leases, and that sale price would be $450,000.00. Construction cost are less for a larger company that would be the logical buyer.

8. On behalf of my employer company, I have acquired multiple sites where only the lease and permits were in place. However, finding a good location with "eyes on" visibility to the traveling public at sufficient traffic counts where the zoning would allow billboards is the premium or hard part of developing billboards. In North

Carolina, including Carteret County, restrictive or prohibitive development regulations from local governments make finding a suitable location for a billboard very difficult. Once a lease and permits are secured, building a billboard is fairly easy with the multitude of suppliers and in-house or third-party contracting options. It only takes a few days to erect a sold billboard structure once the supplies are mobilized onsite.

9. Based on my billboard experiences, I agree with Grey Vick's assessment in his affidavit that a fair rental price to acquire the property for a limited time when Grey Outdoor already has in place a lease and permits would approximate the rental revenue that would be earned from the billboards themselves. Just like any business, especially one that earns rental revenue, if the property owner has gotten to the line of being close to opening (such as Grey Outdoor), to interrupt or stop that use, the price exchanged for a third party to tie up the property would closely replicate the lost earnings or the rent that would have been obtained during the period that the property is tied up.

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-906-

STATE OF NORTH CAROLINA COUNTY OF WAKE GREY OUTDOOR, LLC, Petitioner/Plaintiff, vs. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; J. ERIC BOYETTE, in his official capacity as Secretary of Transportation of the North Carolina Department of Transportation; ROBBY L. TAYLOR, in his official capacity as District Engineer; and STEPHEN M. GARDNER, in his official capacity as North Carolina Department of Transportation Outdoor Advertising Coordinator, Respondents/Defendants.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO: 23CV028880-910 **AFFIDAVIT OF HARRY C. NEWSTREET**

The undersigned, Harry C. Newstreet, being first duly sworn, certifies as follows:

1. I am over the age of eighteen and give this affidavit upon my own personal knowledge.

2. I am a State Certified General Real Estate Appraiser in North Carolina and Florida. I am the Owner and President of Harry C. Newstreet & Associates, which is based in Boca Raton, Florida.

3. I have worked in the appraisal field for over 30 years. I can perform a wide variety of real estate services that cover the entire spectrum of the real estate appraisal field including property appraisal, acquisition, feasibility, development and counseling, as well as in specialized areas such as expert witness testimony in condemnation for right-of-way, valuation, tax problems and other real estate matters.

4. In this matter, I was asked to prepare a report of the likely damages incurred by Grey Outdoor, LLC, as a result of a permit denial by the North Carolina Department of Transportation for four sign structures on the west side of Highway

-910-

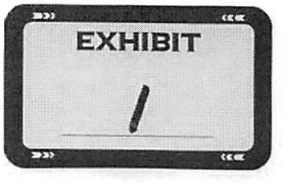
HARRY C. NEWSTREET
& ASSOCIATES

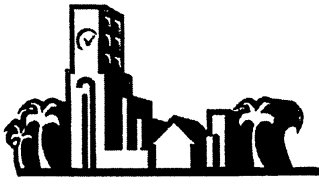
Appraisal of

Grey Outdoor, LLC's
Interest in the Property
Located on the West Side of Highway 70,
North of Tom Mann Road,
Carteret County, North Carolina
File No: 24-24106

Prepared for
Mr. Craig Justus, Esquire
The Van Winkle Law Firm
11 North Market Street
PO Box 7376
Asheville, North Carolina 28802-7376

Prepared by
Harry C. Newstreet, MAI
Harry C. Newstreet & Associates
879 Southwest 17th Street
Boca Raton, Florida 33486





HARRY C. NEWSTREET
& ASSOCIATES

April 29, 2024

Mr. Craig Justus, Esquire
The Van Winkle Law Firm
11 North Market Street
PO Box 7376
Asheville, North Carolina 28802-7376

Re:	**Sign Permit Holder:**	**Grey Outdoor, LLC**
	Location:	**The West Side of Highway 70, North of Tom Mann Road, Carteret County, North Carolina**
	File No:	**24-24106**

Dear Mr. Justus:

According to your request, we have prepared this report of our appraisal of the damages incurred by Grey Outdoor, LLC as a result of a permit denial by the North Carolina Department of Transportation for four sign structures on the west side of Highway 70, north of Tom Mann Road, Carteret County, North Carolina. Grey Outdoor applied for and were denied permits to build four sign structures on property leased from Mattie Mason, the underlying fee owner. Grey Outdoor has an existing lease as well as permits from the Town of Newport, for the four sign structures. The purpose of this appraisal assignment is to form an opinion of the market value of the various interests that Grey Outdoor, LLC has in the property both before and after the denial of the permits for the four structures, as well as the market rate of return for the difference between the before and after value on a daily basis. The various interests include a leasehold interest in the land, an ownership interest in the sign structure and a vested right to maintain the signs on the land. The function and intended use of the report is for use by the client in litigation with the North Carolina Department of Transportation.

To report the assignment results, we use the Appraisal Report option of Standards Rule 2-2(a) of USPAP. This format summarizes the information analyzed, the appraisal methods employed, and the reasoning that supports the analyses, opinions, and conclusions. We have carefully examined those factors that we deemed pertinent in arriving at an estimate of value. We have not personally inspected the property that is the subject of this report. The value opinion reported is qualified by certain definitions, limiting conditions, and certification, which are set forth within this report. The appraisal is intended to conform with the Uniform Standards of Professional Appraisal Practice (USPAP), the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute, and applicable state appraisal regulations.

879 SOUTHWEST 17th STREET • BOCA RATON, FLORIDA 33486 • (954)575-3535 • FAX: (954)252-4504
E-MAIL: harry@harrynewstreet.com

As a result of our analysis, we have formed an opinion of the market value before and after the denial of the permits for the four structures, as well as the market rate of return for the difference between the before and after value on a daily basis, as defined within the report, subject to the definitions, certifications and limiting conditions set forth in the attached report, as of May 18, 2023, is:

BEFORE VALUE
FOUR HUNDRED AND FIFTY THOUSAND DOLLARS
($450,000)

AFTER VALUE
NOMINAL VALUE
($1,000)

MARKET RATE OF RETURN ON A DAILY BASIS
EIGHTY-SIX DOLLARS
($86)

This letter must remain attached to the report in order for the value opinion set forth to be considered valid.

Your attention is invited to the following data that, in part, forms the basis for our conclusions.

Respectfully submitted,

Harry C. Newstreet & Associates

Harry C. Newstreet, MAI
North Carolina State Certified General Real Estate Appraiser No. A9174

Stephen Gardner and Robby Taylor by and through counsel responded to each of the listed "Requests for Admission." Please see above the listed individuals address and contact information.

1. The Croatan National Forest is not a "North Carolina State Park."

RESPONSE: Admit in part and deny in part. We admit the Croatan National Forest is not titled a "North Carolina State Park, however we deny that the Croatan National Forest does not fall under the purview of N.C.G.S. 136-129.2. The Croatan National Forest provides the similar scenic, recreational, and aesthetic value to the public.

2. The Croatan National Forest is not a "National Park.

RESPONSE: Admit in part and deny in part. We admit the Croatan National Forest is not a "National Park," however, however we deny that the Croatan National Forest does not fall under the purview of N.C.G.S. 136-129.2. The Croatan National Forest provides the similar scenic, recreational, and aesthetic value to the public.

3. The Croatan National Forest is not a "State or national wildlife refuge."

RESPONSE: Admit in part and deny in part. We admit the Croatan National Forest is not titled a "National Park," however, however we deny that the Croatan National Forest does not fall under the purview of N.C.G.S. 136-129.2. The Croatan National Forest provides the similar scenic, recreational, and aesthetic value to the public.

4. The Croatan National Forest is not a "designated wild and scenic river.

RESPONSE: Admit in part and deny in part. We admit the Croatan National Forest is not titled a "designated wild and scenic river" however we deny that the Croatan National Forest does not fall under the purview of N.C.G.S. 136-129.2. The Croatan National Forest provides the similar scenic, recreational, and aesthetic value to the public.

5. The four (4) applications submitted by the Petitioner for State Permits complied with all substantive standards for the issuance of such permits to erect new billboards under the OACA and the related DOT regulations.

RESPONSE: Admit in part and deny in part. We admit that Petitioner complied with the procedural standards for the issuance of such permits. We deny that all substantive standards were met, because the proposed location of said permits are within 1200 feet of the Croatan Nation Forest, which NCDOT, et. al contends is within the scope of N.C.G.S. 136-129.2 and is therefore prohibited.

6. Neither the Site for the proposed Billboards nor the proposed Billboards, if erected as applied for, are located within 1,200 feet of a North Carolina State Park as referred to in N.C.G.S. §136-129.2(a)(l) b.

RESPONSE: Deny. It is the contention of NCDOT et. al that the Croatan National Forest is under the purview N.C.G.S. §136-129.2. The Croatan National Forest provides the similar scenic, recreational, and aesthetic value to the public and it is the duty of NCDOT under N.C.G.S. §136-127 to ensure the regulation, erection and maintenance of outdoor advertising signs and devices should be controlled and regulated in order to promote the safety, health, welfare and convenience and enjoyment of travel on and protection of the public investment in highways within the State, and to promote safety on the highways, to attract tourists and promote the prosperity, economic well-being and general welfare of the State, and to preserve and enhance the natural scenic beauty of the highways.

7. Neither the Site for the proposed Billboards nor the proposed Billboards, if erected as applied for, are located within 1,200 feet of a National Park as referred to in N.C.G.S. §136-129.2(a)(l) b.

RESPONSE: Deny. It is the contention of NCDOT et. al that the Croatan National Forest is under the purview N.C.G.S. §136-129.2, and the proposed location is within 1200 feet of said Forest.

8. Neither the Site for the proposed Billboards nor the proposed Billboards, if erected as applied for, are located within 1,200 feet of a State or national wildlife refuge as referred to in N.C.G.S. §136-129.2(a)(l) b.

RESPONSE: Deny. It is the contention of NCDOT et. al that the Croatan National Forest is under the purview N.C.G.S. §136-129.2, and the proposed location is within 1200 feet of said Forest.

9. Neither the Site for the proposed Billboards nor the proposed Billboards, if erected as applied for, are located within 1,200 feet of a designated wild and scenic river as referred to in N.C.G.S. §136-129.2(a)(l) b.

RESPONSE: Deny. It is the contention of NCDOT et. al that the Croatan National Forest is under the purview N.C.G.S. §136-129.2, and the proposed location is within 1200 feet of said Forest.

10. N.C.G.S. §136-129.2(a)(l) b. does not list a "National Forest" as a thing or place to require or trigger the separation of billboards.

RESPONSE: Admit in part and deny in part. We admit that N.C.G.S. §136-129.2(a)(l)b does not list "National Forest." We deny that the Croatan National Forest does fall within the purview of N.C.G.S. §136-129.2(a)(l) b.

11. Boyette's Decision affirming the Denial Letter does not rely on the term "parkland" as an excuse to deny the State Permits.

RESPONSE: Admit in part and Deny in part. Eric Boyette did not include the term "parkland" in the final denial letter; however, Eric Boyette did affirm the original denial letter, which included the term "parkland."

12. Boyette's Decision provides one reason for denying the State Permits, being the contention that Petitioner failed to comply with N.C.G.S. §136-129.2(a)(l) b.

RESPONSE: Admit

13. The term "parkland" is omitted from N.C.G.S. §136-129.2(a)(1)(b).

RESPONSE: Admit in part. The term "parkland" is not listed in N.C.G.S. §136-129.2(a)(1)(b). However, I do not have any knowledge to suggest that the term "parkland" was 'omitted' for a purpose.

14. The term "parkland" as referenced in DOT regulations pertains to directional signs, not billboards.

RESPONSE: Deny. The term "parkland" is listed as definition (19) under 19A NCAC 02E .0201 DEFINITIONS FOR OUTDOOR ADVERTISING CONTROL.

15. Petitioner has complied with all procedural requirements for filing an appeal of the denial of the State Permits (not including Petitioner's damages claim).

RESPONSE: Admit.

STATE OF NORTH CAROLINA COUNTY OF WAKE GREY OUTDOOR, LLC Petitioner/Plaintiff, vs. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; J. ERIC BOYETTE, in his official capacity as Secretary of Transportation of the North Carolina Department of Transportation; ROBBY L. TAYLOR in his official capacity as District Engineer; and STEPHEN M. GARDNER, in his official capacity as North Carolina Department of Transportation Outdoor Advertising Coordinator, Respondent/Defendants.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO:23CV028880-910 RESPONDENT/DEFENDANT'S SUPPLEMENTAL RESPONSES TO PLAINTIFF'S REQUESTS FOR ADMISSIONS

NOW COMES Respondent, The North Carolina Department of Transportation, through its attorneys, Assistant Attorney General Jessica N. Price, and hereby submit our supplemental responses to Petitioner's First Requests for Admissions as follows:

RESPONSES TO PETITIONER'S REQUESTS FOR ADMISSION

Stephen Gardner and Robby Taylor by and through counsel responded to each of the listed "Requests for Admission." Please see above the listed individuals address and contact information.

1. The Croatan National Forest is not a "North Carolina State Park."

RESPONSE: Admit in part and deny in part. We admit the Croatan National Forest is not titled a "North Carolina State Park," however we deny that the Croatan National Forest does not fall under the purview of N.C.G.S. 136-129.2. The Croatan National Forest provides the similar scenic, recreational, and aesthetic value to the public as would a North Carolina State Park.

2. The Croatan National Forest is not a "National Park."

RESPONSE: Admit in part and deny in part. We admit the Croatan National Forest is not titled a "National Park," however we deny that the Croatan National Forest does not fall under the purview of N.C.G.S. 136-129.2. The Croatan National Forest provides the similar scenic, recreational, and aesthetic value to the public as would a "National Park."

3. The Croatan National Forest is not a "State or national wildlife refuge."

RESPONSE: Admit in part and deny in part. We admit the Croatan National Forest is not titled a "State or national wildlife refuge," however we deny that the Croatan National Forest does not fall under the purview of N.C.G.S. 136-129.2. The Croatan National Forest provides the similar scenic, recreational, and aesthetic value to the public as would a "State or national wildlife refuge."

4. The Croatan National Forest is not a "designated wild and scenic river."

RESPONSE: Admit in part and deny in part. We admit the Croatan National Forest is not titled a "designated wild and scenic river" however we deny that the Croatan National Forest does not fall under the purview of N.C.G.S. 136-129.2. The Croatan National Forest provides the similar scenic, recreational, and aesthetic value to the public as would a "designated wild and scenic river."

Respectfully submitted, this the 28th day of March, 2024.

JOSH H. STEIN
ATTORNEY GENERAL

/s/ Jessica N. Price
Jessica N. Price
Assistant Attorney General
Bar No. 52354
ATTORNEY FOR RESPONDENTS
North Carolina Department of Justice
1505 Mail Service Center
Raleigh, North Carolina 27699-1505
(919) 707-4534

administrative law. I have been the General Counsel for the North Carolina Outdoor Advertising Association for over two decades.

6. I have personally reviewed the costs and attorney fees billed or submitted to the Petitioner/Plaintiff and paid by Petitioner/Plaintiff in this matter.

7. For the purposes of this request, I have not included any time spent by associates or other lawyers in the firm or paralegals as noted in the invoices to the client. The total amount of billed attorney fees directly related to my time and labor as of the date of this Affidavit because of and to defend against the permit denials and decisions of the Respondents/Defendants that are the focus of this case is $58,180.00. A true and accurate copy of the invoices for my services (and firm) performed are attached hereto as Exhibit "1" and incorporated herein by reference.

8. The total amount of court-related costs that Petitioner/Plaintiff seeks to recover from Respondents/Defendants is $3,088.74, which represents the fees for transcripts of the depositions taken in this matter. Each of the depositions are being tendered to the Court in support of Petitioner/Plaintiff's various motions for summary judgment and for an award of fees and costs. True and accurate copies of the deposition related invoices are attached hereto as Exhibit "2".

9. On January 8, 2024, I served upon the Respondents/Defendants, among other things, a request for admissions pursuant to Rule 36 of the North Carolina Rules of Civil Procedure. As part of those requests, I sought to narrow down the issues of whether the Respondents/Defendants would admit that the Croatan National Forest was not one of the listed places or locations in N.C.G.S. §136-129.2(a)(1)b. (i.e., State Park, National Park, State or national wildlife refuge or designated wild and scenic river). A copy of our requests is attached hereto as Exhibit "3a" and incorporated herein by reference. The Respondents/Defendants' initial responses admitted and denied in part, even though the request was straightforward and was deserving of a clearer response. A copy of the first response is attached hereto as Exhibit "3b" and incorporated herein by reference.

10. After receiving the Exhibit "3b" response, I followed up with counsel for Respondents/Defendants regarding the ambiguity in their responses (attached as Exhibit "3c"). Supplemental responses followed (attached as Exhibit "3d"). Due to the continuing vagueness and impropriety of the responses, I requested new answers, which were not forthcoming. A true and accurate copy of our correspondence is attached hereto as Exhibit "3e" and incorporated herein by reference.

11. As a result of the Respondents/Defendants' confusing responses and refusal to properly admit that the Croatan National Forest is not a State Park, a National Park, a State or national wildlife refuge, or a designated wild and scenic river, the Petitioner/Plaintiff had to incur substantial expenses, including reasonable

From: Price, Jessica <jprice@ncdoj.gov>
Sent: Tuesday, March 26, 2024 9:56 AM
To: Craig D. Justus <cjustus@vwlawfirm.com>; Cynthia Arrowood <carrowood@vwlawfirm.com>
Cc: Chelsea Barry <cbarry@vwlawfirm.com>; Taylor, Robby L <rltaylor@ncdot.gov>; Holley, Miranda <Mholley@NCDOJ.GOV>
Subject: RE: Grey Outdoor

Craig, I will be sending you a copy of our updated responses to the Admissions by COB Thursday.

From: Craig D. Justus <cjustus@vwlawfirm.com>
Sent: Monday, March 25, 2024 5:23 PM
To: Price, Jessica <jprice@ncdoj.gov>; Cynthia Arrowood <carrowood@vwlawfirm.com>
Cc: Chelsea Barry <cbarry@vwlawfirm.com>; Taylor, Robby L <rltaylor@ncdot.gov>; Holley, Miranda <Mholley@NCDOJ.GOV>
Subject: Re: Grey Outdoor

Jessica, please respond to the below inquiry with clarifying answers to the RFAs.
Sent from my iPhone

> On Mar 14, 2024, at 11:31 AM, Craig D. Justus <cjustus@vwlawfirm.com> wrote:
>
> Jessica,
>
> Let's block off April 15-16 for now. I hope to hear from you by tomorrow for the former Secretary. Thank you.
>
> I am going to send out notices of deposition next week as well as get through your responses for apparent shortcomings, if any. Glancing, I did notice that Request for Admission No. Three response copied Two and they were separate questions. Can you revisit number 3 of the RFA? Additionally, you use the word "titled" in some responses, which is unclear of meaning; other places you don't (Compare RFA 2 with RFA 1, 3-4). The questions were are they a thing or aren't they. For example, if I ask, "is a thing a "dog"?" and if you say, "it is titled a "dog", I don't know if you are saying it is or is not.
>
> You will receive today a Second Request for Production that contains 1 request (with a list of a handful of properties). I would like to have a response to this Second Set in time for our depositions, if possible. If not, then we may need to move and readjust summary judgment for the early June date rather than the early May date. Once you receive, please let me know as soon as you can.
>
> Thank you,
>
> Craig

From: Craig D. Justus
Sent: Thursday, March 28, 2024 7:38 PM
To: Price, Jessica
Cc: Cynthia Arrowood; Chelsea Barry
Subject: Re: Supplemental Responses.

Jessica,

The use of "titled" is non responsive. It is or is not. I must assume that you are denying the admissions since you did not admit. We will seek attorneys fees for a failure to respond among other grounds for fees. I will give you until the first deposition to correct. Enjoy your time off!

Craig
Sent from my iPhone

On Mar 28, 2024, at 3:45 PM, Price, Jessica <jprice@ncdoj.gov> wrote:

Good afternoon,

I have attached a copy of our supplemental responses regarding the requests for admissions. Question number 3 was corrected, along with a typo in our response for question 1. As for clarification regarding the use of the word titled, that term has remained in our responses, as it relates to our argument regarding NCGS 136-129.2.

Also, I will be out of the office next week, therefore if you have any questions or concerns you may reach out to Miranda Holley, or I will respond when I am back in the office April 8th.

Kind regards,

Jessica N. Price
Assistant Attorney General
Transportation Division
Phone: (919) 707- 4534
Email: Jprice@ncdoj.gov
1505 Mail Service Center, Raleigh, NC 27699-1505
ncdoj.gov

attorney's fees, in proving the truth of the matter requested. Attached as Exhibit "4" is a true and accurate copy of an invoice for the time and expense of witness J. Mark Teague, who provided an affidavit (and a supplemental affidavit) in support of Petitioner/Plaintiff's rebuttal of the opposition's unwarranted denials. Moreover, my time in preparing for depositions and preparing the affidavits for Mr. Teague are directly related to the Respondents/Defendants' unreasonable failure to admit to what should have been a readily discernable and admittable fact. During the deposition of J. Eric Boyette, he agreed that the Croatan National Forest was not any of the places or locations described in N.C.G.S. §136-129.2(a)(1)b. (Boyette Dep. pp. 32:15-33:19). Stephen M. Gardner only admitted in his deposition that the Croatan National Forest was not a State Park, a State wildlife refuge or a designated wild and scenic river. (Gardner Dep. pp. 63:21-64:6, 65:10-16). He continued to claim in his deposition that the Croatan National Forest was a National Park or national wildlife refuge. (Gardner Dep. pp. 66:15-67:1, 114:7-17). Robby L. Taylor claimed in his deposition that the Croatan National Forest was a National Park. (Taylor Dep. p. 28:10-12).

12. In their recent submittal to the Court, the Respondents/Defendants now appear to eschew a claim that the Croatan National Forest is one of the listed places or locations in the statute, but that the Department of Transportations' regulatory term "parkland" is an allowed substitute for the terms in the statute, and that the Croatan National Forest would fit under the meaning of "parkland." As pointed out to the Respondents/Defendants' multiple times in the appeal (Appeal, ¶ 5 and 16), Petition, and depositions (Gardner Dep. pp. 36:1-47:1), the term "parkland" in the Department's regulations only pertains to the regulation of "directional signs", not billboards.

13. Every time that the Respondents/Defendants throw out some unsubstantiated contention in this case, the undersigned is responsible as a zealous advocate to respond or refute the claim. At the very beginning of these proceedings, we attempted on several occasions to notify the Respondents/Defendants of their unreasonable positions. A true and accurate copy of our correspondence is attached hereto as Exhibit "5a" and "5b" and incorporated herein by reference. To respond to the myriad of constantly shifting, baseless claims or defense, considerable time and expense are incurred. A prime example is a statement in the Respondents/Defendants' recent memorandum of law prepared in support of their motion for summary judgment. There is a legally unsubstantiated statement that the Croatan National Forest contains "scenic rivers", presumably to try to convince the courts that the phrase "designated wild and scenic river" in the controlling statute is now applicable. During the proceedings to date, including the depositions, the State had not taken any such position; in fact, all the State witnesses that were deposed denied the Croatan National Forest fitting under the phrase "designated wild and scenic river." (Boyette Dep. p. 33:4-8, Taylor Dep. p. 40:22-25, Gardner Dep. pp. 63:21-64:6). However, because of this new statement, J. Mark Teague was asked to do another

J.M. Teague Engineering & Planning

1155 North Main Street
Waynesville NC 28786

Invoice

Date	Invoice #
5/22/2024	8705

Bill To
The Van Winkle Law Firm 11 North Market Street Asheville, North Carolina 28801

Client Project Name	Terms
	Due on receipt

JMTE Project Name	JMTE Account	Project Location
Public Land Definition FORS 1121	0230-01-15 FORS 1121	

Item Description	Service Date	Quantity	Rate	Amount
Principal Engineer NEW PROJECT National park define Van Winkle - Call with client NO FEE	4/2/2024	0.50000	0.00	0.00
Principal Engineer call with client to discuss scope. Research.	4/11/2024	2.25000	300.00	675.00
Principal Engineer research	4/17/2024	1.10000	300.00	330.00
Principal Engineer research land uses and prepare report	4/25/2024	3.25000	300.00	975.00
Principal Engineer research land uses and prepare report. Review US Code, USFS website, DOI website	4/27/2024	2.90000	300.00	870.00
Executive Assistant Set phone conference NO FEE	4/29/2024	0.16667	0.00	0.00
Principal Engineer call with client. Report edit. Research Scenic Byways, NFS guide.	4/29/2024	2.80000	300.00	840.00
Principal Engineer report edit. Call with client. Review Codes, additional material	4/30/2024	2.90000	300.00	870.00
Executive Assistant Expert Report proofed, combined, signed and saved to server, proofed Affidavit and sent comments to attorney, revised, resigned and resent	5/1/2024	1.50000	85.00	127.50
Principal Engineer final report edits and sign. Read and signed affidavit. Logistics with CL	5/1/2024	1.80000	300.00	540.00
Principal Engineer review and approve updated affidavit	5/22/2024	0.50000	300.00	150.00

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Payments/Credits	$0.00
Balance Due	$5,377.50