

**2021 SENATE TRANSPORTATION**

**SB 2113**

# 2021 SENATE STANDING COMMITTEE MINUTES

## Transportation Committee Fort Totten Room, State Capitol

SB 2113  
1/14/2021

A BILL for an Act to create and enact a new subsection to section 39-06.2-10.6 and new subsection to section 39-20-05 of the North Dakota Century Code, relating to conducting department of transportation administrative hearings by electronic means; and to amend and reenact subsection 2 of section 39-06-33 of the North Dakota Century Code, relating to conducting department of transportation administrative hearings by electronic means.

**Chair Clemens** calls the meeting to order. Present are Chair Clemens, Vice Chair Fors, Senators Bakke, Conley, Dwyer, D. Larsen. [10:02]

### Discussion Topics:

- Allowing video conferencing in hearings at the Department of Transportation
- Due process

**Terra Miller Bowley [10:02]**, Deputy Director for Administration for the Department of Transportation, introduces SB 2113 and testifies in favor of the bill and submits testimony #742.

**Senator Hogue [10:26]**, offers oral testimony in opposition to SB 2113.

**Jackson Lofgren [10:32]**, lobbyist and past president of the North Dakota Association of Criminal Defense Lawyers, testifies in opposition and submits testimony #746.

**Jesse Walstad [10:35]**, member of the NDACDL, testifies in opposition and submits testimony #826.

**Terra Miller Bowley [10:42]** answers questions from the committee.

### Additional written testimony:

**Lloyd Suhr**, attorney at Suhr & Lofgren PLLC, submits testimony #612.

**Luke Heck** submits testimony #779.

**Chair Clemens** adjourns the meeting. [10:42]

*Sheldon Wolf, Committee Clerk*

**SENATE TRANSPORTATION COMMITTEE**  
**January 14, 2021 - 10:00 AM - Ft. Totten Room**

**North Dakota Department of Transportation**  
**Terra Miller-Bowley, Deputy Director for Administration**

**SB 2113**

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Mr. Chairman, members of the committee, my name is Terra Miller-Bowley and I am the Deputy Director for Administration for the North Dakota Department of Transportation (Department). I'm here today in support of Senate Bill 2113.

The purpose of this bill is to provide the authority for the Department's hearing officers to hold hearings in a telephonic, virtual, or other electronic format. The Department currently employs hearing officers who conduct administrative hearings regarding driver's license suspensions, revocations, and cancellations under authority of the Department.

Of the various administrative hearings conducted, most are implied consent hearings resulting in suspension or revocation of driving privileges, at times including commercial driver's licenses. These hearings involve the hearing officer, any witnesses, law enforcement officer(s) who investigated the occurrence and may have stopped and subsequently arrested the driver, and documents from the state crime laboratory relating to the administration of alcohol concentration testing.

These administrative proceedings are intended to be short in duration, typically less than an hour. In advance of the hearing, the petitioner or their counsel are sent notices regarding the hearing and copies of the documents comprising the hearing file. A majority of the hearing is limited to the testimony and cross-examination of the witnesses.

Under current law, as interpreted by the ND Supreme Court, these hearings must be held in-person, unless the petitioner or their counsel consent to a telephone hearing. The Court has ruled that the Department cannot unilaterally decide that a hearing will be by telephone, based upon an interpretation of statutory language enacted before the development of current teleconference or virtual meeting capabilities. Yet, the Department regularly holds telephone hearings where petitioners willingly agree to one.

In most cases there is little actual need to conduct the testimony face to face rather than by telephone or other electronic means. Yet, requiring the personal appearances of witnesses, including arresting officers, does result in cases being dismissed when witnesses, who may have been available by telephone, were not able to be present in person because of the obligations to other duties and responsibilities. Often there is little to no practical reason to hold the hearings in person other than a hope the officer is unavailable in-person, causing the Department to dismiss the suspension due to logistical technicalities that have nothing to do with the merits of the case.

There have been situations in which hearing officers have traveled a great distance for one hearing only to have the driver or attorney waive the hearing upon confirmation the arresting officer is in fact present. This is an unnecessary use of time and resources, in the hope of a dismissal of a proceeding because the arresting officer is physically unavailable even though the officer may

have been more readily available by telephone or video. The use of technologies advances the interests of having hearings in which all participants may more readily and affordably participate while providing more assurance dismissals are based upon the merits of the case. In fact, video conferencing actually allows hearing officers to more closely observe a witness by viewing them in an orientation that shows their full face rather than the usual profile view during an in-person hearing.

The Department seeks authority not to limit hearings but to expand the methods available to delivering them, bearing in mind the public safety goals of drivers licensing laws, including Implied Consent. COVID-19 presented historic challenges to all of society, including the delivery of government services. The Department responded by adding additional hearing options, specifically video conferencing, so participants could continue to attend hearings no matter their location. Many continue to prefer such options. This bill recognizes that new technologies are now a part of how business is done by authorizing the Department to utilize them in the delivery of its hearing opportunities.

This bill would also allow the Department the flexibility to take into account the circumstances of the witnesses and the potential nature of the evidence along with the due process rights of the driver, and strike an appropriate balance when determining the means of holding the hearing. The Department would still be able to have an “in-person” hearings.

Regarding the provision of the bill relating to notices, decisions or orders being alternatively delivered, current law assumes the use of the mail as substantially the only way to deliver notices and orders, not envisioning the advances which today allow this to be accomplished faster, more efficiently, and more economically. Recognizing these other options are available and already in use, this bill would allow the Department to more uniformly embrace the electronic means of delivery.

Mr. Chairman, that concludes my testimony, and I will be happy to answer any questions the committee may have.

January 14, 2021

Testimony to the **Senate Transportation Committee**

By Jackson Lofgren on behalf of the ND Association of Criminal Defense Lawyers

**Testimony In Opposition to SB 2113**

Chairman Clemens and Committee Members:

My name is Jackson Lofgren and I represent the ND Association of Criminal Defense Lawyers. The NDACDL is made up of lawyers who dedicate at least a portion of their practice to criminal defense. The mission of the NDACDL is “to promote justice and due process...” and “...promote the proper and fair administration of criminal justice within the State of North Dakota. We are **opposed** to SB 2113.

During the 2017 legislative session the Department of Transportation (DOT) submitted a similar bill which also would have given the DOT unilateral authority to hold administrative hearings by telephone or other electronic means. That bill, H.B. 1129, received a Do Not Pass recommendation from this Committee and failed in the Senate with a vote of 0 yeas to 45 nays. We ask for a similar Do Not Pass recommendation on this bill.

Due Process requires when the government seeks to deprive a citizen of life, liberty, or property, the individual have an opportunity to be heard at a hearing before an impartial decisionmaker. The United States Supreme Court has stated due process requires a hearing at a meaningful time, in a meaningful manner, with the opportunity to confront adverse witness and present arguments and evidence.

North Dakota’s DOT administrative process is weighted heavily in favor of the agency. A hearing officer gathers and submits evidence on behalf of the DOT, rules on objections, and makes the decision to suspend or revoke. The DOT hearing officer acts as the prosecutor, judge, and jury and is employed by the agency seeking to take the license. By statute virtually anything that makes its way into the DOT’s file is deemed admissible even if it would normally be excluded under the rules of evidence.

This contrasts greatly with what is at stake in these hearings. The ability to drive is vital to most North Dakotans. Losing the ability to drive usually means the loss of employment, the inability to legally perform necessary farm and ranch work, difficulty transporting kids to school, and other significant hurdles. These proceedings should not be treated as a technicality or predetermined formality.

Telephonic and remote hearings lack the reliability of in person hearings. The driver and the hearing officer often cannot see the witness. There is no way to observe if the witness is testifying from memory or simply reading from a report. A witness could be answering questions while reading from a training manual. As stated by the United States Supreme Court “[t]he perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it.” Coy v. Iowa, 487 U.S. 1012, 108 S.

Ct. 2798 (1988). “A witness ‘may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.’” Id. at 1019. “It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back’ and “even if the lie is told, it will often be told less convincingly.” Id.

Technical problems are inevitable with telephonic and remote hearings. Witnesses will invariably lose telephone reception or internet access and portions of the hearing testimony will be missed. It is extremely difficult to examine exhibits and introduce evidence. North Dakota’s rules of civil procedure indicate testimony should be in person unless there is good cause or the parties agree and there are appropriate safeguards. N.D. R. Civ. P. 43. Safeguards could include having a notary present with the witness to administer the oath and verify the witness’s identity. See Lawrence v. Delkamp, 2008 ND 111, 750 N.W.2d 452. The DOT’s present practice of the hearing officer simply reading the perjury statute over the telephone and asking the witness to promise to tell the truth is not sufficient.

Finally, requiring parties to participate by telephone or other electronic means places an unreasonable obstacle on the indigent and individuals who are not proficient with technology and bars them from meaningfully participating in the hearing process.

For these reasons we urge a **DO NOT PASS** on SB 2113.

Thank You,

*Jackson J. Lofgren*

Jackson Lofgren

January 13, 2021

Testimony to the **Senate Transportation Committee**

By Jesse H. Walstad, Attorney

Testimony In Opposition to S.B. 2113

Chairman and Members of the Senate Transportation Committee:

My name is Jesse Walstad. I am a criminal defense attorney at the Vogel Law Firm in Bismarck. I write in opposition to S.B. 2113 and recommend a **DO NOT PASS**. S.B. 2113 invites the Legislative Assembly to create a due process exception in conflict with the uniform holdings of the North Dakota and United States Supreme Courts relating to the procedural and substantive rights of licensed motorists. Granting the Department of Transportation this sweeping unilateral authority would significantly erode due process, diminish and conflict with the procedural safeguards of the Administrative Agencies Practice Act (“AAPA”), and give way to a host of practical concerns for which no reliable solution exists.

S.B. 2113 is of dubious constitutional validity. It is a fundamental concept of our jurisprudence that “[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”<sup>1</sup> The North Dakota Supreme Court has long recognized driver’s licenses as a protectable property interests that trigger procedural due process protections.<sup>2</sup> The North Dakota Supreme Court has held motorists are entitled to an in-person hearing, and that the Department cannot unilaterally waive that right.<sup>3</sup> The Legislative Assembly should not accept the Department’s invitation to overrule decades of due process jurisprudence. Eliminating in-person hearings would substantially erode procedural process in all administrative hearings, elevate the risk of erroneous deprivation of substantial private interests, and diminish the credibility of the Department and the administrative hearing process in North Dakota.

S.B. 2113 also conflicts with the procedural safeguards of the AAPA found in N.D.C.C. ch. 28-32. Under the AAPA, “a formal hearing is required whenever the administrative agency acts in a quasi-judicial capacity unless the parties either agree otherwise or there is no dispute of a material fact.”<sup>4</sup> “At any hearing in an adjudicative proceeding, the parties shall be afforded opportunity to present evidence and cross-examine witnesses.”<sup>5</sup> “To the extent necessary for full disclosure of all relevant facts and issues, the person presiding at the hearing shall afford to all parties and other persons allowed to participate the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence.”<sup>6</sup> Under the AAPA “[n]o information or evidence except that which has been offered, admitted,

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<sup>1</sup> *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

<sup>2</sup> See generally, *Morrell v. N.D. Dep’t of Transp.*, 1999 ND 140, 598 N.W.2d 111; *Sabinash v. Director of Dept. of Transp.*, 509 N.W.2d 61, 63 (N.D.1993); *Kobilansky v. Liffbrig*, 358 N.W.2d 781 (N.D.1984).

<sup>3</sup> *Landsiedel v. Dir., N.D. Dep’t of Transp.*, 2009 ND 196, ¶ 12, 774 N.W.2d 645 (“[A]n ordinary reading of N.D.C.C. § 39-20-05 demonstrates the Legislature intended the Department to conduct in-person hearings, and the Department cannot unilaterally determine hearings will be conducted telephonically.”); see also *Wolfer v. N.D. Dep’t of Transp.*, 2010 ND 59, ¶ 15, 780 N.W.2d 645 (“In testimony by telephone the image of the witness cannot be seen nor does it disclose if the witness is using or relying upon any notes or documents and, as a result, meaningful communication is effectively curtailed or prevented [...] Above all, in testimony by telephone the trier of facts is put in a difficult, if not impossible, position to take into account the demeanor of the witness in determining the witness’ [sic] credibility.”).

<sup>4</sup> *Steele v. N.D. Workmen’s Comp. Bureau*, 273 N.W.2d 692, 701 (N.D. 1978).

<sup>5</sup> N.D.C.C. § 28-32-21(2); see also *People to Save the Sheyenne River, Inc. v. N.D. Dep’t of Health*, 2005 ND 104, ¶ 14, 697 N.W.2d 319.

<sup>6</sup> N.D.C.C. § 28-32-35.

and made a part of the official record of the proceeding shall be considered by the administrative agency.”<sup>7</sup> In essence, a “fair hearing” under the AAPA requires a reasonable opportunity for a party to meaningfully confronting witnesses and evidence against them and to present witnesses, evidence, and arguments in their defense in a fair, accessible, and effective way. For a variety of technical and practical reasons remote administrative hearings dramatically increase the risk of deprivation of these fundamental statutory and constitutional rights. When a party has not been given a meaningful opportunity to confront, test, and explain evidence against the party and to present evidence and argument in the party’s own defense, the party has been deprived of a fair hearing.<sup>8</sup> In practice, unilateral deprivation of in-person administrative hearings will result in fundamentally unfair hearings in conflict with the basic precepts of the AAPA thereby undermining the Department’s credibility and denying North Dakota citizens due process of law.

At its most basic form, an administrative hearing is intended to be a truth-finding process. Granting the Department the unilateral authority to eliminate in-person administrative hearings fundamentally impairs that process and diminishes the credibility of the outcome. During the COVID-19 pandemic, my clients and I have observed the practical concerns and obstacles of electronic administrative hearings first hand. During one telephonic administrative hearing, the call dropped during my cross examination of the officer, it dropped again in the middle of my arguments in defense of my client. I have also observed multiple occasions when meaningful examination of material witnesses has been impaired and in some cases rendered impossible by the practical difficulty of refreshing recollection with a document, audio, or video under the technical constraints of the remote hearing platform. As a practical matter, remote hearings make it extraordinarily difficult to introduce full and complete evidence into the record. As a result, it fundamentally undermines the truth-finding process to the great disadvantage of the public who depend on the Department, not only to get the job done, but to do the job fairly, accurately, and legally.

Granting the Department unilateral authority to conduct administrative hearing by electronic means significantly disadvantages individuals of limited means, those without easy access to the requisite technology, and those who may lack the prerequisite technical proficiency for meaningful participation. As an attorney with easy access to reliable technology who has conducted numerous hearings electronically during the COVID-19 pandemic, I continue to encounter unexpected obstacles in nearly every electronic hearing. I have no doubt the obstacles presented by remote hearings would deprive the average North Dakota motorist, without similar experience and access to technology of a fair and meaningful opportunity to defend themselves.

During the 2017 Legislative Assembly, this Committee wisely recommended a Do Not Pass on a nearly identical bill, H.B. 1129, that like S.B. 2113, had the potential to grant the Department unilateral authority to conduct administrative hearings telephonically or by other electronic means. H.B. 1129 went on to fail in the Senate with a vote of 0 yeas to 45 nays. I respectfully urge this Committee to stand firm to its wise prior resolve to uphold the due process rights of our North Dakota motorists and recommend a **DO NOT PASS** on S.B. 2113.

Respectfully,

  
Jesse Walstad

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<sup>7</sup> N.D.C.C. § 28-32-24(2).

<sup>8</sup> *Mun. Servs. Corp. v. State By & Through N.D. Dep’t of Health & Consol. Labs*, 483 N.W.2d 560, 565 (N.D. 1992).



Testimony in opposition to SB 2113 before the Senate Transportation Committee  
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Chairman Clemens and Members of the Senate Transportation Committee:

I am an attorney in private practice in Bismarck, focusing in the areas of criminal and DUI defense. I respectfully submit this testimony in opposition to SB 2113, which proposes amendments to three different statutes so as to allow the North Dakota Department of Transportation (Department) to conduct administrative hearings by electronic means at the discretion of the hearing officer.

As a matter of constitutional law, any time a person's liberty interests (such as their driving privileges) are at risk by governmental action, they are entitled to due process. This consists of notice and an opportunity to be heard. Inherent in the guarantee of due process is the requirement that the opportunity to be heard be substantively meaningful.

Administrative hearings are already heavily slanted in favor of the Department. The hearing officers are not independent magistrates. They are employees of the Department. They swear in witnesses, (typically the arresting or citing officer) and conduct all witness examinations on behalf of the Department. They present documentary evidence on behalf of the Department. They rule on all evidentiary issues and objections. They decide all questions of fact. They decide all questions of law. They issue final orders. They are, in essence, functioning as the prosecutor, judge, and jury all at the same time.

The ability to have these proceedings in-person is critical to the preservation of any meaningful due process that still exists in the process. In-person hearings allow for the driver, or an attorney on their behalf to clearly hear and observe the witness. Facial expressions, body language, and other non-verbal communications can be as critical to the taking of testimony as verbal statements. Testifying officers frequently rely upon or refer to reports or other documents during testimony, and in-person proceedings allow examination of those documents. In-person proceedings also allow examination of physical documents and exhibits that the hearing officer is relying upon or referring to during the course of the hearing. Occasionally, video evidence (e.g. from an officer's in-car recording system) needs to be played during a hearing as part of the record, something that is only feasible with in-person proceedings.

Proceedings held by electronic means severely limit or completely eliminate these protections. You cannot see or hear witnesses in an electronically conducted hearing the same as you can when in-person. You cannot examine documents or present video evidence the same as you can when in-person. Technology issues with electronic hearings are also a frequent problem, including poor or dropped cellular reception, internet interruptions or strength issues, and video / audio lags. These limitations not only make proceedings more difficult to conduct, but they can also jeopardize the ability to keep a clear and accurate record of the proceedings for later review. In summary, electronic proceedings are far more vulnerable to problems that dilute preservation of meaningful due process.

Another problem with SB 2113 is that it vests absolute and sole discretion in the hearing officer to decide if a hearing will be held in-person or electronically. There may

occasionally be instances where an electronic proceeding may be most appropriate (e.g. inclement weather making travel unsafe). However, the propriety of conducting a hearing electronically should be determined on a case-by-case basis under particularized facts with the consensus of all parties rather than being a matter of statute or within the sole discretion of the hearing officer.

On March 26, 2020, Governor Burgum issued Executive Order 2020-11, which temporarily suspended in-person Department administrative hearings in direct and limited response to the COVID-19 pandemic. This was never intended to be permanent, as established by Executive Order 2020-44, issued on December 18, 2020 and terminating the previous suspension of in-person proceedings. Unlike the Governor's Executive Order, SB 2113 is not in response to COVID-19. It would not be temporary. It would implement long-term changes that materially impede meaningful due process.

This is the second time that the Department has proposed legislation that would allow hearings to be conducted in an electronic format as determined by the hearing officer. See SB 1129, (65<sup>th</sup> Legislative Assembly, 2017). That legislation was far narrower than SB 2113, as it only authorized the use of electronic mediums to conduct hearings where a participant was unavailable to appear in person. That legislation failed. SB 2113, being far more reaching than its predecessor, and having far greater negative impact on due process rights, should also fail.

I respectfully ask that this committee recommend a DO NOT PASS on SB 2113. Thank you for your time and attention.

January 13, 2021

Senate Transportation Committee

*Via electronic submission*

**Re: Testimony in Opposition of S.B. 2113.**

Dear Members of the Senate Transportation Committee:

My name is Luke Heck, and I am a criminal defense attorney at the Vogel Law Firm in Fargo, ND. I submit this written testimony in opposition to S.B. 2113 as a result of the constitutional implications that this proposed bill would have on motorists' rights. In short, the North Dakota Supreme Court has repeatedly held that "[i]t is well settled that a driver's license is a protectable property interest that may not be suspended or revoked without due process."<sup>1</sup> In acknowledging this constitutional protection, the Supreme Court has held that the Department of Transportation's failure to hold an in-person hearing, but instead a remote hearing telephonically, violates motorists' due process rights.<sup>2</sup> In making this conclusion, the Court reiterated,

"In testimony by telephone the image of the witness cannot be seen nor does it disclose if the witness is using or relying upon any notes or documents and, as a result, meaningful communication is effectively curtailed or prevented.... Above all, in testimony by telephone the trier of facts is put in a difficult, if not impossible, position to take into account the demeanor of the witness in determining the witness' credibility"<sup>3</sup>

In other words, the elimination of in-person administrative hearings would wholly deprive North Dakota motorists of their ability to meaningfully defend against the adverse action that the Department seeks to take against their driving privileges, and could trigger significant due process implications.

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<sup>1</sup> *Morrell v. N. Dakota Dep't of Transp.*, 1999 ND 140, ¶ 8, 598 N.W.2d 111, 114; *see also Sabinash v. Director of Dept. of Transp.*, 509 N.W.2d 61, 63 (N.D.1993); *see also Kobilansky v. Liffbrig*, 358 N.W.2d 781, 786 (N.D.1984) (stating a driver's license is a protectable property interest to which the guarantee of procedural due process applies).

<sup>2</sup> *See Wolfer v. N. Dakota Dep't of Transp.*, 2010 ND 59, 780 N.W.2d 645, 648; *see also Landsiedel v. Dir., N.D. Dep't of Transp.*, 2009 ND 196, 774 N.W.2d 645.

<sup>3</sup> *See Wolfer* at ¶ 15 (citing *Lawrence v. Delkamp*, 2008 ND 111, ¶ 10, 750 N.W.2d 452).

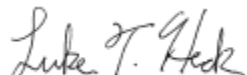
Moreover, the elimination of in-person administrative hearings would create significant practical issues as well, as evidenced by some notable issues that have occurred as a result of the Department holding administrative hearings via videoconference during the pandemic. First, in an administrative hearing for one of my clients, held via videoconference, one of the police officers involved was disconnected from the videoconference. He was unable to reconnect, and as a result had to attend telephonically in lieu of video for his testimony, contrary to the Governor's Executive Order for that particular timeframe. At that same hearing, I, on behalf of my client, sought to offer squad car video evidence into the record. The administrative hearing officer admitted the squad car video into evidence while on videoconference. However, he could not review the squad car video prior to his deadline to issue a decision on my client's driving privileges because the hearing was held a day prior to the deadline, cloud-based filing share attempts did not work due to the police department's squad car video programming, and the only alternative way for him to receive the video evidence was by mail, which was physically impossible due to the hearing being held in the late afternoon on the day preceding the 30-day deadline to hold the hearing. As a result, my client's license was suspended without consideration of evidence offered by her, despite the same being admitted into the record.

Second, my law partner has a similar tale of turbulence with remote hearings during the pandemic. In one instance, his client's administrative hearing was disrupted due to a police officer testifying while at home. While testifying, an individual at the officer's location was loudly playing video games during the hearing, creating significant issues with the officer attempting to testify, and disrupting the administrative hearing irreparably altogether. In another, issues arose with the Department's admission of hearing exhibits due to the inability to have an in-person hearing. In this circumstance, the hearing officer did not adequately identify which particular serial numbered Intoxilyzer device record that was being offered, and because the hearing was remote, my law partner was unable to conduct an after the fact clarification of the exhibit, or any self-review prior to the exhibit being offered in to evidence.

Undoubtedly defense attorneys around the State have had similar issues as those I have outlined above during the period where videoconference hearings were received. These issues are real, are far from one-off aberrations, and create legitimate issues for motorists to be able to adequately defend themselves against the Department's proposed taking of their driving privileges.

As a result of the constitutional and practical implications that this legislation would create, I respectfully ask the committee to consider one of two options. First, I would ask the committee to reject S.B. 2113. Alternatively, I would respectfully propose that in lieu of the current proposal, the statute be modified to permit remote hearings if, and only if, a remote hearing is agreed to by the motorist.

Sincerely,

A handwritten signature in cursive script, appearing to read "Luke T. Heck".

Luke T. Heck

# 2021 SENATE STANDING COMMITTEE MINUTES

## Transportation Committee Fort Totten Room, State Capitol

SB 2113  
1/15/2021

A BILL for an Act to create and enact a new subsection to section 39-06.2-10.6 and new subsection to section 39-20-05 of the North Dakota Century Code, relating to conducting department of transportation administrative hearings by electronic means; and to amend and reenact subsection 2 of section 39-06-33 of the North Dakota Century Code, relating to conducting department of transportation administrative hearings by electronic means.

**Chair Clemens** calls the meeting to order. Chair Clemens, Vice Chair Fors, Senators Bakke, Conley, Dwyer, and D. Larsen are present. [11:05]

### Discussion Topics:

- Virtual hearings at the Department of Transportation
- Video conferencing

**Senator D. Larsen** moves to adopt amendment [LC 21.8113.01001]. [11:09]

**Senator Conley** seconds. [11:09]

Senators	Vote
Senator David Clemens	Y
Senator Robert Fors	Y
Senator Cole Conley	Y
Senator Michael Dwyer	Y
Senator Doug Larsen	Y
Senator JoNell Bakke	Y

Motion passes 6-0-0. [11:09]

**Senator D. Larsen** moves to DO PASS as amended. [11:10]

**Senator Fors** seconds. [11:10]

Senators	Vote
Senator David Clemens	Y
Senator Robert Fors	Y
Senator Cole Conley	Y
Senator Michael Dwyer	Y
Senator Doug Larsen	Y

Senator JoNell Bakke	Y
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Motion passes 6-0-0. [11:11]

**Senator D. Larsen** will carry. [11:11]

**Chair Clemens** adjourns the meeting. [11:12]

*Sheldon Wolf, Committee Clerk*

January 14, 2021

SK  
1/15

PROPOSED AMENDMENTS TO SENATE BILL NO. 2113

Page 1, line 14, remove "hearing"

Page 1, line 15, replace "officer" with "licensee"

Page 1, line 21, replace the first "hearing officer" with "licensee"

Page 2, line 3, replace the first "hearing officer" with "licensee"

Renumber accordingly



**REPORT OF STANDING COMMITTEE**

**SB 2113: Transportation Committee (Sen. Clemens, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2113 was placed on the Sixth order on the calendar.

Page 1, line 14, remove "hearing"

Page 1, line 15, replace "officer" with "licensee"

Page 1, line 21, replace the first "hearing officer" with "licensee"

Page 2, line 3, replace the first "hearing officer" with "licensee"

Renumber accordingly

**2021 HOUSE TRANSPORTATION**

**SB 2113**

# 2021 HOUSE STANDING COMMITTEE MINUTES

## Judiciary

Room JW327B, State Capitol

SB 2113  
3/10/2021

Relating to conducting department of transportation administrative hearings by electronic means.

**Chairman Klemin** called the hearing to order at 2:30 PM

Present: Representatives Klemin, Karls, Becker, Buffalo, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter.

### Discussion Topics:

- Hearing location
- Online hearings
- Licensee requirement

**Clint Morgenstern: Staff Attorney, ND DOT:** Testimony # 8396, #8397 2:32

**Jackson Lofgren, Attorney – Suhr & Lofgren PLLC:** Verbal testimony

**Chairman Klemin** closed the hearing at 2:53.

**Rep. T. Jones:** Moved to adopt the amendment proposed 21.8113.02001

**Rep. Magrum:** Seconded

Voice vote carried.

**Rep. Karls:** Do Pass as Amended

**Rep. Magrum:** Seconded

Roll Call Vote:

<b>Representatives</b>	<b>Vote</b>
Chairman Klemin	Y
Vice Chairman Karls	Y
Rep Becker	A
Rep. Christensen	Y
Rep. Cory	A
Rep T. Jones	Y
Rep Magrum	Y
Rep Paulson	Y
Rep Paur	A
Rep Roers Jones	A
Rep B. Satrom	N
Rep Vetter	Y
Rep Buffalo	Y
Rep K. Hanson	Y

**9-1-4 Motion carried**

Carrier: Rep. Paulson

Stopped 2:57

DeLores D. Shimek  
Committee Clerk

March 10, 2021

DA 3/10/21  
1 of 1

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2113

Page 1, line 14, replace "at" with "with"

Page 1, line 14, replace "discretion" with "consent"

Page 1, line 20, replace "at" with "with"

Page 1, line 20, replace "discretion" with "consent"

Page 2, line 2, replace "at" with "with"

Page 2, line 2, replace "discretion" with "consent"

Renumber accordingly

**REPORT OF STANDING COMMITTEE**

**SB 2113, as engrossed: Judiciary Committee (Rep. Klemin, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (9 YEAS, 1 NAY, 4 ABSENT AND NOT VOTING). Engrossed SB 2113 was placed on the Sixth order on the calendar.

Page 1, line 14, replace "at" with "with"

Page 1, line 14, replace "discretion" with "consent"

Page 1, line 20, replace "at" with "with"

Page 1, line 20, replace "discretion" with "consent"

Page 2, line 2, replace "at" with "with"

Page 2, line 2, replace "discretion" with "consent"

Renumber accordingly

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2113

Page 1, line 14, replace, "discretion" with, "consent"

Page 1, line 20, replace, "discretion" with, "consent"

Page 2, line 2, replace, "discretion" with, "consent"

Renumber accordingly.

HOUSE JUDICIARY COMMITTEE  
March 10, 2021 – 11:00 AM – Justice Wing 327B

North Dakota Department of Transportation  
Clint Morgenstern, Staff Attorney

SB 2113

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Mr. Chairman, members of the committee, my name is Clint Morgenstern and I serve as a staff attorney for the North Dakota Department of Transportation (Department). I am here today in support of Senate Bill 2113 and to propose an amendment.

The Department introduced this bill to expand the methods of delivering administrative hearings to licensees. COVID-19 presented historic challenges to all of society, including the delivery of government services. The Department responded to an emergency order issued by the governor by adding hearing options, particularly video conferencing, so participants could continue to attend hearings no matter their location. Many continue to prefer such options. This bill recognizes that new technologies are now a part of how business is done by authorizing the Department to utilize these methods, with the licensee's consent.

The bill currently reads, "...at the *discretion* of the licensee...". The Department would like to replace, "at the *discretion* of the licensee" with "at the *consent* of the licensee." The Department supports this version because use of the word "discretion" could be interpreted to allow the licensee to dictate the type of electronic means used, even if the type selected is not available to all participants, including law enforcement, at all locations or under all circumstances. Using the word "consent" would allow the department to reach an agreement as far as the type of hearing that we would be able to provide.

For example, if the department were unable to provide a virtual electronic hearing due to service outage or unavailability, we believe the word "discretion" could be viewed as an excuse to allow the licensee to demand an electronic or other format type of hearing that the Department would not be able accommodate. This action could then force a dismissal of the licensee's hearing. The Department would support a do pass recommendation with our amendments.

Mr. Chairman, that concludes my testimony, and I will be happy to answer any questions the committee may have.