

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #5

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2005 NOV 22 P 2: 27

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE  
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: STATE LOTTERY COMMISSION TITLE NUMBER: 179

CITE AUTHORITY: W.Va. CODE 29A-3-4

RULE TYPE: PROCEDURAL \_\_\_\_\_ INTERPRETIVE X

EXEMPT LEGISLATIVE RULE \_\_\_\_\_

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW  
\_\_\_\_\_

AMENDMENT TO AN EXISTING RULE: YES X NO \_\_\_\_\_

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 7

TITLE OF RULE BEING AMENDED: LOTTERY INTERPRETIVE RULE  
\_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_  
\_\_\_\_\_

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS JANUARY 1, 2006

  
Authorized Signature

TITLE 179  
INTERPRETIVE RULE  
WEST VIRGINIA LOTTERY  
SERIES 7

FILED  
2005 NOV 22 P 2: 27  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

LOTTERY INTERPRETIVE RULE

**§179-7-1. General.**

1.1. Scope and Purpose. - The purpose of this interpretive rule is to disclose how the State Lottery Commission will interpret, clarify and explain provisions of either the Racetrack Video Lottery Act codified in W.Va. Code §29-22A-1 et seq., or the Limited Video Lottery Act codified in W.Va. Code §29-22B-101 et seq., or in both acts.

1.2. Authority. - W. Va. Code - §29A-3-4

1.3. Filing Date. - November 22, 2005

1.4. Effective Date. - January 1, 2006

**§179-7-2 Interpretation of terms and words found in the Limited Video Lottery Act.**

2.1. "Fraternal society," as the term is found in W.Va. Code §29-22B-1101(c), means a retail licensee that is either a fraternal beneficiary society that is exempt from federal income tax under section 501(c)(8) of the Internal Revenue Code of 1986, as amended, or a domestic fraternal society that is exempt from federal income tax under section 501(c)(10) of the Internal Revenue Code, and was an existing chapter or local unit of a national tax exempt fraternal benefit society or a domestic fraternal society organized under the lodge system on the first day of January two thousand one.

2.2 "Licensed limited video lottery location approved by the commission," as the term is found in W.Va. Code §29-22B-1201(a), means the location in excess of the following straight-line distances from any of the following places:

2.2.a. The location is at least one hundred fifty feet from, or has an external structural connection not amounting to a common internal wall to, a premises that already has a retail license for video lottery terminals;

2.2.b. The location is at least three hundred feet from a church, school, daycare center, or the perimeter of a public park; or

2.2.c. The location is at least three hundred feet from a business that sells petroleum products capable of being used as fuel in an internal combustion engine.

2.3. "Monitor," as the word is found in W.Va. Code §29-22B-702, means that the licensed premises must be staffed at all times when limited video lottery games are being played. This interpretation means that a person who views the video lottery licensed premises on a video screen in a place outside the premises described in the licensee's license from the Alcohol Beverage Control Administration and the license from the State Lottery Commission is not monitoring "...video lottery terminals to prevent access or play by persons who are under the age of twenty-one years or who are visibly intoxicated," as required by section 702(8) of the Act. This interpretation is also in keeping with W.Va. Code §29-22B-1201(c) that says, "Personnel of the limited video lottery retailer shall be present during all hours of operation at each video lottery terminal location. These personnel shall make periodic inspections of the restricted access adult-only

facility in order to provide for the safe and approved operation of the video lottery terminals and the safety and well-being of the players.”

2.4 “Veterans organization,” as the term is found in W.Va. Code §29-22B-1101(c), means a retail licensee that is exempt from federal income tax under section 501(c)(19) of the Internal Revenue Code and was an existing chapter, post or local unit of a national tax exempt veterans organization organized under the lodge system on the first day of January two thousand one.

### **§179-7-3. Interpretation of terms and words found in the Racetrack Video Lottery Act.**

3.1. As used in W.Va. Code §29-22A-8(l), the word “voids” in the sentence that says, *The sale of more than five percent of a license or permit holder's voting stock, or more than five percent of the voting stock of a corporation which controls the license or permit holder or the sale of a license or permit holder's assets, other than those bought and sold in the ordinary course of business, or any interest therein, to any person not already determined to have met the qualifications of section seven of this article voids the license unless the sale has been approved in advance by the commission,* means that the license is void after due process has been afforded to the licensee or permit holder and a final order has been entered. In that same sentence, the word “person” does not include acquisition of common stock of a licensee or permit holder by a state or federally licensed banking institution, nor does it include acquisition of licensee or permit holder’s stock by an institutional investor such as a pension fund or a mutual fund registered with the United States Securities and Exchange Commission, as well as a registered investment company, a registered investment advisor, a collective trust fund or a qualified insurance company as those entities are defined in the Investment Company Act of 1940 and the Investment Advisors Act of 1940, that is holding the stock only as an investment and not for purposes of control of the licensee or permit holder.

3.2 W.Va. Code §29-22A-6(c)(3) now reads in part as follows:

- (c) Each video lottery terminal shall meet the following maximum and minimum theoretical percentage payout during the expected lifetime of said terminal: ...*
- (3) Each terminal shall have a probability greater than one in seventeen million of obtaining the maximum payout for each play.*

The Commission’s interpretation of W.Va. Code §29-22A-6(c)(3) is that the word “play” means the initial time a video lottery terminal’s play button is pushed, or its play lever is pulled, or the initial spin of its reels after the video lottery terminals receive a base wager. When there are several “plays” within a game as the term “game” is defined by W.Va. Code §29-22A-3(y), only the initial play is used to determine the 1-in-17 million odds calculation. Odds for subsequent optional selections such as bonus features are not used in determining compliance with W.Va. Code §29-22A-6(c)(3). In addition, where the game being played is an interstate or international lottery game authorized under W.Va. Code §29-22-5(a)(5), the odds of the interstate or international game shall be set by the participating government lotteries by contract or agreement.

## **PUBLIC COMMENTS – AMENDED LOTTERY INTERPRETIVE RULE**

On November 18, 2005, the State Lottery Commission met to review comments received by November 1, 2005 concerning proposed amendments to the Commission's "Lottery Interpretive Rule," 179 CSR 7. As of the November 1, 2005 deadline, the State Lottery Office received four comments. The source of those comments were:

1. The West Virginia Municipal League, Lisa Dooley, Executive Director;
2. The City of Ranson, Hon. A. David Hamill, Mayor;
3. Attorney Daniel J. Guida; and
4. The West Virginia Amusement & Limited Video Lottery Operators Association, Patricia R. Pope, Executive Director.

What follows is a summary of the comments of each person or organization.

### **The West Virginia Municipal League**

The Municipal League comments, dated October 14, 2005 and signed by Executive Director Lisa Dooley, were favorable to the rule changes. The letter stated that, "The increase in footage under certain circumstances will be somewhat helpful to small cities without zoning. The increase from churches, schools daycares, and public parks is a good first step."

### **The City of Ranson**

The comments of the City of Ranson were dated October 19, 2005 and were signed by Mayor David Hamill. The City states that the 300-foot distances are not great enough. Further, the rule should be expanded to include community and recreational facilities (echoing Guida, below), residential zones, and any building that is used for local, state or federal government. The City suggests that the rule also require all licensees to serve meals by setting a percentage of the total gross income of the licensed business for the sale of food exclusive of alcoholic beverages.

### **Attorney Daniel J. Guida**

The comments of Daniel Guida were dated October 25, 2005. In addition to being a practicing attorney in Weirton, Mr. Guida is a limited video lottery licensed retailer. His suggestions included specific definitions for the terms "day care center," "school," "churches" and "public park." He also spent a page discussing zoning issues, primarily about what happens to an existing business that wants to expand after it is established in a location. He wonders whether the distance restrictions in the rule will operate just as zoning restrictions now do to prohibit expansion toward a church or school. Finally, Mr. Guida suggested strengthening the fraternal and veterans restriction by requiring that the fraternal or veterans club possessed a private club or tavern license on January 1, 2001.

### **The West Virginia Amusement & Limited Video Lottery Operators Association**

The comments of the West Virginia Amusement & Limited Video Lottery Operators Association, dated October 31, 2005 and signed by Executive Director Patricia R. Pope, expressed concerns about the amendments limiting where limited video lottery retailers may locate in the future. The Association suggested that the Commission wait the maximum six-month period allowed by law to promulgate the rule changes in order to allow Association members and others to complete the installation of the remaining

video lottery terminals. The Association also suggested that the new distances be applied prospectively, only. The Association suggested clarifying distance requirements between lottery locations and parks, schools, etc., so that retailers and operators will know how the distances are measured. Finally, the Association suggests the rule state that the distances in the Rule supercede any greater distances set forth in local zoning ordinances.

The Association cites several reasons why the Commission cannot impose standards by an interpretive rule including the lack of statutory authority to promulgate the rule, the denial of constitutional due process and property rights and the vagueness of the petroleum products restriction. Although the Association had serious questions with respect to the authority of the State Lottery Commission to make several of the rule amendments, it nevertheless made the four suggestions listed in the preceding paragraph.

**Decision of the Commission.**

The Commission commends the four individuals who took the time to comment on the rule amendments. After reading and discussing the rule comments, the State Lottery Commission decided that no revision to the rule was warranted and voted that the rule in its original form as it was when filed for comment will be the agency-approved rule for promulgation. The Commission selected the bright-line effective date of January 1, 2006.



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President, Spencer
- MAYOR DANNY JONES  
Vice President, Charleston
- MAYOR JESSE CORLEY  
Secretary, White Hall
- MAYOR DAVID FELINTON  
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- MAYOR WILLIAM MILLER  
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- MAYOR JIM CHRISTIE  
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- MAYOR JIMMY COLOMBO  
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- MAYOR TONY PAESANO  
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- RECORDER NANCY SHOBE  
Parliamentarian, Buckhannon
- MAYOR TREY MORRONE  
Chaplain, Kenova
- LISA DOOLEY  
Executive Director

October 14, 2005

RECEIVED  
OCT 18 2005  
WV LOTTERY

*PC-MECKTON*

Mr. John Musgrave, Director  
West Virginia Lottery  
P.O. Box 2067  
Charleston, WV 25327

Re: WV Lottery Interpretive Rule Series 7

Dear Director Musgrave,

On behalf of the WV Municipal League, we have reviewed the interpretive rule, WV Lottery Series 7, 179-7-2 and submit the following comments.

The increase in footage under certain circumstances will be somewhat helpful to small cities without zoning. The increase from churches, schools, daycares, and public parks is a good first step.

Cities understand the limitations your commission has under statute. We also know there is a great need to have the legislature revisit the Limited Video Lottery statute to allow for more local control in the placement of these establishments in municipalities.

Thank you for the opportunity to comment. I look forward to working with you on legislation we hope to see forthcoming.

Sincerely,

*Lisa Dooley*

Lisa Dooley  
Executive Director

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# City of Ranson



312 South Mildred Street  
 Ranson, West Virginia 25438-1621  
 Phone (304) 725-1010 Fax (304) 728-8579

**Council Members**  
 Pete Breeden  
 Kimberly Biddle  
 Donnic Magaha  
 Duke Pierson  
 Howard Shade

Mayor A. David Hamill Recorder Tony Braithwaite

October 19, 2005

Via: First Class Mail & Facsimile

John Musgrave, Lottery Director  
 PO Box 2067  
 Charleston, WV 25327

RE: Limited Video Lottery Rule

Dear Mr. Musgrave:

This shall serve as my comment to an Interpretive Rule which was filed with the Secretary of State's office calling for new limited video lottery establishments to be located at least 300 feet from churches, schools, childcare centers, public parks and gas stations. While I am supportive of this change and believe the Commission is on the right track, I believe that the distance should be greater than 300 feet and should also include community and recreational facilities, residential zones, and any building which is used for local, state, or federal government.

I would also propose that the Commission should clarify the intent of the original requirement that the establishment serve meals. Our town, as well as many others, are becoming inundated with applicants who request a license to operate a restaurant. However, the "restaurant" becomes a limited video lottery establishment which serves nachos, or hotdogs and calls it a "meal". The requirement, as it is currently written, does not give the local governing body any authority to preserve the community's integrity, or protect the general public from being deceived about the services offered in an establishment until they have already entered same. It would seem that a percentage of total gross income should come from the sale of food, and should not include the sale of alcoholic beverages.

Thank you in advance for your assistance and please do not hesitate to contact me should you have any questions.

Sincerely,

A. David Hamill, Mayor

ADH/pdm  
 Enclosure

# GUIDA

LAW OFFICES



DANIEL J. GUIDA  
Attorney At Law

3374 Main Street, Weirton, WV 26062-4704 · (304) 748-1213 · FAX (304) 748-1225 · (800) 870-0700  
Email: guidalaw@comcast.net

October 25, 2005

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OCT 27 2005

WV LOTTERY

pc: MELTON

John Musgrave, Director  
West Virginia Lottery  
P.O. Box 2067  
Charleston, WV 25327-2067

Dear Director Musgrave,

Please consider the following as comments to proposed West Virginia Lottery Interpretive Rule, Title 179, Series 7.

I. Distances from Specified Locations:

The proposed rules says that a LVL location must be at least 300 feet from a "church, school, day care center, or the perimeter of a public park." (§179-7-2.2b). However, these terms are vague and there are no definitions as what exactly these words mean, which will only cause confusion and, perhaps, litigation.

The following are my thoughts:

(a) Day care center should be expanded upon and instead should read as follows:

"day care center, family day care home, foster family group home, group home, group home facility, residential child care facility or family day care facility as those terms are defined in West Virginia Code, §49-2B-1, et. seq.

If the purpose of keeping LVL parlors away from day care centers is to provide a "zone" or "sanctity" around said center to protect children, then it would only seem proper to include the other facilities mentioned above.

(b) School should be defined as "the building or buildings comprising a public or private elementary, vocational, or secondary school or a private or public college, junior college or university," or something like that. Without such a definition, it will be argued that a dance or karate school is a "school" within the meaning of the proposed interpretive rule.

Further, what about school or government-owned stadiums, athletic complexes, gymnasiums, field houses or ballfields? I think there should be at least a 300 foot distance between any LVL establishment and the perimeter of any stadium, athletic complex, gymnasium, field house or ballfield owned by any school or governmental agency.

(c) Churches should be defined to mean "the building or buildings wherein an organization represented by a priest, minister, rector or authorized representative of any bona fide church or religions where such priest, minister, rector or representative holds or operates under a certificate of credit, commission or ordination under the ecclesiastical laws of a religious corporation incorporated under the laws of any state or territory of the United States of America, or any voluntary religious association, and who fully conforms to the rites and practices prescribed by the supreme conference, convocation, convention, assembly, association or synod of the system of faith with which they are affiliated."

Churches or religious organizations which are organized for the primary purpose of conferring certificates of commission, credit or ordination for a price and not primarily for the purpose of teaching and practicing a religious doctrine or belief should not be considered to be a "church" for purposes of this rule.

These definitions, while not perfect, will provide at least some instruction as to what does and does not constitute a "church."

(d) Public park. I assume this includes state public parks as well as city and county-owned parks and swimming pools.

But, what about freestanding public playgrounds? Or government-owned community centers or recreation centers? How about public libraries (as defined by West Virginia Code, §10-1-1)?

October 25, 2005

II. ZONING ISSUES:

I have great concern that if the subject interpretive rule is passed building additions, expansions, enlargements or extensions ("expansions") to existing LVL establishments may not be possible. Specifically, I am concerned that an existing business (which complied with prior restrictions) will be unable to expand its building without violating the new restrictions.

For example, assume an LVL retailer is currently 200 feet from a day-care center but desires to expand its building and by doing so gets closer to the day-care center. May the retailer rely on the "grandfather exception" for nonconforming uses to allow it to get closer to said day-care center?

Or, assume a LVL retailer is currently 300 feet away from a church per the measurement the ABCC uses (i.e., front door to front door, normal walking path). If the subject rule passes, the measurement will be a straight-line one and the LVL retailer now becomes, say, 150 feet from the church. If the LVL retailer wants to expand his business, can he or she do it?

In *Stop and Shop, Inc., vs. Board of Zoning Appeals of Westover*, 184 W.Va. 168, 399 S.E.2d 879 (1990), the issue was the encroachment of a commercial use by a business into a residential neighborhood.

In *Stop & Shop*, the business sought a writ of mandamus to compel the issuance of a building permit to allow it to build a parking lot and driveway on a residential lot adjoining the premises. The rub was that the parking lot was to be located on land zoned residential and the driveway would send traffic onto a residential street. Importantly, the proposed site for the parking lot and driveway was at one time zoned commercial, but was changed to residential.

In *Stop & Shop*, the West Virginia Supreme Court stated in the sole Syllabus Point:

A retail store operating on land zoned commercial cannot rely on a grandfather exception for nonconforming uses to allow it to expand into a residential area.

The Supreme Court concluded that the *Stop and Shop* failed to bring to the Court's "attention any statute giving the

owner of a conforming use the right to expand that use onto neighboring land restricting such a use." id., at p. 171.

Although the proposed lottery interpretive rule is probably not a "zoning" law, it certainly can be argued that it is one or, at least, its functional equivalent. At the minimum, the proposed rule raises issues whether an LVL retailer may rely on a "grandfather" exception to allow it to expand into an area covered by the proposed interpretive rule.

Of course, this causes me concern and I think the proposed interpretive rule should clearly provide for the addition, expansion, enlargement or extension of a nonconforming or existing use. See, for example, West Virginia Code, §8A-7-10(c) ("...[a] zoning ordinance may provide for the enlargement or extension of a nonconforming use...").

Anyway, here's my suggestion on how the proposed language should read:

(a) This policy statement shall not prohibit the continuance of the existing use of any land, building or structure, or any part thereof, to operate a limited video lottery establishment.

(b) This policy statement shall not prohibit the addition, expansion, enlargement, extension, alteration, repair or replacement of any building or structure, or any part thereof, for the purpose for which the building or structure, or any part thereof, is used on the effective date.

(c) This policy statement shall be subject to the provisions of West Virginia Code, §8A-7-10(c) and (d).

### III. FRATERNAL AND VETERANS CLUBS:

A fraternal club is defined, in part, as:

"...an existing chapter or local unit of a national tax exempt fraternal benefit society or a domestic fraternal society organized under the lodge system on the first day of January two thousand one."

See, Proposed Interpretative Rule, §179-7-2.1.

October 25, 2005

A veterans club is defined, in part, as:

"...an existing chapter, post or local unit of a national tax exempt veterans organization organized under the lodge system on the first day of January two thousand one."

See, Proposed Interpretative Rule, §179-7-2.4

Obviously, the point of these definitions is to go back in time and see what fraternal or veterans organizations were existing as of January 1, 2001 ----- at a time before anyone thought about LVL's. This way, no more "bogus" (as some call them) fraternal and veterans organizations could be created solely to get 10 LVL terminals, and not really for charitable purposes.

I wonder whether this definition is tight enough to block all non-intended fraternal or veterans organizations from taking advantage of the law? That is, if an organization existed (i.e., had a filing with the Secretary of State's office prior to January 1, 2001) but was not really operating any business, why should it now be able to take advantage of the 10 machine rule?

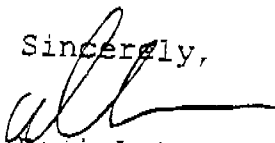
Perhaps, the following can be added at the end of the above definitions:

"and which possessed a private club license from the Alcohol and Beverage Control Commission (ABCC) as of said date."

This way, those clubs, like the Elks, Moose, VFW, American Legion, etc..., which the 10 machine law was intended to help, will not be affected. However, any other "fraternal" club which was not actively engaged in running a club as of January 1, 2001 ----- whether or not it was registered in the Secretary of State's office before said date ----- will not be able to take advantage of the 10 machine law.

I am of the sincere hope that my comments will be helpful to you. If you have any questions, please contact me.

Sincerely,



Daniel J. Guida, Esq.  
Attorney at Law

DJG/tmo

COMMENTS ON FISCAL NOTE  
AND TECHNICAL, STATUTORY AND CONSTITUTIONAL ISSUES

A. Effect on State Government and Others

WV Code §29A-3-4 requires an agency proposing an interpretive rule to attach a fiscal note "itemizing the cost of implementing the rules as they relate to this state *and to persons affected by the rules and regulation.*" The fiscal note attached to the proposed interpretive rule states that the rule would have no direct effect on revenues to the state, and does not discuss impact on persons affected by the rules or regulations. It goes on to project a zero impact on state government revenues for fiscal years 2005 and 2006.

The WV ALVBOA questions the accuracy of the fiscal note's impact on state government, and certainly believes it will have a fiscal impact on operators and retailers affected by the rule. There is no doubt, for example, that the proposed rule will negatively affect potential retailers located within 300 feet of a gasoline service station, as these locations would be denied the opportunity to benefit from limited video lottery. Similarly, any fraternal or veterans organization not in operation five years ago will face a similar fate, and the rule is unclear as to what effect it will have on such organizations that are currently licensed by the Commission to have 10 terminals. If the rule is applied to them retroactively, it could cut their revenues in half.

There is also no doubt that the proposed rule will result in a decrease in revenues for operators, as they find it more and more difficult to place their terminals. Each day of delay caused by the drying up of potential locations will cost the operators, and ultimately the state itself.

B. Technical Issues

The Fiscal Note attached to the proposed rule contains a section entitled "Memorandum" in which the agency is to "identify any areas of vagueness, technical defects, reasons the rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form." We believe there are several such areas not addressed on the Memorandum. They are:

1. Use of interpretive rule

An "interpretive rule" is defined in WV Code §29A-1-2(c) as follows:

"Interpretive rule" means every rule, as defined in subsection (I) of this section, adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information

or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it and *which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests. An interpretive rule may not be relied upon to impose a civil or criminal sanction nor to regulate private conduct or the exercise of private rights or privileges nor to confer any right or privilege provided by law and is not* admissible in any administrative or judicial proceeding for such purpose, except where the interpretive rule established the conditions for the exercise of discretionary power as herein provided. However, an interpretive rule is admissible for the purpose of showing that the prior conduct of a person was based on good faith reliance on such rule. The admission of such rule in no way affects any legislative or judicial determination regarding the prospective effect of such rule. Where any provision of this code lawfully commits any decision or determination of fact or judgment to the sole discretion of any agency or any executive officer or employee, the conditions for the exercise of that discretion, to the extent that such conditions are not prescribed by statute or by legislative rule, may be established by an interpretive rule and such rule is admissible in any administrative or judicial proceeding to prove such conditions.

The use of an interpretive rule to **prohibit** certain locations from having limited video lottery clearly affects their private rights, privileges and interests. At the very least, proposals to this effect should be accomplished by legislative rule, which has the check of being considered by the Legislature.

2. Lack of statutory authority to promulgate rule

Under WV Code §29A-4-2, a person may challenge the validity of a rule if it threatens to interfere or impair his or her legal rights or privileges on the grounds, and the court shall declare the rule invalid if, among other things, the rule "exceeds the statutory authority or jurisdiction of the agency..."

We do not disagree with the Commission's apparent desire to limit access to limited video lottery, and the current statute and regulations impose serious restrictions both on the location of limited video lottery establishments and a total ban on advertising and promotion. Current law and regulations for limited video lottery, combined with restrictions for any ABCC location, insure that there are minimum distances between LVL locations and from schools and churches.

The proposed amendments to the interpretive rule impose additional restrictions which may be desirable from a public policy perspective, but which raise serious legal

questions.

The provision stating that a limited video lottery location cannot be closer than 150 feet, using a straight-line distance, from another LVL location, is supported by the underlying statute, but other restrictions do not appear grounded in the law, as discussed within.

The restriction on the definitions of "fraternal society" and "veterans organization" to those that were an existing chapter or local unit on January 1, 2001 goes far beyond the plain meaning of the statute and is in effect a substantive change in the law. There is absolutely nothing in the underlying statute suggesting that the Legislature intended to limit the definition of fraternal or veterans organizations to those that were in operation as of January 1, 2001. This is in stark contrast to the clear preference given by the Legislature to retail locations that had been granted a private club or class A beer license as of that date, which were specifically authorized by the Legislature under WV Code Sections 29-22B-1104 and 1105 to obtain a "certificate of authority" for two video lottery terminals under the Limited Video Lottery Act. If the Legislature had wanted to restrict the definition of fraternal or veterans organizations to chapters or local units in operation on January 1, 2001, it could have done so.

Similarly, there is no statutory basis for the proposed rule's ban on locating a limited video lottery retail establishment within a 300-foot straight line distance from a church, school, daycare center or perimeter of a public park. WV Code §11-16-8 prohibits any ABCC licensed establishment (including all limited video lottery locations) from being within three hundred feet of any school or church, measured from front door to front door, along the street or streets. So, to the extent that the proposed rule overlaps with this restriction, it is valid. But the proposed rule has no statutory basis in banning a limited video lottery establishment from being within 300 feet of a daycare center or park, and the 300 foot restriction, even for a church or school, is valid only if the measurement is made under WV Code §11-16-8 and not by drawing a straight line.

Finally, there is no statutory basis for the proposed rule's ban on locating a limited video lottery location within 300 feet of a business that sells petroleum products. Not only is such a restriction unsupported by the law, it also directly contradicts 179 CSR 5 - the Lottery Commission's legislative rule approved by the Legislature - which in Section 34 sets forth the circumstances under which a limited video lottery retailer may be located contiguous or adjacent to a business that sells petroleum products.

### 3. Constitutional due process and property rights

As stated above, several of the provisions in the rule undermine the rights granted to operators and cannot be implemented even by interpretive rule. Because of the expense

that operators and retailers have made -- both in payments to the state for the right to own and operate terminals until the year 2011 and to others for the purchase of terminals and renovation to locations -- we believe that they could not be imposed until the year 2011 -- even by legislative change -- without violating the constitutional due process and property rights of operators and retailers.

#### 4. Vagueness on petroleum products restriction

The distance restrictions under the proposed rule with respect to a church, school, daycare center and business that sells petroleum products are vague in that they do not state from what point to what point the 300 foot straight-line rule is to be imposed. It is an open question as to whether the 300 feet is from the front door of the video lottery location to the front door of the daycare center, for example; the two closest points of the buildings; or the distance between property lines. Without further explication, it is impossible for a retailer or operator to know whether a limited video lottery location will qualify.

It is also unclear what effect the proposed distance restrictions would have on similar restrictions imposed by cities and counties. WV Code §29-22B-1202, contained in the Limited Video Lottery Act, states that it shall pre-empt state or local regulation. Because the Lottery Commission proposes to establish new distance restrictions for limited video lottery establishments, we believe the rule should make it clear that such restrictions supersede similar restrictions by municipalities or counties.

### SUMMARY OF RECOMMENDATIONS

Although the West Virginia Limited Video Lottery Association has serious questions with respect to the authority of the Lottery Commission to make several of the amendments to interpretive rule, 179 CSR 7, it recommends that the Commission do the following at a minimum:


1. Refrain from promulgating the rule for the full 6 months authorized by law in order to give operators and retailers time to adjust to the proposed changes on limited video lottery.
2. Make it clear that the amendments in Section 2 of the rule are prospective only, and do not apply to current operations or to any locations for which an application is submitted before the rule is actually promulgated.
3. Clarify the distance requirements between limited video lottery locations and parks, schools, etc., so that retailers and operators will know how the distances are measured.

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4. Make it clear that the new distance requirements supersede any local regulations.

Thank you for your consideration.

Sincerely,

  
Patricia R. Pope  
Executive Director