

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

Do Not Mark In this Box

71 57
APR 20 1988

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Structural Barriers Compliance Board TITLE NUMBER: 183

RULE TYPE: Procedural; CITE AUTHORITY 18-10F-3

AMENDMENT TO AN EXISTING RULE: YES___ NO^x___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 2-18-10F-3

TITLE OF RULE BEING PROPOSED: Appeal Procedures

DATE OF PUBLIC HEARING: April 20, 1988 TIME: 10-11:45 a.m.

LOCATION OF PUBLIC HEARING: Bridgeport Holiday Inn
I-79 (Exit 119) and U. S. Route 50
Clarksburg, WV

COMMENTS LIMITED TO: ORAL___, WRITTEN___, BOTH^x___

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Structural Barriers Compliance Board
Div. of Rehabilitation Ser.

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

State Capitol

The issues to be heard shall be limited to the proposed rule.

Charleston, WV 25305

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Ken Hechler

183 CSR 2

Title 183
Structural Barriers Compliance Board
Procedural Rules

Series 2
Appeals Procedure

183-2-1. General.

1.1. Scope.

It is the policy of the Structural Barriers Compliance Board to allow a method for anyone to appeal a decision made by the State Fire Marshal in relation to rules and regulations under Title 183 Series 1 entitled, "Elimination of Structural Barriers in Public Use Buildings and Facilities."

1.2. Authority.

These procedure rules are issued under the authority of the West Virginia Code Chapter 18, Article 10F.

1.3. Effective date.

1.4. Filing date.

1.5. Certification.

These rules are certified authentic by the State Structural Barriers Compliance Board.

183-2-2. Order of Decision of the State Fire Marshal, and Appeals and Procedure for Appeals from Such Orders or Decisions.

Any person aggrieved by an order or written decision of an approved designee of the State Fire Marshal shall first proceed to the office of the State Fire Marshal for review of the decision. The person shall submit his appeal to the office of the State Fire Marshal in writing within thirty (30) days. Any person aggrieved by an order or final written decision of the State Fire Marshal based upon or made in the course of the administration or enforcement of the provisions of Chapter 18, Article 10F of the Code of West Virginia or based upon or made pursuant to these rules and regulations and desiring to contest such order or decision, may file an appeal from such order or written decision with the Structural Barriers Compliance Board. Preserving the right to have such an appeal and the

manner of proceeding with resulting contested case shall be governed by the following rules and regulations and by the corresponding state statutes.

183-2-3. State Fire Marshal's Order and Decisions are Final and Conclusive.

Any order or final written decision of the State Fire Marshal based upon or made in the course of the administration or enforcement of the provisions of Chapter 18, Article 10F of the Code of the State of West Virginia, or based upon or made pursuant to these rules and regulations, shall be final and conclusive, unless vacated or modified upon review pursuant to the appeal rights and procedures provided by said statute and these rules and regulations.

183-2-4. Appeal Petition.

The appeal petition is to be typewritten, styled "Appeal Petition," and submitted with an original and one (1) copy. It shall be complete in itself so as to fully state the matters contested. No telegram, telephone call, or similar communication will be regarded as an appeal petition. The petition must contain and include the following: (1) a copy of the order or decision of the State Fire Marshal being contested; (2) a clear and concise assignment of each error which the petitioner alleges to have been committed by the State Fire Marshal in issuing said order or decision with each assignment of error being shown in separately numbered paragraphs; (3) a clear and concise statement of fact upon which the petitioner relies as sustaining his assignment of errors; (4) the address petitioner desires to have all notices, documents, and the final order mailed to; (5) the telephone number or numbers where petitioner can be contacted; (6) the names and addresses of all persons having any ownership interest in the property which is the subject of the State Fire Marshal's order being contested; (7) a prayer setting forth the relief sought; and (8) the signature of the petitioner or its duly authorized officer.

183-2-5. Time Requirement and Manner of Filing Appeal Petition.

An appeal petition must be personally delivered or mailed to the Chairman of the Structural Barriers Compliance Board within thirty (30) days following service of final written decision of the State Fire Marshal upon the petitioner, or within thirty (30) days following actual receipt if service be not required or for some reason not made of the order or decision being contested. Any appeal petition that is mailed shall be by certified mail, return receipt requested, and shall be considered timely if postmarked within the said thirty (30) day period. Any appeal petition not delivered or mailed as aforesaid within said thirty (30) day period shall not be timely filed and the order or decision of the State Fire Marshal being contested by the untimely appeal petition shall be final and conclusive.

183-2-6. Copy of Appeal Petition to Structural Barriers Compliance Board.

Upon receipt of an appeal petition, the Chairperson, Structural Barriers Compliance Board shall forthwith supply a copy of same to the Structural Barriers Compliance Board with an opinion by the State Fire Marshal regarding the urgency of the matter being contested. The State Fire Marshal may elect to file a response to the appeal petition and, if he does, same shall be delivered to the Structural Barriers Compliance Board and a copy mailed to the petitioner.

183-2-7. Scheduling Appeal Petition for and Notice of Hearing.

The Structural Barriers Compliance Board shall schedule a hearing on the appeal petition giving the petitioner and the Structural Barriers Compliance Board at least ten (10) days written notice of the date, time, and place of the hearing. Said notice to the petitioner shall be by personal delivery or by certified mail, return receipt requested, shall contain a short and plain statement of the matters to be considered at the hearing, shall contain a copy of the State Fire Marshal's response, if any, to the appeal petition, and shall be mailed or personally delivered by the Chairperson, Structural Barriers Compliance Board no later than thirty (30) days after receipt of the appeal petition. A copy of the said notice to the petitioner shall be supplied to the State Fire Marshal. Any such hearing shall be conducted at a designated location at the State Capitol in Charleston, West Virginia, or at the discretion of the Chairperson, Structural Barriers Compliance Board at a location within the county where the premises in question are totally or partially located.

183-2-8. Authorized Representative.

The petitioner may appear individually, or by counsel.

183-2-9. Continuances.

A motion for continuance will not normally be granted unless made three days before the hearing in writing, or during the hearing, in either case for good and sufficient cause. Upon consideration of a motion for continuance, the urgency of the situation shall be determined and taken into consideration. Conflicting engagements of counsel or the employment of new counsel will not be regarded as good ground for a continuance, unless set forth in a motion filed promptly after the notice of hearing has been mailed, or unless extenuating circumstances are shown, which the Structural Barriers Compliance Board or hearing examiner deems adequate.

183-2-10. Absence of Petitioner or Counsel at the Scheduled Hearing.

The absence of the petitioner or his legal counsel at a hearing, after service of notice of time, date, and place, shall not be the occasion for delay or continuance. The hearing shall proceed and the case be regarded as having been submitted for decision on the part of the absent petitioner or petitioners.

183-2-11. Hearing Examiner.

Any member of the Structural Barriers Compliance Board may conduct a hearing on an appeal petition, and when so acting shall be referred to as the hearing examiner. Alternatively, the Structural Barriers Compliance Board may authorize and empower an impartial attorney as a hearing examiner.

183-2-12. Evidence.

(1) All witnesses appearing at such hearing shall testify under oath or affirmation. Every adverse party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

(2) All relevant and material evidence, including papers, records, agency staff memoranda and documents in the possession of the Structural Barriers Compliance Board or the State Fire Marshal of which either party desires to avail himself, may be offered and made a part of the record in the case, notwithstanding admissibility objections which might be validly asserted in a court of law.

(3) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. Except as otherwise herein stated, the rules of evidence as applied in civil cases in the circuit courts of this state shall be followed in considering what evidence shall be admitted. However, when necessary to ascertain facts not reasonably susceptible of proof under those rules, reasonably authenticated evidence not admissible thereunder may be admitted, except where precluded by statute or privilege, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

183-2-13. Record of Proceedings.

All of the testimony, evidence, and rulings on admissibility of evidence at any such hearing shall be reported by stenographic notes and characters or by mechanical means and in such a manner that an accurate transcript of the testimony may be prepared. An official record of the hearing will be prepared by the Structural Barriers Compliance Board, but a transcript, as aforesaid, need not be prepared by the Structural Barriers Compliance Board unless it be required for an appeal. The cost of such transcript shall be borne by the petitioner.

183-2-14. Informal Disposition.

At any stage of the proceedings, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

183-2-15. Decision by the Structural Barriers Compliance Board.

Upon the conclusion of the hearing, the person designated by the Structural Barriers Compliance Board as hearing examiner shall prepare a recommended decision supported by findings of fact and conclusions of law affirming, modifying, or vacating the earlier order of decision of the State Fire Marshal with respect to which said hearing was held, and the Structural Barriers Compliance Board may, thereafter, either accept, modify, or reject such recommended decision. If it shall accept such decision it shall sign the same as its own; if it shall reject or modify the same, it shall prepare a written decision setting forth findings of facts and conclusions of law. In either event, the order signed by the Structural Barriers Compliance Board shall be final unless vacated or modified upon judicial review thereof. A copy of said order shall be served upon each party to the hearing and his attorney of record, if any, in person or by certified mail, return receipt requested.

183-2-16. Judicial Review.

An appeal may be taken by the petitioner or by the State Fire Marshal to the circuit court of the county where the premises are totally or partially located, if filed within thirty (30) days after the date upon which such party was served with a copy of the final order or decision of the Structural Barriers Compliance Board. The final order signed by the Structural Barriers Board shall be final and conclusive if the proceedings for judicial review have not been duly instituted within the said thirty (30) day period.