

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #8

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1990 AUG -1 11:10:35

NOTICE OF AN EMERGENCY AMENDMENT TO AN EMERGENCY RULE

AGENCY: Alcohol Beverage Control Commissioner TITLE NUMBER: 175

DATE EMERGENCY RULE WAS ORIGINALLY FILED: June 25, 1990

IS THIS THE FIRST EMERGENCY AMENDMENT TO THE ORIGINALLY FILED EMERGENCY RULE:

X


IS THIS THE SECOND EMERGENCY AMENDMENT TO THE ORIGINALLY FILED EMERGENCY RULE:

DATE OF FIRST EMERGENCY AMENDMENT: _____

SERIES NUMBER OF RULE: 5 TITLE OF RULE Licensing Of Retail

Liquor Stores

THE ATTACHED IS AN EMERGENCY AMENDMENT TO AN EXISTING EMERGENCY RULE. THIS EMERGENCY AMENDMENT BECOMES EFFECTIVE UPON FILING.


Harry C. Camper, Jr.
Commissioner



State of West Virginia
Department of Tax and Revenue

Charleston 25305

GASTON CAPERTON
GOVERNOR

FILED
1990 AUG -1 11 10:35
OFFICE OF THE SECRETARY
DEPARTMENT OF TAX AND REVENUE
CHARLES O. LORENSEN
SECRETARY

CONSENT TO FILE PROPOSED RULE

July 31, 1990

To Whom It May Concern: _____

Title of Rule: Licensing of Retail Liquor Stores

Title Number: 175

Series Number: 5

Pursuant to West Virginia Code § 5F-2-2(a), the undersigned hereby consents to the filing of the foregoing rule.

Signed this 31st day of July, 1990.

Charles O. Lorensen, Secretary
Department of Tax and Revenue



State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

CHARLES O. LORENSEN
SECRETARY

FILED
1989 AUG -1 11 10:35

DATE: August 1, ~~July 31,~~ 1989
TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
FROM: HARRY G. CAMPER, JR., ALCOHOL BEVERAGE CONTROL COMMISSIONER
EMERGENCY RULE TITLE:

1. Date of filing: August 1, ~~July 31,~~ 1990
2. Statutory authority for promulgating the emergency rule: W. Va. Code §§ 60-2-16 and 60-3A-6
3. Date of filing of proposed legislative rule: June 25, 1990
4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?
No
5. Has the same or similar emergency rule previously been filed and expired? No
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.
N/A

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

S.B. 337 required the Alcohol Beverage Control Commissioner to establish by July 1, 1990, the maximum wholesale mark-up percentage to be applied to prices paid by the ABCC and which will determine the prices of liquor sold to retail liquor stores.

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

S.B. 337 authorized the privatization of ABCC stores, such action to occur within a given time-frame. The rule provides appropriate procedures and guidance for the activity which will be completed before December 31, 1990.

FILED

EMERGENCY
WEST VIRGINIA LEGISLATIVE REGULATIONS 1990 AUG -1, 11:10:25
ALCOHOL BEVERAGE CONTROL COMMISSION
DEPARTMENT OF TAX AND REVENUE
TITLE 175
SERIES 5

LICENSING OF RETAIL LIQUOR STORES

Filed: August 1, 1990

§ 175-5-1. General.

1.1 Type of Regulation. - These regulations are emergency legislative regulations as defined in W. Va. Code §§ 29A-1-2(d) and 29A-3-15.

1.2 Scope. - These emergency legislative regulations explain and clarify the State Retail Liquor License Act, as stated in W. Va. Code § 60-3A-1 et seq.

1.3 Authority. - These emergency legislative regulations are issued under the authority of W. Va. Code § 29A-3-15 and W. Va. Code § 60-2-16.

1.4 Filing Date. - August 1, 1990.

1.5 Effective Date. - These amended emergency legislative regulations become effective immediately upon filing.

1.6 Citation. - These amended emergency legislative regulations may be cited as 175 C.S.R. 5, § ____ (1990).

§ 175-5-2. Legislative Findings and Declarations; Legislative Purpose.

2.1. It is the intent of the Legislature that the sale of liquor at retail should no longer be by the State, but rather by retail licensees; that there is a need for the State to control the wholesale sales of liquor; that the health and welfare of the citizens of this State will be adequately protected by the licensing and control of such retail licensees; that the sale of liquor through retail licensees will satisfy reasonable consumer concerns of availability and price; and that the operation and efficiency of State government will be improved by removing the State from the retail sale of liquor and permitting sales of liquor by retail licensees under licenses issued by the State together with strict enforcement of laws and rules relating to the sale of liquor.

2.2 It is the purpose of the Legislature in providing for the retail sale of liquor to:

2.2.1 Continue revenue to the State from the wholesale sale of liquor, by requiring all retail licensees to purchase all liquor (other than wine with an alcohol content of fourteen percent (14%) or less by volume) from the Commissioner and by further requiring all private clubs licensed under the provisions of West Virginia Code article 60-7 to purchase all liquor (other than

wine with an alcohol content of fourteen percent (14%) or less by volume) from retail licensees;

2.2.2 Provide a system of controls, through limitations on the numbers of retail outlets and application of the police power of the State, to discourage the intemperate use of liquor;

2.2.3. Preserve and continue the tax base of counties and municipalities derived from the retail sale of liquor; and

2.2.4. Obtain for the State financial gain from the issuance of retail licenses.

§ 175-5-3. Sale of Liquor by Retail Licensees Permitted; Cessation of Retail Sale of Liquor by State.

3.1 Notwithstanding any provision of the Code of West Virginia of 1931, as amended to the contrary, the sale of liquor by retail licensees in accordance with the provisions of West Virginia Code article 60-3A shall be lawful.

3.2 Upon the opening of a retail outlet in any market zone, the State shall, as soon as practicable, discontinue operating any and all State liquor stores and agency stores within such market zone so long as a retail outlet is in operation in such market zone.

§ 175-5-4. Definitions. As used in these emergency regulations and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein, and shall apply in the singular and the plural.

4.1 "Alcohol" means ethyl alcohol, whatever its origin, and shall include synthetic ethyl alcohol but not denatured alcohol.

4.2 "Alcohol Beverage Control Commissioner," "Commissioner," or "ABCC" means the West Virginia Alcohol Beverage Control Commissioner (Administrator) or his delegate.

4.3 "Alcoholic liquor" or "liquor" means alcohol, beer, fortified wine and distilled spirits, and any liquid or solid capable of being used as a beverage, but shall not include wine with an alcohol content of fourteen percent (14%) or less by volume, nonintoxicating beer or nonintoxicating beverages.

4.4 "Applicant" means any person who bids for a retail license, or who seeks the Commissioner's approval to purchase or otherwise acquire a retail license from a retail licensee, in accordance with the provisions of West Virginia Code article 60-3A.

4.5 "Application" means the form prescribed by the Commissioner which must be filed with the Commissioner by any person bidding for a retail license.

4.6 "Board" means the Retail Liquor Licensing Board created by West Virginia Code article 60-3A.

4.7 "Class A retail license" means a retail license permitting the retail sale of liquor at more than one retail outlet within a specified market zone.

4.8 "Class B retail license" means a retail license permitting the sale of liquor at only one retail outlet within a specified market zone.

4.9 "Code" means the Code of West Virginia of 1931, as amended.

4.10 "Designated areas" means one or more geographic areas within a market zone designated as such by the Board.

4.11 "Distilled spirits" means ethyl alcohol, ethanol or spirits, or wine, including all dilutions and mixtures thereof, from whatever source or by whatever process produced, for beverage use, and shall include, but not be limited to, natural spirits, whiskey, brandy, rum, gin, vodka, cordials and liqueurs. Any alcoholic beverage containing more than twenty-four percent (24%) of alcohol by volume shall be deemed to be distilled spirits.

4.12 "Executive officer" means the president of an applicant or retail licensee, any vice president of an applicant or retail licensee in charge of a principal business unit or division, or any other officer of an applicant or retail licensee who performs a policy making function.

4.13 "Fortified wine" means any wine to which brandy or other alcohol has been added and includes dessert wines which are not fortified and any wine containing greater than fourteen percent (14%) by volume.

4.14 "Intoxicated" means having one's faculties impaired by alcohol or other drugs to the point where physical or mental control or both are markedly diminished.

4.15 "Market zone" means a geographic area designated as such by the Board for the purpose of issuing retail licenses.

4.16 "Nonintoxicating beer" means any beverage, obtained by the fermentation of barley, malt, hops, or similar products or substitute and containing at least one half of one percent (.5%) alcohol by volume, but not more than four and two-tenths percent (4.2%) of alcohol by weight, or six percent (6%) by volume, whichever is greater.

4.17 "Original package" means any closed or sealed container or receptacle used for holding alcoholic liquor.

4.18 "Person" means any individual, partnership, joint stock company, business trust, association, corporation or other form of business enterprise, including a receiver, trustee or liquidating agent.

4.19 "Public place" means any place, building or conveyance to which the public has, or is permitted to have access, including restaurants, soda fountains, hotel dining rooms, lobbies, and corridors of hotels and any highway, street, lane, park or place of public resort or amusement: Provided, That the term "public place" shall not mean or include any of the above-named places or any portion or portions thereof which qualify and are licensed under the

provisions of West Virginia Code Chapter 60 to sell alcoholic liquors for consumption on the premises.

4.20 "Retail license" means a license issued under the provisions of West Virginia Code article 60-3A permitting the sale of alcoholic liquor at retail.

4.21 "Retail licensee" means the holder of a retail license.

4.22 "Retail outlet" means a specific location where alcoholic liquor may be lawfully sold by a retail licensee under the provisions of West Virginia Code article 60-3A.

4.23 "Secretary" means the Secretary of the West Virginia Department of Tax and Revenue.

4.24 "State" means the State of West Virginia.

4.25 "Wine" means any beverage obtained by the fermentation of the natural content of fruits, or other agricultural products, containing sugar, and includes, but is not limited to, still wines, champagne and other sparkling wines, carbonated wines, imitation wines, vermouth, cider, perry, sake or other product offered for sale or sold as wine containing not less than seven percent (7%) nor more than twenty-four percent (24%) alcohol by volume.

§ 175-5-5. Creation of Retail Liquor Licensing Board; Members, Terms, Meetings and Officers; General Provisions.

5.1 West Virginia Code § 60-3A-5 created the State Retail Liquor Licensing Board, such Board being composed of five (5) members, three (3) of whom are appointed by the Governor by and with the advice and consent of the Senate, one (1) of whom being be the Secretary of Tax and Revenue, and one (1) of whom being the Commissioner. The Secretary of Tax and Revenue and the Commissioner serve as the chairman and secretary, respectively, of the Board. No more than two (2) of the three (3) members appointed by the Governor may be of the same political party. No member of the Board may hold a retail license or have any financial interest, directly or indirectly, in any retail licensee.

5.2 The provisions of West Virginia Code § 60-3A-5(b) and this Section 175-5-5.2 apply to the three (3) members appointed by the Governor. They shall be appointed for overlapping terms of three (3) years each and until their respective successors have been appointed and have qualified, except for the original appointments.

5.2.1 For the purpose of original appointments, one (1) member shall be appointed for a term of three (3) years and until his or her successor has been appointed and has qualified, one (1) member shall be appointed for a term of two (2) years and until his or her successor has been appointed and has qualified, and one (1) member shall be appointed for a term of one (1) year and until his or her successor has been appointed and has qualified.

5.2.2 Members may be reappointed for any number of terms.

5.2.3 Before entering upon the performance of his or her duties, each member shall take and subscribe to the oath required by West Virginia Constitution article IV, § 5. Vacancies shall be filled by appointment by the Governor in the case of death, resignation, incompetency, neglect of duty, gross immorality or malfeasance in office.

5.2.4 Members shall receive compensation of one hundred dollars (\$100.00) per day for each day actually engaged in the performance of their duties as board members, and in addition shall be reimbursed for all reasonable and necessary expenses actually incurred in the performance of their duties.

5.3 A majority of the members of the Board constitutes a quorum and meetings shall be held at the call of the Chairman.

5.4 Staff, office facilities and costs of operation of the Board shall be provided by the Commissioner.

§ 175-5-6. General Powers and Duties of Board and Commissioner.

6.1 The Board shall create, based on economic and demographic factors, market zones within the State for the issuance of Class A and Class B retail licenses, and, if deemed necessary or desirable by the Board, to create one or more designated areas within such market zones for the issuance of Class B retail licenses.

6.2 The Commissioner shall:

6.2.1 Prescribe application forms for persons desiring to acquire retail licenses and adopt an orderly procedure and timetable for investigating, processing and approving applications;

6.2.2 Develop a form of retail license to be issued to each retail licensee under the provisions of West Virginia Code article 60-3A and these regulations;

6.2.3 Disseminate to the public information relating to the issuance of retail licenses;

6.2.4 Promulgate standards for advertising the sale, availability, price and selection of liquor;

6.2.5 Enforce the provisions of West Virginia Code article 60-3A and these regulations;

6.2.6 Impose civil penalties upon retail licensees;

6.2.7 Enter the retail outlet of any retail licensee at reasonable times for the purpose of inspecting the same, and determining the compliance of such retail licensee with the provisions of West Virginia Code article 60-3A and any rules promulgated in accordance with West Virginia Code article 29A-3 by the Board or the Commissioner pursuant to the provisions of West Virginia Code article 60-3A; and

6.2.8 Issue subpoenas and subpoenas duces tecum for the purpose of conducting hearings under the provisions of West Virginia Code §§ 60-3A-25 or 60-3A-27 and Sections 175-5-25 or 175-5-27 of these regulations, which subpoenas and subpoenas duces tecum shall be issued in the time, for the fees, and shall be enforced in the manner specified in West Virginia Code § 29A-5-1 with like effect as if such Section 29A-5-1 was set forth in extenso in West Virginia Code article 60-3A and these regulations.

6.2.9 Settle, through the hearing procedure provided in Section 175-5-28a disputes relative to the boundaries of market zones and designated areas within market zones.

6.3 The Board and the Commissioner shall each:

6.3.1 Engage accounting, legal and other necessary professional consultants to assist them in carrying out their respective duties under West Virginia Code article 60-3A and these regulations; and

6.3.2 Adopt, amend, or repeal such procedural, interpretive and legislative rules, consistent with the policy and objectives of West Virginia Code article 60-3A and these regulations, as they may deem necessary or desirable for the public interest in carrying out the provisions of said article and these regulations. Such rules shall be adopted, amended and repealed in accordance with the provisions of West Virginia Code, chapter 29A.

§ 175-5-7. Market Zones; Class A and Class B Retail Licenses.

7.1 The Board shall determine the number of and establish market zones for the retail sale of liquor within this State. For each market zone so established, the Board shall designate whether one (1) Class A retail license or one (1) or more Class B retail licenses, or both, shall be issued for the zone.

7.1.1 Each Class A retail license shall permit the holder thereof to operate such number of Class A retail outlets as the Board shall have authorized for that market zone.

7.1.2 If the Board determines to issue one (1) or more Class B licenses, the number of Class B retail licenses to be issued by the Commissioner within the market zone shall not exceed fifty percent (50%) of the number of retail outlets authorized for the Class A retail license for such market zone: Provided, That in a market zone where the number of retail outlets authorized under the Class A retail license is an odd number, the number of Class B retail licenses which may be issued in such market zone shall be rounded up to the next highest whole number following that number which is equal to fifty percent (50%) of the number of retail outlets authorized under such Class A retail license.

7.1.3 Market zone boundaries established by the Board on June 1, 1990 will not be affected by any changes in municipal boundaries, tax district boundaries or any other boundaries utilized in establishing such market zones.

7.2 If the Board determines that a market zone is not suited for the issuance of a Class A retail license, then only Class B retail licenses may be

authorized for such market zone and the Board shall determine the maximum number of Class B retail licenses which may be issued for such market zone.

7.3 When authorizing Class B retail licenses for a market zone, the Board may create one or more designated areas within such market zone and authorize one Class B retail license for each such designated area. For each such market zone, the Commissioner may issue additional Class B retail licenses for retail outlets to be located outside any such designated area, but the number of such additional Class B retail licenses, when added to the total number of Class B retail licenses issued for all designated areas within the market zone, shall not exceed the maximum number of Class B retail licenses permitted under West Virginia Code § 60-3A-7(a) and Section 175-5-7.1.2 of these regulations for that market zone.

7.4 A person may hold one (1) or more Class A retail licenses and one (1) or more Class B retail licenses, but for the same market zone no person shall hold a Class A retail license and a Class B retail license or more than one (1) Class B retail license. Additionally, a person who holds a Class A license may not establish a retail outlet in another retail licensee's Class B designated area.

§ 175-5-8. Retail License Application Requirements; Retail Licensee Qualifications.

8.1 Prior to or simultaneously with the submission of a bid for a retail license, each applicant shall file an application with the Commissioner, stating under oath the following:

8.1.1 If the applicant is an individual, his or her name and residence address;

8.1.2 If the applicant is a corporation, limited partnership, partnership or association:

8.1.2.1 the name and business address of such applicant;

8.1.2.2 the state of its incorporation or organization;

8.1.2.3 the number, either federal employer number or social security account number, it uses for tax identification;

8.1.2.4 the names and residence addresses of each executive officer and director or general partner of such entity;

8.1.2.5 the names and residence addresses of any person owning, directly or indirectly, at least twenty percent (20%) of the outstanding stock of or partnership interest in such applicant; and

8.1.2.6 and the county or counties where the applicant is considering the conduct of liquor sales, if successfully licensed; and

8.1.3 That the applicant has never been convicted in this State of any felony or other crime involving moral turpitude or convicted of any felony

in this or any other state court or any federal court for a violation of any state or federal liquor law, and if the applicant is a corporation, limited partnership, partnership or association, that none of its executive officers, directors or general partners, or any person owning, directly or indirectly, at least twenty percent (20%) of the outstanding stock of or partnership interests in such applicant, has been so convicted.

8.1.4 The application shall include a statement by the applicant consenting to the conduct of a background investigation by the Commissioner.

8.2 An applicant shall provide to the Commissioner any such additional information as the Commissioner may request.

8.2.1 A certified copy of the applicant's application for the Federal Basic Permit must be filed with the application for a retail liquor license.

8.2.2 If the applicant for a retail license holds a Federal Basic Permit, the wholesale dealers in liquor tax stamp and/or the retail dealers in liquor tax stamp, only the applications upon which such permit and tax stamps were issued must be submitted with the application for the retail license.

8.3 Whenever a change occurs in any information provided to the Commissioner, such change shall immediately be reported to the Commissioner in the same manner as originally provided.

8.4 The Commissioner shall disqualify each bid submitted by an applicant under West Virginia Code § 60-3A-10 and Section 175-5-10 of these regulations, and no applicant shall be issued or be eligible to hold a retail license under this article, if:

8.4.1 The applicant has been convicted in this State of any felony or other crime involving moral turpitude or convicted of any felony in this or any other state court or any federal court for a violation of any state or federal liquor law; or

8.4.2 Any executive officer, director or general partner of the applicant, or any person owning, directly or indirectly, at least twenty percent (20%) of the outstanding stock of or partnership interests in the applicant, has been convicted in this State of any felony or other crime involving moral turpitude or convicted of any felony in this or any other state court or any federal court for a violation of any state or federal liquor law.

8.5 Federal regulations require a person who purchases alcoholic liquors for resale to obtain a Basic Permit and certain tax stamps.

8.5.1 A Basic Permit will be issued if:

8.5.1.1 Such person (or in the case of a corporation, any of its officers, directors or principal stockholders) has not, within five (5) years prior to the date of application been convicted of a felony under Federal or State law, and has not, within three (3) years prior to the date of

application, been convicted of a misdemeanor or under any federal law relating to liquor, including the taxation thereof; and

8.5.1.2 Such person, by reason of his business experience, is likely to commence business as a retail licensee within a reasonable period and to maintain such business activities in conformity with federal law; and

8.5.1.3 The business activities proposed are not in violation of the laws of West Virginia.

8.5.1.4 In order to obtain the Basic Permit for wholesalers and retailers of alcoholic liquors, an applicant must provide the Bureau of Alcohol, Tobacco and Firearms with the name, including trade name or names, if any, and the address of the applicant, the kind of permit applied for and the location of the business; whether the applicant is an individual, a partnership or a corporation; if a partnership, the name and address of each partner; if a corporation, the name and address of each of the principal officers and of each shareholder owning ten percent (10%) or more of the corporate stock.

8.5.2 The retail licensee will be required to purchase the following federal tax stamps.

8.5.2.1 A person who purchases alcoholic liquors for resale and such resales will be wholesale sales, such as to private clubs, is required to register for and obtain a Wholesale Dealer In Liquors tax stamp. The tax stamp must be obtained before engaging in any business which will involve the wholesale sale of alcoholic liquors. The cost of this tax stamp is \$500 per year.

8.5.2.2 A person who purchases alcoholic liquors for resale and such resales will be retail sales, such as sales to consumers, is required to register for and obtain a Retail Dealer In Liquors tax stamp. This stamp must be obtained before engaging in any business which will involve the retail sales of alcoholic liquors. The cost of this tax stamp is two hundred and fifty dollars (\$250) per year.

8.5.3 An applicant must apply for the Basic Permit and register for the foregoing dealer classifications and federal tax stamps in a manner sufficiently timely so that such documents will be provided within twenty (20) days after the applicant is notified of being the successful bidder.

§ 175-5-9. Investigation of Applicants for Retail License; Notification to Applicants Approving or Denying Application; General Provisions Relating to Licensing.

9.1 Upon receipt of an application for a retail license and such supplemental information as the Commissioner may require, the Commissioner may conduct such investigation of an application as deemed necessary or desirable.

9.1.1 The applicant, upon submitting an application, is deemed to consent to the ABCC conducting a complete investigation of the applicant.

9.2 Upon the completion of any investigation of an applicant, the Commissioner shall inform such applicant in writing whether the application has been approved or denied, and shall post a copy of the decision in the Commissioner's office.

9.3 When an application is denied, the Commissioner shall provide the applicant the reasons for the denial, including specific findings of fact, and the applicant shall be entitled to a hearing before the Commissioner if the hearing is requested within five (5) days after the decision is issued. Any such hearing shall be held as specified in West Virginia Code § 60-3A-27 and Section 175-5-27 of these regulations, but the decision after hearing shall, notwithstanding the provisions of West Virginia Code § 60-3A-27 and Section 175-5-27 of these regulations, be final and binding and not subject to judicial review.

9.3.1 The hearing request must be in writing and must provide grounds for the hearing.

9.3.2 Within ten (10) days after receipt of the hearing request, the Commissioner shall schedule a hearing and at least twenty (20) days notice of the hearing shall be provided.

9.3.3 The Commissioner must render his decision within twenty (20) days after completion of the hearing.

9.4 An applicant shall provide all information required by West Virginia Code article 60-3A and these regulations, and shall satisfy all requests for information pertaining to qualification and in the form specified by the Commissioner. By filing an application, an applicant shall waive liability for any damages resulting from any disclosure or publication in any manner of any material or information acquired during inquiries, investigations or hearings.

§ 175-5-10. Bidding Procedure.

10.1 The issuance of retail licenses shall be based on sealed competitive bids in accordance with the provisions of West Virginia Code § 60-3A-10 and Section 175-5-10 of these regulations. The bidding procedure and timetable for the issuance of retail licenses shall be announced by public notice published as a Class II-0 legal advertisement in compliance with the provisions of West Virginia Code article 59-3, and the publication area for such publication shall be each market zone within which a retail outlet shall be located. The second publication of such notice must appear on or before May 29, 1990.

10.2 Prior to the advertisement for bids for a retail license, the Commissioner shall determine whether the current lessor for any existing State liquor store or stores within the applicable market zone or designated area will agree to accept the eventual Class B retail licensee as lessee for the remaining term of the lease. Should such lessor agree to accept the eventual Class B retail licensee, such retail licensee shall have the option to assume such lease. In market zones where there are two (2) or more Class B retail licensees, the retail licensee who or which submitted the highest responsible bid shall have the option to assume such lease and, if such retail licensee does not assume such lease, then the retail licensee who or which submitted the next

highest responsible bid for a retail license in such market zone shall have the option to assume such lease.

10.3 Each bid shall indicate the market zone for which the retail license is sought, whether the bid is for a Class A retail license or Class B retail license, and, if the Board has created one (1) or more designated areas for such market zone, whether the bid is for the Class B retail license to be issued for any such designated area. No bid shall be altered or withdrawn after the appointed hour for the opening of bids. Each retail license shall be awarded to the highest responsible bidder. In market zones where two (2) or more Class B retail licenses are authorized (other than for a designated area or areas), such licenses shall be awarded to those persons submitting the highest responsible bids.

10.3.1 Lump sum bids for all Class A retail licenses in the State will be permitted.

10.3.2 Lump sum bids for more than one (1) but less than all Class A retail licenses in the State will not be permitted.

10.3.3 A bid submitted for all Class A licenses will be evaluated by the State Retail Liquor Licensing Board by comparing this bid to the sum of each of the highest qualified Class A license bids received for each of the individual market zones. If the lump sum bid is higher than the total of such individual highest bids, the Board will award all Class A licenses in the State to the highest qualified lump sum bidder. Conversely, if the sum of such individual bids is equal to or greater than all lump sum bids, then the Class A licenses will be awarded to the persons submitting the highest qualified bid in each of the market zones.

10.3.4 A bid for more than one (1) Class A license but less than all Class A licenses in the State must designate the Class A licenses bid upon and allocate the bid amount for each such Class A license.

10.4 No bid shall be considered unless the bond required under West Virginia Code § 60-3A-11 and Section 175-5-11 of these regulations is submitted to the Commissioner. All bids for a retail license may be rejected by the Board if the Board determines that the highest responsible bid is inadequate, in which event the Commissioner shall begin anew the bidding process for that retail license.

10.5 For each ten (10) year license period, the Board may determine that the interest of the State is best served by receiving alternate bids in one (1) or more market zones where the board has authorized both a Class A license and one (1) or more Class B licenses. In such case, the Commissioner shall advertise the zone both for a Class A license and one (1) or more Class B licenses, and also for only Class B licenses; in the second alternative the number of Class B licenses shall be the sum of the authorized Class A license locations and the number of Class B licenses offered for the market zone.

10.5.1 When alternate bidding is authorized by the Board for a market zone, the Commissioner shall total the apparent successful bids for the Class A license and the Class B license(s) in alternate one and shall total the

apparent successful bids for Class B licenses in alternate two. If the total of the apparent successful bids is higher in alternate one, then the Commissioner shall award the Class A license and the authorized number of Class B licenses. If however, the total of the apparent successful bids in alternate two is higher than the total for alternate one, the Commissioner shall award only the Class B licenses authorized in alternate two and no Class A license shall be issued.

10.6 Each person desiring to submit a bid must file the same with the Commissioner and the Commissioner must have date-stamped the bid as having been received on or before 1:00 p.m. EDT on Tuesday, August 28, 1990. The failure to deliver or the nonreceipt of a bid prior to the appointed date and hour shall constitute sufficient reason for the rejection of a bid. After the award of the retail license, the Commissioner shall indicate upon the successful bid that it was the successful bid. Subsequent to the awarding of all retail liquor licenses, a copy of each bid and the respective bidder's application shall be maintained as a public record, shall be open to public inspection in the Commissioner's office and shall not be destroyed without the written consent of the legislative auditor.

10.7 In the event two or more bids for the same retail license are for the same amount, the following procedure will be followed to determine the successful bidder.

10.7.1 Such bidders shall be notified to meet at the Commissioner's Office at a specified date and time.

10.7.2 At the time of the meeting, the names of the affected bidders which shall have been written on paper, shall be placed in a hat or similar container.

10.7.3 The Commissioner shall then draw from the hat one of the pieces of paper and the bidder named thereon shall be declared to the successful bidder.

10.8 Prior to the issuance of the retail license to the successful bidder, the bid price, as specified in West Virginia Code § 60-3A-12 and Section 175-5-12 of these regulations, shall be paid to the Commissioner by money order, certified check or cashier's check or wire transfer. All retail licenses shall be signed by the Commissioner in the name of the State of West Virginia.

10.9 Notification of successful bid and deadline for bid payment shall be by certified mail, return receipt requested. If the successful bidder fails to pay to the Commissioner the bid price within twenty (20) days of the Commissioner's notification to do so, the bid bond provided for in West Virginia Code § 60-3A-11 and Section 175-5-11 of these regulations shall be forfeited and such bidder shall not be issued the retail license: Provided, That such bid bond shall not be forfeited but shall be released if the successful bidder fails to qualify for the Federal Basic Permit or the wholesaler or retailer tax stamp unless the bidder provided false information to the federal government or the Commissioner. The Commissioner shall then issue the retail license to the next highest responsible bidder for such retail license or reject all bids and start anew the bidding procedure for such retail license.

10.10 If the successful bidder has paid the entire bid price and then fails to qualify for the Federal Basic Permit, the Wholesale Dealer In Liquors permit or the Retail Dealer In Liquors permit, the amount of the bid price will be refunded unless the successful bidder provided false information to the federal government or to the Commissioner and such false information was the basis for denial of such permit. In such a situation the amount paid by the successful bidder will be retained by the Commissioner and deposited in the State General Fund.

§ 175-5-10a. Preference for Resident Bidders.

10a.1 In determining the highest responsible bidder for purposes of West Virginia Code § 60-3A-10 and Section 175-5-10 of these regulations, the Board shall afford a five percent (5%) preference for West Virginia resident bidders, which preference shall be computed by multiplying the bid price submitted by each resident bidder by 1.05.

10a.2 For purposes of West Virginia Code § 60-3A-10a and this Section 175-5-10a, a bidder shall be deemed to be a West Virginia resident if the bidder:

10a.2.1 has resided in West Virginia for at least the four (4) years immediately prior to the date on which the bid is opened; or, if the bidder is a corporation.

10a.2.1.1 has had its headquarters or principal place of business in this State for at least the four (4) years immediately prior to such date; or

10a.2.1.2 that each of the principal officers, directors and shareholders who own ten percent (10%) or more of the corporate shares of the corporation have resided in West Virginia for at least four (4) years immediately prior to the date upon which the bid is opened; or

10a.2.1.3 if the bidder is a partnership, that each partner owning a ten percent (10%) or more partnership interest in a partnership formed for the purpose of obtaining a retail liquor license have resided in West Virginia for at least four (4) years immediately prior to the date upon which the bid is opened; and

10a.2.1.4 if separate corporations form a new corporation for purposes of obtaining a retail liquor license, each corporation has had its headquarters or principal place of business in this State for at least four (4) years immediately prior to the date upon which the bid is opened; or

10a.2.1.5 if a parent corporation forms a subsidiary corporation for the purpose of obtaining a retail liquor license, such parent corporation has had its headquarters or principal place of business in this State for at least four (4) years immediately prior to the date upon which the bid is opened; or

10a.2.2 meets the requirements set forth in West Virginia Code § 5A-3-44 relating to a residency of vendors, except for the requirement of having paid business and occupation taxes.

10a.3 A bidder who feels he meets the requirements for residency set forth in West Virginia Code § 60-3A-10a and Section 175-5-10a.2 of these regulations, must affirmatively assert his claim on the official application form to receive this preferential treatment.

§ 175-5-11. Bonding Requirements.

11.1 Each applicant submitting a bid or bids under West Virginia Code § 60-3A-10 and Section 175-5-10 of these regulations shall furnish to the Commissioner a bond at the time of bidding, which bond shall guarantee the payment of twenty-five percent (25%) of the price bid(s) for the retail license(s).

11.1.1 The bid bond shall be enclosed within the sealed bid of the applicant so as not to reveal the amount of the applicant's bid prior to bid opening day: Provided, That if the bid bond is in the form of cash or negotiable securities;

11.1.1.1 it shall be transmitted directly either in person or by Certified Mail Return Receipt Requested to the State Treasurer's Office, and

11.1.1.2 a certified statement to the effect that the bid bond in the amount required was in the form of cash or negotiable securities was transmitted directly to the State Treasurer's Office shall be enclosed with the sealed bid.

11.2 The bond required by West Virginia Code § 60-3A-11 and this Section 175-5-11 shall be furnished in cash or negotiable securities or shall be a surety bond issued by a surety company authorized to do business with the State or an irrevocable letter of credit issued by a financial institution acceptable to the Commissioner; a cashier's check or surety bond is the preferred means of posting the bid bond. If furnished in cash or negotiable securities, the principal shall be deposited without restriction in the State Treasurer's office and credited to the Commissioner, but any income shall inure to the benefit of the applicant.

11.2.1 When cash or negotiable securities are deposited with the Treasurer to comply with the bid bond requirement, the treasurer shall not reveal the amount of the deposit to the Commissioner or any other official or person until the bid opening day.

11.2.2 At the time when bids are opened, a representative of the Treasurer of West Virginia will be present to confirm the amount of deposit made in behalf of license bids.

11.3 The bond shall be returned to an applicant following the bidding if such applicant is not the successful bidder for the retail license, and, if an applicant is the successful bidder, the bond shall be released after issuance of the retail license.

§ 175-5-12. Annual Retail License Fee; Expiration and Renewal of Retail Licenses.

12.1 The annual retail license period shall be from July first to June thirtieth of the following year.

12.1.1 The annual retail license fee for a Class A retail license shall be the sum obtained by multiplying the number of retail outlets operated by the retail licensee in the market zone to which such Class A retail license applies by one thousand five hundred dollars (\$1,500.00).

12.1.2 The annual retail license fee for a Class B retail license shall be five hundred dollars (\$500.00).

12.1.3 The annual retail license fee for the initial year of issuance shall be prorated based on the number of days remaining between the date of issuance and the following June thirtieth.

12.1.4 The holder of a Class A retail license is not required to operate the maximum number of locations permitted for the license. A license fee is due only for a location which is selling liquor during any portion of the license year.

12.1.5 Once an annual license for a location is established, the license fee shall not again be pro rated for any subsequent year.

12.2 All retail licenses shall expire on June thirtieth of each year and may be renewed only upon the submission to the Commissioner of the same information required to originally apply for the license and such additional information as may be requested by the Commissioner on such forms and by such date as may be prescribed by the Commissioner, together with the payment to the Commissioner of the applicable annual retail license fee required under West Virginia Code § 60-3A-12 and this Section 175-5-12.

12.3 No person may sell alcoholic liquor at any retail outlet if the retail license applicable to such outlet has been suspended or revoked, or has expired.

12.4 All retail licenses issued or renewed under the provisions of West Virginia Code article 60-3A and these regulations shall expire and be of no further force or effect as of the July first, in the year 2000, prior to which time new retail licenses shall be issued by following the bidding and other procedures set forth in West Virginia Code article 60-3A and these regulations for the initial issuance of retail licenses.

§ 175-5-13. Commissioner's Reports to the Legislature. - Reserved for Future Use.

§ 175-5-14. Sale, Assignment or Transfer of Retail License.

14.1 No person may purchase or otherwise acquire a retail license unless the Commissioner has first approved of such person's qualifications to hold a retail license, which qualifications shall be the same as those required under West Virginia Code § 60-3A-8 and Section 175-5-8 of these regulations.

14.1.1 In no case may the holder of a Class A license sell one (1) or more authorized locations or in any way seek to divide a Class A license.

14.2 No person may sell, assign or otherwise transfer a retail license without the prior written approval of the Commissioner, which approval shall not be unreasonably withheld. For purposes of West Virginia Code § 60-3A-14 and this Section 175-5-14, the merger of a retail licensee or the sale of more than fifty percent (50%) of the outstanding stock of or partnership interests in the retail licensee shall be deemed to be a sale, assignment or transfer of a retail license under said Section 60-3A-14 and this Section 175-5-14.

§ 175-5-15. Surrender of Retail License.

Any retail licensee may surrender a retail license to the Commissioner at any time. The Commissioner shall then proceed to reissue the retail license by following the bidding and other procedures set forth in West Virginia Code article 60-3A and these regulations for the initial issuance of a retail license. There will be no pro rata return of the initial bid or of any annual license fee which has been paid the Commissioner.

§ 175-5-16. Restriction on Location of Retail Outlets.

No retail outlet may be located within the immediate vicinity of a school or church: Provided, That the provisions of West Virginia Code § 60-3A-16 and this Section 175-5-16 shall not apply to the location of a retail licensee who, on the date of the passage of the State Retail Liquor License Act (West Virginia Code article 60-3A), holds a license for the retail sale of wine, fortified wine or nonintoxicating beer at such location.

§ 175-5-17. Wholesale Prices Set by Commissioner; Continuation of Price Increases on Liquor; Retail Licensees to Purchase Liquor from State; Transportation and Storage; Method of Payment.

17.1 The Commissioner shall fix wholesale prices for the sale of alcoholic liquor to retail licensees. The Commissioner shall sell alcoholic liquor to retail licensees according to a uniform pricing schedule: Provided, That the Commissioner may also establish discount prices for the sale to retail licensees of alcoholic liquor in inventory at State liquor stores and agency stores, but such discount prices shall only be available to retail licensees who pick-up such alcoholic liquor at such stores. The Commissioner shall obtain if possible, upon request, any alcoholic liquor requested by a retail licensee.

17.1.1 Any alcoholic liquor picked up by a retail licensee from a State liquor store or agency prior to November 30, 1990 shall be discounted twenty percent (20%) from its wholesale catalog price as that price is defined in Administrative Rule 175-1-4.2.

17.2 On or before July 1, 1990, the Commissioner shall specify the maximum wholesale markup percentage which may be applied to the prices paid by the Commissioner for all alcoholic liquor in order to determine the prices at which all alcoholic liquor will be sold to retail licensees during the succeeding three (3) years.

17.2.1 Until July 1, 1993, the wholesale liquor mark-up used to calculate the uniform cost for alcoholic liquor charged to every retail licensee by the Commissioner will be twenty-five percent (25%). During the three (3)

year period ending July 1, 1993, price changes will only occur because of changes in the distillers' delivered price to the ABCC and the Federal Excise Tax. The sum of these two variables times 1.25 shall be the wholesale cost charged by the Commissioner to every retail liquor licensee. A shipping and handling charge of one dollar and five cents (\$1.05) per case delivered shall also be charged.

17.3 A retail licensee shall purchase all alcoholic liquor (other than wine) for resale in this State only from the Commissioner, and the provisions of West Virginia Code §§ 60-6-12 and 60-6-13 shall not apply to the transportation of such liquor: Provided, That a retail licensee shall purchase wine from a distributor thereof who is duly licensed under West Virginia Code article 60-8. All alcoholic liquor (other than wine) purchased by retail licensees shall be stored in the State at the retail outlet or outlets operated by the retail licensee. Fortified wines and cordials must be purchased only from the Commissioner.

§ 175-5-18. Days and Hours Retail Licensees May Sell Liquor.

Retail licensees may not sell liquor on Sundays, Christmas or any primary or general statewide election day, or between the hours of 10:00 p.m. and 8:00 a.m. on weekdays and Saturdays, wine and fortified wines may not be sold between 2:00 a.m. and 1:00 p.m. on Sundays or between 2:00 a.m. and 7:00 a.m. on weekdays or Saturdays.

18.1 For purpose of this section, "election day" shall mean only statewide primary election or general election days, and shall not mean any other State or local election day.

§ 175-5-19. Limitation on Amount to be Sold.

Not more than ten gallons of alcoholic liquor may be sold by a retail licensee to a person at one time without the approval of the Commissioner, but a sale in excess of ten gallons may be made to a religious organization purchasing wine for sacramental purposes. This section does not apply to purchases by private clubs as defined in West Virginia Code article 60-7.

§ 175-5-20. Nonapplication of Regulations to Retail Sales of Nonintoxicating Beer.

These regulations do not apply to retail sales of nonintoxicating beer and a retail licensee may sell nonintoxicating beer for consumption off the premises of any retail outlet operated by such retail licensee if such retail licensee has obtained the appropriate license to sell the same under West Virginia Code article 11-16. Beer which has an alcoholic content in excess of the limits set for nonintoxicating beer by West Virginia Code § 11-16-3 may be sold by a retail liquor licensee when such beer has been purchased from the ABCC.

§ 175-5-21. Tax on Purchases of Alcoholic Liquor.

21.1 For the purpose of providing financial assistance to and for the use and benefit of the various counties and municipalities of this State, there is levied by West Virginia Code § 60-3A-21 a tax upon all purchases of alcoholic

liquor from retail licensees. The tax so levied is five percent (5%) of the purchase price and must be added to all purchases from retail licenses and the tax must be collected with the purchase price by the retail licensee.

21.2 All such taxes shall be remitted to the Tax Commissioner who shall then deposit such taxes with the State Treasurer. All such taxes shall be distributed quarterly by the State Treasurer upon warrants of the Auditor payable to the counties and municipalities.

21.2.1 All such tax collected outside of a municipality but within one (1) mile of the corporate limits of any municipality shall be remitted to such municipality.

21.2.2 All other tax so collected shall be remitted to the county wherein collected:

21.2.2.1 Where the corporate limits of more than one (1) municipality are within one (1) mile of the place of collection of such tax, all such tax collected shall be divided equally among each of such municipalities.

21.2.2.2 Such mile is measured by the most direct hard surface road or access way usually and customarily used as ingress and egress to the place of tax collection.

§ 175-5-22. Requirement for Posting Informational Sign.

22.1 Each retail licensee shall post in an open and prominent place within each retail outlet operated by such person a blood-alcohol chart in the form prescribed by West Virginia Code § 60-6-24.

§ 175-5-23. Records Required of Retail Licensees; Inspection of Records.

23.1 Every retail licensee must keep a record in book form showing the date that all distilled spirits, wine and beer were received on his premises, and from whom received.

23.2 Every retail licensee shall also maintain records showing the merchandise code and quantity for each sale to a religious organization or to a private club as defined in West Virginia Code article 60-7.

23.2.1 In the case of sales to a private club, the club must be identified by name, address and ABCC license number, and the full name of the person receiving the order must be clearly listed.

23.3 Records required to be maintained by this Section 23 shall not be destroyed, erased or altered for at least four (4) complete calendar years or until the year the retail licensee is audited and accepted by the Department of Tax and Revenue.

§ 175-5-24. Unlawful Acts by Persons.

24.1 Any person under the age of twenty-one (21) years who, for the purpose of purchasing alcoholic liquor from a retail licensee, misrepresents his or her

age, or who for such purpose presents or offers any written evidence of age which is false, fraudulent or not actually his or her own, or who illegally attempts to purchase alcoholic liquor from a retail licensee, is guilty of a misdemeanor, and, upon conviction thereof, shall be fined in an amount not to exceed fifty dollars (\$50.00) or imprisoned in the county jail for a period not to exceed seventy-two (72) hours, or both fined and imprisoned, or, in lieu of such fine and imprisonment, may, for the first offense, be placed on probation for a period not exceeding one (1) year.

24.2 Any person who knowingly buys for, gives to or furnishes to anyone under the age of twenty-one (21) to whom he or she is not related by blood or marriage any alcoholic liquor from whatever source, is guilty of a misdemeanor and shall, upon conviction thereof, be fined in an amount not to exceed one hundred dollars (\$100.00) or imprisoned in the county jail for a period not to exceed ten (10) days, or both fined and imprisoned.

24.3 No person while on the premises of a retail outlet may consume alcoholic liquor or break the seal on any package or bottle of liquor. Any person who violates the provisions of West Virginia Code § 60-3A-24(c) and this Section 175-5-24.3 is guilty of a misdemeanor and shall, upon conviction thereof, be fined in an amount not to exceed one hundred dollars (\$100.00) or imprisoned in the county jail for a period not to exceed ten (10) days, or both fined and imprisoned.

§ 175-5-25. Certain Acts of Retail Licensees Prohibited; Criminal Penalties.

25.1 It is unlawful for any retail licensee, or agent or employee thereof, on such retail licensee's premises to:

25.1.1 Sell or offer for sale any alcoholic liquor other than from the original package or container;

25.1.2 Sell, give away, or permit the sale of, gift of, or the procurement of, any alcoholic liquor, for or to any person under the age of twenty-one (21);

25.1.3 Sell, give away, or permit the sale of, gift of, or the procurement of, any alcoholic liquor, for or to any person visibly intoxicated;

25.1.4 Sell or offer for sale any alcoholic liquor on any Sunday or other than during the hours permitted for the sale of alcoholic liquor by retail licensees as provided under West Virginia Code article 60-3A and these regulations;

25.1.5 Permit the consumption by any person of any alcoholic liquor;

25.1.6 With the intent to defraud, alter, change or misrepresent the quality, quantity or brand name of any alcoholic liquor;

25.1.7 Permit any person under eighteen (18) years of age to sell, furnish or give alcoholic liquor to any other person;

25.1.8 Purchase or otherwise obtain alcoholic liquor in any manner or from any source other than that specifically authorized in West Virginia Code article 60-3A and these regulations; or

25.1.9 Permit any person to break the seal on any package or bottle of alcoholic liquor.

25.2 Any person who violates any provision of West Virginia Code article 60-3A and these regulations, except West Virginia Code § 60-3A-23 and Section 175-5-23 of these regulations, including, but not limited to, any provision of West Virginia Code § 60-3A-25 and this Section 175-5-25, or any other rule promulgated by the Board or the Commissioner, or who makes any false statement concerning any material fact, or who omits any material fact with intent to deceive, in submitting an application for a retail license or for a renewal of a retail license or in any hearing concerning the suspension or revocation thereof, or who commits any of the acts declared in West Virginia Code article 60-3A and these regulations to be unlawful, is guilty of a misdemeanor, and shall, upon conviction thereof, for each offense be fined not less than one hundred dollars (\$100.00) or more than five thousand dollars (\$5,000.00), or imprisoned in the county jail for not less than thirty (30) days nor more than one (1) year, or both fined and imprisoned. Magistrates have concurrent jurisdiction with the circuit courts for offenses under West Virginia Code article 60-3A and these regulations.

25.3 Nothing in West Virginia Code article 60-3A or these regulations, or any other rule of the Board or Commissioner, prevents or prohibits any retail licensee from employing any person who is at least eighteen (18) years of age to serve in any retail licensee's lawful employment at any retail outlet operated by such retail licensee, or from having such person sell liquor under the provisions of West Virginia Code article § 60-3A and these regulations. With the prior approval of the Commissioner, a retail licensee may employ persons at any retail outlet operated by such retail licensee who are less than eighteen (18) years of age but at least sixteen (16) years of age, but such persons' duties shall not include the sale of liquor: Provided, That the authorization to employ such persons under the age of eighteen (18) years shall be clearly indicated on the retail license issued to any such retail licensee. Permission to employ persons who are sixteen (16) or seventeen (17) years of age must be sought on the application for license or on any annual license renewal form only and such approval will not be unreasonably withheld.

25.3.1 The age restrictions in Section 175-5-25.3 applies to minor children of the licensee.

§ 175-5-26. Civil Penalties.

26.1 Any retail licensee who violates any provision of West Virginia Code article 60-3A or these regulations or any other rule promulgated by the Board or Commissioner, may be assessed a civil penalty by the Commissioner, which penalty shall not be more than one thousand dollars (\$1,000.00) for each such violation. Each violation shall constitute a separate offense. In determining the amount of the penalty, the Commissioner shall consider the retail licensee's history of previous violations, the appropriateness of such penalty to the size of the business of the retail licensee charged, the gravity of the violation and the

demonstrated good faith of the retail licensee charged in attempting to achieve rapid compliance after notification of a violation.

26.2 A civil penalty shall be assessed by the Commissioner only after the Commissioner shall have given at least ten (10) days' notice to the retail licensee. Notice shall be in writing, shall state the reason for the proposed civil penalty and the amount thereof, and shall designate a time and place for a hearing where the retail licensee may show cause why the civil penalty should not be imposed. Notice shall be sent by certified mail to the address for which the retail license was issued. The retail licensee may, at the time designated for the hearing, produce evidence in his or her behalf and be represented by counsel.

26.3 The provisions West Virginia Code § 60-3A-28(b), (c), (d) and (e) and Section 175-5-28.2, 28.3, 28.4 and 28.5 of these regulations are applicable to any such hearing and with respect to judicial review thereafter.

§ 175-5-27. Suspension or Revocation of Retail License.

27.1 The Commissioner may, upon his or her own motion, or upon the sworn complaint of any person, conduct an investigation to determine if any provision of West Virginia Code article 60-3A, these regulations or of any other rule promulgated by the Board or Commissioner under authority of West Virginia Code article 60-3A has been violated by any retail licensee. The Commissioner may suspend or revoke a retail license if the retail licensee, or any employee thereof acting in the scope of his or her employment, has violated any such provision, and may suspend a retail license without hearing for a period not to exceed twenty (20) days if he or she finds probable cause to believe that the retail licensee, or any employee thereof acting in the scope of his or her employment, has willfully violated any such provision.

27.2 The Commissioner may revoke a retail license for any reason which would constitute grounds for the denial of an application filed pursuant to West Virginia Code § 60-3A-8.

§ 175-5-28. Notice of and Hearing on Revocation.

28.1 Before a retail license issued under the authority of West Virginia Code article 60-3A may be suspended for a period of more than twenty (20) days, or revoked, the Commissioner shall give at least ten (10) days notice to the retail licensee.

28.1.1 Notice shall be in writing, shall state the reason for suspension or revocation, and shall designate a time and place for a hearing where the retail licensee may show cause why the retail license should not be suspended or revoked.

28.1.2 Notice shall be sent by certified mail to the address for which the retail license was issued.

28.1.3 The retail licensee may, at the time designated for the hearing, produce evidence in his or her behalf and be represented by counsel.

28.2 Such hearing and the administrative procedures prior to, during and following the same, shall be governed by and in accordance with the provisions of West Virginia Code article 29A-5 in like manner as if the provisions of said Article 29A-5 were fully set forth in this section.

28.3 Any person adversely affected by an order entered following such hearing shall have the right of judicial review thereof in accordance with the provisions of West Virginia Code § 29A-5-4 with like effect as if the provisions of said Section 29A-5-4 were fully set forth in this section.

28.4 The judgment of a circuit court reviewing such order of the Commissioner shall be final unless reversed, vacated or modified on appeal to the Supreme Court of Appeals in accordance with the provisions of West Virginia Code § 29A-6-1.

28.5 Legal counsel and services for the Commissioner in all such proceedings in any circuit court and the Supreme Court of Appeals shall be provided by the Attorney General or his or her assistants and in any proceedings in any circuit court by the prosecuting attorney of that county as well, all without additional compensation.

28.6 Upon final revocation, the Commissioner shall proceed to reissue the retail license by following the procedures set forth in West Virginia Code article 60-3A and these regulations for the initial issuance of a retail license.

§ 175-5-28a. Notice of and Hearing on Boundary Disputes.

28a.1 Any retail licensee who disputes the placement of any part of the boundary which forms a part of the boundary of the market zone, or designated area within the market zone, within which the retail licensee's retail outlet is located may petition the Commissioner for a resolution of the dispute.

28a.1.1 The petition shall be in writing, and shall state the boundary in dispute, the grounds of the petition and all persons who may be affected by the Commissioner's decision.

28a.1.2 A copy of the petition shall be concurrently served upon all persons who may be affected by the Commissioner's decision and the petitioner shall verify under oath that such service has occurred.

28a.1.3 Within ten (10) days after receipt of the petition, the Commissioner shall schedule a hearing on the matter. At least twenty (20) days' notice of the hearing shall be provided to affected persons, such notice to be sent by Certified Mail, Return Receipt Requested to the addresses provided by the petitioner.

28a.2 Such hearing and the administrative procedures prior to, during and following the same, shall be governed by and in accordance with the provisions of West Virginia Code article 29A-5 in like manner as if the provisions of said Article 29A-5 were fully set forth in this section.

28a.3 Any person adversely affected by an order entered following such hearing shall have the right of judicial review thereof in accordance with the provisions of West Virginia Code § 29A-5-4 with like effect as if the provisions of said Section 29A-5-4 were fully set forth in this section.

28a.4 The judgment of a circuit court reviewing such order of the Commissioner shall be final unless reversed, vacated or modified on appeal to the Supreme Court of Appeals in accordance with the provisions of West Virginia Code § 29A-6-1.

28a.5 Legal counsel and services for the Commissioner in all such proceedings in any circuit court and the Supreme Court of Appeals shall be provided by the Attorney General or his or her assistants and in any proceedings in any circuit court by the prosecuting attorney of that county as well, all without additional compensation.

28a.5.1 Each party shall be responsible for his own legal representation.

§ 175-5-29. Disposition of Inventory upon Revocation or Surrender of Retail License.

In the event of the revocation or surrender of any retail license in accordance with the provisions of West Virginia Code article 60-3A and these regulations, the Commissioner shall purchase, and the retail licensee holding such retail license shall sell to the Commissioner, all of the alcoholic liquor inventory of such retail licensee based on the then current delivered cost to the retailer of such inventory less any expenses incurred by the Commissioner in connection with the repossession thereof. The Commissioner, before paying such net amount to such retail licensee, shall honor all liens and warrants issued by the Tax Commissioner pursuant to West Virginia Code article § 11-10 and shall then pay any remaining proceeds to the licensee.

§ 175-5-30. Employees of ABCC - Reserved for Future Use.

§ 175-5-31. Rules of Construction; Severability.

31.1 Nothing contained in West Virginia Code article 60-3A and these regulations shall be construed to modify the provisions of West Virginia Code article 60-5 relating to local option elections, except that the references to sales of alcoholic liquor by the Commissioner shall be deemed to refer to sales of alcoholic liquor by retail licensees.

31.2 If any section, subsection, subdivision, provision, clause or phrase of West Virginia Code article 60-3A and these regulations, or the application thereof, to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other sections, subsections, subdivisions, provisions, clauses or phrases or applications of these regulations, and to this end each and every section, subsection, subdivision, provision, clause and phrase of Article 60-3A and these regulations is declared to be severable.

31.3 The provisions of West Virginia Code § 60-3A-31(b) and Section 175-5-31.2 of these regulations shall be fully applicable to all future amendments or additions to this West Virginia Code article 60-3A and these regulations, with like effect as if the provisions of said sections were set forth in extenso in every such amendment or addition and were reenacted as a part thereof.

31.4 In the event of any conflict between any provision of West Virginia Code article 60-3A and any other provision of the Code, any such other provision shall be construed and applied so as to enable the Board and Commissioner to implement and make effective the provisions of said Article 60-3A.

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
Deputy Secretary of State

CATHERINE FREROTTE
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STATE OF WEST VIRGINIA
SECRETARY OF STATE
Charleston 25305

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Special Assistant

(Plus all the volunteer
help we can get)

August 6, 1990

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Alcohol Beverage Control Commissioner

RULE: New Rule, Series 5; Licensing of Retail Liquor Stores

DATE FILED AS AN EMERGENCY RULE: June 25, 1990

DECISION NO. 23-90

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be approved. A copy of the complete decision with required findings is available from this office.

A handwritten signature in cursive script that reads "Ken Hechler".

KEN HECHLER
Secretary of State

FILED
KCO AUG - 6 PM 4:30
CLERK OF COURTS
DEPT. OF STATE

KEN HECHLER
Secretary of State

MARY P. RATLIFF
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(Plus all the volunteer
help we can get)

DECISION EMERGENCY RULE DECISION (ERD 23-90)

AGENCY: Alcohol Beverage Control Commissioner
RULE: New Rule, Series 5, Licensing of Retail Liquor Stores
FILED AS AN EMERGENCY RULE: June 25, 1990

- par. 1 The Alcohol Beverage Control Commissioner (ABCC) has filed the new rule as an emergency.
- par. 2 West Virginia Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [29A-3-15a(a)].
- par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The ABCC filed this emergency rule with supporting documents with the Secretary of State on June 25, 1990 and with the LRMRC on June 25, 1990.

par. 7 It is the determination of the Secretary of State that the ABCC has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- WV Code §60-2-16 reads:

The commission (Commissioner) shall have the power to prescribe rules and regulations to give effect to the powers invested in it (him) by this chapter. Rules and regulations shall be recorded in a book especially kept for that purpose, and in its (his) discretion may be published for general circulation. All other records and entries necessary to show the official conduct of the commission (Commissioner) shall be preserved and shall be public records and open for inspection during business hours.

par. 9 §60-3A-6 of the WV Code further states in part:

(b) The commissioner shall:

(1) Prescribe application forms for persons desiring to acquire retail licenses and adopt an orderly procedure and timetable for investigating, processing and approving applications;

(2) Develop a form of retail license to be issued to each retail licensee under the provisions of this article;

(3) Disseminate to the public information relating to the issuance of retail licenses;

(4) Promulgate standards for advertising the sale, availability, price and selection of liquor;

(5) Enforce the provisions of this article;

(6) Impose civil penalties upon retail licensees;

(7) Enter the retail outlet of any retail licensee at reasonable times for the purpose of inspecting the same, and determining the compliance of such retail licensee with the provisions of this article and any rules promulgated by the board or the commissioner pursuant to the provisions of this article; and

(8) Issue subpoenas and subpoenas duces tecum for the purpose of conducting hearings under the provisions of §60-3A-26 or §60-3A-28 of this article, which subpoenas and subpoenas duces tecum shall be issued in the time, for the fees and shall be enforced in the manner specified in §29A-5-1 of this code with like effect as if such one was set forth in extenso herein.

(c) The board and commissioner shall each:

(1) Engage accounting, legal and other necessary professional consultants to assist them in carrying out their respective duties under this article; and

(2) Adopt, amend, or repeal such procedural, interpretive and legislative rules, consistent with the policy and objectives of this article, as they may deem necessary or desirable for the public interest in carrying out the provisions of this article. Such rules shall be adopted, amended and repealed in accordance with the provisions of §29-1-1 et seq. of this code.

par. 10 It is the determination of the Secretary of State that the ABCC has not exceeded its statutory authority in promulgating this emergency rule.

par. 11 (C) Emergency: WV Code 29A-3-15(g) defines "emergency" as follows:

(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

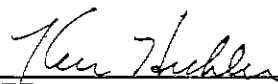
par. 12 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 13 The facts and circumstances as presented by the ABCC are as follows:

With the passage of S.B. 337, the Legislature authorized the establishment of retail liquor stores by enacting West Virginia Code Article 60-3A. Section 60-3A-17, the Alcohol Beverage Control Commissioner is required to establish by July 1, 1990, the maximum wholesale mark-up percentage to be applied to prices paid by the ABCC and which will determine the prices of liquor sold to retail stores. These regulations are necessary to establish the wholesale mark-up percentage and to provide appropriate guidance for the license bidding procedure.

par. 14 It is the determination of the Secretary of State that this proposal qualifies under the definition of emergency for "time limitation".

par. 15 This decision shall be cited as Emergency Rule Decision 23-90 or ERD 23-90 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the Alcohol Beverage Control Commissioner, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER
SECRETARY OF STATE

Entered _____

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SECRETARY OF STATE