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SECRETARY OF STATE

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October 8, 2009

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Alcohol Beverage Control Commission

RULE: Amendment, 175CSR5, Licensing of Retail Outlets

DATE FILED AS AN EMERGENCY RULE: August 31, 2009

DECISION NO. 26-09

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

A handwritten signature in cursive script, appearing to read "Natalie E. Tennant", written over a horizontal line.

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 26-09)

AGENCY: Alcohol Beverage Control Commission
RULE: Amendment, 175CSR5, Licensing of Retail Outlets
FILED AS AN EMERGENCY RULE: August 31, 2009

- par. 1 The Alcohol Beverage Control Commission (ABCC) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 W. Va. 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].
- par. 4 (A) Procedural Compliance: W. Va. 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 August 31, 2009 and with the LRMRC August 31, 2009.
- par. 7 It is the determination of the Secretary of State that the ABCC has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority – W. Va. Code §60-3A-6(b)(3) reads:
- 3) Notwithstanding any other provision of this code to the contrary, proposed legislative rules for this article filed in the State Register by September 1, 2009, may be filed as emergency rules. Such emergency rules shall include the standards, criteria and formulae or methodology utilized by the board when establishing the minimum bid for each license pursuant to section ten-b of this article.***

par. 9 It is the determination of the Secretary of State that the ABCC has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency – W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) 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. 11 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. 12 The facts and circumstances as presented by the ABCC are as follows:

175 CSR I and 175 CSR 5 fail to contemplate bidding licenses for any 10 year period beyond the year 2000, and certain licensed retailer operations in 175 CSR I must be revised, such as: (1) computer requirements; (2) web, phone and fax ordering; (3) minimum case ordering; (4) delivery/pick up requirements; (5) electronic payment and pricing; and (6) additional clean up language since the last time the rule was edited due to changes in the law or typographical errors in the rule. W.Va. Code §60-3a-6(c)(3) provides for the emergency status of this rule. Furthermore, the rule warrants emergency status along with 175 CSR 5 in order for the state to: (1) properly provide purchase options and bid the 10 year licenses for the retail sale of liquor; (2) ensure the continued supply and sales of liquor; (3) prevent any harm to the public and licensed retailers that could result from not issuing licenses; (4) permit the Commissioner to perform his statutory duties and responsibilities; and (5) modernize the processes for liquor ordering, payment and delivery. Thus, the granting of emergency status to this rule prevents any public harm that could result from the unavailability of Licensed retailers to sell liquor in West Virginia and further prevent ss of rev flue to the State.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "time limitation"

par. 14

This decision shall be cited as Emergency Rule Decision 26-09 or ERD 26-09 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Alcohol Beverage Control Commission, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

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