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December 14, 1994

OFFICE OF THE SECRETARY OF STATE

Dec 14 4 07 PM '94

FILED

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

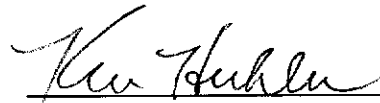
AGENCY: Division of Highways

RULE: Amendment, Series 2, Acquisition, Disposal, Lease and Management of Real Property and Appurtenant Structures and Relocation Assistance

DATE FILED AS AN EMERGENCY RULE: November 2, 1994

DECISION NO. 19-94

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


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**EMERGENCY RULE DECISION
(ERD 19-94)**

AGENCY: Division of Highways
RULE: Amendments, Series 2, Acquisition, Disposal, Lease and Management of Real Property and Appurtenant Structures and Relocation Assistance

FILED AS AN EMERGENCY RULE: November 2, 1994

- par. 1 The Division of Highways (Division) has filed the above amendments to an existing 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(b))].
- 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 thirty-five day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Division filed this emergency rule with supporting documents with the Secretary of State November 2, 1994 and with the LRMRC November 2, 1994.

par. 7 It is the determination of the Secretary of State that the Division 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 §17-2A-19 reads in part:

The commissioner shall adopt and promulgate rules in accordance with the provisions of §29A-3-1 et seq. of the code governing and controlling the making of any leases or sales pursuant to the provisions of this section, which rules may provide for the giving of preferential treatment in making leases to the persons from whom the properties or rights or interests therein were acquired or their heirs or assigns and shall also provide for granting a right of first refusal to abutting landowners at fair market value in the sale of any real estate or any interest or right therein owned by the division of highways

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

par. 10 (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. 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 Division are as follows:

The WV Legislature's passage of HR 4339 mandated revisions to the WV Division of Highways' procedures for disposal of excess right-of-way. The revisions prescribed in the referenced bill became effective July 1, 1994. Therefore, the purpose of this filing is to change the subject rules to comply with the time limitations imposed by HR 4339.

The required rule changes relate to the disposition of excess highway right-of-way. Prior to these changes, sale of the excess right-of-way to the principal abutting landowners was only permitted with respect to former railroad and former turnpike rights-of-way owned by the West Virginia Division of Highways. However, after July 1, 1994, the Division of Highways, must first offer any excess right-of-way for sale to principal abutting landowners.

par. 13 It is the determination of the Secretary of State that the Division has not provided with any substantial evidence that this proposal is an emergency; therefore, this proposal **does not qualify** under the definition of an emergency as defined in §29A-3-15(g).

par. 14 This decision shall be cited as Emergency Rule Decision 19-94 or ERD 19-94 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Division of Highways, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER
Secretary of State

Entered _____

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

DEC 14 4 07 PM 1994

FILED