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WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

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October 16, 2000

NOTICE OF ACTION TAKEN BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register

TO: Norman Roush
Highways, Division of
Capitol Complex
Building 5, Room A-164

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Regulations Relating to Use of State Road Rights of Way and Areas Adjacent Thereto, 157CSR6**

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

- 1. Authorize the agency to promulgate the Legislative rule
 - (a) as originally filed _____
 - (b) as modified by the agency ✓
- 2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached. _____
- 3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached. _____
- 4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached. _____
- 5. Recommends that the Legislative rule be withdrawn; a statement of reasons for such recommendation is attached. _____

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: Department of Transportation, Division of Highways
Subject: Use of State Road Rights of Way and Adjacent Areas,
157CSR6
Counsel: Rita A. Pauley
Date: October 6, 2000

OFFICE OF THE SECRETARY OF STATE
OCT 11 8 30 AM '00
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PERTINENT DATES

Filed for public comment: July 14, 2000
Public comment period ended: August 14, 2000
Filed following public comment period: August 23, 2000
Filed LRMRC: August 23, 2000
Filed as emergency:

Fiscal Impact: The agency anticipates a \$5 million increase in annual costs to the agency. This expenditure will be for the relocation utility lines. This change was required under House Bill No.4049.

ABSTRACT

This is an existing rule which covers the various uses of state roads rights-of-way and adjacent areas. The rule covers such things as issuance of permits for the use of highway rights-of-way, permits for making openings or placing structures upon or along over or under state roads, removal of obstructions from state roadways, construction of driveways on state rights-of-way, advertising along rights of way, licensing of salvage yards and placing roadside memorial markers.

The proposed amendments to this rule are being filed in response to House Bill No. 4049 and House Bill No. 4063 passed during the 2000 Legislative Session. House Bill No. 4049 shifted the responsibility for the cost of relocating public utility lines located within state road rights of way from the utility companies to the division of highways when the utility lines must be moved as a result of highway construction. House Bill No. 4063 authorized

the placement of memorial markers or other tributes within highway rights-of-way to memorialize people who have died as a result of traffic accidents. A third bill, Senate Bill No. 427, also affects part of the rule dealing with salvage yards. Some changes need to be made to the rule to reflect the requirements of the Waste Tire Management Act passed during the 2000 Legislative Session. The majority of the changes made to the rule are stylistic in nature to bring the rule into conformity with the requirement of the Secretary of State's office and the LRMRC.

The proposed rule amends a current legislative rule. The following is a synopsis of the substantive amendments.

Section 2 contains definitions. New definitions have been added including authorization number, commissioner, division and memorial marker.

Subsection 3.8 dealing with utility installations has been amended to provide for reimbursement of public utilities by the division of highways for relocation costs incurred when highway's projects require the utility lines to be moved. Reimbursable relocation costs include such things as the amount paid by the public utility to relocate the lines after deducting any increase in value and any salvage value. In general, projects performed by the Division of Highways or authorized by the Division which alter the function of the highway involved are considered eligible for reimbursement expenses. This included such things as new highways, highway realignments, certain landslide corrections, intersection improvements and bridge replacements and major bridge renovations.

Section 9 roadside memorials is new. This section provides guidance for the placement of memorial markers within rights-of-way of state highways. The intent of this section is to effectuate House Bill No. 4063. The rule authorizes temporary memorial markers. These temporary markers are described as that normally used at funerals and at graveside ceremonies. This would limit the use of memorials to fresh flowers; it would prohibit artificial arrangements, wooden crosses and things of that nature. Prior to putting a memorial marker in a right-of-way, the family must register with the division of highways and be authorized to put up a marker. The statute does not specifically authorize the registration requirement. The memorial markers may not be placed in highway medians, on any bridge, attached to trees, fences,

signs, signals, or utility poles. This would appear to require the markers to be free standing and self-supporting. The rule does provide that permanent markers may be used if a formal permit is obtained from the Division of Highways. The Division of Highways has reserved the right to remove memorial markers without notice when it is necessary for construction, maintenance or safety along a highway.

AUTHORITY

Statutory authority: W.Va. Code, §17-2A-8, which provides, in part, as follows:

In addition to all other duties, powers and responsibilities given and assigned to the commissioner in this chapter, the commissioner may:

(24) Make and promulgate rules and regulations for the government and conduct of personnel, for the orderly and efficient administration and supervision of the state road program and for the effective and expeditious performance and discharge of the duties and responsibilities placed upon him or her by law;

ANALYSIS

I. **HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?**

Yes.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

No. According to Delegate Flanigan, the intent of the legislation was to allow the placement of memorial markers in a safe manner without being burdensome to the families.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

No.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

Yes.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

Yes.

VIII. OTHER.

Counsel has suggested technical modifications.