

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

Do Not Mark In this Box

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE July 14, 1989
ADMINISTRATIVE LAW DIVISION

NOTICE OF AN EMERGENCY RULE

AGENCY: Department of Transportation, Div. of Highways TITLE NUMBER: 157

CITE AUTHORITY: WV Code §17-1-2A-4-16-22 and 23

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES X, NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: VI

TITLE OF RULE BEING AMENDED: Regulations Relating to Use of

State Road Rights of Way and Areas Adjacent Thereto

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY:

TITLE OF RULE BEING FILED AS AN EMERGENCY:

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

The circumstances for filing this Emergency Rule stem from the decision made by Judge John R. Frazier, Circuit Court of Mercer County, West Virginia, in Civil Action 87-C-355-F on June 30, 1989. As stated in the Second Supplemental Order of the June 30, 1989 proceedings by the Court, "The Court specifically finds that its earlier rulings regarding the partial unconstitutionality of the existing rules and regulations constitute the facts and circumstances of the emergency required to be stated in filing the emergency rules, as set forth in the aforesaid W.Va. Code §29A-3-15."

The Court also ruled that these revisions be filed forthwith by the Commissioner of Highways as proposed emergency rules with your office as well as with the Legislative Rule Making Review Committee. A copy of the June 30, 1989 Second Supplemental Order of the referenced case is attached.

Also, this filing is being made in order to recognize revisions to Chapter 17, Article 23, Sections 2, 4 and 8 as amended and reenacted by House Bill No. 3146, passed March 12, 1988 and effective June 10, 1988. The amendments

Use Additional Sheets If Necessary.

ADDITIONAL SHEET ATTACHED

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #2

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1989 JUL 14 PM 4:22

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Dept. of Transportation, Division of Highways TITLE NUMBER: 157

RULE TYPE: Legislative; CITE AUTHORITY 17-1-2A-4-16-22 & 23

AMENDMENT TO AN EXISTING RULE: YES X NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: VI

TITLE OF RULE BEING AMENDED: Regulations Relating to Use of State

Road Rights of Way and Areas Adjacent Thereto

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON August 13, 1989 AT 12:00 P.M.

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Mr. C. Cameron Lewis

Division of Highways

State Capitol Complex

Building Five

Charleston, WV 25305

THE ISSUES TO BE HEARD SHALL BE
LIMITED TO THIS PROPOSED RULE.



Fred VanKirk

Acting Division Administrator - State Highway Engineer

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL



FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE July 14, 1989
ADMINISTRATIVE LAW DIVISION

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

State Capitol Complex
Building Five
Charleston, West Virginia 25305

GASTON CAPERTON
GOVERNOR

FRED VANKIRK
ACTING COMMISSIONER
STATE HIGHWAY ENGINEER

July 14, 1989

Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, West Virginia 25305

Dear Secretary Hechler:

Legislative Rules
Highways Commissioner
Notice of an Emergency Rule
Series VI

The Notice of an Emergency Rule filed with your office on December 14, 1988 is hereby withdrawn. The revisions of this filing have been combined with an Emergency Rule filing submitted to your office on July 14, 1989. The public hearing for the December 14, 1988 filing was held on February 8, 1989 and the comments of that hearing as well as the comments received from the July 14, 1989 submission will be combined and addressed upon submission of the Agency Approved filing on this series.

Very truly yours,

A handwritten signature in cursive script that reads "Fred VanKirk".

Fred VanKirk
Acting Commissioner-
State Highway Engineer

FBK:c
Attachment

NOTICE OF AN EMERGENCY RULE
Department of Highways
Series VI

address changes in the provisions for the licensing and maintaining of salvage yards. However, these changes will not apply if the salvage yard was licensed prior to June 12, 1988.

Notable changes made to Series VI, Section 7 are as follows: the definition of "Unzoned Commercial or Industrial Area" now specifies "viable" commercial or industrial activities; also, seven qualifications for identifying unzoned commercial or industrial areas have been added, while three qualifications have been added to the listing of circumstances which shall not be considered commercial or industrial activity.

Additionally, Section 7.5, Permits Required has been supplemented with information addressing the Division of Highways' internal processing of an Outdoor Advertising Permit Application. This processing includes: the assignment of an application number, notification to the applicant and local public advertisement of same; the submission of comments, request for public hearing and the Division's decision to approve, deny or hold a hearing; the Division's notification of hearing to the requestor, applicant and public; the provisions for determining hearing costs and application of the costs to the party of bad faith; and finally, the right to judicial review by the adversely affected party of the final decision.

Notable changes made to Series VI, Section 8 are as follows: definitions for abandoned salvage yards, residential community, and occupied private residence have been added, while the definition of a salvage yard has been revised to exclude garbage dumps and sanitary landfills. Additionally, changes to the application for license have been made as follows: an annual license fee of \$200.00 is now specified; and the prerequisite of obtaining a permit from the County Planning Commission prior to establishing a salvage yard after July 1, 1984 has been included.

Also, distance restrictions from the edge of roadway for expressway, trunkline, feeder, state and local service roads and from single occupied private residences as well as occupied private residences which are a part of a residential community are prescribed for salvage yards licensed after June 12, 1988. A certified survey showing the distance to the nearest occupied residence, if within 1,000 feet, or the distance to the nearest occupied residence of a community, if within 5,000 feet, must accompany salvage yard applications after June 12, 1988.

Finally, all County Planning Commissions, or in their absence an appropriate office or agency, shall promulgate rules that conform with these rules and regulations before a permit may be issued after June 12, 1988. These rules must at least address the determination of the effect of proposed salvage yards on residential, business or commercial property investment and values, establish a quota for the number of yards in the county and the social, economic, and environmental impact on community growth and development in specified areas before issuing the commission's approval of a request for a salvage yard.

Date: July 14, 1989



Fred VanKirk, Acting Division Administrator-
State Highway Engineer

FISCAL NOTE FOR PROPOSED RULES

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE July 14, 1989
ADMINISTRATIVE LAW DIVISION

Rule Title: Series VI, Regulations Relating to Use of State Road
Rights of Way and Areas Adjacent Thereto

Type of Rule: X Legislative Interpretive Procedural

Agency Division of Highways Address State Capitol Complex, Building 5,
Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Personal Services	\$11,000			\$11,000	\$11,000
Current Expense				unchanged	unchanged
Repairs & Alterations				unchanged	unchanged
Equipment				unchanged	unchanged
Other Advertising & Public Hearing	\$5,500			\$5,500	\$5,500
Estimated Total Cost	\$16,500			\$16,500	\$16,500

2. Explanation of above estimates:

The cost estimates are based on the estimated number of permit locations to be submitted in a year which is 275. The estimate of 20% as to the required public hearings as based on the number of inquiries on permits that have been submitted this year would equal 55. The estimated cost per hearing is \$300.00 which does not include the undetermined amount of cost for DOT Personnel.

3. Objectives of this rule:

This filing of an Emergency Amendment to an Emergency Rule is being made in order to comply with the decision made by Judge John R. Frazier, Circuit Court of Mercer County, West Virginia, in Civil Action 87-C-355-F on June 30, 1989. The revisions address changes to the "Rules and Regulations for Outdoor Advertising on the State Highway System" as presented in the subject Series VI, Legislative Rules.

Notable changes made to Series VI, Section 7 are as follows: the definition of "Unzoned Commercial or Industrial Area" now specifies "viable" commercial or industrial activities; also, seven qualifications for identifying unzoned commercial or industrial areas have been added, while three qualifications have been added to the listing of circumstances which shall not be considered commercial or industrial activity.

Additionally, Section 7.5, Permits Required has been supplemented with information addressing the Division of Highways' internal processing of an Outdoor Advertising Permit Application. This processing includes: the assignment of an application number, notification to the applicant and local public advertisement of same; the submission of comments, request for public hearing and the Division's decision to approve, deny or hold a hearing; the Division's notification of hearing to the requestor, applicant and public; the provisions for determining hearing costs and application of the costs to the party of bad faith; and finally, the right to judicial review by the adversely affected party of the final decision.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

The person who files the permit application would have to bear the burden of the expense of advertising in the paper and also the expense of a public hearing if so required.

C. Economic Impact on Citizens/Public at Large.

None.

Date July 14, 1989



Fred VanKirk

DATE:

July 14, 1989

TO:

LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM:

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
DIVISION OF HIGHWAYS

PROPOSED RULE TITLE: Regulations Relating to Use of State Road Rights
of Way and Areas Adjacent Thereto

SUMMARY OF RULE CONTENT - This series of regulations was promulgated in order to establish general rules pertaining to the use of state road rights of way and adjacent areas within the provisions of Chapter 17, Articles 1, 2A, 4, 16, 22 and 23 of the Code. The items addressed include: the purpose, and process of issuing permits for the use of state road rights of way; the rules for issuing permits for making openings or placing structures, in, upon, along, over, under and across state roads; the procedures for removing obstructions from roadways; references to the "Manual for Constructing Driveways on State Highway Rights-of-Way; the rules and regulations for outdoor advertising on the state highway system; and the rules and regulations for controlling and licensing salvage yards.

STATEMENT OF CIRCUMSTANCES REQUIRING CHANGES TO THE RULE - The circumstances for filing this Emergency Amendment stem from the decision made by Judge John R. Frazier, Circuit Court of Mercer County, West Virginia, in Civil Action 87-C-355-F on June 30, 1989. As stated in the Second Supplemental Order of the June 30, 1989 proceedings by the Court, "The Court specifically finds that its earlier rulings regarding the partial unconstitutionality of the existing rules and regulations constitute the facts and circumstances of the emergency required to be stated in filing the emergency rules, as set forth in the aforesaid W.Va. Code §29A-3-15.

The Court also ruled that these revisions be filed forthwith by the Commissioner of Highways as proposed emergency rules with your office as well as with the Legislative Rule Making Review Committee. A copy of the June 30, 1989 Second Supplemental Order of the referenced case is attached.

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Additionally, Section 7.5, Permits Required has been supplemented with information addressing the Division of Highways' internal processing of an Outdoor Advertising Permit Application.

This processing includes: the assignment of an application number, notification to the applicant and local public advertisement of same; the submission of comments, request for public hearing and the Division's decision to approve, deny or hold a hearing; the Division's notification of hearing to the requestor, applicant and public; the provisions for determining hearing costs and application of the costs to the party of bad faith; and finally, the right to judicial review by the adversely affected party of the final decision.

As a final note, in accordance with the Governor's reorganization plan, all references to the Department of Highways have been changed to "Division of Highways" and all references to the Commissioner have been changed to "Division Administrator". These changes are considered non-substantive and will be applied throughout the agency approved rule upon it's filing, unless otherwise directed.

FILING OF ADMINISTRATIVE LEGISLATIVE REGULATIONS

BY THE

DEPARTMENT OF TRANSPORTATION
DIVISION OF HIGHWAYS

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EMERGENCY

WEST VIRGINIA ADMINISTRATIVE REGULATIONS

DEPARTMENT OF TRANSPORTATION
DIVISION OF HIGHWAYS ADMINISTRATOR

CHAPTER 17-2A

SERIES VI

FILED IN THE OFFICE OF
THE SECRETARY OF STATE

THIS DATE July 14, 1989
ADMINISTRATIVE LAW DIVISION

Subject: Regulations Relating to Use of State Road Rights of
Way and Areas Adjacent Thereto

Section 1/ General

1.01/ Scope. -- These ~~interpretive~~ legislative regulations establish general rules pertaining to the use of state road rights of way and adjacent areas.

1.02/ Authority. -- These rules and regulations are issued under authority of West Virginia Code, Chapter 17, Articles 1, 2A, 4, 16, 22, and 23.

1.03/ Filing Date. -- July 14, 1989

1.04/ Effective Date. -- July 14, 1989

Section 2/ Definitions

2.01/ Road; Public Road; Highway. -- Within the meaning of these rules and regulations the words or terms "road", "public road", or "highway" shall be deemed to include, but shall not be limited to, the right of way, roadbed and all necessary culverts, sluices, drains, ditches, waterways, embankments, slopes, retaining walls, bridges, tunnels, and viaducts necessary for the maintenance of travel, dispatch of freight and communication between individuals and communities; and such public road or highway shall be taken to include any road to which the public has access and which it is not denied the right to use, or any road or way leading from any other public road over the land of another person, and which shall have been established pursuant to law, (Reference, Chapter 17, Article 1, Section 3, Code.)

EMERGENCY

Department of Highways
Adm. Reg. 17-2A
Series VI, Sec. 3

Section 3/ Use of Right of Way; Permits

3.01/ Purpose. -- The purpose of these regulations is to establish rules governing the making of openings or placing of structures, in, along, over, under or across State roads and highway and the issuance of permits for such purposes. (Code, WV, Chapter 17, Article 16, Section 6.)

3.02/ Entrances from Residence Properties, Industrial or Business Establishments. -- All entrances to any state road, whether from a residence, industrial or business property, shall be constructed in accordance with the "Manual on Rules and Regulations for Constructing Driveways on State Highway Right of Way", prepared by the Traffic Engineering Division of the Department of Highways, dated March 1970, and filed in the Office of the Executive Secretary of the Department of Highways, and all amendments thereto hereinafter duly adopted and filed in said Office. All such entrances shall be adequately drained and properly stablized. (Code, WV, Chapter 17, Article 4, Sections 47 thru 52.) (Code, WV, Chapter 17, Article 2A, Section 12.)

3.03/ School Bus Shelters. -- All school bus shelters shall be constructed in accordance with plans approved by the Department of Highways Commissioner, and when so constructed, such shelters may be constructed within the right of way limits at such locations as the Department of Highways' Commissioner may direct. All affected shoulder areas shall be properly stablized.

3.04/ Overhead Structures. --

 (1)3.4.1 Expressway, Trunkline and Feeder Roads - All overhead structures constructed over expressway, trunkline and feeder roads, such as grade separations, wire structures, coal tipples, conveyors, etc., must be constructed so as to provide a minimum vertical clearance of 18 feet over the entire width of the roadway, including shoulders, and a minimum horizontal clearance of 10 feet on either side of the pavement edges and in no instance shall the total horizontal clearance be less than 40 feet at right angles to the centerline of the highway. In cases where proposed construction or reconstruction plans require greater horizontal clearances, such clearances must be provided.

EMERGENCY

Department of Highways
Adm. Reg. 17-2A
Series VI, Sec. 3.4.2

(2)3.4.2 State Local Service Roads - The minimum vertical clearances over state local service roads shall be 18 feet for the entire width of the roadway, including shoulders, and the minimum horizontal clearance shall be 8 feet on either side of the pavement edges, and in no instance shall the total horizontal clearance be less than 30 feet at right angles to the centerline of the road. In cases where proposed construction or reconstruction plans require greater horizontal clearances, such clearances must be provided.

Provided, however, that in the event of conflict between the provisions of Sections (1) and (2) above, and the terms of deeds conveying real estate to the Department of Highways, the latter shall control.

(2)3.4.3 Coal Tipples, Conveyors, etc. - All coal tipples or conveyors carrying or transporting loose material must be adequately encased within the limits of the highway right of way and a sufficient distance on either side of the highway right of way to properly protect the traveling public or other highway users.

(4)3.4.4 Construction Plans Submitted with Application - All applications for permits covering such construction must be accompanied with a plan in sufficient detail that a complete structural analysis may be made by the Commissioner.

3.05/ Underpass Structures. -- All underpass structures, such as tunnels, coal mine haulways, airways, etc., constructed under state highways, must be constructed so as to properly support and otherwise protect the highway.

(1)3.5.1 Length - All such structures constructed at or near the grade of an existing highway must be of sufficient length to conform to the existing width of the roadway or any existing proposed roadway construction or reconstruction plans.

(2)3.5.2 Pedestrians - If necessary, such structures shall be provided with sidewalks to properly accomodate pedestrian traffic along the highway.

(2)3.5.3 Construction Plans Submitted with Application - All applications for permits covering such construction must be accompanied with a plan in sufficient detail that a complete structural analysis may be made by the Commissioner.

EMERGENCY

Department of Highways
Adm. Reg. 17-2A
Series VI, Sec. 3.6

3.06/ Subsurface Mining. -- A permit must be obtained from the Department of Highways for all subsurface mining being carried on or to be carried on under any state highway.

(1)3.6.1 Conditions - The individual or company doing the mining shall carry on the operation so as to properly protect the highway from damage, and in the event damage to the highway does occur, the individual or company doing the mining shall either restore the highway at his or its own expense in a manner satisfactory to the Department of Highways or reimburse the Department of Highways for the actual expense that may be incurred in restoring the highway.

(2)3.6.2 Maps - All applications for permits covering subsurface mining shall be accompanied with a map showing the position of the coal seam or other mineral or minerals proposed to be mined, horizontally and vertically with relation to the highway.

3.07/ Seismic Surveys. -- The Commissioner's Department of Highways seismic surveys, for the location of oil or gas deposits, to be conducted on state roadways upon compliance with the following conditions.

(1)3.7.1 The work shall be performed when the ground is dry. Test holes shall not be larger than six (6) inches in diameter. Shot points shall be located at a safe distance from culverts, bridges and pavements, so as not to cause damage thereto. Shots shall not be in proximity to public or private buildings, and shall be so placed as to avoid disturbance to domestic water supplies. Upon completion of the work, ditches shall be restored and shoulders reshaped to the satisfaction of the District Engineer. Drill holes shall be plugged with concrete at a depth of thirty (30) inches below ground level.

3.08/ Utility Installations. -- All individually, publicly, and privately owned utilities, including, but not limited to, electric, communication, gas, oil, petroleum products, chemical, water, steam, sewage, drainage, and similar facilities that are to be accommodated, adjusted or relocated within State highway right-of-way, shall be in accordance with the current manual, "Accommodation of Utilities on Highway Right of Way" filed with the Secretary of State on February 4, 1982 and made a part of these regulations.

3.09/ Railway Grade Crossings. -- All railway grade crossings of any state highway shall be constructed and maintained in accordance with the following requirements:

EMERGENCY

Department of Highways
Adm. Reg. 17-2A
Series VI, Sec. 3.9.1

(1)3.9.1 Conformity to Grade - All railway grade crossings must be constructed so as to conform to the grade of the highway involved. If necessary, in order to obtain proper conforming grades and alignment, the railway company shall be required at its own expense to relocate and reconstruct the section of the road affected in accordance with existing standards.

(2)3.9.2 Spur Tracks - Spur tracks should not be super-elevated across the highway.

(3)3.9.3 High Speed Tracks - High speed tracks shall be so located as to cross the highway on a track tangent or slight curve in order to eliminate or cause minimum track superelevation.

(4)3.9.4 Crossing at Right Angles - All tracks shall cross the highway as near to a right angle as feasible.

(5)3.9.5 Rail Elevation - The top of rail elevation shall conform to the highway surface elevation or, highway approach grades conforming to current standards shall be provided. After the track is placed, the top of rail elevation shall not be altered by the railway company without prior approval of the change in elevation by the Commissioner.

(6)3.9.6 Type of Pavement - The type of pavement on crossings shall be of a high-type surface or other semi-permanent material as specified by the Commissioner of the Department of Highways based on the type and volume of highway and rail traffic.

(7)3.9.7 Width of Surface - The width of the crossing surface shall be in accordance with standards promulgated by the Commissioner of the Department of Highways.

(8)3.9.8 Maintenance - The railway company roadbed and crossing shall be maintained by the railway company in a condition acceptable to the Commissioner of the Department of Highways.

(9)3.9.9 Traffic Control Devices - As a minimum, the railway company shall install and maintain crossbuck signs in accordance with the "Manual on Uniform Traffic Control Devices for Streets and Highways." (Code, WV, Chapter 17, Article 3, Section 1.)

EMERGENCY

Department of Highways
Adm. Reg. 17-2A
Series VI, Sec. 3.9.9

Where a track is being constructed across any state highway, the Commissioner of the Department of Highways may require that the railway company at its own expense install and maintain active traffic control devices conforming to the "Manual on Uniform Traffic Control Devices for Streets and Highways." (Code, WV, Chapter 17, Article 3, Section 1), and existing standards.

~~(10)~~3.9.10 Abandoned Tracks and Appurtenances - When any railway track crossing a state highway is abandoned, the railway company shall promptly remove the tracks, ties, etc., and any appurtenances to the crossing such as crossbuck signs, active traffic control devices or other equipment. The highway shall be repaired with a pavement and shoulders of the same type and width as the adjacent pavement and shoulders, and in a manner satisfactory to the Commissioner of the Department of Highways.

Section 4/ Rules for Issuance of Permits for Making Openings or Placing Structures; In, Upon, Along, Over, Under and Across State Roads

4.01/ General. -- These regulations are promulgated pursuant to the authority and provisions of Chapter 17, Article 16, Section 6, of the Code.

4.02/ General Regulations for Issuance of Such Permits. --

~~(1)~~4.2.1 Form of Application - Applications for permission to perform work within highway right of way shall be made on Department's standard permit form. The application shall give full information concerning the work to be done and be accompanied by a sketch.

~~(2)~~4.2.2 Signature Required - Applications shall be legally signed by the applicant or his duly authorized representative.

~~(3)~~4.2.3 Security - The applicant shall deposit with the Department in the form of a certified check, money order, or executed bond, with surety satisfactory to the Department, to cover any damage the Department may sustain by reason of the granting of the permit, including any expense incurred in restoring the highway to its original condition, or the proper repair of any and all damages that may result within one (1) year from the date of the completion of the work.

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(4)4.2.4 Completion Date - The application shall state the date the proposed installation is to be completed.

(5)4.2.5 Approval of Application - Applicants for permits shall file the original and three (3) copies of such application with the District Engineer in whose District the proposed installation is to be made. Before any work can be started, the application must be approved by the District Engineer or the Director of the Maintenance Division.

(6)4.2.6 Inspection - The work shall be done under the supervision and to the satisfaction of the Department. The applicant agrees to reimburse the Department for any inspection costs incurred under the permit.

(7)4.2.7 Notification - The applicant shall notify the Department at least 48 hours in advance of the date work will begin.

(8)4.2.8 Control of Traffic - The traveling public shall be protected at all times in accordance with the current manual, "Traffic Control for Streets and Highway Construction and Maintenance Operations" (August 18, 1980.)

(9)4.2.9 Damage - Damage to the road resulting at any time from work authorized under the permit shall be repaired by the applicant. Unsatisfactory repairs may be corrected by the Department or its authorized agent and the cost thereof paid by the applicant.

(10)4.2.10 Save Harmless - The person, firm or corporation to whom a permit is issued shall agree to save harmless the State, the Commissioner, and any and all officers, agents and employees of the Department of Highways from any damages to persons or property arising or resulting from work authorized or done under the permit.

(11)4.2.11 Liability - The Department assumes no liability for damage to the proposed installation by reason of construction or maintenance work on the road.

(12)4.2.12 Removal - All permits granted shall be subject to the removal of the installation by the permittee at no cost to the Department of Highways when required for improvement of the road, and subject to all regulations now or hereinafter adopted by the Highways Commissioner.

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~~(13)~~4.2.13 Cancellation - The Highways
Commissioner reserves the right at any time to cancel any permit in the event the applicant or the person by whom the work is being done thereunder fails to comply with the terms and conditions under which it is granted.

Section 5/ Removal of Obstructions From Roadway

5.01/ Procedure for Effecting Removal of Obstructions. -- The procedure for effecting the removal of any obstruction, as the same is defined in Chapter 17, Article 16, Section 1, of the Code, from the right of way limits of any state highway, shall be as follows:

~~(1)~~5.1 Notice - The County Maintenance
Superintendent shall notify the owner or the person responsible for the obstruction that he or she is violating the law in placing, or causing to be placed, the obstruction within the highway right of way limits, and that immediate steps must be taken not only to remove the obstruction, but also to make any necessary repairs resulting from the existence of the obstruction.

~~(2)~~5.2 Additional Notice - In the event of failure or undue delay on the part of the owner or the person responsible to remove immediately the obstruction, the County Maintenance Superintendent shall notify the District Engineer of the circumstances relating thereto. Thereupon the District Engineer shall notify the responsible party by letter to remove the obstruction. If the obstruction is not removed within ten (10) days, the Commissioner, or his duly authorized representative, shall then cause a written notice to be served upon the owner or person responsible for the obstruction in the manner provided by law for service of notice or process, notifying such owner or responsible person to remove said obstruction within ten (10) days from the date of service of the notice. (Penalty for non-compliance, removed by the Department of Highways and assessment and collection of costs therefore are governed by statute.) (See Chapter 17, Article 16, Sections 3, 4, 5, of the West Virginia Code.)

Section 6/ Reference Manual for Constructing Driveways on State Highway Right-of-Way

Series VI, Sections 6.01 through 6.10~~(1)~~4 have been superseded by the manual containing the Rules and Regulations

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for Constructing Driveways on State Highway Rights-of-Ways heretofore filed with the Secretary of State in March of 1970.

These regulations were prepared by the West Virginia Department of Highways Traffic Engineering Division in compliance with the Official Code of West Virginia of 1931, as amended, Chapter 17, Article 2A, Section 8, Paragraph 37, to establish road policies and administrative practices for control of traffic and the promotion of safety on the public highways and Chapter 17, Article 4, Section 47 through 52; Chapter 17, Article 2A, Section 12; and Chapter 16, Article 16, Section 6, pertaining to access facilities to State Highways from and to real property and also pursuant to Chapter 29A of the Official Code of West Virginia of 1931, as amended, commonly known as the Administrative Procedures Act then in full force and effect. All the material contained in the rescinded regulations formerly promulgated on October 14, 1966, is contained in said Manual which has been filed and is made a part of this book of Rules and Regulations and to be read in conjunction therewith.

The appendix to Series VI contained in the former book of Regulations in its entirety is also rescinded by this Manual and the Manual on Uniform Traffic Control Devices for Street and Highways, 1978 Edition (Code, West Virginia, Chapter 17, Article 3, Section 1), also filed as a part of these Rules and Regulations.

Section 7/ Rules and Regulations for Outdoor Advertising on the State Highway System

7.01/ Purpose. -- These Legislative rules and regulations are adopted by the Commissioner of Highways Division of Highways Administrator pursuant to the provisions of Chapter 17, Article 22, Sections 8 and 11, of the Official Code of West Virginia of 1931, as amended, for the purposes of regulating and controlling the erection and maintenance of outdoor advertising signs, displays and devices along the total highway system and further to set up specific regulations relating to size, spacing and lighting of those signs, displays and devices, located along those highways in West Virginia designated for federal-aid funding purposes as federal-aid interstate and federal-aid primary highways in accordance with Title 23, United States Code, and the above designated Code sections.

These rules and regulations are correlated and shall have application with that certain agreement dated the 6th day of

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January, 1969, between the United States of America, represented by the Secretary of Transportation, acting through the Federal Highway Administrator, and that agreement dated the 19th day of June, 1961, between the United States Secretary of Commerce and the State Road Commissioner and the so-called "National Standards" prepared and promulgated by the Bureau of Public Roads in relation to the National System of Interstate and Defense Highways.

7.02/ Definitions. -- As used in these rules and regulations:

 (1)7.2.1 "Sign" - shall mean any structure erected for advertising purposes upon which any poster, bill, printing, writing, drawing, painting, or advertising material of any kind or character whatsoever, may be placed, posted, painted, tacked, nailed, glued or otherwise fastened, affixed or displayed.

 (2)7.2.2 "Display" - shall mean any poster, bill, printing, writing, drawing, painting, or advertising material of any kind or character whatsoever, designed and intended to draw the attention of the public to any goods, merchandise, property, real or personal, business service, entertainment or amusement, produced, bought, sold, conducted, furnished, or dealt in by any person, which is placed, posted, painted, tacked, nailed, glued or otherwise affixed or fastened to any advertising sign or structure, or otherwise displayed outdoors.

 (3)7.2.3 "Device" - shall mean any card, cloth, paper, metal or wooden advertising emblem or sign of any kind or character, which is posted, stuck, glued, tacked, nailed, painted or otherwise fastened or affixed to or upon any fence, post, tree or thing other than an advertising sign or structure.

 (4)7.2.4 "Person" - shall include an individual, partnership, association, or corporation.

 (5)7.2.5 "Interstate Highway" - shall mean that portion of the system of highways in West Virginia, which for federal-aid funding purposes has been designated or classified or redesignated or reclassified as interstate highway and which are classified as Expressway, under the provisions of Chapter 17, Article 4, Section 2, of the Official Code of West Virginia of 1931, as amended.

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1687.2.6 "Federal-Aid Primary Highway" - shall mean any highway which for federal-aid funding purposes has been designated or classified or redesignated or reclassified as federal-aid primary highway.

1787.2.7 "Controlled-Access Highway" - shall mean any state highway or portion thereof which for purposes of federal-aid funding has been designated a federal-aid primary highway and further has been designated a controlled-access highway pursuant to the authority vested in the Commissioner Division Administrator in Chapter 17, Article 4, Sections 39, 40 and 41, of the Official Code of West Virginia of 1931, as amended.

1887.2.8 "Zoned Commercial or Industrial Area" - shall mean an area zoned for business, trade, industry, or commerce, pursuant to state, county, municipal or local law, ordinance or regulation.

1987.2.9 "Unzoned Commercial or Industrial Area" - shall mean an area not zoned by State or local law, regulation or ordinances on which there is located one or more "viable" commercial or industrial activities and the area along the highway extending outward 800 feet from and beyond the edge of such activity.

Unzoned commercial or industrial areas shall not include the land on the opposite side of the highway from said activities except on two-lane non-controlled access highways, the unzoned commercial or industrial area may be located on the opposite side of the highway from the commercial or industrial activity if in the opinion of the Commissioner Division Administrator the topographical conditions on the same side of the highway as the activity are such that it is not reasonably usable, and provided the land on the opposite side of the highway has not been designated scenic by the Commissioner Division Administrator.

In no instance will the unzoned commercial or industrial area established by a single activity include land on both sides of the highway.

To qualify as an unzoned commercial or industrial area a business shall have, but not be limited to, the following.

- (a) A current business registration certificate issued by the West Virginia Tax Department.
- (b) A public access road.

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(c) Identification sign for the business. This sign shall conform to all rules and regulations concerning an on premiss sign.

(d) The hours the business is open shall be posted.

(e) Ample parking shall be provided for all customers.

(f) The business shall have electricity provided by the local power company. This shall not be an extension from any other building.

(g) The business shall have been in operation for a minimum period of six (6) months prior to the date of the permit application.

None of the following shall be considered a commercial or industrial activity:

(a) Outdoor advertising structures.

(b) Agricultural, forestry, grazing, farming, or other related activities, including, but not limited to wayside produce stands.

(c) Activities conducted in a building or structure principally used as a residence.

(d) Railroad tracks or minor sidings.

(e) Activities more than 660 feet from the main traveled way.

(f) Transient or temporary activities.

(g) Any commercial or industrial activity upon which the permit application is based which is operated primarily to serve as the basis for an outdoor advertising permit.

(h) Part time commercial or industrial activity, defined as any commercial or industrial activity operated for less than twenty-five (25) hours per week and open to the general public less than twenty-four (24) hours per week.

(i) Any other commercial or industrial activity which the Division Administrator finds is not meaningful commercial or industrial activity.

(10) 7.2.10 "Intervening Building, Structure or Roadway" - shall mean a building, overhead structure, or roadway which is located in such a manner that from any point along the highway, it obscures all signs, displays and devices on the same side of the highway within the minimum spacing distances set forth in Section 7.10. Only roads, streets, and highways which enter directly into the main traveled way of the highway system being considered will be regarded as intervening roadways.

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(11)7.2.11 "Main-Traveled Way" - shall mean the traveled way of a highway on which through traffic is carried. In the case of a divided highway, the traveled way of each of the separate roadways for traffic in opposite directions is a main-traveled way. It does not include such facilities as frontage roads, turning roadways, or parking areas.

(12)7.2.12 "Urban Area" - means an area including and adjacent to a municipality or other urban place having a population of 5,000 or more, as determined by the latest available Federal census within boundaries to be fixed by a State Highway Department subject to the approval of the Secretary of the U.S. Department of Transportation, or his authorized representative.

7.03/ Licenses Required, Applications. -- No person shall engage in the business of outdoor advertising in this State without first obtaining a license therefore from the Commissioner; and no person shall construct, erect, operate, use, maintain, lease or sell any advertising sign, display or device in this State without first obtaining such a license from the ~~Commissioner~~ Division Administrator. A license fee in the amount of one hundred dollars per annum, payable annually in advance, shall be charged for such license.

(1)7.3.1 Applications for licenses, or renewal of licenses, shall be made on forms furnished by the ~~Commissioner~~ Division Administrator and shall be accompanied by the annual fee.

(2)7.3.2 Licenses shall expire on the thirtieth day of June of each year, and shall not be prorated. Application for renewal of licenses shall be made not less than thirty (30) days prior to the date of expiration.

7.04/ Revocation of License. -- The ~~Commissioner~~ Division Administrator shall have authority, after thirty (30) days notice in writing to a licensee, to make and enter an order revoking any license granted by him upon repayment of a proportionate part of the license fee, in any case where he shall find that any material information required to be given in the application for the license is knowingly false or misleading or that the licensee has violated any of the provisions of Article 22, Chapter 17, of the Code, and/or these regulations, unless such licensee shall, before the expiration of said thirty (30) days, correct such false or misleading information and comply with the provisions of said article and/or regulations:

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17.4.1 Orders - A ~~Commissioner's~~ Division Administrator's order revoking a license shall be accompanied by a findings of fact and conclusions of law upon which said order was made and entered.

17.4.2 Judicial Review - Any person adversely affected by an order made and entered by the ~~Commissioner~~ Division Administrator is entitled to a judicial review as set out in Article 22, Chapter 17, of the Code.

7.05/ Permits Required. -- No person shall construct, erect, operate, use, maintain, or cause or permit to be constructed, erected, operated, used or maintained any outdoor advertising sign, display or device without first obtaining a permit from the ~~Commissioner~~ Division of Highways Administrator, and paying the annual fee. In the case of new permits, an inspection fee can be charged as is deemed necessary by the ~~Division/Administrator~~.

Upon receipt of a permit application an application number shall be assigned by the Division of Highways. The applicant shall be notified of the temporary application number and shall then be required to publish a class 2 legal advertisement in the newspaper(s) serving the area where the proposed outdoor advertising sign, display or device is proposed to be located. A copy of the certificate of publication shall be provided to the Department within ten (10) days of the final publication date.

As a minimum the advertisement shall include the application number, the location (including ownership of the property upon which the sign is to be placed) and shall notify the public that comments will be received by the Division of Highways, Highway Services Section, until 10 days after the final publication. The advertisement shall also state that all comments must include the specific application number to which they refer.

Any person who claims to be affected by the proposed sign may submit written comments to the Division of Highways, Highway Services Section, and may request a public hearing within ten days of the final publication. Within ten working days of the close of the comment period the Division shall determine whether to approve, deny, or hold a public hearing for said permit.

When the Division determines that a public hearing is required it shall notify the person(s) who requested the

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hearing and the permit applicant. The Division shall cause notice to be published and hold the hearing in accordance with Administrative Regulations, Commissioner of Highways, Chapter 17-2A, Series I (1982), Section 3, Hearing Procedures (hereinafter WV Adm. Reg. 17-2A).

The Division Administrator shall assess the Division's costs of the hearing against the permit applicant or against the party requesting the hearing if he finds that either the application for the permit or the request for hearing was filed in bad faith.

Any party adversely affected by the final decision of the Division Administrator may apply for judicial review through application for a writ of certiorari to the Circuit Court of Kanawha County in accordance with W.Va. Code § 53-3-1 and W.Va. Code § 14-2-2.

The regulations in the preceding six paragraphs relating to publication of notice of an application, comments on a pending application, notice of hearing, hearing on permit, assessment of costs and judicial review shall not apply to an application for a permit for an advertising sign, display or device to be located within the boundaries of an incorporated municipality or of a county-zoned commercial or industrial area.

(1)7.5.1 License Required - No permit shall be issued to any person who has not obtained the license provided for in Section 7.03.

(2)7.5.2 Application - A separate application for a permit shall be made for each separate advertising sign, display or device, on the form furnished by the ~~Commissioner~~ Division Administrator. The application shall be signed by the applicant or his duly authorized representative. Such authorization must be submitted to the ~~Commissioner~~ Division Administrator in writing.

(3)7.5.3 Payment - Every application shall be accompanied by a fee of one dollar for each advertising sign, display or device, which fee shall be retained if the permit is issued. In addition thereto, the ~~Commissioner~~ Division Administrator may charge an inspection fee which will be retained as a cost of inspection whether the permit be issued or not.

(4)7.5.4 Refusal of Permit - The ~~Commissioner~~ Division Administrator shall make and enter an order to the effect and shall cause a copy of such order to be served on such applicant by Certified Mail, return receipt requested, where any

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permit application is refused. Such order shall be accompanied by findings of fact and conclusions of law upon which such order was made and entered.

(8)7.5.5 Change of Advertising Copy - The holder of a permit shall during the term thereof have the right to change the advertising copy on the structure or sign for which it was issued without payment of any additional fee.

(8)7.5.6 Expiration - Permits shall expire on the thirtieth day of June of each year and shall not be prorated, and may be renewed upon the payment of the same fee required to be paid upon application originally. No application shall be required for a renewal of a permit.

Construction of the sign or signs for which a permit is issued shall be initiated no later than one year from the date of issuance of the permit and shall be completed within a reasonable time thereafter. In the event of noncompliance with this provision, the permit may be cancelled at the discretion of the ~~Commissioner~~ Division Administrator. A sign within the meaning of this provision is as construed by Section 2 of Article 22, Chapter 17 of the Code of West Virginia of 1931, as amended.

7.061 Revocation of Permits. -- The ~~Commissioner~~ Division Administrator shall have the authority, after thirty (30) days notice in writing to the permittee, to make and enter an order revoking any permit issued by him under Section 7.05 upon repayment of a proportionate part of the fee in any case where it shall appear to the ~~Commissioner~~ Division Administrator that the application for the permit contains knowingly false or misleading information or that the permittee has violated any of the provisions of Article 22, Chapter 17, of the Code, unless such permittee shall, before the expiration of said thirty (30) days, correct such false or misleading information and comply with the provisions of Article 22, Chapter 17, of the Code.

(1)7.6.1 Findings of Fact - Such order shall be accompanied by findings of fact and conclusions of law upon which the order was made and entered.

(2)7.6.2 Zoning Boards, Commissions or Other Public Agencies - If the construction, erection, operation, or maintenance of any advertising sign, display or device, for which a permit is issued is prevented by any zoning board, municipal building ordinance, commission or public agency, which has jurisdiction over such matters, the fee for such

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permit shall be deemed to have accrued if the advertising sign is erected or the inspection by the Commissioner Division Administrator had been performed. Any other inspection fees charged will also have deemed to be accrued.

7.6.3 Judicial Review - Any person adversely affected by an order made and entered under this section refusing to grant or revoking a permit is entitled to judicial review as set out in Article 22, Chapter 17, of the Code.

7.07/ Territorial Application. -- The territory under the jurisdiction of the Commissioner Division Administrator for the purposes of these regulations shall include all of the State.

Authorized representatives of the Commissioner Division Administrator may enter into and upon any land which has outdoor advertising signs, displays or devices in the performance of their functions and duties under the provisions of Article 22, Chapter 17, of the Code, and/or these regulations.

7.08/ Prohibition of Certain Outdoor Advertising. -- No outdoor advertising sign, display or device shall be erected or maintained within 660 feet of the nearest edge and visible as to informative content from the right of way of any road within the State Road System designated and classified or redesignated or reclassified for purposes of allocation of Federal-Aid Highway Funds as Federal-Aid Interstate or Federal-Aid Primary Highways, except as provided in Sections 7.10 and 7.18.

No outdoor advertising sign, display, or device shall be erected or maintained along the State Road System designated and classified or redesignated and reclassified for purposes of allocation of Federal-Aid Highway Funds as Federal-Aid Interstate or Federal-Aid Primary Highway outside of urban areas which are more than 660 feet off the nearest edge of the right-of-way visible from the main traveled way of the system and erected with the purpose of a message being read from such main traveled way except as otherwise provided in these regulations.

7.09/ Existing Signs. -- No outdoor advertising sign, display or device lawfully in existence adjacent to Federal-Aid Interstate or Federal-Aid Primary Highways on September 1, 1965, which does not conform to the requirements of Sections 7.08 or 7.10, shall be required to be removed until such time as the federal share of the just compensation

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to be paid is available. No sign, display or device erected after this date shall be removed until it is in non-conformance with these regulations for a period of five (5) years. No sign erected prior to January 6, 1969, but subsequent to October 22, 1965, shall be required to be removed in zoned or unzoned commercial or industrial areas for violation of size, spacing and lighting requirements as set out in Section 7.10 until the end of the fifth year it becomes non-conforming.

7.10/ Exempted Areas. -- Outdoor advertising signs, displays and devices whose size, spacing and lighting are in conformance with the following subsections may be erected within 660 feet of the nearest edge of the right-of-way of those roads designated for Federal-Aid funding purposes as Federal-Aid Interstate or Federal-Aid Primary Highways within zoned and unzoned commercial or industrial areas as defined in Section 7.02(8) and (9), except as provided in Section 7.18.

Should the licensee desire to place a sign, display or device within 660 feet of a two-lane non-controlled access highway in an unzoned commercial or industrial area, on the opposite side of the highway from the activity establishing the zoning, he will submit a written request for a variance specifying the reasons, with the permit application. The decision to allow a variance will be made by the Commissioner based on the conditions in the area and the documentation of the licensee. Once the side of the highway is determined it will not be changed where the area was established by a single activity.

(X)7.10.1 Size -

(a)7.10.1.a The maximum area of any sign shall be 1200 square feet with a maximum height of 25 feet and a maximum length of 60 feet, inclusive of cutouts and extensions, but excluding decorative bases, and structural supports.

(b)7.10.1.b A sign may contain one or two advertisements per facing, not to exceed the maximum area.

(c)7.10.1.c Back-to-back or V-type signs will be permitted and shall be treated as one structure with an area of 1200 square feet permitted for each facing.

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(2)7.10.2 Spacing -

(1)7.10.2.a Federal-Aid Interstate
Highways and Controlled-Access Facilities Within Zoned and
Unzoned Commercial or Industrial Areas:

(1)7.10.2.a.1 No two signs shall be spaced less than 500 feet apart on the same side of the highway.

(2)7.10.2.a.2 No sign shall be located within 500 feet of an interchange. This requirement shall not apply within the boundaries of any municipality.

(1)7.10.2.b Other Federal-Aid Primaries:

(1)7.10.2.b.1 Outside a Municipality
- no two signs shall be spaced less than 300 feet apart on the same side of the highway.

(2)7.10.2.b.2 Inside Municipalities -
no two signs shall be spaced less than 100 feet apart on the same side of the highway.

(1)7.10.2.c The foregoing spacing requirements shall not apply to the signs which in the opinion of the licensee are separated by an intervening building, structure or roadway, as defined in Section 7.02. Where a licensee is of the opinion that a situation exists where an intervening building, structure or roadway would justify a variance from the spacing requirements, he will document the same in writing to the ~~Commissioner~~ Division Administrator at the time of submission of the permit application. Each individual submission of such documentation will be considered based upon the sight distances in the area and the documentation submitted by the licensee.

(1)7.10.2.d Notwithstanding any other provision of this section, signs which are double decked, side-by-side, back-to-back, or V-type will be permitted if they meet the requirements of Subsections 1, 2, and 3 of this section.

(3)7.10.3 Lighting - Signs may be illuminated, subject to the following restrictions:

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~~(a)~~ 7.10.3.a No outdoor advertising may contain lighting which is not shielded and any lighting shall be of such low intensity as not to cause glare or impair the vision of an operator of any motor vehicle.

~~(b)~~ 7.10.3.b No sign shall be illuminated by any rapid flashing intermittent light or lights, which change in a time sequence faster than 12 cycles/revolutions per minute, without a written acceptance of the variance from the Commissioner.

~~(c)~~ 7.10.3.c No sign shall be illuminated so as to obstruct the view of any connecting road or intersection or to obscure an official traffic device or signal.

7.11/ Exceptions. --

~~(1)~~ 7.11.1 In lieu of exercising control of size, spacing and lighting of outdoor advertising signs, displays or devices in zoned commercial or industrial areas as set forth in Section 7.10, the ~~Commissioner~~ Division Administrator may certify to the Federal Highway Administrator that a state, regional, county, municipal or local zoning law, regulations, or ordinance or building ordinance has established effective control of size, spacing and lighting of outdoor advertising signs, displays and devices.

All licensees in the affected area will be advised of the ~~Commissioner's~~ Division Administrator's action. This certification will be effective as long as the control exercised is consistent with Chapter 17, Article 22, of the Code, and these regulations.

~~(2)~~ 7.11.2 The following signs are excepted from these regulations:

~~(a)~~ 7.11.2.a Directional or other official signs and notices required or authorized by law.

~~(b)~~ 7.11.2.b Signs, displays and devices advertising the sale or lease of property on which they are located.

~~(c)~~ 7.11.2.c Signs advertising activities conducted upon the property which they are located, and markers of underground utility facilities.

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(d) 7.11.2.d To fall within the purview of subsections (b) and (c) the sign, display or device shall have to meet the following requirements:

(1) 7.11.2.d.1 For Sale or Lease Signs - one sign advertising the sale or lease of the property which is visible to traffic proceeding in any one direction may be erected.

(2) 7.11.2.d.2 Business or Activity Sign - one double-faced sign or two signs, one visible in each direction may be erected not more than 500 feet from the center of the activity. Such a sign or signs may not exceed 150 square feet including border and trim but excluding structural supports. Center of activity is determined by location of cash register or main business activity.

(3) 7.11.2.d.3 A "Privilege Sign" - may be erected on or within 25 feet of the business activity itself if it meets all state or local building regulations, not to exceed 50 square feet. The sign must advertise an activity which is the principal one or one of the principal activities taking place.

(4) 7.11.2.d.4 No "On Premise Sign" - may be located if it is separated from the activity by an intervening parcel of land or building.

(5) 7.11.2.d.5 An "On Premise Sign" - may not be erected on the opposite side of the highway from the activity unless topographical conditions make it impossible to locate on the same side of the highway. The sight distance required to qualify for this variance will be less than 250 feet.

7.12/ Purchase or Condemnation. -- The Département/et
Highways/Commissioner Division of Highways Administrator is authorized and empowered to make acquisition of all of the property rights and interests specified in Chapter 17, Article 22, Section 5, of the Code, when any sign, display or device is required to be removed by reason of the provisions of Chapter 17, Article 22, of the Code, or of these regulations, by purchase at private sale, or in the event he is unable to do so, by proceeding in eminent domain. Just and full compensation shall be paid upon the removal of any outdoor advertising sign, display or device which is:

(1) 7.12.1 Lawfully in existence on or after
January 1, 1968;

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(2)7.12.2 Lawfully in existence on or after January 1, 1968, adjacent to any highway which shall be designated or redesignated as part of the federal-aid interstate or primary systems;

(3)7.12.3 Lawfully erected after January 1, 1968.

7.13/ Bond of Out-of-State Licensee. -- No license shall be granted as provided in Section 7.03 to any person not a resident of this state, or to any person having his principal place of business outside the state, or which is incorporated outside the state, until such person shall have furnished and filed with the ~~Commissioner~~ Division Administrator a bond payable to the State of West Virginia, with approved surety in the sum of two thousand five hundred dollars, conditioned that such licensee shall fulfill all the requirements of law and observe and obey all regulations relating to the business of outdoor advertising in the State of West Virginia.

All sums received from the forfeiture of any bond or bonds shall be deposited in a special fund created in Chapter 17, Article 22, Section 10, of the Code.

7.14/ Permit Identification Number. -- Every permit issued in accordance with these regulations shall be assigned a separate identification number. It shall be the duty of each permittee to fasten said permit identification number tag to the sign for which it was furnished. Said tag will contain a number, the expiration date of the permit and the name of the permittee. Construction, erection, operation, use or maintenance of an outdoor advertising sign, display or device without having said permit number tag affixed thereto shall be prima facie evidence that the same is in violation of the provisions of Chapter 17, Article 22, of the Code, and these regulations.

7.15/ Removal After Expiration or Revocation of Permit. -- All outdoor advertising signs, displays and devices shall be removed by the permittee within thirty (30) days after the date of the expiration or revocation of the permit for the same.

7.16/ Measurements. --

(1)7.16.1 In determining unzoned commercial or industrial areas, measurements shall be made from the farthest or outer most edge of the used area of the commercial or

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industrial activity, structures, driveways, parking lots, storage areas, or other areas constituting an integral part of such commercial or industrial activity.

~~(2)~~7.16.2 The distance requirement set forth in Section 7.10~~(2)~~.2 shall be measured along the interstate or controlled access facility, from the nearest point of the beginning or ending of the pavement widening at the exit from or entrance to the main traveled way.

~~(3)~~7.16.3 Official and "on premise" signs as set out in Section 7.11 shall not be counted nor shall measurements be made from them for the purposes of determining compliance of spacing regulations.

7.17/ General Restrictions. --

~~(1)~~7.17.1 No outdoor advertising sign, display or device shall use the words "stop" or "danger", or present or imply the need of requirement of stopping, or the existence of danger.

~~(2)~~7.17.2 No outdoor advertising sign, display or device shall be a copy or imitate a traffic sign or other official signal.

~~(3)~~7.17.3 No outdoor advertising sign, display or device shall attempt or purport to direct traffic.

~~(4)~~7.17.4 No outdoor advertising sign, display or device shall be painted, affixed, or attached to any natural feature, such as but not limited to; rocks, cliffs, trees and shrubbery.

~~(5)~~7.17.5 No outdoor advertising sign, display or device shall hinder the clear, unobstructed view of approaching or merging traffic, or obscure from view any traffic sign or other official signs.

~~(6)~~7.17.6 No outdoor advertising sign, display or device shall be located as to obscure the view of any connecting road or intersection.

~~(7)~~7.17.7 No person shall construct, operate or maintain an outdoor advertising sign, display or device without permission of the owner or other person in lawful possession or control of the land on which it is located.

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7.18/ Control of Outdoor Advertising Along
Federal-Aid Interstate and Defense Highways.

-- The following subsections are correlated and shall have the application in conformance with the so-called "National Standards" prepared and promulgated by the Federal Highway Administration of the United States Department of Transportation and all reference to said "National Standards". The following subsections will apply to all outdoor advertising along interstate and defense highways except on those situations where Sections 7.02 to 7.17 are stricter in application.

(17)7.18.1 Territory Involved -

(17)7.18.1.a General Area (Protected):

These regulations shall be applicable to all areas adjacent to interstate and defense highways, the entire right of way of which was acquired subsequent to July 1, 1956, and which said areas are within 660 feet of the nearest edge of right of way limits within and without municipalities.

(17)7.18.1.b Excepted Areas (Unprotected):

The following areas are excepted areas within the meaning of these regulations:

(17)7.18.1.b.1 Any area wherein a line drawn perpendicular to the center line of the median and extended to both edges of the width of the normal right of way, intersects any right of way acquired for right of way purposes prior to July 2, 1956.

(17)7.18.1.b.2 Areas within a county wherein such area was zoned as commercial or industrial or the land use as of September 21, 1959, was clearly established by state law as commercial or industrial.

(17)7.18.1.b.3 Areas within the corporate boundaries of municipalities which are designated as commercial or industrial areas, as such corporate boundaries existed on September 21, 1959.

(17)7.18.2 "On Premise" Signs Within Protected Areas Outside of Information Sites - All "on premise" signs within protected areas outside of informational sites shall comply with the Federal Standards for Class 2 signs, and with the following:

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(a) 7.18.2.a For Sale or For Lease Signs:

One sign advertising the sale or lease of the property upon which it is located and which is visible to traffic proceeding in any one direction may be erected. This may be one double-faced sign, one face being visible to traffic, proceeding in one direction, or two signs with the face of each visible only to traffic proceeding in one direction.

(b) 7.18.2.b Business or Activity Sign:

One double-faced sign or two signs, one visible in each direction, and more than fifty (50) feet from the center of activity, advertising the activity being conducted on premises is permissible.

(1) 7.18.2.b.1 Such sign may not

exceed 20 feet in any one dimension or 150 square feet in area, including border and trim, but excluding supports.

(2) 7.18.2.b.2 "Center of activity" is

determined by location of cash register or main business activity, i.e., motel office.

(c) 7.18.2.c Signs Within 50 Feet of

Advertised Activity: Within fifty (50) feet of advertised activity any number of signs of any size may be erected.

(d) 7.18.2.d General Restrictions: Other

than size and distance the following restrictions shall be applicable to "on premise" signs:

(1) 7.18.2.d.1 Such signs may not

attempt to direct traffic.

(2) 7.18.2.d.2 Such signs may not

imitate a traffic sign.

(3) 7.18.2.d.3 Lighting, if any, must

be shielded.

(4) 7.18.2.d.4 Such signs may not

contain or include or be illuminated by any flashing, intermittent or moving light or lights.

(5) 7.18.2.d.5 Such signs may not move

or have any animated or moving parts.

(6) 7.18.2.d.6 Such signs may not be

on or attached to any natural feature.

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(7)7.18.2.d.7 Such signs may not hinder clear, unobstructed view of official signs and approaching or merging traffic.

(8)7.18.2.d.8 Any letters, trade-mark, etc., advertising a product may not be larger or more conspicuous than those advertising the activity, except a sign not more than fifty (50) feet from the advertised activity.

(3)7.18.3 Signs Within 12 Air Miles of an Advertised Activity - All signs within twelve (12) air miles of an advertised activity shall comply with the Federal Standards for Class 3 signs and with the following regulations:

(a)7.18.3.a Such signs may advertise only activities being conducted within twelve (12) air miles of the sign and shall be visible only to interstate traffic not served by an information site within twelve (12) air miles of the advertised activity.

(b)7.18.3.b Such signs shall not be nearer than two (2) miles in advance of an intersection of the main traveled way and an exit roadway. This distance shall be measured from the edge of the exit roadway nearest to approaching traffic.

(c)7.18.3.c Such signs shall also be one thousand (1000) feet beyond the intersection of an entrance roadway and the main traveled highway. This distance shall be measured from the edge of the entrance roadway, including acceleration lanes, nearest to traffic which has passed the entrance roadway.

(d)7.18.3.d Within the area located between two (2) and five (5) miles approaching an intersection, as above measured.

(e)7.18.3.e Six (6) signs may be located, provided that there are not more than two (2) signs within any mile measured from any point, and such signs shall not be less than one thousand (1000) feet apart.

(f)7.18.3.f Beyond five (5) miles an average of one (1) sign per mile is permitted.

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(g)7.18.3.g Other than distance the following restrictions shall be applicable to all signs erected within twelve (12) air miles of an advertised activity.

(1)7.18.3.g.1 Not more than one sign, advertising the same activity or attraction, visible to traffic moving in any one direction, will be permitted on any one interstate highway. The text must be visible to traffic.

(2)7.18.3.g.2 No sign may exceed twenty (20) feet in any dimension or one hundred fifty (150) square feet in area, including border and trim.

(3)7.18.3.g.3 Such signs may not be erected in scenic areas.

(4)7.18.3.g.4 The provisions of Section 7.18(2)(d) shall also be applicable to these signs.

(4)7.18.4 Signs in the Specific Interest of the Traveling Public Permitted - All signs in the specific interest of the traveling public referring to public places operated by the federal, state or local government shall be permitted within a protected area.

(a)7.18.4.a When the following areas have been so designated by the Department of Highways signs may be erected giving information concerning same:

(1)7.18.4.a.1 Natural phenomena
(Man-made lakes not included).

(2)7.18.4.a.2 Historical sites.

(3)7.18.4.a.3 Areas of natural scenic beauty.

(4)7.18.4.a.4 Areas naturally suited for outdoor recreation.

(5)7.18.4.a.5 Places for camping, lodging, eating, and vehicle service repair. Trade names, if any, on Class 4 signs, Federal Standards, are permitted only if it identifies or characterizes such a place or service. If a Class 2 or 3 sign also qualifies as a Class 4 sign, Federal Standards, trade name is not required to be of equal prominence.

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(b)7.18.4.b All signs designated in this subsection shall comply with the Federal Standards for Class 4 signs and with the following restrictions:

(1)7.18.4.b.1 Such signs must be more than twelve (12) miles from the nearest panel within an informational site service interstate highway traffic to which such sign is visible. A sign qualifying both as a Class 3 and 4, Federal Standards, may be permitted under the above regulations, subsection (3) of this section, or Section 7.18(3)(a).

(2)7.18.4.b.2 The provisions of Section 7.18(2)(d) shall also be applicable to these signs.

(3)7.18.5 Informational Sites, Signs Permitted
- Signs relating to informational sites shall be permitted within protected areas. Such signs shall comply with the Federal Standards for Class 3 and 4 signs and the following regulations:

(a)7.18.5.a The sign shall be placed upon a panel which shall not exceed thirteen (13) feet in height or twenty-five (25) feet in length, including border and trim, but excluding supports.

(b)7.18.5.b The sign shall not exceed twelve (12) square feet.

(c)7.18.5.c The text may not be legible from the main traveled way or turning roadway.

(d)7.18.5.d Only one sign concerning one activity or place is permitted within any one site.

(e)7.18.5.e Signs concerning a single activity or place may be permitted within more than one informational site, but no Class 3 sign, as defined by Federal Standards, which does not also qualify as a Class 4, Federal Standards, sign may be permitted if the informational site is within twelve (12) air miles of the advertised activity.

(f)7.18.5.f No moving signs or any animated or moving parts are permitted.

(g)7.18.5.g Illumination of panels may be by white lights only.

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(X)7.18.5.h No sign on a panel may be permitted to contain, include or be illuminated by any other lights, or any flashing, intermittent, or moving lights.

(X)7.18.5.i Lighting must be so effectively shielded as to prevent beams or rays of light from being directed at the highway.

(X)7.18.5.j Lighting must be of such low intensity or brilliance as not to cause glare or to impair the vision of the driver of any motor vehicle, or to otherwise interfere with any driver's operation of a motor vehicle.

(X)7.18.6 Federal, State, Local Laws - Nothing herein contained shall be construed to permit the erection or maintenance of signs otherwise prohibited or declared to be illegal.

Section 8. Salvage Yards

8.01. Definitions. -- This section and all subsequent sections are promulgated in accordance with the authority contained in Chapter 17, Article 23, Sections 1 through 13, the authority is specifically contained in section 11 thereof. As used in these rules and regulations.

(X)8.1.1 "Salvage" - Shall mean old scrap copper, brass, rope, rags, batteries, paper, rubber, trash, waste, junked, dismantled or wrecked machinery, machines or motor vehicles, or any parts of any junked, dismantled or wrecked machinery, machines or motor vehicles, iron, steel and other old or scrap ferrous or non-ferrous materials.

(X)8.1.2 "Salvage Yard" - Shall mean any place which is maintained, operated or used for the storing, keeping, buying, selling, or processing of salvage, or for the operation and maintenance of a motor vehicle graveyard, and the term shall also include garbage dumps and sanitaryfills. Any collection of three or more automobile hulks, or combination of ferrous or non-ferrous materials together with one or more automobile hulks, or a collection of any salvage contained in an area more than one-quarter acre in size, shall be considered a salvage yard.

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8.1.3 "Abandoned salvage yards" - means any unlicensed salvage yard or any salvage yard that was previously licensed but upon which the license has not been renewed for more than one year.

~~(3)~~8.1.4 "Fence" - Shall mean an enclosure, barrier or screen constructed of materials or consisting of planting, natural objects or other appropriate means approved by the Commissioner and located, placed or maintained so as effectively to screen at all times salvage yards and the salvage therein contained from the view of persons passing upon the public roads of this State.

~~(4)~~8.1.5 "Owner or Operator" - Shall include an individual, firm, partnership, association or corporation or the plural thereof.

8.1.6 "Residential Community" - means an area wherein five or more occupied private residences are located within any one thousand feet radius.

8.1.7 "Occupied Private Residence" - means a private residence which is occupied for at least six months each year.

~~(5)~~8.1.8 "Unzoned Industrial Area" - Shall mean an area within a municipality not zoned by State or local law, regulation or ordinance. A salvage yard shall be determined to be in an unzoned industrial area within a municipality when it is located within a radius of 1000 feet of at least one industrial activity which is in continuing operation for at least three (3) months of the year. None of the following shall be considered industrial activities:

- (a) Outdoor advertising structures.
- (b) Agricultural, forestry, ranching, grazing, farming and related activities, including, but not limited to, wayside fresh produce stands.
- (c) Activities normally and regularly in operation less than three (3) months of the year.
- (d) Transient or temporary activities.
- (e) Activities not visible from the traffic lanes of the main traveled way.

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(f) Activities more than 300 feet from the nearest edge of the main traveled way.

(g) Activities conducted in a building principally used as a residence.

(h) Railroad tracks, minor sidings, and passenger depots.

(i) Junkyards, as defined in Section 136, Title 23, United States Code.

8.02/ Application for License. -- No salvage yard shall be established, operated or maintained without a license. Application for a license to establish, maintain or operate a salvage yard shall be made in writing on the form prescribed by the Commissioner and shall be signed by the applicant or his authorized agent. A license fee in the amount established by Chapter 17, Article 23, Section 3 of the Code of Two Hundred Dollars (\$200), payable by certified or cashier's check or money order, shall accompany the application. The license shall expire on the first day of January following the date of issuance. The license may be renewed from year to year upon submitting the prescribed form and the established sum.

Information required to be furnished shall include, but not be limited to, the name, address, and business capacity of the applicant, i.e., whether the business is conducted by an individual, partnership, corporation, society or association; the date such business was established; the date of the last salvage yard license (if any issued) and the number thereof, and the location of the salvage yard, including the number of the nearest State highway. (Chapter 17, Article 23, Section 3.)

After July 1, 1984 any owner or operator establishing a salvage yard shall first obtain a permit from the County Planning Commission, or if the County does not have a planning commission from any agency so designated by the County Commission in which the salvage yard is to be located. (Chapter 17, Article 23, Section 4.)

8.03/ Areas in Which No Salvage Yard Permitted. -- On or after July 1, 1967, no license shall be issued to establish, operate or maintain a salvage yard, or any part thereof, within 1000 feet of the nearest edge of the right of way of any road within the state road system, designated and classified as either expressway, trunkline, or feeder. On or

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after July 1, 1967, no license shall be issued to establish, operate or maintain a salvage yard, or any part thereof, within 300 feet of the nearest edge of the right of way of any state local service road, unless the view thereof from said road shall be effectively screened and obscured by a fence or fences.

On or after June 12, 1988, no license shall be issued to establish, operate or maintain a salvage yard, or any part thereof, within 1000 feet of the nearest edge of the right of way of any road within the state road system, designated and classified as either expressway, trunkline, or feeder. On or after June 12, 1988, no license shall be issued to establish, operate or maintain a salvage yard, or any part thereof, within 500 feet of the nearest edge of the right of way of any state local service road, unless the view thereof from said road shall be effectively screened and obscured by a fence or fences. No license may be issued allowing a salvage yard within one thousand feet of the nearest occupied private residence; unless waived by the owner of such residence, a copy of which shall accompany the salvage yard application; or within five thousand feet of the nearest occupied private residence which is part of a residential community. (Chapter 17, Article 23, Section 4.)

8.04/ Existing Salvage Yards. -- The license, issued prior to July 1, 1967, of any salvage yard which is located within 1000 feet of the nearest edge of the right of way of a road designated as either expressway, trunkline or feeder, or is located within 300 feet of the nearest edge of a state local service road, may be renewed only if the view of said salvage yard, and all parts thereof, is effectively screened from view of the traveling public.

Any salvage yard which on July 1, 1967, was duly licensed may continue to be operated and maintained without screening by fences so long as said yard is not located within 1000 feet of any road designated as either expressway, trunkline or feeder, or is not located within 300 feet of the nearest edge of the right of way of any state local service road.

Any salvage yard which was licensed prior to June 12, 1988 may continue to be operated and maintained in accordance with the statutes and regulations in effect at the time the yard was initially licensed.

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The licensing of salvage yards situated within municipalities shall be in accordance with the terms and provisions of Chapter 17, Article 23, Section 7 of the Code, relating thereto.

8.05/ Fences. -- Fences shall be kept in good order and repair and no advertisement shall be permitted thereon other than the name of licensee and the nature of the business conducted on the premises. The fence shall be of such height as effectively to screen the salvage yard and salvage contained therein, and shall be constructed of wood, metal or such other material as may be approved by the Commissioner. Fences shall be maintained in a manner satisfactory to the Commissioner.

(1)8.5.1 Fences must be located in such a manner as to not be hazardous to the traveling public.

(2)8.5.2 The construction of fences shall be uniform and no patchwork type of construction shall be permitted.

(3)8.5.3 Fences shall be painted where the composition is such that painting is required. The paint used shall be of such color as to blend into the surrounding neighborhood of the yard.

(4)8.5.4 Where a living fence is constructed the operator shall secure the consent and permission of the Commissioner as to the location and type of plant material which may be used, in order effectively to screen the view of the yard from the traveling public.

(5)8.5.5 Gates shall be of the same height as the component fence and shall be opened only for the purpose of permitting ingress and egress to and from the enclosure.

(6)8.5.6 The Commissioner shall have the right to make determination as to whether a salvage yard is effectively screened by the fencing employed.

8.06/ Payment of Costs of Fencing. -- The cost of the erection of fences shall be paid by the salvage yard operator, provided, however, that if in the opinion of the Commissioner effective screening cannot be accomplished by the usual and ordinary methods, the Commissioner may determine and pay such additional costs as are necessary to provide effective screening.

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8.07/ Removal, Purchase or Condemnation of Salvage Yard. -- Whenever a salvage yard is so situated that in the opinion of the Commissioner the same cannot be effectively screened by fencing, the Commissioner may:

(1)8.7.1 With the consent of the owner or operator of such salvage yard pay the cost of removal of all salvage and equipment from such salvage yard to such other location as said owner or operator may direct and whereat a salvage yard business may lawfully be conducted.

(2)8.7.2 Purchase at private sale, or acquire by proceeding in eminent domain, in accordance with the provisions of Chapter 54, of the Code, all such property rights and interests, other than title to real property, as are necessary and required to effect a lawful termination of such salvage yard business.

8.08/ Distance Measurements. -- All measurements determinative of the location of salvage yards in relation to State highways shall be made in a line drawn perpendicular from the nearest edge of the right of way. All applications submitted after June 12, 1988 for a new salvage yard license must be accompanied by a certified survey showing the distance to the nearest residence if within 1,000 ft. of an occupied private residence or within 5,000 ft. of a residential community. All measurements shall be made in a straight line from the outer most boundry of the salvage yard to the occupied private residence or the nearest residence in a residential community.

8.09/ Maintenance. -- Salvage in yards not required by law to be fenced, and all salvage exposed to view from the public highway, shall be neatly aligned, and all wrecked or used automobiles shall have doors, hoods and trunk lids closed.

8.10/ County Planning Commissions: -- All County Planning Commissions, or if a County does not have a County Planning Commission, then an appropriate office or agency designated by the County Commission, in which the salvage yard is located, shall before issuing a permit after June 12, 1988, promulgate rules that conform with these rules and regulations. That agency shall promulgate such reasonable rules including, but not limited to, determining the effect of the proposed salvage yard on residential, business or commercial property investment and values, establish a quota for the number of

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salvage yards in the county and the social, economic and
enironmental impact on community growth and development in
utilities, health, education, recreation, safety, welfare and
convenience, if any, before issuing such approval permit.
[§17-23-4]. A county in promulgating these rules may be
stricter than those of the Department but at no time shall they
be less restrictive.

WEST VIRGINIA:

At a Circuit Court continued and held for the County of Mercer, at
the Courthouse thereof, . . . Friday , the 30th
day of June , 19 . 89

PRESENT: The Honorable John R. Frazier, Judge

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA
NOTED CIVIL DOCKET, JUNE 30, 1989

DAN R. BOWMAN and
DORIS M. BOWMAN

Plaintiffs,

v

CIVIL ACTION NO. 87-C-355-F

ACKEN SIGN, INC. a corporation
et al and WILLIAM S. RITCHIE,
Commissioner of the West Virginia
Department of Highways,

Defendants.

SECOND SUPPLEMENTAL ORDER

This matter came on the 1st day of May, 1989, having previously been set for further hearing by the Court, for a status conference and related matters by the Court's letter dated April 18, 1989, and thereupon appeared the plaintiffs by their counsel, Edwin B. Wiley, and appeared the defendant, Outdoor East, L.P., successor in interest to Acken Sign, Inc., by their counsel, Jerry Cameron, and appeared the defendant, Fred VanKirk, Acting Commissioner of the West Virginia Department of Highways, successor in interest to William S. Ritchie, by his counsel, Robert F. Bible.

Thereupon, the Court after extensive discussion with the counsel present, and after review of the proposed revised "Rules and Regulations for Outdoor Advertising on the State Highway System" (Exhibit A) (hereinafter "Outdoor Advertising Regulations") required by the Court's order pursuant to the previous hearings held on April 18, 1988 and April 25, 1988, found that the proposed rules did not meet all of the

(JRF) requirements set forth in the previous orders in this matter, including the modifications requested by Tony Cameron and after further discussion with counsel, the Court finds that in her letter dated June 8, 1985 (Exhibit C) the second proposed revised Outdoor Advertising Regulations (Exhibit B) ^{and C} as revised by and agreed to by all counsel, except for the objections and exceptions set forth hereinafter, do comply with the Court's prior rulings regarding notice and public hearing and regarding the definition of "industrial and commercial areas."

Based upon the foregoing, the Court does hereby Adjudge, Order and Decree as follows:

(JRF) That the second proposed revised Outdoor Advertising Regulations (Exhibit B) ^{and C} be filed forthwith by the West Virginia Commissioner of Highways with the Office of the Secretary of State and the Legislative Rule Making Review Committee as proposed emergency rules in accordance with the procedures set forth in the W.Va. Administrative Procedures Act, W. Va. Code §29A-3-15. The Court specifically finds that its earlier rulings regarding the partial unconstitutionality of the existing rules and regulations constitute the facts and circumstances of the emergency required to be stated in filing the emergency rules, as set forth in the aforesaid W.Va. Code §29A-3-15. The Court hereby notes and overrules the Objection and Exception of the Defendants to this portion of the Court's ruling.

The Court does hereby further Adjudge, Order and Decree that the West Virginia Commissioner of Highways shall forthwith

JRF
proceed to promulgate the second proposed revised Outdoor Advertising Regulations (Exhibit B) ^{and C} as legislative rules pursuant to the procedures set forth in W.Va. Code §29A-3-1 et seq.

JRF
The Court does hereby further Adjudge, Order and Decree that the West Virginia Commissioner of Highways shall forthwith forward a copy of the second proposed Outdoor Advertising Regulations (Exhibit B) ^{and C} to the appropriate officials of the Federal Highway Administration (FHWA) and seek the concurrence of the FHWA to the aforementioned second proposed Outdoor Advertising Regulations.

JRF
It is further Adjudged, Ordered and Decreed that the W.Va. Commissioner of Highways shall file with the Court his affidavit and supporting exhibits showing that the actions required herein have been accomplished, ^{and the Court} ~~at which time this~~ *retains jurisdiction of this matter. To all of which* ~~action shall be dismissed as to the aforementioned West~~ *the parties except and object.* ~~Virginia Commissioner of Highways~~

Enter this 30 day of JUNE, 1989.

John R. Franzer
JUDGE

Prepared by:

Robert F. Bible
Robert F. Bible, Counsel
WV Department of Highways

Reviewed by:

Edwin B. Wiley
Edwin B. Wiley, Esquire

Jerry Cameron
Jerry Cameron, Esquire

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June 8, 1989

Mr. Robert F. Bible, Attorney
West Virginia Department of Highways
State Capitol Complex, Building Five
Charleston, West Virginia 25305

Mr. Edwin B. Wiley
Attorney at Law
1517 North Walker Street
Princeton, WV 24740

Re: Bowman vs. Acken Signs, et al.

Gentlemen:

I am in receipt of Bob's letter of May 16, 1989, enclosing the proposed Order and Regulations. I would like to request one modification to the proposed regulations and this being in Section 7.05 on page 10 after the second full paragraph, insertion of the following paragraph:

The regulations in the preceding six paragraphs relating to publication of notice of an application, comments on a pending application, notice of hearing, hearing on permit, assessment of costs and judicial review shall not apply to an application for a permit for an advertising sign, display or device to be located within the boundaries of an incorporated municipality or of a county-zoned commercial or industrial area.

It was my understanding that the area that we were concerned about was the unzoned commercial or industrial area and that the other areas have adequate protection by their zoning and related ordinances.

Hopefully, the above request will be acceptable to you. Please advise by telephone as to same.

Very truly yours,

Jerry J. Cameron

JJC/36/ijf

cc Honorable John R. Frazier, Judge
bcc Mr. Thompson H. Gooding, Jr.
Mr. Joel Locke
Mr. Ben Anderson

COUNTY OF MERCER, ---
STATE OF WEST VIRGINIA:

I, WILMA F. GRUBB, Clerk of the Circuit Court of said County and State,
do hereby certify that the foregoing is a true and exact copy from the records of my
office as the same exist therein.

In testimony whereof, I hereunto place my hand and affix the official seal of
the Court, this, the 30th day of
June, 19 89.

WILMA F. GRUBB, Clerk
Circuit Court, Mercer County, West Virginia

By: Donna Barberie,
Deputy Clerk

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone (304) 345-4000
Corporations 342-9000



STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

WILLIAM H. HARRINGTON
Deputy Secretary

RICHARD O. HARTMAN
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

SHEREE COHEN
Special Assistant

(Plus all the volunteer
help we can get)

August, 1989

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Department of Transportation, Division of Highways

RULE: Amendments, Series 6; Regulations Relating to Use of State
Road Rights of Way and Areas Adjacent Thereto

DATE FILED AS AN EMERGENCY RULE: July 14, 1989

DECISION NO. 9-89

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.

KEN HECHLER
Secretary of State

FILED
1989 AUG - 7 PM 4:58
OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 345-4000
Corporations 342-8000



STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

FILED

1989 DEC -7 PM 4:58

WILLIAM H. HARRINGTON
Chief of Staff

RICHARD O. HARTMAN
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

SHEREE COHEN
Special Assistant

(Plus all the volunteer
help we can get)

DECISION

EMERGENCY RULE DECISION (ERD 9-89)

AGENCY: Department of Transportation, Div. of Highways
RULE: Amendments Series 6, Regulations Relating to Use
of State Road Rights of Way and Areas Adjacent
Thereto

FILED AS AN EMERGENCY RULE: July 14, 1989

- par. 1 The Department of Transportation, Division of Highways, has filed the above emergency amendments to Series 6, Regulations Relating to Use of State Road Rights of Way and Areas Adjacent Thereto.
- 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 Department of Transportation, Division of Highways filed this emergency rule with supporting documents with the Secretary of State on July 14, 1989 and with the LRMRC on July 14, 1989.
- par. 7 It is the determination of the Secretary of State that the Department of Transportation, Division of Highways, 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 §5F-2-2 reads in part:
§5F-2-2. Power and authority of the secretary of each department.
(a)(11) Promulgate rules, as defined in Section 2 (Section 29A-1-2), Article 1, Chapter 29A of this code, to implement and make effective the powers, authority and duties granted and imposed by the provisions of this chapter, such promulgation to be in accordance with the provisions of Chapter 29A (Section 29A-1-1 et seq.) of this Code;
- par. 9 West Virginia Code §5F-2-1 reads in part:
§5F-2-1. Transfer an Incorporation of agencies and boards.
(g) The following agencies and boards, including all of the allied, advisory, affiliated or related entities and funds associated with any such agency or board, are hereby transferred to and incorporated in and shall be administered as part of the Department of Transportation:
(2) The Department of Highways provided for in article 2A (§17-2A-1 et seq.), chapter 17 of this code;
- par. 10 West Virginia Code §17-2A-8 reads in part:
§17-2A-8. Powers, duties and responsibilities of commissioner.
In addition to all other duties, powers and responsibilities given and assigned to the commissioner in this chapter, the commissioner may:
(15) Establish and maintain a uniform system of road signs and markers:
(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 effective and expeditious performance and discharge of the duties and responsibilities placed upon him by law;

par. 11 West Virginia Code §17-22-11 reads:

§17-22-11. Enforcement of provisions by commissioner; rules and regulations.

It shall be the function and duty of the state road commissioner to administer and enforce the provisions of this article, and in the performance of his duties hereunder, he may assign to division engineers, and other employees in his department, such duties as he may deem proper. The commissioner is hereby authorized and empowered to promulgate rules and regulations implementing the provisions of this article, including rules and regulations permitting the State of West Virginia to comply with the provisions of Title 23, United States Code, relating to the payment of bonuses for the regulation of outdoor advertising adjacent to the interstate system, and the terms and provisions of any agreement heretofor entered into pursuant to law by and between the state road commissioner of West Virginia and the secretary of commerce of the United States relating to the payment of such bonuses, any provisions of this article to the contrary notwithstanding.

par. 12 It is clear that the Secretary of the Department of Transportation has the authority to amend the rules of that department dealing with the regulation of state road rights of way and adjacent areas with regard to the placement of signs. Of particular interest in this case is the admonition that rules will be promulgated "for the effective and expeditious performance and discharge of the duties and responsibilities placed upon him by law." See West Virginia Code §17-2A-8(24).

par. 13 This emergency rule was also filed to recognize revisions made by the West Virginia Legislature in H.B. 3146 which took effect on June 10, 1988. After having reviewed the regulations against the Act of the Legislature, it is the finding of the Secretary of State that the Secretary of Transportation is acting within the statutory authority provided for in the West Virginia Code.

par. 14 There are several revisions made to 157 CSR 6.7. These changes were made because of a case before Judge John R. Frazier of the Circuit Court of Mercer County, West Virginia, in the case of Bowman v. Acken Sign Inc., Civil Action No. 87-C-355-F. In a Supplemental Order dated May 1, 1989, Judge Frazier held that "the current rules and regulations of the commissioner entitled 'Rules and Regulations for Outdoor Advertising on State Highway System' designated as 157 CSR 6.7 are unconstitutional in part as follows:

(a) The rules and regulations fail to afford public notice and opportunity for the general public to be heard on the issue of the issuance of the permit to erect and license to maintain an outdoor advertising sign.

(b) The rules and regulations fail to define with particularity 'commercial and industrial activities' necessary to meet the definition contained in 157 CSR 6-7.2(i) of 'Unzoned Commercial or Industrial Area' and such failure to adequately define such activities constitute vagueness and ambiguity to such an extent as to render the definition contained therein subject to individual and improper interpretation and not within the stated intent of the statutes and regulations applicable to outdoor advertising." (See Exhibit A).

In his Second Supplemental Order for this case, dated June 30, 1989, Judge Frazier found that the regulations now placed before the Legislative Rule-Making Review Committee met the requirements set forth in his previous orders. He then ordered the Commissioner of Highways to file these regulations as proposed emergency rules pursuant to the provisions the West Virginia Administrative Procedures Act (See West Virginia Code §29A-3-15) (See the Second Supplemental Order attached as part of Exhibit A).

par. 15 The West Virginia Outdoor Advertising Association has raised several objections on the contents of this particular rule. All of their objections deal with the section of the emergency rule that was expressly ordered to be filed by Judge Frazier. The objections raised by the outdoor advertisers will be addressed as they were raised in their memorandum dated July 28, 1989. (See the memorandum of the West Virginia Outdoor Advertising Association in opposition to emergency rule which is attached as Exhibit B).

par. 16 The provisions of Series 6, Section 7 of the rules of the West Virginia of Highways are based on the provisions of article twenty-two, chapter seventeen, of the Code and particularly on the requirements of §17-22-15. Subsection (f) of §17-22-16 provides for the judicial review of a decision by the commissioner (now the director of the Division of Highways) for the refusal to grant or revoke a permit. An appellant is granted three options for venue under this statute and they are: 1) The county where the operator's principle place of business is located; 2) The county in which the sign is located; and 3) Kanawha County if all parties agree thereto. The judicial review provided for by 152 CSR 6.7.5 in these emergency regulations reads as follows:

Any party adversely affected by the final decision of the Division Administrator may apply for judicial review through application for a writ of certiorari to the Circuit Court of Kanawha County in accordance with W. Va. Code §53-3-1 and §14-2-2.

par. 17 It is the opinion of the Secretary of State that the provisions of the proposed regulations are in conflict with the provisions

of §17-22-15. Further the provisions of the regulations are far more restrictive in terms of the appellate rights available to parties aggrieved by the decision of the Division Administrator. The Department of Transportation is faced with a situation in which a Circuit Court has ruled its regulations unconstitutional because of its lack of provisions relating to public input in this area. Certainly it is inconsistent for the same court to approve of and order the filing of rules that severely restrict the ability of the same persons to appeal their case once it has been ruled upon by the Division of Highways. However, it is not the place of this office to second guess the rulings of a court in this state when the record shows that the court was cognizant of the issues surrounding this situation. Therefore, I must overrule the objection raised by the West Virginia Outdoor Advertising Association on this issue and allow the provisions of 152 CSR 6.7.5 on appeals to stand. The Association points out in its objections that the number of persons who are allowed to appeal decisions made by the Division Administrator is far larger than the group defined in the provisions of §17-22-15. Perhaps this is the reason for the court's action.

par. 18 It is the finding of the Secretary of State that the Department of Transportation, Division of Highways, has met its obligations to abide by the statutory authority provided to it in promulgating these regulations. This is particularly true when one considers that the provisions of §17-2A-8(24) envision that these duties and responsibilities may be placed upon him "by law". Obviously an order by a court of original jurisdiction is an obligation placed on the department by law.

par. 19 (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. 20 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. 21 While the Department of Transportation does not expressly identify which of these elements it claims, it appears to the Secretary of State that at least two of them may apply in this case. The first is time limitation, and the second is substantial harm.

par. 22 The facts and circumstances as presented by the Department of Transportation are as follows:

The circumstances for filing this Emergency Rule stem from the decision made by Judge John R. Frazier, Circuit Court of Mercer County, West Virginia, in Civil Action 87-C-355-F on June 30, 1989. As stated in the Second Supplemental Order of the June 30, 1989 proceedings by the Court, "The Court specifically finds that its earlier rulings regarding the partial unconstitutionality of the existing rules and regulations constitute the facts and circumstances of the emergency required to be stated in filing the emergency rules, as set forth in the aforesaid W. Va. Code §29A-3-15."

The Court also ruled that these revisions be filed forthwith by the Commissioner of Highways as proposed emergency rules with your office as well as with the Legislative Rule Making Review Committee. A copy of the June 30, 1989 Second Supplemental Order of the referenced case is attached.

Also, this filing is being made in order to recognize revisions to Chapter 17, Article 23, Sections 2, 4 and 8 as amended and reenacted by House Bill No. 3146, passed March 12, 1988 and effective June 10, 1988. The amendments address changes to the provisions for the licensing and maintaining of salvage yards. However, these changes will not apply if the salvage yard was licensed prior to June 12, 1988.

Notable changes made to Series 6, Section 7, are as follows: the definition of "Unzoned Commercial or Industrial Area" now specifies "viable" commercial or industrial activities; also, seven qualifications for identifying unzoned commercial or industrial areas have been added, while three qualifications have been added to the listing of circumstances which shall not be considered commercial or industrial activity.

Additionally, Section 7.5, "Permits Required" has been supplemented with information addressing the Division of Highways' internal processing of an Outdoor Advertising Permit Application. This processing includes: the assignment of an application number, notification of the applicant and local public advertisement of the same; the submission of comments, request for public hearing and the Division's decision to approve, deny or hold a hearing; the Division's notification of hearing to the requestor, applicant and public; the provisions for determining hearing costs and application of the costs to the party of bad faith; and finally, the right to judicial review by the adversely affected party of the final decision.

Notable changes made to Series 6, Section 8 are as follows: definitions for abandoned salvage yards, residential community and occupied private residence have been added, while the definition of a salvage yard has been revised to exclude garbage dumps and sanitary landfills. Additionally, changes to the application for license have been made as follows: an annual license fee of \$200.00 is now specified; and the prerequisite of obtaining a permit from the County Planning Commission prior to establishing a salvage yard after July 1, 1984 has been included.

Also, distance restrictions from the edge of roadway for expressway, trunkline, feeder, state and local service roads and from single occupied private residences as well as occupied private residences which are a part of a residential community are prescribed for salvage yards licensed after June 12, 1988. A certified survey showing the distance to the nearest occupied residence, if within 1,000 feet, or the distance to the nearest occupied residence of a community, if within 5,000 feet, must accompany salvage yard applications after June 12, 1988.

Finally, all County Planning Commissions, or in their absence an appropriate office or agency, shall promulgate rules that conform with these rules and regulations before a permit may be issued after June 12, 1988. These rules must at least address the determination of the effect of proposed salvage yards on residential, business or commercial property investment and values, establish a quota for the number of yards in the county and the social, economic, and environmental impact on community growth and development in specified areas before issuing the commission's approval of a request for a salvage yard.

- par. 23 As has already been mentioned, all of the proposed emergency rule with the exception of Section 7 of Series 6 are being made because of the provisions of H.B. 3146 which took effect on June 10, 1988. I hereby hold that the time limitations requirement for an emergency rule is applicable to this situation and hereby uphold the emergency status of all of these provisions.
- par. 24 On the question of the applicability of the emergency provisions of §29A-3-15(g) of the code, we are faced with a question of whether a decision issued by a circuit court in West Virginia can be used to change the state-wide policy of an agency of the state when such policy changes are expressly ordered by the circuit judge.
- par. 25 In the past, I have expressly upheld the changes required by the West Virginia Supreme Court as constituting a sufficient emergency to change the regulation of state agencies. (See Emergency Rule Decision 6-88 which dealt with the Civil Service Commission Regulations after AFSCME v. West Virginia Civil Service Commission, No. 17929 and Emergency Rule Decision 23-86 which dealt with the rules of the Department of Energy following the holding of the West Virginia Supreme Court in UMWA v. Faerber.)
- par. 26 In 1986, I was faced with an Emergency Rule Decision whose impetus also came from a circuit court decision. This Decision, No. 2-86, involved the legislative regulations for promotion and evaluation of the Department of Public Safety. The circuit court of Kanawha County had ruled certain portions of the regulations invalid and void and this ruling left the Department of Public Service with such an incomplete policy on promotion and evaluation that it had to revise its regulations in order to maintain any policy in this area. I upheld this situation as being an emergency for that department.

- par. 27 Based on the precedence of decisions made by this office, it is clear that a decision by the West Virginia Supreme Court that affects the standing regulations of an agency is sufficient justification to file an emergency rule to bring those regulations into compliance with the court's ruling. Similarly, an action by the circuit court of Kanawha County has also led me to make such ruling. In this case, the Circuit Court of Mercer County has expressly ruled that the regulations are unconstitutional. Further it has approved the regulations that were filed by the Department of Highways as meeting the requirements of the court in light of its decision.
- par. 28 It is the holding of the Secretary of State, therefore, that the Department of Highways has met its obligation to show that a time limitation has been placed upon it by the direct order of the Circuit Court of Mercer County in its Second supplemental Order dated June 30, 1989. Further, I find that in the light of the court's holding that the constitutional rights of persons affected by the placement by signs by this regulation has been violated, there exists also the element of substantial harm under the definition of emergency.
- par. 29 It is the decision of the Secretary of State that this proposal of the Department of Transportation is in procedural compliance with the provisions of West Virginia Code §29A-3-15. Further it does not exceed the statutory authority provided to the Department of Transportation by the West Virginia Code. Also, that the facts and circumstances presented constitute an emergency as defined by the Administrative Procedures Act. Therefore, the Secretary of State decides that this Emergency Rule should be approved.
- par. 30 This decision shall be cited as Emergency Rule Decision 9-89 or ERD 9-89 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the Department of Transportation, the Attorney General and the Legislative Rule Making Review Commission.

KEN HECHLER
SECRETARY OF STATE

Entered _____

EXHIBIT A
Court Orders

NOTED CIVIL 11 1987

APR 2 1987

WILMA F. GAUB
CLERK CIRCUIT COURT
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

DAN R. BOWMAN and
DORIS E. BOWMAN

PLAINTIFFS

V.

CIVIL ACTION NO. 87-C-355-F

ACKEN SIGN INC.,
a Corporation and
G.S.R. GUPTA, an individual

DEFENDANTS

TEMPORARY ORDER

This matter came on this the 2nd day of April, 1987, to be heard on the Plaintiff's request for a temporary restraining order and thereupon appeared the Plaintiff, Dan R. Bowman, in person and by counsel, Edwin B. Wiley, and there appeared the Defendant, Acken Sign, Inc., by its representative William Acken and by its counsel, Jerry Cameron and thereupon counsel for the Plaintiff tendered and asked leave to file their duly verified Affidavit and Complaint which the Court upon review does find proper and is hereby ORDERED filed in this cause.

Thereupon the Court after listening to statements of counsel and a review of the pleadings finds that good cause exists for believing that the proposed structure may constitute a nuisance under law and that the Plaintiffs may suffer irreparable harm and have no other adequate remedy at law does hereby ADJUDGE, ORDER and DECREE that the grounds and premises of the said Defendant, G.S.R. Gupta and Acken Sign, Inc. are hereby enjoined and restrained temporarily by this Court from the

construction and placement of a steel structure as alledged in this action and the Defendants are hereby enjoined and restrained from constructing, maintaining, erecting or in any other way using the premises for advertising purposes by the erection of a steel structure until further Order of this Court and it is further ADJUDGED, ORDERED and DECREED that the Plaintiffs shall show cause before this Court at a hearing to be held on May 8, 1987 at 9:30 o'clock a.m. as to why the said injuction should be made permanant and the Defendants should be permanently restrained and enjoined by this Court from the construction of a steel structure on the said property and the plaintiffs are ORDERED to post a surety bond in this case in the amount of Four Thousand Dollars (\$4,000.00) with the Clerk of the Court on or before 3:00 p.m. this date. It is further Ordered that service of a certified copy of this Order along with a copy of the Complaint filed herein with supporting affidavit upon the Defendant G.S.R. Gupta shall constitute sufficient Notice of the pending court actions and proceedings.

Entered this the 2^d day of April, 1987.

ORDER:

John R. Fitzgerald
J-U-D-G-E

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

NOTED CIVIL DOCKET

MAY 4 1987

WILMA F. GRUBB
CLERK CIRCUIT COURT
MERCER COUNTY

DAN R. BOWMAN and
DORIS E. BOWMAN

PLAINTIFFS

V. CIVIL ACTION NO. 87-C-355-F

ACKEN SIGN INC.,
a Corporation,
GAP ASSOCIATES, a General Partnership,
ANIL B. AGERWAL, D. PATNIK and
G.S.R. GUPTA, individuals

DEFENDANTS

TEMPORARY ORDER

This day came the Plaintiff by Counsel and tendered to the Court their Amended Complaint and asked leave to file the same in this action.

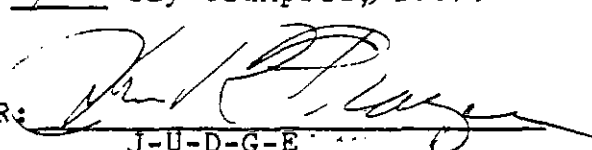
Based upon the matters of previously of record and the statements of Counsel for the Plaintiff, the Court finds that no responsive pleading has been filed by the Defendants at this time and that the filing of the Amended Complaint is necessary to name the actual owners of the real estate in question in this action and to give them proper notice and that the Plaintiffs may suffer irreparable harm if an immediate temporary injunction is not issued by the Court, that the Plaintiff has no adequate remedy at law, that the granting of temporary injunction will not substantially prejudice the rights of the Defendant pending a timely hearing by the Court.

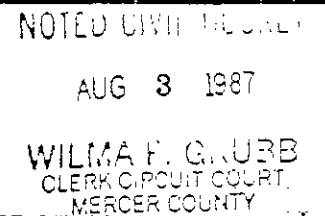
Based upon the previous findings of the Court the Court finds that good cause exists for believing that the proposed structure may constitute a nuisance under law and that the Plaintiffs may suffer irreparable harm and have no other adequate

remedy at law does hereby ADJUDGE, ORDER and DECREE that the grounds and premises of the said Defendant, GAP ASSOCIATES, G.S.R. Gupta, D. Patnik and Anil B. Agerwal and Acken Sign, Inc. are hereby enjoined and restrained temporarily as by the previous Order of the Court from the construction and placement of a steel structure as alledged in this action and the Defendants are hereby enjoined and restrained from constructing, maintaining, erecting or in any other way using the premises for advertising purposes by the erection of a steel structure until further Order of this Court and it is further ADJUDGED, ORDERED and DECREED that the Plaintiffs shall show cause before this Court at a hearing to be held on May 8, 1987 at 9:30 o'clock a.m. as to why the said injuction should be made permanant and the Defendants should be permanently restrained and enjoined by this Court from the construction of a steel structure on the said property and the plaintiffs have posted a surety bond in this case in the amount of Four Thousand Dollars. (\$4,000.00) with the Clerk of the Court which was previously Ordered filed. It is further Ordered that service of a certified copy of this Order along with a copy of the Complaint and the Amended Complaint filed herein with supporting affidavit upon the Defendants shall constitute sufficient Notice of the pending court actions and proceedings.

Entered this the 1 day of May, 1987.

ORDER:


J-U-D-G-E



IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA.

DAN R. BOWMAN and
DORIS E. BOWMAN,

PLAINTIFFS,

VS:

CIVIL ACTION NO. 87-C-355-F

ACKEN SIGN, INC., a corporation, et al.,

DEFENDANTS.

ORDER

This civil action is before the Court for decision after a trial to the Court; upon briefs and proposed findings of facts and conclusions of law filed by both parties; upon consideration of all of which the Court finds as follows:

1. In addition to claiming the proposed sign is a nuisance, the Plaintiffs contend the West Virginia Department of Highways (Department) unlawfully granted the Defendant a permit to erect the subject sign.
2. The Defendant's application for a permit to erect an outdoor sign on the GAP property was filed with the Department on October 10, 1986.
3. After an on-site inspection by one of its employees, the Department approved the application and issued Permit No. 015-466. The permit issued by the Department does not contain any findings of fact or conclusions of law. It does not address the objections raised by the Plaintiffs in this proceeding to support their contention that the permit was improperly issued. Those matters include the intervening road between Route 460 and Mercer Mall, known as the Mall Road, the legality of the on-site Mercer Mall sign, and the distance between the proposed sign and the Mercer Mall sign.
4. Outdoor advertising is regulated in this State by West Virginia Code §17-22-1, et seq. and

the Department's Rules and Regulations. Section 15 governs applications and permits for outdoor signs.

5. Section 15 does not provide for any notice to the general public or those directly affected by the proposed sign regarding the pending application nor does it provide any opportunity for opponents to appear and oppose the permit. Plaintiffs did not have notice of the Defendant's application before the Department nor an opportunity to appear and object to the application.

6. Section 15 requires the Department when it refuses a permit to issue an Order accompanied by findings of fact and conclusions of law to support its refusal. The applicant can then seek judicial review. No such findings and conclusions are required when the permit is approved nor is there any provision for appealing such action.

7. West Virginia Code §17-22-1, et seq. and particularly Section 15 appears to violate the due process rights of the Plaintiffs and the general public.

8. This case should be remanded to the Department for a hearing and further consideration. This will give the Department an opportunity to consider the matters raised by the Plaintiffs and to make findings of fact and conclusions of law regarding these and other relevant issues. If the Department's decision is appealed, its findings and conclusions will enable this Court to make a more knowing and intelligent decision regarding the Department's action.

9. Remanding this case to the Department of Highways for hearing does not interfere with its administrative responsibilities. On the contrary, remand will give the Department an opportunity to more fully develop and address the issues raised by the Plaintiffs and make findings and conclusions to support its decision.

10. Such hearing will also insure Plaintiffs' procedural and substantive due process rights.

It is therefore **ORDERED** and **ADJUDGED** that this action be remanded to the West Virginia Department of Highways for a full administrative hearing on the application of the Defendant for a permit to erect an outdoor advertising sign. This hearing shall be held within thirty (30) days. The hearing shall be recorded and both parties given an opportunity to fully develop the issues raised in this Court and any

other issues that may bear on the propriety of the Defendant's application for a permit. Within thirty (30) days of the hearing the Department shall enter an Administrative Order regarding its decision on the Defendant's application for a permit. The Order shall include specific findings of fact and conclusions of law. Either party may file a Notice with this Court of an appeal of the action of the Department of Highways which appeal shall include a record of the proceedings before the Department of Highways. Any notice of appeal shall also be sent to the Department who may participate in this proceedings.

It is further **ORDERED** and **ADJUDGED** that any decision on the nuisance complaint of the Plaintiffs shall be deferred pending the action of the Department of Highways on the remand and any appeal of that Department's ruling with this Court.

To all of which action adverse to them, the parties object.

A certified copy of this Order shall be sent to William Ritchie, Commissioner, West Virginia Department of Highways, Charleston, West Virginia, by return receipt requested mail. A copy of this Order shall be sent to counsel of record.

This action shall remain on the docket of this Court pending the hearing before the Department of Highways and any appeal from its Administrative Order.

Dated this the 27th day of July, 1987.

ENTER:


JUDGE JOHN R. FRAZIER

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

DAN R. BOWMAN and
DORIS E. BOWMAN

PLAINTIFFS

V. CIVIL ACTION NO. 87-C-355-F

ACKEN SIGNS INC.,
a Corporation,
GAP ASSOCIATES, a General Partnership,
ANIL B. AGERWAL, D. PATNIK and
G.S.R. GUPTA, individuals

DEFENDANTS

NOTED CIVIL DOCKET
SEP 22 1987
WILMA F. GRUBB
CLERK CIRCUIT COURT
MERCER COUNTY

ORDER

This day came counsel for the Plaintiff's above named and tendered and asked leave to file their Petition in this case seeking to have William S. Ritchie, Jr., held in contempt of court for his failure to abide by the the terms and conditions of the Order heretofore entered in this case and which said Petition being found proper in all respects is accordingly Ordered filed.

A hearing on the matters contained in the Petition is Odered held on the 9th day of October, 1987 at 1:00 p.m. and the said William S. Ritchie, Jr. is hereby Ordered to appear before this Court and show cause, if any he can, why he should not be adjudged in contempt of this Court for his failure to abide by those requirements contained in the previous Order of this Court entered on August 3, 1987.

A certified copy of this Order served upon the Secretary of State and upon the said William S. Ritchie, Jr.

shall constitute sufficient notice of this hearing.

ENTER:

ORDER John R. Traeger
JUDGE

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

DAN R. BOWMAN and
DORIS E. BOWMAN,

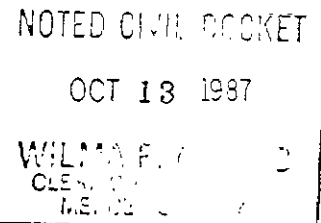
PLAINTIFFS,

-vs-

ACKEN SIGNS, INC.,
a corporation, et al.,

DEFENDANTS.

CIVIL ACTION NO.
87-C-355-F



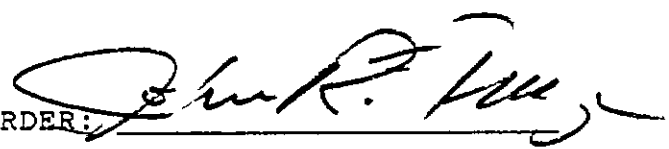
ORDER

This day came William S. Ritchie, Jr., West Virginia Commissioner of Highways on his motion, previously filed herein, to intervene, pursuant to W.Va. R.C.P., Rule 24(a), in order to protect the interests of the West Virginia Department of Highways as those interests may appear in the premises.

These being no objection thereto, and if appearing that the movement may intervene of right, it is hereby Adjudged and Ordered that William S. Ritchie, Jr., West Virginia Commissioner of Highways if hereby made an additional party defendant in the above styled action, and that his name shall hereinafter be added to the styled of this action.

It is further Adjudged and Ordered that the Petition For Rule To Show Cause filed by the Plaintiffs herein and the Order granting the aforesaid rule is hereby dismissed from the docket of this court.

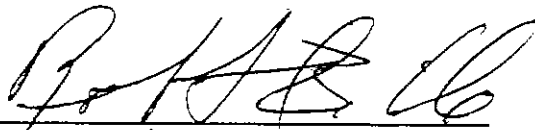
Enter this 9 day October, 1987.

ORDER: 

Judge

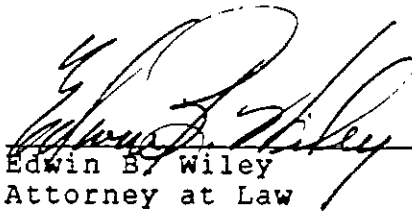


Anthony G. Halkias
Director, Legal Division
West Virginia Department of Highways
1900 Washington Street, East
Charleston, West Virginia 25305

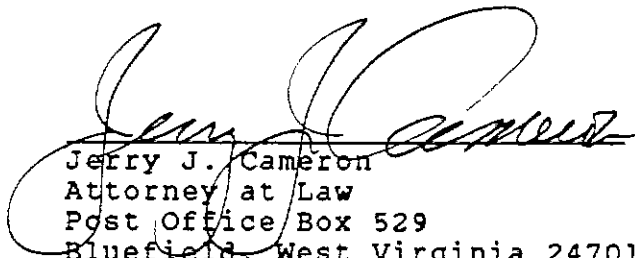


Robert F. Bible
Attorney at Law
West Virginia Department of Highways
1900 Washington Street, East
Charleston, West Virginia 25305

Reviewed and Approved by:



Edwin B. Wiley
Attorney at Law
1517 North Walker Street
Princeton, West Virginia 24740



Jerry J. Cameron
Attorney at Law
Post Office Box 529
Bluefield, West Virginia 24701-0529

NOTED ON FILE
APR 8 1988

WILMA F. GRUBBS
CLERK CIRCUIT COURT
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

DAN R. BOWMAN and
DORIS E. BOWMAN,

Plaintiffs,

VS.

CIVIL ACTION NO. 87-C-355-F

ACKEN SIGNS, INC., a corporation,
GAP ASSOCIATES, a General
Partnership, ANIL B. AGERWAL,
D. PATNIK and G.S.R. GUPTA,
individuals, WILLIAM S. RITCHIE,
Commissioner of the West Virginia
Department of Highways,

Defendants.

ORDER

On February 16, 1988, came all parties, by counsel,
to a status conference previously scheduled by the Court.

The purpose of the status conference was to review
the report, findings, conclusion and decision of James B.
Bartlett, Hearing Examiner, which report, findings, conclusion
and decision are hereto attached and made a part hereof and
are ORDERED to be made a part of the record in this matter.

After a discussion of the Hearing Examiner's findings,
other proceedings held in this matter, and the position of the
parties, the Court determined that sufficient evidence has
been presented and ORDERED that no further evidence shall be
taken. All evidence presented in this matter to date, including
hearings before the Court and before the said Hearing Examiner,
are ORDERED and made a part of the record of this case.

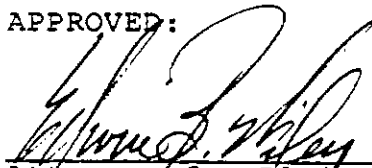
Ed Wiley advised that it was the position of plain-
tiffs that they have been denied property rights in that a

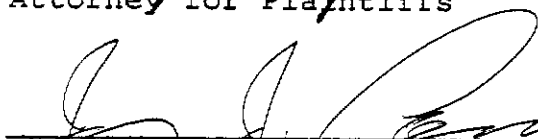
sign cannot be placed on their property and they cannot use their property as they desire if the outdoor display is allowed to be built on the GAP property. They challenge the constitutional right of the Department of Highways in its regulation in issuing a permit for outdoor advertising signs. Plaintiffs move to file a Brief supporting their position and challenging the constitutionality of the Department of Highways' regulations which motion was opposed by defendants and which motion was granted by the Court. Plaintiffs had until March 8, 1988, to file their Brief in support of their motion, to which Brief defendants were required to file a response on or before March 25, 1988. The Court ordered a decision conference for 3:00 p.m. on April 18, 1988, at which time the Court would render its decision and hear any further arguments of counsel.

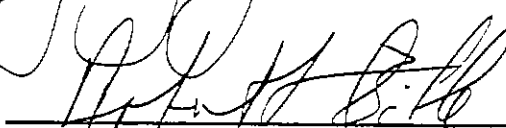
Plaintiffs withdrew their Petitions for review served on January 30, 1988.


John R. Frazier, Judge

APPROVED:


Attorney for Plaintiffs


Attorney for Defendant Acken Signs, Inc.


Attorney for Department of Highways

NOTED CIVIL DOCKET

JUN 24 1988

WILMA F. GRUBB
CLERK CIRCUIT COURT
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

DAN R. BOWMAN and
DORIS E. BOWMAN,

Plaintiffs,

VS.

CIVIL ACTION NO. 87-C-355-F

ACKEN SIGNS, INC., a corporation,
GAP ASSOCIATES, a General
partnership, ANIL B. AGERWAL,
D. PATNIK and G.S.R. GUPTA,
individuals, WILLIAM S. RITCHIE,
COMMISSIONER OF THE WEST VIRGINIA
DEPARTMENT OF HIGHWAY,

Defendants.

ORDER

On the 18th and 25th days of April, 1988, hearings were held in this matter to allow counsel to make oral arguments in support of their positions on the issues presented in this case. After all counsel had completed their arguments, this Court issued a ruling on the constitutionality of the West Virginia Outdoor Advertising regulations and ordered that counsel for plaintiffs prepare the Order reflecting that ruling. The Court further ruled on the legality of defendant Acken Signs, Inc.'s outdoor advertising Permit No. 015-466 issued by the West Virginia Department of Highways and plaintiffs' common law claim that erection of the proposed outdoor advertising sign on property adjacent to theirs would constitute a nuisance. This Order reflects the Court's ruling on the latter issues.

Upon evidence adduced at the various hearings held in this matter, pleading, brief, and oral arguments, the Court hereby finds that plaintiffs have constructed a residence on

their real estate at issue in this action along with a nonattached garage which houses a cabinet shop out of which plaintiff Dan Bowman sells and manufactures cabinets and related wooden products on a part-time basis, that plaintiffs have had their property for sale as commercial type property, that Mercer Mall containing 30 or more businesses is located immediately across the road from plaintiffs' property, that the property and house located next to plaintiffs' property owned by GAP Associates (GAP) is rented, that GAP signed a lease with Acken Signs, Inc. (Acken) for the location of an outdoor advertising sign structure, that the area in question is a commercial area, although plaintiffs reside in the area and there are other residences in the vicinity; that defendant Acken has incorporated the latest in engineering and safety with regards to the design and materials of the outdoor advertising sign which is proposed to be erected; that as a result of such engineering and design, no danger to life and limb exists to plaintiffs or others; that because the real estate is commercial in nature, no diminution in property value shall be sustained by plaintiffs upon the erection of the proposed outdoor advertising sign; that the erection of the proposed advertising sign will not devalue plaintiffs' property as a commercial property; that erection of the proposed outdoor advertising sign will not interfere with plaintiffs' everyday use of their property; that the outdoor sign's lighting devices may cast light upon plaintiffs' property, and the Court will reserve its ruling on that

HUGGINS, COULLING,
BREWSTER, MORHOUS
& CAMERON
ATTORNEYS AT LAW
BLUEFIELD, W. VA.

limited issue until the permitted advertising sign is constructed in accordance with this Order; that this Court believes it is in the best interest of justice that the sign be placed at the farthest allowable location from the Bowman property line; that for all the above reasons and for such other facts as appear of record and introduced into evidence at the various hearings held in this matter, the Court finds that the proposed outdoor advertising sign will not constitute a nuisance; but, that it is in the interests of justice for the Court to attempt to accommodate the respective interests of the parties to this suit as much as practicable.

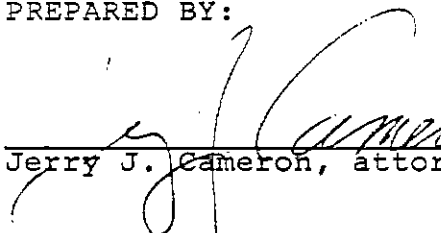
Therefore, it is hereby ORDERED and ADJUDGED that Acken will be allowed to erect the proposed permitted outdoor advertising sign on the property of GAP Associates; that Permit No. 015-466 is a validly issued and existing permit for erection of an outdoor advertising sign; that the sign will not be erected at the originally permitted location on the GAP Associates property but rather the sign shall be erected on the said property at the farthest location from the boundary line of plaintiffs' property allowed by the rules and regulations of the West Virginia Department of Highways; that to the extent necessary, the permit issued by the West Virginia Department of Highways is hereby modified so as to allow erection of the proposed advertising sign in accordance with this ruling; that Acken will not be required to make any further application or request to the West Virginia Department of Highways for such erection except a new survey will be

provided; that the Court reserves ruling on how late at night Acken will be permitted to illuminate the outdoor advertising sign until the effect of such illumination upon plaintiffs' property can be examined and determined by this Court; that plaintiffs are released from their bond and the Clerk of Court is ordered to refund same to plaintiffs and are further not required to reimburse Acken for delay in erecting the proposed advertising sign; and, that the costs of this proceeding are to be divided equally between Acken, plaintiffs, and the West Virginia Department of Highways. Plaintiffs and defendants object and take exception to the respective portions of the Court's ruling which are contrary to the legal positions taken by those parties.

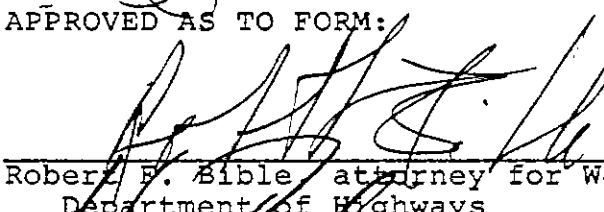
ENTER: This 24th day of June, 1988.

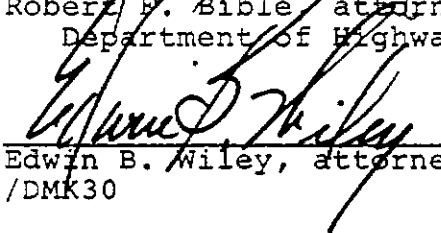

Judge

PREPARED BY:


Jerry J. Cameron, attorney for Acken Signs, Inc.

APPROVED AS TO FORM:


Robert F. Bible, attorney for West Virginia
Department of Highways


Edwin B. Wiley, attorney for plaintiffs
/DMK30

HUGGINS, COULLING,
BREWSTER, MORHOUS
& CAMERON
ATTORNEYS AT LAW
BLUEFIELD, W. VA.

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

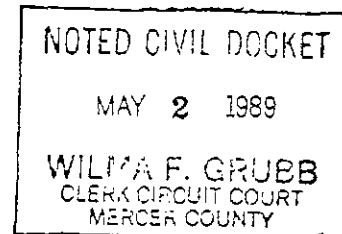
DAN R. BOWMAN and DORIS E. BOWMAN

PLAINTIFFS

V.

CIVIL ACTION NO.87-C-355-F

ACKEN SIGN INC., a Corporation,
GAP ASSOCIATES, a General
Partnership, ANIL B. AGERWAL,
D. PATNIK and G.S.R. GUPTA,
individuals, WILLIAM S. RITCHIE,
Commissioner of the West Virginia
Department of Highways,



DEFENDANTS

SUPPLEMENTAL ORDER

This matter came on the 18th day of April, 1988 and the 25th day of April, 1988, having previously been set for further hearing by the Court and thereupon appeared the Plaintiff by counsel, Edwin B. Wiley, and there appeared the Defendant, Acken Sign, Inc., by it's counsel, Jerry Cameron and David Kersey and the Defendant, William S. Ritchie, Commissioner, by his counsel, Robert Bible..

Thereupon the Court after listening to statements of counsel, having heard extensive evidence in this matter on other occasions, having reviewed the briefs of the respective parties, a review of the pleadings filed herein and all other matters coming to the attention of the Court finds in part as follows:

1. The current rules and regulations of the Commissioner entitled "Rules and Regulations for Outdoor Advertising on the State Highway System" designated as 157 CSR 6-7 are unconstitutional in part as follows:

(a) The Rules and Regulations fail to afford public notice and opportunity for the general public to be heard on the issue of the issuance of the permit to erect and license to maintain an outdoor advertising sign.

(b) The Rules and Regulations fail to define with particularity "commercial and industrial activities" necessary to meet the definition contained in 157 CSR 6-7.2(i) of "Unzoned Commercial or

Industrial Area" and such failure to adequately define such activities constitute vagueness and ambiguity to such an extent as to render the definition contained therein subject to individual and improper interpretation and not within the stated intent of the statutes and regulations applicable to outdoor advertising.

2. To the extent that the Plaintiffs have alleged that the other portions of the rules and regulations are unconstitutional for various reasons the Court finds such arguments are without merit.

Based upon the foregoing findings of fact the Court does hereby ADJUDGE, ORDER AND DECREE as follows:

The Defendant, William S. Ritchie, Commissioner of the West Virginia Department of Highways, or his lawful successor shall immediately take such steps as are necessary to correct the constitutional infirmities as are specified above by the enactment of such rules and regulations as are necessary to afford general notice to the public of the permit application to afford those persons who may be adversely affected thereby a meaningful hearing and opportunity to be heard prior to such issuance and possible licensure of an outdoor advertising permit and to properly define business or industrial activity which would make a geographical area includable as a commercial or industrial area.

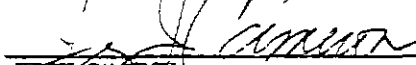
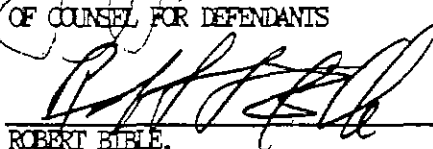
This matter shall remain open upon the dockets of this court for any further rulings necessary, ~~for the enforcement of the lighting provisions and the placement provisions of the sign.~~

Entered this the 1 day of May, 1989.

ORDER:



J-U-D-G-E


EDWIN B. WILEY,
OF COUNSEL FOR PLAINTIFFS
JERRY CAMERON,
OF COUNSEL FOR DEFENDANTS
ROBERT BIBLE,
OF COUNSEL FOR WEST VIRGINIA
DEPARTMENT OF HIGHWAYS

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA.

DAN R. BOWMAN,

PLAINTIFF,

VS: CIVIL ACTION NO. 87-C-355-F

ACKEN SIGNS,

DEFENDANT.

N O T I C E

TO: Edwin B. Wiley
Attorney at Law
1500 North Walker Street
Princeton, West Virginia 24740

Jerry J. Cameron
Attorney at Law
Hudgins, Coulling, Brewster, Morhous & Cameron
P. O Box 529
Bluefield, West Virginia 24701

Robert F. Bible
Attorney, Legal Division
West Virginia Department of Highways
State Capitol Complex
Building Five
Charleston, West Virginia 25305

NOTED CIVIL DOCKET

JUN 26 1989

WILMA F. GRUBB
CLERK CIRCUIT COURT
MERCER COUNTY

Please be advised that a hearing will be held before the undersigned Judge on Friday, June 30, 1989 at 2:00 p.m. for the following matters:

1. Entry of an Order relative to the last hearing in this matter.
2. Consideration of a supplemental order temporarily enjoining the Department of Highways from issuing any further permits for outdoor advertising signs pending filing and operation of new regulations in accordance with the Court's previous Orders.

3. And for such other related matters.

Dated this the 23rd day of June, 1989.


JUDGE JOHN R. FRAZIER

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

DAN R. BOWMAN and
DORIS M. BOWMAN

Plaintiffs,

v

CIVIL ACTION NO. 87-C-355-F

ACKEN SIGN, INC. a corporation
et al and WILLIAM S. RITCHIE,
Commissioner of the West Virginia
Department of Highways,

Defendants.

SECOND SUPPLEMENTAL ORDER

NOTED CIVIL DOCKET

JUN 30 1989

WILMA F. GRUBB
CLERK CIRCUIT COURT
MERCER COUNTY

This matter came on the 1st day of May, 1989, having previously been set for further hearing by the Court, for a status conference and related matters by the Court's letter dated April 18, 1989, and thereupon appeared the plaintiffs by their counsel, Edwin B. Wiley, and appeared the defendant, Outdoor East, L.P., successor in interest to Acken Sign, Inc., by their counsel, Jerry Cameron, and appeared the defendant, Fred VanKirk, Acting Commissioner of the West Virginia Department of Highways, successor in interest to William S. Ritchie, by his counsel, Robert F. Bible.

Thereupon, the Court after extensive discussion with the counsel present, and after review of the proposed revised "Rules and Regulations for Outdoor Advertising on the State Highway System" (Exhibit A) (hereinafter "Outdoor Advertising Regulations") required by the Court's order pursuant to the previous hearings held on April 18, 1988 and April 25, 1988, found that the proposed rules did not meet all of the

RF) requirements set forth in the previous orders in this matter, including the modifications requested by Tony Cameron and after further discussion with counsel, the Court finds that in his letter dated June 8, 1987 (Exhibit C) the second proposed revised Outdoor Advertising Regulations (Exhibit B) and C as revised by and agreed to by all counsel, except for the objections and exceptions set forth hereinafter, do comply with the Court's prior rulings regarding notice and public hearing and regarding the definition of "industrial and commercial areas."

Based upon the foregoing, the Court does hereby Adjudge, Order and Decree as follows:

RF) That the second proposed revised Outdoor Advertising Regulations (Exhibit B) and C be filed forthwith by the West Virginia Commissioner of Highways with the Office of the Secretary of State and the Legislative Rule Making Review Committee as proposed emergency rules in accordance with the procedures set forth in the W.Va. Administrative Procedures Act, W. Va. Code §29A-3-15. The Court specifically finds that its earlier rulings regarding the partial unconstitutionality of the existing rules and regulations constitute the facts and circumstances of the emergency required to be stated in filing the emergency rules, as set forth in the aforesaid W.Va. Code §29A-3-15. The Court hereby notes and overrules the Objection and Exception of the Defendants to this portion of the Court's ruling.

The Court does hereby further Adjudge, Order and Decree that the West Virginia Commissioner of Highways shall forthwith

JRF
proceed to promulgate the second proposed revised Outdoor Advertising Regulations (Exhibit B) ^{and C} as legislative rules pursuant to the procedures set forth in W.Va. Code §29A-3-1 et seq.

JRF
The Court does hereby further Adjudge, Order and Decree that the West Virginia Commissioner of Highways shall forthwith forward a copy of the second proposed Outdoor Advertising Regulations (Exhibit B) ^{and C} to the appropriate officials of the Federal Highway Administration (FHWA) and seek the concurrence of the FHWA to the aforementioned second proposed Outdoor Advertising Regulations.

JRF
It is further Adjudged, Ordered and Decreed that the W.Va. Commissioner of Highways shall file with the Court his affidavit and supporting exhibits showing that the actions required herein have been accomplished, ^{and the Court} ~~at which time this action shall be dismissed as to the aforementioned West Virginia Commissioner of Highways~~ ^{retains jurisdiction of this matter. To all of which the parties except and object.}

Enter this 30 day of June, 1989.

John R. Franzer
JUDGE

Prepared by:

Robert F. Bible 30 June 1989
Robert F. Bible, Counsel
WV Department of Highways

Reviewed by:

Edwin B. Wiley
Edwin B. Wiley, Esquire

Terry Cameron
Terry Cameron, Esquire

FILED

1989 JUL 28 PM 2: 27

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

MEMORANDUM

TO: THE HONORABLE KEN HECHLER,
Secretary of State of West Virginia
Administrative Law Division

FROM: WEST VIRGINIA OUTDOOR ADVERTISING
ASSOCIATION, An Unincorporated
Assocaition

DATE: JULY 28, 1989

MEMORANDUM OF THE WEST VIRGINIA OUTDOOR ADVERTISING
ASSOCIATION IN OPPOSITION TO EMERGENCY RULE

Gregory A. Morgan, Esquire
Counsel for West Virginia Outdoor
Advertising Association, An
Unincorporated Association

Suite One, Schroath Building
Clarksburg, West Virginia 26301
Telephone: (304) 624-5687

YOUNG, MORGAN & CANN
Of Counsel

M E M O R A N D U M

TO: THE HONORABLE KEN HECHLER,
Secretary of State of West Virginia
Administrative Law Division

FROM: WEST VIRGINIA OUTDOOR ADVERTISING ASSOCIATION,
An Unincorporated Association

DATE: JULY 28, 1989

RE: MEMORANDUM OF THE WEST VIRGINIA OUTDOOR ADVERTISING
ASSOCIATION IN OPPOSITION TO EMERGENCY RULE

The West Virginia Outdoor Advertising Association, an Unincorporated Association ("Association"), submits this Memorandum at the request of representatives of The Honorable Ken Hechler, Secretary of State of the State of West Virginia, and pursuant to West Virginia Code § 29A-3-15a(c). This Memorandum sets forth the Association's position with respect to certain "Emergency Amendments To An Existing Rule" filed with the Administrative Law Division of the Secretary of State's office by the Department of Transportation, Division of Highways ("D.O.H."), on July 14, 1989. The revisions are to Series VI of the Administrative Regs. 17-2A.

The emergency rule amends several areas of Series VI. Among those are to the definition of "Unzoned Commercial or Industrial Area" found in Section 7. Certain criteria have been established to determine whether or not any particular business can be considered a "viable commercial or industrial" activity for the purposes of the sign placement. In Section 8 amendments have been made with respect to the definition of salvage yards. The Association has no quarrel with the these amendments, and, in fact, fully supports the strengthening of the "unzoned commercial and industrial activity" definition and the addition of the "viability" concepts. The amendments to the regulations respecting salvage yards have no application to the industry.

The amendments to Section 7.5, entitled "Permits Required" are, however, of great concern to the Association, attached hereto and designated as Exhibit "1." The emergency rule requires, for the first time, the public advertisement (by publication) of the application for a permit to construct, erect, operate, use, or maintain an outdoor advertising sign. The expense to be borne by the Applicant also included are provisions allowing any person claiming to be affected by the proposed sign to request a public hearing prior to the issuance of the permit; for the notice of hearing and the procedure for hearings to be held by the D.O.H. and for the assessment of the cost of such hearings upon the parties.

The Association believes that these amendments, adopted by means of the emergency rule, are inappropriate and improper under the standards set forth in W. Va. Code § 29A-3-15, and must be disapproved by the Secretary of State. Section 7.5 should be disapproved for two (2) of the three (3) reasons provided for in W. Va. Code § 29A-3-15a(b). First, the Division of Highways has exceeded the scope of its statutory authority and, secondly, no emergency exists to support the emergency rule. These matters will be addressed separately.

I. THE AMENDMENT TO SECTION 7.5 AS SET FORTH IN THE EMERGENCY RULE MUST BE DISAPPROVED.

A. The notice and hearing provisions exceed the scope of the statute.

The authorizing statute for Section 7.5 of Series VI is W. Va. Code § 17-22-15, a copy of which is attached hereto, designated as Exhibit "1." The authorizing section specifies in detail the process by which a licensed outdoor advertising operator must obtain a permit to erect a sign. Subsection (a) provides that "no person shall construct, erect, operate, use ... any advertising sign, display or device without first obtaining a permit therefor from the Commissioner and paying the annual fee."

Subsection (b) details the contents of the permit, the amount of the annual fee, the procedure to be followed upon the event of a denial by the Commissioner of the permit; requires that June 30th be the expiration date of all permits; and, certain other matters. Subsection (b) also protects the lessor of the sign location property by specifically requiring that "each application shall be accompanied by an affidavit of the applicant or his agent that the owner or other person in control or possession of the real property upon which advertising sign, display, or device is to be constructed, erected, operated, used or maintained, has consented thereto."

Subsection (e) sets forth detailed procedures for the revocation of the permit.

Subsection (f) provides for nondiscretionary judicial review of any decision by the Commissioner (now the Division Director of the Division of Highways) for the refusal to grant or revoking a permit, and gives the Appellant three (3) options for venue, being (1) the county where the operator's principal place of business is located, (2) the county in which the sign is to be located, and (3) Kanawha County.

Memorandum
Page 3
July 27, 1989

Analysis of Section 7.5 of the emergency rule reveals its virtual complete disregard for the statutory procedure enacted by W. Va. Code § 17-22-15. It imposes procedures, including the provision of a published public notice, at the operator's expense, a public comment period, and the discretionary holding of a public hearing on the issue of the grant or denial of the required permit, which hearing may be requested by any person who claims to be affected by the proposed sign, which are not found in the statute and are outside the scope of authority granted in W. Va. Code § 17-22-15, or, for that matter, anywhere else in Article 22, nor are they anywhere to be found in the federal counterpart to Article 22, which is Section 131 of Title 23 of the United States Code (see Exhibit "3"). The publication requirement and the opening of the permit process to virtually everyone in the world are matters completely outside the standards set by the statute. There is no language whatsoever in the section which requires these additional burdens on licensed outdoor operators, is there any shown any language from which these requirements can be necessarily inferred. The Association respectfully submits that the D.O.H. is without power to unilaterally impose these additional burdens in the absence of specific statutory authority.

Perhaps the most glaring defect in Section 7.5 is the provision for judicial review contained therein which is in direct conflict with the provisions of W. Va. Code § 17-22-15.

As noted above, the Code section provides that "any persons adversely affected by an Order made and entered by the Commissioner (now the Division Administrator) refusing to grant or revoking a permit is entitled to judicial review thereof." (Emphasis supplied.) The section provides three (3) venue options. Section 7.5 as set forth in the emergency rule, completely disregards the obvious legislative intent and is a blatant attempt to rewrite the statute. In Section 7.5, judicial review is provided as follows:

"Any party adversely affected by the final decision of the Division Administration may apply for judicial review through application for a Writ of Certiorari, to the Circuit Court of Kanawha County." (Emphasis supplied.)

The section is in direct conflict with the statutory provision on three (3) counts. First, the Code section makes review mandatory and nondiscretionary. That is, if a decision is appealed, the Court is required to review the decision. The emergency rule merely allows an application for a Writ of Certiorari, thus making the hearing of the appeal a matter of the Court's discretion. The

conflict between the statute and the rule operates to invalidate the rule as a matter of law and should clearly be disapproved.

Secondly, Section 7.5 would allow the application to be made only to Kanawha County, not, as the statute allows, to either the county which is the principal place of business of the applicant or to the county in which the proposed sign is to be located. Thus, the emergency rule directly contradicts and restricts an aggrieved party's right to judicial review in his chosen forum as permitted by law.

Thirdly, the provision allowing any "party" to appeal, when considered in conjunction with the public comment, notice and hearing provisions of the amendments to Section 7.5, allows applications for judicial review by persons who are not real parties in interest in the issuance of the permit. The former regulation made the permit application subject to the consent of the affected landowner (See W. Va. Code § 17-22-15[b]). The new regulation will allow delaying litigation by anyone who, for any reason, opposes outdoor advertising. This is in direct conflict with the stated legislative interest of Article 22 of Chapter 17. The Code which states as follows:

"The legislature hereby finds and declares:
(a) That outdoor advertising is a legitimate, commercial use of private property adjacent to roads and highways; (b) that outdoor advertising is an integral part of the business and marketing function and an established segment of the national economy which serves to promote and protect private investments in commerce and industry; (c) that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to federal-aid interstate and primary highways should be regulated in order to protect the public investment in such highways, to promote the recreational value of public travel, to preserve natural beauty, and to promote the reasonable, orderly and effective display of such signs, displays and devices.

The legislature further finds and declares that fiscal actualities reflect that the people of the State of West Virginia would suffer economically if the State failed to participate

fully in the allocation and apportionment of federal-aid highway funds, more specifically that a reduction in federal-aid highway funds would necessitate increased local taxation to support and maintain the state road program and system, and that it is the intention of this bill, among other things, to provide a statutory basis for regulation of outdoor advertising consistent with the public policy relating to areas adjacent to federal-aid interstate and primary highways declared by the Congress of the United States, in Title 23, United States Code, and that the economic benefit resulting from full participation in the federal highway program would constitute a benefit to the community as a whole. (1967, c. 177.)"

The Division of Highways has detoured far off its regulatory right of way in the filing of Section 7.5. It has imposed costly and time-consuming burdens not contemplated nor authorized by the authorizing law. It further purports to rewrite and substantially restrict the rights of persons aggrieved by a D.O.H. decision to appeal it, and to restrict the forum in which the appeal can be heard. All of these amendments are completely beyond the scope of this agency's legal authority, especially in light of the fact that there has been no change, modification or amendment in the controlling statutory provisions since 1967. The amendments to Section 7.5 implemented by means of the emergency rule should be immediately disapproved.

- B. The facts and circumstances stated in the emergency rule do not state the existence of an emergency as defined by the Administrative Procedures Act.

The Secretary of State is assigned the legal duty disapproving emergency rules when he determines that there is no existing emergency to justify the promulgation of the emergency rule, W. Va. Code § 29A-3-15a(b)(2). In order to aid the Secretary of State in the performance of this duty, the Administrative Procedures Act (hereinafter "A.P.A.") requires that the agency must file a statement of the facts and circumstances constituting the emergency, W. Va. Code § 29A-3-15(a), copies of which are attached hereto as Exhibit "4."

In accordance with this requirement the following statement was filed with the emergency rule on July 15, 1989:

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"THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

The circumstances for filing this Emergency Rule stem from the decision made by Judge John R. Frazier, Circuit Court of Mercer County, West Virginia, in Civil Action 87-C-355-F on June 30, 1989. As stated in the Second Supplemental Order of the June 30, 1989 proceedings by the Court, 'The Court specifically finds that its earlier rulings regarding the partial unconstitutionality of the existing rules and regulations constitute the facts and circumstances of the emergency required to be stated in filing the emergency rules, as set forth in the aforesaid W.Va. Code §29A-3-15.'

The Court also ruled that these revisions be filed forthwith by the Commissioner of Highways as proposed emergency rules with your office as well as with the Legislative Rule Making Review Committee. A copy of the June 30, 1989 Second Supplemental Order of the referenced case is attached." (Emphasis in the original.)

The emergency which is said to justify the rule is the issuance of the order of the Circuit Court of Mercer County, West Virginia. No other facts or circumstances have been cited or presented.

The A.P.A. defines "emergency" in subsection (g) 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. (1982, c. 121; 1985, c. 153; 1986, c. 97; 1987, cc. 75, 76.)

As is apparent, the A.P.A. definition does not include orders of Courts. Further, the D.O.H. states no other facts or circumstances which allege any threat to the public peace, health, safety or welfare which the promulgation of this rule is necessary to

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prevent, nor that there is any time limit imposed by the Code or by any federal statute or regulation nor that any substantial harm exists to the public interest. The terms of the A.P.A. definition are plain and unambiguous. No circumstances or state of facts have been presented by the Department of Transportation, Highways Division, which satisfy the statutory definition of "emergency." The Secretary of State must, therefore, under terms of the procedure established by the A.P.A., disapprove the emergency rule because of the clear lack of the existence of an emergency, and the failure of the D.O.H. to any facts which support the existence of an emergency as defined by the A.P.A.

The promulgation of the emergency rule makes no change in the law which purports to redress any imminent threat, nor is there any amendment that cannot wait for consideration in the normal course of affairs. The only "emergency" is that created by the Circuit Judge.

That there is, in fact, no existing emergency, and that the Judge's declaration of the emergency is a sham, can be seen from the progress of Civil Action No. 87-C-355-F. This matter was initiated in 1987, and tried almost a year ago. The Circuit Court has been supervising the revision of the regulations for over a year, and has, at least temporarily, accomplished their promulgation in the form of the emergency rule by means by the expedient of ordering the D.O.H. to file the rule. By doing so, Judge Frazier has overstepped his authority, since the A.P.A. provides that it is the agency itself which must find the existence of an emergency, not any outside or third party authority, even if judicial. The acceptance of Judge Frazier's authority to find the existence of an emergency by the refusal of the Secretary of State to disapprove the emergency rule would violate the separation of powers provisions found in Article V of the West Virginia Constitution, which states in part, "the Legislative, Executive and Judicial Departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to the others...".

In finding and declaring the existence of an emergency, which is a function and power of the Executive Branch, Judge Frazier has usurped judicial power in violation of the separation of powers provisions of the constitution.

It should also be noted that in spite of Judge Frazier's finding that an emergency exists, there has been no equitable or injunctive relief ordered by the Court to halt the issuance of new permits, and, in fact, the sign permit in the case before Judge

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Frazier has been granted and issued. It is clear that the Judge is attempting to unilaterally legislate and regulate the law in this area to suit himself and in effect expand his county jurisdiction statewide. This is completely improper. The facts do not justify the emergency and the Secretary, therefore, has a mandatory legal duty to disapprove this emergency rule. Any other decision would render the A.P.A. meaningless.

CONCLUSION

For the reasons set forth above, the Secretary of State should disapprove of Section 7.5 of Administrative Regs. 17-2A as amended by the emergency rule because the amendments exceed the scope of the agency's statutory authority and because the facts and circumstances stated do not justify the existence of an emergency as defined by the A.P.A.

GAM:pjp
Exhibits Attached

Department of Highways
Adm. Reg. 17-2A
Series VI, Sec. 7.4.1

(1) 7.4.1 Orders - A ~~commissioner's~~ division administrator's order revoking a license shall be accompanied by a findings of fact and conclusions of law upon which said order was made and entered.

(2) 7.4.2 Judicial Review - Any person adversely affected by an order made and entered by the ~~Commissioner~~ Division Administrator is entitled to a judicial review as set out in Article 22, Chapter 17, of the Code.

7.051 Permits Required. -- No person shall construct, erect, operate, use, maintain, or cause or permit to be constructed, erected, operated, used or maintained any outdoor advertising sign, display or device without first obtaining a permit from the ~~Commissioner~~ Division of Highways Administrator, and paying the annual fee. In the case of new permits, an inspection fee can be charged as is deemed necessary by the Division/Administrator.

Upon receipt of a permit application an application number shall be assigned by the Division of Highways. The applicant shall be notified of the temporary application number and shall then be required to publish a class 2 legal advertisement in the newspaper(s) serving the area where the proposed outdoor advertising sign, display or device is proposed to be located. A copy of the certificate of publication shall be provided to the Department within ten (10) days of the final publication date.

As a minimum the advertisement shall include the application number, the location (including ownership of the property upon which the sign is to be placed) and shall notify the public that comments will be received by the Division of Highways, Highway Services Section, until 10 days after the final publication. The advertisement shall also state that all comments must include the specific application number to which they refer.

Any person who claims to be affected by the proposed sign may submit written comments to the Division of Highways, Highway Services Section, and may request a public hearing within ten days of the final publication. Within ten working days of the close of the comment period the Division shall determine whether to approve, deny, or hold a public hearing for said permit.

When the Division determines that a public hearing is required it shall notify the person(s) who requested the

Editor's note. — For designation of the office of state road commissioner as department of highways, see § 17-2A-1.

§ 17-22-15. Permit required for each sign, etc.; applications; refusal of permits; expiration and renewal; change of advertising copy; revocation; fee; judicial review.

(a) Except as in this article otherwise provided, no person shall construct, erect, operate, use, maintain, or cause or permit to be constructed, erected, operated, used or maintained any advertising sign, display, or device without first obtaining a permit therefor from the commissioner and paying the annual fee therefor, as herein provided. The commissioner shall not issue such a permit to any person who has not obtained the license provided for in section thirteen [§ 17-22-13] of this article.

(b) A separate application for a permit shall be made for each separate advertising sign, display, or device, on a form furnished by the commissioner, which application shall be signed by the applicant or his representative duly authorized in writing to act for him, and shall describe and set forth the size, shape and the nature of the proposed advertising sign, display, or device, and its actual or proposed location with sufficient accuracy to enable the commissioner to locate and identify it. Every application shall be accompanied by a fee of one dollar for each advertising sign, display, or device, which fee shall be retained by the commissioner if the permit is issued. Each portion of an advertising sign upon which a display is posted or exhibited shall constitute a separate advertising sign for purposes of this section. If the permit is refused the commissioner shall make and enter an order to that effect and shall cause a copy of such order to be served on such applicant by certified mail, return receipt requested, and shall refund one half the fee to the applicant. Such order shall be accompanied by findings of fact and conclusions of law upon which such order was made and entered. Each application shall be accompanied by an affidavit of the applicant or his agent that the owner or other person in control or possession of the real property upon which such advertising sign, display, or device is to be constructed, erected, operated, used or maintained, has consented thereto. Application shall be made in like manner for a permit to operate, use or maintain any existing advertising sign, display or device. Permits issued hereunder shall expire on the thirtieth day of June of each year, and shall not be prorated, and may be renewed upon the payment of the same fee required to be paid upon application for a permit. No application shall be required for a renewal of a permit.

(c) If more than one side of an advertising sign is used for advertising, a fee for each such side shall be required. Advertisements sculptured in the round shall be treated as using three sides.

(d) The holder of a permit shall, during the term thereof, have the right to change the advertising copy on the structure or sign for which it was issued without payment of any additional fee.

later than March 31, 1979. Such report shall include the information required by subsection (a) together with the Secretary's conclusions and recommendations for appropriate legislation.

"(d) There is hereby authorized to be appropriated not to exceed \$350,000 to carry out this section."

CODE OF FEDERAL REGULATIONS

Reimbursement for certain costs related to highway construction and railroad work, 23 CFR Part 140.

Railroad-highway insurance protection; railroad-highway projects, 23 CFR Part 646.

CROSS REFERENCES

This section is referred to in 23 USCS §§ 120, 121.

RESEARCH GUIDE

Am Jur:

65 Am Jur 2d, Railroads § 287.

§ 131. Control of outdoor advertising

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title [23 USCS § 104], until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever

he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the

zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

- (A) The taking from the owner of such sign, display, or device of a right, title, leasehold, and interest in such sign, display, or device; and
- (B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit information directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas and other travel information systems within the rights-of-way for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable. The Federal share of the cost of establishing such an information center or travel information system shall be that which is provided in section 120 [2

USCS § 120] for a highway project on that Federal-aid system to be served by such center or system.

(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State highway department shall be entitled to such payments unless the State maintains the control required under such agreement: *Provided*, That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be considered a breach of such agreement or the control required thereunder. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

(k) Subject to compliance with subsection (g) of this section for the payment of just compensation, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136 [23 USCS § 136(b)], or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136 [23 USCS § 136(g)], the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United

States Code, section 1254 [28 USCS § 1254]. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136 [23 USCS § 136(b)], the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed \$20,000,000 for the fiscal year ending June 30, 1966, not to exceed \$20,000,000 for the fiscal year ending June 30, 1967, not to exceed \$2,000,000 for the fiscal year ending June 30, 1970, not to exceed \$27,000,000 for the fiscal year ending June 30, 1971, not to exceed \$20,500,000 for the fiscal year ending June 30, 1972, and not to exceed \$50,000,000 for the fiscal year ending June 30, 1973. The provisions of this chapter [23 USCS §§ 101 et seq.] relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967.

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.

(o) The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the time of their erection which do not conform to the requirements of subsection (c), where such signs, displays, and devices are in existence on the date of enactment of this subsection [enacted May 5, 1976] and where the State demonstrates that such signs, displays, and devices (1) provide directional information about goods and services in the interest of the traveling public, and (2) are such that removal would work a substantial economic hardship in such defined area.

(p) In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act [Amendments] of 1974 [enacted Jan 4, 1975], which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed, the United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).

(q)(1) During the implementation of State laws enacted to comply with this section, the Secretary shall encourage and assist the States to develop

sign controls and programs which will assure that necessary directional information about facilities providing goods and services in the interest of the traveling public will continue to be available to motorists. To this end the Secretary shall restudy and revise as appropriate existing standards for directional signs authorized under subsections 131(c) (1) and 131(f) [subsections (c)(1) and (f) of this section] to develop signs which are functional and esthetically compatible with their surroundings. He shall employ the resources of other Federal departments and agencies, including the National Endowment for the Arts, and employ maximum participation of private industry in the development of standards and systems of signs developed for those purposes.

(2) Among other things the Secretary shall encourage States to adopt programs to assure that removal of signs providing necessary directional information, which also were providing directional information on June 1, 1972, about facilities in the interest of the traveling public, be deferred until all other nonconforming signs are removed.

(Aug. 27, 1958, P. L. 85-767, § 1, 72 Stat. 904; Sept. 21, 1959, P. L. 86-342, Title I, § 106, 73 Stat. 612; June 29, 1961, P. L. 87-61, Title I, § 106, 75 Stat. 123; Oct. 24, 1963, P. L. 88-157, § 5, 77 Stat. 277; Oct. 22, 1965, P. L. 89-285, Title I, § 101, 79 Stat. 1028; Sept. 13, 1966, P. L. 89-574, § 8(a), 80 Stat. 768; Aug. 23, 1968, P. L. 90-495, § 6(a)-(d), 82 Stat. 817; Dec. 31, 1970, P. L. 91-605, Title I, § 122(a), 84 Stat. 1726; Jan. 4, 1975, P. L. 93-643, § 109, 88 Stat. 2284; May 5, 1976, P. L. 94-280, Title I, § 122, 90 Stat. 438; Nov. 6, 1978, P. L. 95-599, Title I, §§ 121, 122, 92 Stat. 2700; Nov. 9, 1979, P. L. 96-106, § 6, 93 Stat. 797.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act Oct. 22, 1965, P. L. 89-285, 79 Stat. 1028, known as the Highway Beautification Act of 1965, which among other things appears as a note to this section. For full classification of this Act, consult USCS Tables volumes.

"Such Act", referred to in this section, is probably a reference to Act Jan. 4, 1975, P. L. 93-643, 88 Stat. 2281. For full classification of this Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed word "Amendments" is inserted in subsec. (p) to clarify the Act probably intended to be referred to by Congress inasmuch as Act Jan. 4, 1975, P.L. 93-643, § 1, 88 Stat. 2281, provided that that Act may be cited as the "Federal-Aid Highway Amendments of 1974". Act Nov. 6, 1978, P.L. 95-599, § 122(c), 92 Stat. 2701, purported to amend subsec. (c) by inserting "including those which may be changed at reasonable intervals by electronic process or by remote control," after "devices,"; this matter was added after "devices" as the probable intent of Congress.

§ 29A-3-10. Creation of a legislative rule-making review committee.

Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt, 358 S.E.2d 432 (W. Va. 1987).

§ 29A-3-11. Submission of legislative rules to the legislative rule-making review committee.

Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt, 358 S.E.2d 432 (W. Va. 1987).

§ 29A-3-12. Submission of legislative rules to Legislature.

Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt, 358 S.E.2d 432 (W. Va. 1987).

§ 29A-3-13. Adoption of legislative rules; effective date.

Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt, 358 S.E.2d 432 (W. Va. 1987).

§ 29A-3-14. Withdrawal or modification of proposed rules.

Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt, 358 S.E.2d 432 (W. Va. 1987).

§ 29A-3-15. Emergency legislative rules; procedure for promulgation; definition.

(a) Any agency with authority to propose legislative rules may, without hearing, find that an emergency exists requiring that emergency rules be promulgated and promulgate the same in accordance with this section. Such emergency rules, together with a statement of the facts and circumstances constituting the emergency, shall be filed in the state register and shall become effective immediately upon such filing. Such emergency rules may adopt, amend or repeal any legislative rule, but the circumstances constituting the emergency requiring such adoption, amendment or repeal shall be stated with particularity and be subject to de novo review by any court having original jurisdiction of an action challenging their validity. Fifteen copies of the rules and of the required statement shall be filed forthwith with the legislative rule-making review committee.

An emergency rule shall be effective for not more than fifteen months and shall expire earlier if any of the following occurs:

(1) The secretary of state, acting under the authority provided for in section fifteen-a [§ 29A-3-15a] of this article, or the attorney general, acting under the authority provided for in section fifteen-b [§ 29A-3-15b] of this article, disapproves the emergency rule because (A) the agency has exceeded the

Effect of amendments of 1987. — The 1987, reenacted this section as amended by amendment, by c. 75, in the second paragraph Acts 1987, c. 75.
in (a), substituted "An" for "Any"; and in (a)(1), Applied in *Boyd v. Merritt*, 354 S.E.2d 106 (W. Va. 1986).
added "or the attorney general, acting under the authority provided for in section fifteen-b. Cited in *West Virginia Chiropractic Soc'y, Inc. v. Merritt*, 358 S.E.2d 432 (W. Va. 1987).
of this article,"
The amendment by c. 76, effective May 13,

§ 29A-3-15a. Disapproval of emergency rules by the secretary of state; judicial review.

(a) Upon the filing of an emergency rule by an agency, under the provisions of section fifteen [§ 29A-3-15] of this article, by any agency, except for the secretary of state, the secretary of state shall review such rule and, within forty-two days of such filing, shall issue a decision as to whether or not such emergency rule should be disapproved. An emergency rule filed by the secretary of state shall be reviewed by the attorney general as provided for in section fifteen-b [§ 29A-3-15b] of this article.

(b) The secretary of state shall disapprove an emergency rule if he determines:

- (1) That the agency has exceeded the scope of its statutory authority in promulgating the emergency rule;
- (2) That an emergency does not exist justifying the promulgation of the rule; or
- (3) That the rule was not promulgated in compliance with the provisions of section fifteen of this article.

(c) If the secretary of state determines, based upon the contents of the rule or the supporting information filed by the agency, that the emergency rule should be disapproved, he may disapprove such rule without further investigation, notice or hearing. If, however, the secretary of state concludes that the information submitted by the agency is insufficient to allow a proper determination to be made as to whether the emergency rule should be disapproved, he may make further investigation, including, but not limited to, requiring the agency or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.

(d) The determination of the secretary of state shall be reviewable by the supreme court of appeals under its original jurisdiction, based upon a petition for a writ of mandamus, prohibition or certiorari, as appropriate. Such proceeding may be instituted by:

- (1) The agency which promulgated the emergency rule;
- (2) A member of the Legislature; or
- (3) Any person whose personal property interests will be significantly affected by the approval or disapproval of the emergency rule by the secretary of state. (1986, c. 97; 1987, cc. 75, 76.)

Effect of amendments of 1987. — The 1987, reenacted this section as amended by amendment, by c. 75, rewrote (a). Acts 1987, c. 75.
The amendment by c. 76, effective May 13,



WEST VIRGINIA DEPARTMENT OF HIGHWAYS

State Capitol Complex

Building Five

Charleston, West Virginia 25305

GASTON CAPERTON
GOVERNOR

FRED VANKIRK
ACTING COMMISSIONER
STATE HIGHWAY ENGINEER

August 2, 1989

Mr. Robert E. Wilkinson
Deputy Secretary of State
State Capitol, 157-K
Charleston, West Virginia 25305

Dear Mr. Wilkinson:

Thank you for the opportunity to respond to the memorandum from Gregory A. Morgan, Attorney at Law, concerning the opposition to the emergency rules filed by the Division of Highways.

As you are aware the only reason we filed the emergency amendments was because of the requirement of the court.

Whether or not this is sufficient basis to determine if this is an emergency situation should be decided by your office or ultimately the State Supreme Court.

The West Virginia Outdoor Advertising Association was well aware for over a year of this suit. At no time did the advertisers see fit to intervene. Therefore, we do not feel that it is appropriate for the Division of Highways or the Secretary of State to address the legal issues as set forth in the Associations memorandum.

Should you desire additional information, do not hesitate to contact me or Bob Bible of our Legal Division.

Very truly yours,

A handwritten signature in cursive script, appearing to read "C. Cameron Lewis".

C. Cameron Lewis, Director
Highway Services Division

CCL:b

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 345-4000
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STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

WILLIAM H. HARRINGTON
Chief of Staff

RICHARD O. HARTMAN
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

SHEREE COHEN
Special Assistant

(Plus all the volunteer
help we can get)

August, 1989

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Department of Transportation, Division of Highways

RULE: Amendments, Series 6; Regulations Relating to Use of State
Road Rights of Way and Areas Adjacent Thereto

DATE FILED AS AN EMERGENCY RULE: July 14, 1989

DECISION NO. 9-89

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.

KEN HECHLER
Secretary of State

FILED
1989 AUG - 7 PM 4: 58
OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone (304) 345-4000
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STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

FILED

1989 JUL -7 PM 4:58

WILLIAM H. HARRINGTON
Chief Clerk

RICHARD O. HARTMAN
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

SHEREE COHEN
Special Assistant

(Plus all the volunteer
help we can get)

DECISION

EMERGENCY RULE DECISION
(ERD 9-89)

AGENCY: Department of Transportation, Div. of Highways
RULE: Amendments Series 6, Regulations Relating to Use
of State Road Rights of Way and Areas Adjacent
Thereto

FILED AS AN EMERGENCY RULE: July 14, 1989

- par. 1 The Department of Transportation, Division of Highways, has filed the above emergency amendments to Series 6, Regulations Relating to Use of State Road Rights of Way and Areas Adjacent Thereto.
- 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 Department of Transportation, Division of Highways filed this emergency rule with supporting documents with the Secretary of State on July 14, 1989 and with the LRMRC on July 14, 1989.

par. 7 It is the determination of the Secretary of State that the Department of Transportation, Division of Highways, 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 §5F-2-2 reads in part:

§5F-2-2. Power and authority of the secretary of each department.

(a)(11) Promulgate rules, as defined in Section 2 (Section 29A-1-2), Article 1, Chapter 29A of this code, to implement and make effective the powers, authority and duties granted and imposed by the provisions of this chapter, such promulgation to be in accordance with the provisions of Chapter 29A (Section 29A-1-1 et seq.) of this Code;

par. 9 West Virginia Code §5F-2-1 reads in part:

§5F-2-1. Transfer an incorporation of agencies and boards.

(g) The following agencies and boards, including all of the allied, advisory, affiliated or related entities and funds associated with any such agency or board, are hereby transferred to and incorporated in and shall be administered as part of the Department of Transportation:

(2) The Department of Highways provided for in article 2A (§17-2A-1 et seq.), chapter 17 of this code;

par. 10 West Virginia Code §17-2A-8 reads in part:

§17-2A-8. Powers, duties and responsibilities of commissioner.

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

(15) Establish and maintain a uniform system of road signs and markers:

(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 effective and expeditious performance and discharge of the duties and responsibilities placed upon him by law;

par. 11 West Virginia Code §17-22-11 reads:

§17-22-11. Enforcement of provisions by commissioner; rules and regulations.

It shall be the function and duty of the state road commissioner to administer and enforce the provisions of this article, and in the performance of his duties hereunder, he may assign to division engineers, and other employees in his department, such duties as he may deem proper. The commissioner is hereby authorized and empowered to promulgate rules and regulations implementing the provisions of this article, including rules and regulations permitting the State of West Virginia to comply with the provisions of Title 23, United States Code, relating to the payment of bonuses for the regulation of outdoor advertising adjacent to the interstate system, and the terms and provisions of any agreement heretofor entered into pursuant to law by and between the state road commissioner of West Virginia and the secretary of commerce of the United States relating to the payment of such bonuses, any provisions of this article to the contrary notwithstanding.

par. 12 It is clear that the Secretary of the Department of Transportation has the authority to amend the rules of that department dealing with the regulation of state road rights of way and adjacent areas with regard to the placement of signs. Of particular interest in this case is the admonition that rules will be promulgated "for the effective and expeditious performance and discharge of the duties and responsibilities placed upon him by law." See West Virginia Code §17-2A-8(24).

par. 13 This emergency rule was also filed to recognize revisions made by the West Virginia Legislature in H.B. 3146 which took effect on June 10, 1988. After having reviewed the regulations against the Act of the Legislature, it is the finding of the Secretary of State that the Secretary of Transportation is acting within the statutory authority provided for in the West Virginia Code.

par. 14 There are several revisions made to 157 CSR 6.7. These changes were made because of a case before Judge John R. Frazier of the Circuit Court of Mercer County, West Virginia, in the case of Bowman v. Acken Sign Inc., Civil Action No. 87-C-355-F. In a Supplemental Order dated May 1, 1989, Judge Frazier held that "the current rules and regulations of the commissioner entitled 'Rules and Regulations for Outdoor Advertising on State Highway System' designated as 157 CSR 6.7 are unconstitutional in part as follows:

(a) The rules and regulations fail to afford public notice and opportunity for the general public to be heard on the issue of the issuance of the permit to erect and license to maintain an outdoor advertising sign.

(b) The rules and regulations fail to define with particularity 'commercial and industrial activities' necessary to meet the definition contained in 157 CSR 6-7.2(i) of 'Unzoned Commercial or Industrial Area' and such failure to adequately define such activities constitute vagueness and ambiguity to such an extent as to render the definition contained therein subject to individual and improper interpretation and not within the stated intent of the statutes and regulations applicable to outdoor advertising." (See Exhibit A).

In his Second Supplemental Order for this case, dated June 30, 1989, Judge Frazier found that the regulations now placed before the Legislative Rule-Making Review Committee met the requirements set forth in his previous orders. He then ordered the Commissioner of Highways to file these regulations as proposed emergency rules pursuant to the provisions the West Virginia Administrative Procedures Act (See West Virginia Code §29A-3-15) (See the Second Supplemental Order attached as part of Exhibit A).

par. 15 The West Virginia Outdoor Advertising Association has raised several objections on the contents of this particular rule. All of their objections deal with the section of the emergency rule that was expressly ordered to be filed by Judge Frazier. The objections raised by the outdoor advertisers will be addressed as they were raised in their memorandum dated July 28, 1989. (See the memorandum of the West Virginia Outdoor Advertising Association in opposition to emergency rule which is attached as Exhibit B).

par. 16 The provisions of Series 6, Section 7 of the rules of the West Virginia of Highways are based on the provisions of article twenty-two, chapter seventeen, of the Code and particularly on the requirements of §17-22-15. Subsection (f) of §17-22-16 provides for the judicial review of a decision by the commissioner (now the director of the Division of Highways) for the refusal to grant or revoke a permit. An appellant is granted three options for venue under this statute and they are: 1) The county where the operator's principle place of business is located; 2) The county in which the sign is located; and 3) Kanawha County if all parties agree thereto. The judicial review provided for by 152 CSR 6.7.5 in these emergency regulations reads as follows:

Any party adversely affected by the final decision of the Division Administrator may apply for judicial review through application for a writ of certiorari to the Circuit Court of Kanawha County in accordance with W. Va. Code §53-3-1 and §14-2-2.

par. 17 It is the opinion of the Secretary of State that the provisions of the proposed regulations are in conflict with the provisions

of §17-22-15. Further the provisions of the regulations are far more restrictive in terms of the appellate rights available to parties aggrieved by the decision of the Division Administrator. The Department of Transportation is faced with a situation in which a Circuit Court has ruled its regulations unconstitutional because of its lack of provisions relating to public input in this area. Certainly it is inconsistent for the same court to approve of and order the filing of rules that severely restrict the ability of the same persons to appeal their case once it has been ruled upon by the Division of Highways. However, it is not the place of this office to second guess the rulings of a court in this state when the record shows that the court was cognizant of the issues surrounding this situation. Therefore, I must overrule the objection raised by the West Virginia Outdoor Advertising Association on this issue and allow the provisions of 152 CSR 6.7.5 on appeals to stand. The Association points out in its objections that the number of persons who are allowed to appeal decisions made by the Division Administrator is far larger than the group defined in the provisions of §17-22-15. Perhaps this is the reason for the court's action.

par. 18 It is the finding of the Secretary of State that the Department of Transportation, Division of Highways, has met its obligations to abide by the statutory authority provided to it in promulgating these regulations. This is particularly true when one considers that the provisions of §17-2A-8(24) envision that these duties and responsibilities may be placed upon him "by law". Obviously an order by a court of original jurisdiction is an obligation placed on the department by law.

par. 19 (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. 20 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. 21 While the Department of Transportation does not expressly identify which of these elements it claims, it appears to the Secretary of State that at least two of them may apply in this case. The first is time limitation, and the second is substantial harm.

par. 22 The facts and circumstances as presented by the Department of Transportation are as follows:

The circumstances for filing this Emergency Rule stem from the decision made by Judge John R. Frazier, Circuit Court of Mercer County, West Virginia, in Civil Action 87-C-355-F on June 30, 1989. As stated in the Second Supplemental Order of the June 30, 1989 proceedings by the Court, "The Court specifically finds that its earlier rulings regarding the partial unconstitutionality of the existing rules and regulations constitute the facts and circumstances of the emergency required to be stated in filing the emergency rules, as set forth in the aforesaid W. Va. Code §29A-3-15."

The Court also ruled that these revisions be filed forthwith by the Commissioner of Highways as proposed emergency rules with your office as well as with the Legislative Rule Making Review Committee. A copy of the June 30, 1989 Second Supplemental Order of the referenced case is attached.

Also, this filing is being made in order to recognize revisions to Chapter 17, Article 23, Sections 2, 4 and 8 as amended and reenacted by House Bill No. 3146, passed March 12, 1988 and effective June 10, 1988. The amendments address changes to the provisions for the licensing and maintaining of salvage yards. However, these changes will not apply if the salvage yard was licensed prior to June 12, 1988.

Notable changes made to Series 6, Section 7, are as follows: the definition of "Unzoned Commercial or Industrial Area" now specifies "viable" commercial or industrial activities; also, seven qualifications for identifying unzoned commercial or industrial areas have been added, while three qualifications have been added to the listing of circumstances which shall not be considered commercial or industrial activity.

Additionally, Section 7.5, "Permits Required" has been supplemented with information addressing the Division of Highways' internal processing of an Outdoor Advertising Permit Application. This processing includes: the assignment of an application number, notification of the applicant and local public advertisement of the same; the submission of comments, request for public hearing and the Division's decision to approve, deny or hold a hearing; the Division's notification of hearing to the requestor, applicant and public; the provisions for determining hearing costs and application of the costs to the party of bad faith; and finally, the right to judicial review by the adversely affected party of the final decision.

Notable changes made to Series 6, Section 8 are as follows: definitions for abandoned salvage yards, residential community and occupied private residence have been added, while the definition of a salvage yard has been revised to exclude garbage dumps and sanitary landfills. Additionally, changes to the application for license have been made as follows: an annual license fee of \$200.00 is now specified; and the prerequisite of obtaining a permit from the County Planning Commission prior to establishing a salvage yard after July 1, 1984 has been included.

Also, distance restrictions from the edge of roadway for expressway, trunkline, feeder, state and local service roads and from single occupied private residences as well as occupied private residences which are a part of a residential community are prescribed for salvage yards licensed after June 12, 1988. A certified survey showing the distance to the nearest occupied residence, if within 1,000 feet, or the distance to the nearest occupied residence of a community, if within 5,000 feet, must accompany salvage yard applications after June 12, 1988.

Finally, all County Planning Commissions, or in their absence an appropriate office or agency, shall promulgate rules that conform with these rules and regulations before a permit may be issued after June 12, 1988. These rules must at least address the determination of the effect of proposed salvage yards on residential, business or commercial property investment and values, establish a quota for the number of yards in the county and the social, economic, and environmental impact on community growth and development in specified areas before issuing the commission's approval of a request for a salvage yard.

- par. 23 As has already been mentioned, all of the proposed emergency rule with the exception of Section 7 of Series 6 are being made because of the provisions of H.B. 3146 which took effect on June 10, 1988. I hereby hold that the time limitations requirement for an emergency rule is applicable to this situation and hereby uphold the emergency status of all of these provisions.
- par. 24 On the question of the applicability of the emergency provisions of §29A-3-15(g) of the code, we are faced with a question of whether a decision issued by a circuit court in West Virginia can be used to change the state-wide policy of an agency of the state when such policy changes are expressly ordered by the circuit judge.
- par. 25 In the past, I have expressly upheld the changes required by the West Virginia Supreme Court as constituting a sufficient emergency to change the regulation of state agencies. (See Emergency Rule Decision 6-88 which dealt with the Civil Service Commission Regulations after AFSCME v. West Virginia Civil Service Commission, No. 17929 and Emergency Rule Decision 23-86 which dealt with the rules of the Department of Energy following the holding of the West Virginia Supreme Court in UMWA v. Faerber.)
- par. 26 In 1986, I was faced with an Emergency Rule Decision whose impetus also came from a circuit court decision. This Decision, No. 2-86, involved the legislative regulations for promotion and evaluation of the Department of Public Safety. The circuit court of Kanawha County had ruled certain portions of the regulations invalid and void and this ruling left the Department of Public Service with such an incomplete policy on promotion and evaluation that it had to revise its regulations in order to maintain any policy in this area. I upheld this situation as being an emergency for that department.

- par. 27 Based on the precedence of decisions made by this office, it is clear that a decision by the West Virginia Supreme Court that affects the standing regulations of an agency is sufficient justification to file an emergency rule to bring those regulations into compliance with the court's ruling. Similarly, an action by the circuit court of Kanawha County has also led me to make such ruling. In this case, the Circuit Court of Mercer County has expressly ruled that the regulations are unconstitutional. Further it has approved the regulations that were filed by the Department of Highways as meeting the requirements of the court in light of its decision.
- par. 28 It is the holding of the Secretary of State, therefore, that the Department of Highways has met its obligation to show that a time limitation has been placed upon it by the direct order of the Circuit Court of Mercer County in its Second supplemental Order dated June 30, 1989. Further, I find that in the light of the court's holding that the constitutional rights of persons affected by the placement by signs by this regulation has been violated, there exists also the element of substantial harm under the definition of emergency.
- par. 29 It is the decision of the Secretary of State that this proposal of the Department of Transportation is in procedural compliance with the provisions of West Virginia Code §29A-3-15. Further it does not exceed the statutory authority provided to the Department of Transportation by the West Virginia Code. Also, that the facts and circumstances presented constitute an emergency as defined by the Administrative Procedures Act. Therefore, the Secretary of State decides that this Emergency Rule should be approved.
- par. 30 This decision shall be cited as Emergency Rule Decision 9-89 or ERD 9-89 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the Department of Transportation, the Attorney General and the Legislative Rule Making Review Commission.

KEN HECHLER
SECRETARY OF STATE

Entered _____

EXHIBIT A
Court Orders

NOTED CIVIL 1 1987

APR 2 1987

WILMA F. GRUBB
CLERK CIRCUIT COURT
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

DAN R. BOWMAN and
DORIS E. BOWMAN

PLAINTIFFS

V.

CIVIL ACTION NO. 87-C-355-F

ACKEN SIGN INC.,
a Corporation and
G.S.R. GUPTA, an individual

DEFENDANTS

TEMPORARY ORDER

This matter came on this the 2nd day of April, 1987, to be heard on the Plaintiff's request for a temporary restraining order and thereupon appeared the Plaintiff, Dan R. Bowman, in person and by counsel, Edwin B. Wiley, and there appeared the Defendant, Acken Sign, Inc., by its representative William Acken and by its counsel, Jerry Cameron and thereupon counsel for the Plaintiff tendered and asked leave to file their duly verified Affidavit and Complaint which the Court upon review does find proper and is hereby ORDERED filed in this cause.

Thereupon the Court after listening to statements of counsel and a review of the pleadings finds that good cause exists for believing that the proposed structure may constitute a nuisance under law and that the Plaintiffs may suffer irreparable harm and have no other adequate remedy at law does hereby ADJUDGE, ORDER and DECREE that the grounds and premises of the said Defendant, G.S.R. Gupta and Acken Sign, Inc. are hereby enjoined and restrained temporarily by this Court from the

construction and placement of a steel structure as alledged in this action and the Defendants are hereby enjoined and restrained from constructing, maintaining, erecting or in any other way using the premises for advertising purposes by the erection of a steel structure until further Order of this Court and it is further ADJUDGED, ORDERED and DECREED that the Plaintiffs shall show cause before this Court at a hearing to be held on May 8, 1987 at 9:30 o'clock a.m. as to why the said injuction should be made permanant and the Defendants should be permanently restrained and enjoined by this Court from the construction of a steel structure on the said property and the plaintiffs are ORDERED to post a surety bond in this case in the amount of Four Thousand Dollars (\$4,000.00) with the Clerk of the Court on or before 3:00 p.m. this date. It is further Ordered that service of a certified copy of this Order along with a copy of the Complaint filed herein with supporting affidavit upon the Defendant G.S.R. Gupta shall constitute sufficient Notice of the pending court actions and proceedings.

Entered this the 2^d day of April, 1987.

ORDER: *John R. Givens*
J-U-D-G-E

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

NOTED CIVIL DOCKET

MAY 4 1987

WILMA F. GRUBB
CLERK CIRCUIT COURT
MERCER COUNTY

DAN R. BOWMAN and
DORIS E. BOWMAN

PLAINTIFFS

V. CIVIL ACTION NO. 87-C-355-F

ACKEN SIGN INC.,
a Corporation,
GAP ASSOCIATES, a General Partnership,
ANIL B. AGERWAL, D. PATNIK and
G.S.R. GUPTA, individuals

DEFENDANTS

TEMPORARY ORDER

This day came the Plaintiff by Counsel and tendered to the Court their Amended Complaint and asked leave to file the same in this action.

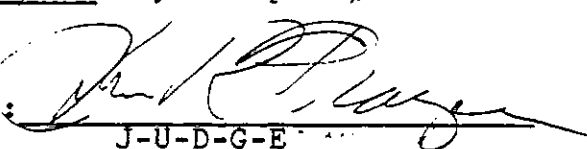
Based upon the matters of previously of record and the statements of Counsel for the Plaintiff, the Court finds that no responsive pleading has been filed by the Defendants at this time and that the filing of the Amended Complaint is necessary to name the actual owners of the real estate in question in this action and to give them proper notice and that the Plaintiffs may suffer irreparable harm if an immediate temporary injunction is not issued by the Court, that the Plaintiff has no adequate remedy at law, that the granting of temporary injunction will not substantially prejudice the rights of the Defendant pending a timely hearing by the Court.

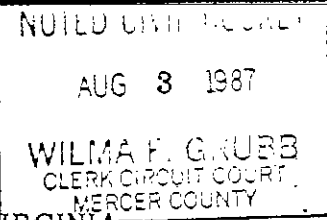
Based upon the previous findings of the Court the Court finds that good cause exists for believing that the proposed structure may constitute a nuisance under law and that the Plaintiffs may suffer irreparable harm and have no other adequate

remedy at law does hereby ADJUDGE, ORDER and DECREE that the grounds and premises of the said Defendant, GAP ASSOCIATES, G.S.R. Gupta, D. Patnik and Anil B. Agerwal and Acken Sign, Inc. are hereby enjoined and restrained temporarily as by the previous Order of the Court from the construction and placement of a steel structure as alledged in this action and the Defendants are hereby enjoined and restrained from constructing, maintaining, erecting or in any other way using the premises for advertising purposes by the erection of a steel structure until further Order of this Court and it is further ADJUDGED, ORDERED and DECREED that the Plaintiffs shall show cause before this Court at a hearing to be held on May 8, 1987 at 9:30 o'clock a.m. as to why the said injuction should be made permanant and the Defendants should be permanently restrained and enjoined by this Court from the construction of a steel structure on the said property and the plaintiffs have posted a surety bond in this case in the amount of Four Thousand Dollars (\$4,000.00) with the Clerk of the Court which was previously Ordered filed. It is further Ordered that service of a certified copy of this Order along with a copy of the Complaint and the Amended Complaint filed herein with supporting affidavit upon the Defendants shall constitute sufficient Notice of the pending court actions and proceedings.

Entered this the 4 day of May, 1987.

ORDER:


J-U-D-G-E



IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA.

DAN R. BOWMAN and
DORIS E. BOWMAN,

PLAINTIFFS,

VS:

CIVIL ACTION NO. 87-C-355-F

ACKEN SIGN, INC., a corporation, et al.,

DEFENDANTS.

ORDER

This civil action is before the Court for decision after a trial to the Court; upon briefs and proposed findings of facts and conclusions of law filed by both parties; upon consideration of all of which the Court finds as follows:

1. In addition to claiming the proposed sign is a nuisance, the Plaintiffs contend the West Virginia Department of Highways (Department) unlawfully granted the Defendant a permit to erect the subject sign.
2. The Defendant's application for a permit to erect an outdoor sign on the GAP property was filed with the Department on October 10, 1986.
3. After an on-site inspection by one of its employees, the Department approved the application and issued Permit No. 015-466. The permit issued by the Department does not contain any findings of fact or conclusions of law. It does not address the objections raised by the Plaintiffs in this proceeding to support their contention that the permit was improperly issued. Those matters include the intervening road between Route 460 and Mercer Mall, known as the Mall Road, the legality of the on-site Mercer Mall sign, and the distance between the proposed sign and the Mercer Mall sign.
4. Outdoor advertising is regulated in this State by West Virginia Code §17-22-1, et seq. and

the Department's Rules and Regulations. Section 15 governs applications and permits for outdoor signs.

5. Section 15 does not provide for any notice to the general public or those directly affected by the proposed sign regarding the pending application nor does it provide any opportunity for opponents to appear and oppose the permit. Plaintiffs did not have notice of the Defendant's application before the Department nor an opportunity to appear and object to the application.

6. Section 15 requires the Department when it refuses a permit to issue an Order accompanied by findings of fact and conclusions of law to support its refusal. The applicant can then seek judicial review. No such findings and conclusions are required when the permit is approved nor is there any provision for appealing such action.

7. West Virginia Code §17-22-1, et seq. and particularly Section 15 appears to violate the due process rights of the Plaintiffs and the general public.

8. This case should be remanded to the Department for a hearing and further consideration. This will give the Department an opportunity to consider the matters raised by the Plaintiffs and to make findings of fact and conclusions of law regarding these and other relevant issues. If the Department's decision is appealed, its findings and conclusions will enable this Court to make a more knowing and intelligent decision regarding the Department's action.

9. Remanding this case to the Department of Highways for hearing does not interfere with its administrative responsibilities. On the contrary, remand will give the Department an opportunity to more fully develop and address the issues raised by the Plaintiffs and make findings and conclusions to support its decision.

10. Such hearing will also insure Plaintiffs' procedural and substantive due process rights.

It is therefore **ORDERED** and **ADJUDGED** that this action be remanded to the West Virginia Department of Highways for a full administrative hearing on the application of the Defendant for a permit to erect an outdoor advertising sign. This hearing shall be held within thirty (30) days. The hearing shall be recorded and both parties given an opportunity to fully develop the issues raised in this Court and any

other issues that may bear on the propriety of the Defendant's application for a permit. Within thirty (30) days of the hearing the Department shall enter an Administrative Order regarding its decision on the Defendant's application for a permit. The Order shall include specific findings of fact and conclusions of law. Either party may file a Notice with this Court of an appeal of the action of the Department of Highways which appeal shall include a record of the proceedings before the Department of Highways. Any notice of appeal shall also be sent to the Department who may participate in this proceedings.

It is further **ORDERED** and **ADJUDGED** that any decision on the nuisance complaint of the Plaintiffs shall be deferred pending the action of the Department of Highways on the remand and any appeal of that Department's ruling with this Court.

To all of which action adverse to them, the parties object.

A certified copy of this Order shall be sent to William Ritchie, Commissioner, West Virginia Department of Highways, Charleston, West Virginia, by return receipt requested mail. A copy of this Order shall be sent to counsel of record.

This action shall remain on the docket of this Court pending the hearing before the Department of Highways and any appeal from its Administrative Order.

Dated this the 27th day of July, 1987.

ENTER:


JUDGE JOHN R. FRAZIER

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

DAN R. BOWMAN and
DORIS E. BOWMAN

PLAINTIFFS

V. CIVIL ACTION NO. 87-C-355-F

ACKEN SIGNS INC.,
a Corporation,
GAP ASSOCIATES, a General Partnership,
ANIL B. AGERWAL, D. PATNIK and
G.S.R. GUPTA, individuals

DEFENDANTS

NOTED CIVIL DOCKET

SEP 22 1987

WILMA F. GRUBB
CLERK CIRCUIT COURT
MERCER COUNTY

ORDER

This day came counsel for the Plaintiff's above named and tendered and asked leave to file their Petition in this case seeking to have William S. Ritchie, Jr., held in contempt of court for his failure to abide by the the terms and conditions of the Order heretofore entered in this case and which said Petition being found proper in all respects is accordingly Ordered filed.

A hearing on the matters contained in the Petition is Odered held on the 9th day of October, 1987 at 1:00 p.m. and the said William S. Ritchie, Jr. is hereby Ordered to appear before this Court and show cause, if any he can, why he should not be adjudged in contempt of this Court for his failure to abide by those requirements contained in the previous Order of this Court entered on August 3, 1987.

A certified copy of this Order served upon the Secretary of State and upon the said William S. Ritchie, Jr.

shall constitute sufficient notice of this hearing.

ENTER:

ORDER

John R. Franzen
JUDGE

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

DAN R. BOWMAN and
DORIS E. BOWMAN,

PLAINTIFFS,

-vs-

ACKEN SIGNS, INC.,
a corporation, et al.,

DEFENDANTS.

CIVIL ACTION NO.
87-C-355-F

NOTED CIVIL DOCKET

OCT 13 1987

WILMA F. J. 3
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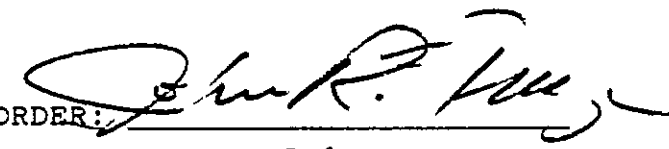
ORDER

This day came William S. Ritchie, Jr., West Virginia Commissioner of Highways on his motion, previously filed herein, to intervene, pursuant to W.Va. R.C.P., Rule 24(a), in order to protect the interests of the West Virginia Department of Highways as those interests may appear in the premises.

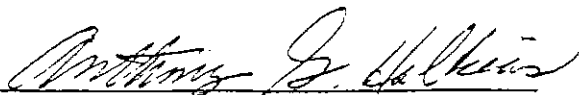
These being no objection thereto, and if appearing that the movement may intervene of right, it is hereby Adjudged and Ordered that William S. Ritchie, Jr., West Virginia Commissioner of Highways if hereby made an additional party defendant in the above styled action, and that his name shall hereinafter be added to the styled of this action.

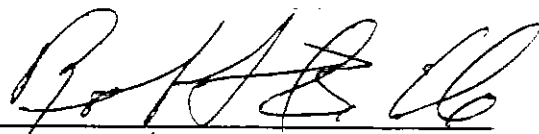
It is further Adjudged and Ordered that the Petition For Rule To Show Cause filed by the Plaintiffs herein and the Order granting the aforesaid rule is hereby dismissed from the docket of this court.

Enter this 9 day October, 1987.

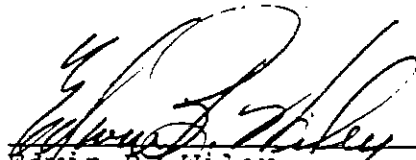
ORDER: 

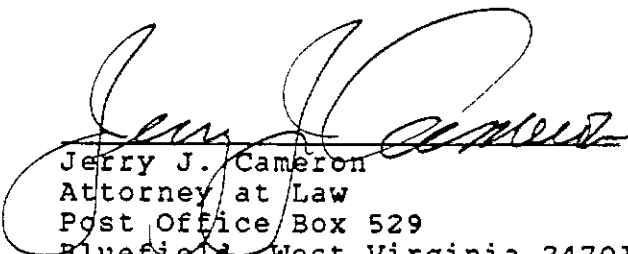
Judge


Anthony G. Halkias
Director, Legal Division
West Virginia Department of Highways
1900 Washington Street, East
Charleston, West Virginia 25305


Robert F. Bible
Attorney at Law
West Virginia Department of Highways
1900 Washington Street, East
Charleston, West Virginia 25305

Reviewed and Approved by:


Edwin B. Wiley
Attorney at Law
1517 North Walker Street
Princeton, West Virginia 24740


Jerry J. Cameron
Attorney at Law
Post Office Box 529
Bluefield, West Virginia 24701-0529

APR 8 1988

WILMA F. GRUBB
CLERK CIRCUIT COURT
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

DAN R. BOWMAN and
DORIS E. BOWMAN,

Plaintiffs,

VS.

CIVIL ACTION NO. 87-C-355-F

ACKEN SIGNS, INC., a corporation,
GAP ASSOCIATES, a General
Partnership, ANIL B. AGERWAL,
D. PATNIK and G.S.R. GUPTA,
individuals, WILLIAM S. RITCHIE,
Commissioner of the West Virginia
Department of Highways,

Defendants.

ORDER

On February 16, 1988, came all parties, by counsel,
to a status conference previously scheduled by the Court.

The purpose of the status conference was to review
the report, findings, conclusion and decision of James B.
Bartlett, Hearing Examiner, which report, findings, conclusion
and decision are hereto attached and made a part hereof and
are ORDERED to be made a part of the record in this matter.

After a discussion of the Hearing Examiner's findings,
other proceedings held in this matter, and the position of the
parties, the Court determined that sufficient evidence has
been presented and ORDERED that no further evidence shall be
taken. All evidence presented in this matter to date, including
hearings before the Court and before the said Hearing Examiner,
are ORDERED and made a part of the record of this case.

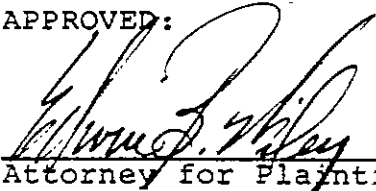
Ed Wiley advised that it was the position of plain-
tiffs that they have been denied property rights in that a

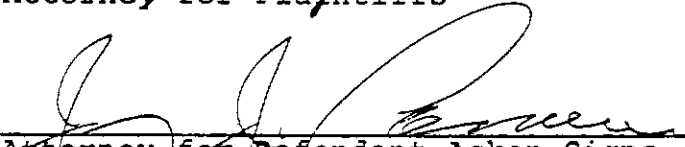
sign cannot be placed on their property and they cannot use their property as they desire if the outdoor display is allowed to be built on the GAP property. They challenge the constitutional right of the Department of Highways in its regulation in issuing a permit for outdoor advertising signs. Plaintiffs move to file a Brief supporting their position and challenging the constitutionality of the Department of Highways' regulations which motion was opposed by defendants and which motion was granted by the Court. Plaintiffs had until March 8, 1988, to file their Brief in support of their motion, to which Brief defendants were required to file a response on or before March 25, 1988. The Court ordered a decision conference for 3:00 p.m. on April 18, 1988, at which time the Court would render its decision and hear any further arguments of counsel.

Plaintiffs withdrew their Petitions for review served on January 30, 1988.


John R. Frazier, Judge

APPROVED:


Attorney for Plaintiffs


Attorney for Defendant Acken Signs, Inc.


Attorney for Department of Highways

NOTED CIVIL DOCKET

JUN 24 1988

WILMA F. GRUBB
CLERK CIRCUIT COURT
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

DAN R. BOWMAN and
DORIS E. BOWMAN,

Plaintiffs,

VS.

CIVIL ACTION NO. 87-C-355-F

ACKEN SIGNS, INC., a corporation,
GAP ASSOCIATES, a General
partnership, ANIL B. AGERWAL,
D. PATNIK and G.S.R. GUPTA,
individuals, WILLIAM S. RITCHIE,
COMMISSIONER OF THE WEST VIRGINIA
DEPARTMENT OF HIGHWAY,

Defendants.

ORDER

On the 18th and 25th days of April, 1988, hearings were held in this matter to allow counsel to make oral arguments in support of their positions on the issues presented in this case. After all counsel had completed their arguments, this Court issued a ruling on the constitutionality of the West Virginia Outdoor Advertising regulations and ordered that counsel for plaintiffs prepare the Order reflecting that ruling. The Court further ruled on the legality of defendant Acken Signs, Inc.'s outdoor advertising Permit No. 015-466 issued by the West Virginia Department of Highways and plaintiffs' common law claim that erection of the proposed outdoor advertising sign on property adjacent to theirs would constitute a nuisance. This Order reflects the Court's ruling on the latter issues.

Upon evidence adduced at the various hearings held in this matter, pleading, brief, and oral arguments, the Court hereby finds that plaintiffs have constructed a residence on

HUDGINS, COULLING,
BREWSTER, MORHOUS
& CAMERON
ATTORNEYS AT LAW
BLUEFIELD, W. VA.

their real estate at issue in this action along with a nonattached garage which houses a cabinet shop out of which plaintiff Dan Bowman sells and manufactures cabinets and related wooden products on a part-time basis, that plaintiffs have had their property for sale as commercial type property, that Mercer Mall containing 30 or more businesses is located immediately across the road from plaintiffs' property, that the property and house located next to plaintiffs' property owned by GAP Associates (GAP) is rented, that GAP signed a lease with Acken Signs, Inc. (Acken) for the location of an outdoor advertising sign structure, that the area in question is a commercial area, although plaintiffs reside in the area and there are other residences in the vicinity; that defendant Acken has incorporated the latest in engineering and safety with regards to the design and materials of the outdoor advertising sign which is proposed to be erected; that as a result of such engineering and design, no danger to life and limb exists to plaintiffs or others; that because the real estate is commercial in nature, no diminution in property value shall be sustained by plaintiffs upon the erection of the proposed outdoor advertising sign; that the erection of the proposed advertising sign will not devalue plaintiffs' property as a commercial property; that erection of the proposed outdoor advertising sign will not interfere with plaintiffs' everyday use of their property; that the outdoor sign's lighting devices may cast light upon plaintiffs' property, and the Court will reserve its ruling on that

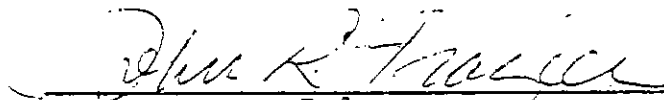
HUDGINS, COULLING,
BREWSTER, MORHOUS
& CAMERON
ATTORNEYS AT LAW
BLUEFIELD, W. VA.

limited issue until the permitted advertising sign is constructed in accordance with this Order; that this Court believes it is in the best interest of justice that the sign be placed at the farthest allowable location from the Bowman property line; that for all the above reasons and for such other facts as appear of record and introduced into evidence at the various hearings held in this matter, the Court finds that the proposed outdoor advertising sign will not constitute a nuisance; but, that it is in the interests of justice for the Court to attempt to accommodate the respective interests of the parties to this suit as much as practicable.

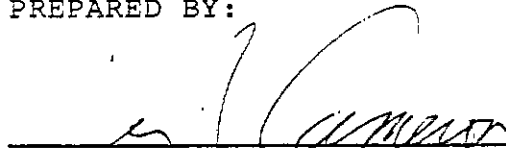
Therefore, it is hereby ORDERED and ADJUDGED that Acken will be allowed to erect the proposed permitted outdoor advertising sign on the property of GAP Associates; that Permit No. 015-466 is a validly issued and existing permit for erection of an outdoor advertising sign; that the sign will not be erected at the originally permitted location on the GAP Associates property but rather the sign shall be erected on the said property at the farthest location from the boundary line of plaintiffs' property allowed by the rules and regulations of the West Virginia Department of Highways; that to the extent necessary, the permit issued by the West Virginia Department of Highways is hereby modified so as to allow erection of the proposed advertising sign in accordance with this ruling; that Acken will not be required to make any further application or request to the West Virginia Department of Highways for such erection except a new survey will be

provided; that the Court reserves ruling on how late at night Acken will be permitted to illuminate the outdoor advertising sign until the effect of such illumination upon plaintiffs' property can be examined and determined by this Court; that plaintiffs are released from their bond and the Clerk of Court is ordered to refund same to plaintiffs and are further not required to reimburse Acken for delay in erecting the proposed advertising sign; and, that the costs of this proceeding are to be divided equally between Acken, plaintiffs, and the West Virginia Department of Highways. Plaintiffs and defendants object and take exception to the respective portions of the Court's ruling which are contrary to the legal positions taken by those parties.

ENTER: This 24th day of June, 1988.

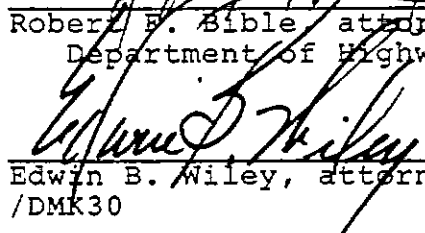

Judge

PREPARED BY:


Jerry J. Cameron, attorney for Acken Signs, Inc.

APPROVED AS TO FORM:


Robert E. Bible, attorney for West Virginia
Department of Highways


Edwin B. Wiley, attorney for plaintiffs
/DMK30

HUGGINS, COULLING,
BREWSTER, MORHOUS
& CAMERON
ATTORNEYS AT LAW
BLUEFIELD, W. VA.

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

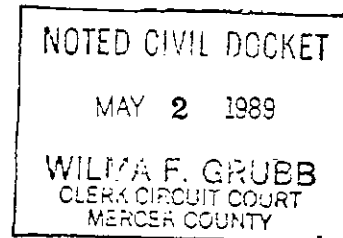
DAN R. BOWMAN and DORIS E. BOWMAN

PLAINTIFFS

V.

CIVIL ACTION NO.87-C-355-F

ACKEN SIGN INC., a Corporation,
GAP ASSOCIATES, a General
Partnership, ANIL B. AGERWAL,
D. PATNIK and G.S.R. GUPTA,
individuals, WILLIAM S. RITCHIE,
Commissioner of the West Virginia
Department of Highways,



DEFENDANTS

SUPPLEMENTAL ORDER

This matter came on the 18th day of April, 1988 and the 25th day of April, 1988, having previously been set for further hearing by the Court and thereupon appeared the Plaintiff by counsel, Edwin B. Wiley, and there appeared the Defendant, Acken Sign, Inc., by it's counsel, Jerry Cameron and David Kersey and the Defendant, William S. Ritchie, Commissioner, by his counsel, Robert Bible..

Thereupon the Court after listening to statements of counsel, having heard extensive evidence in this matter on other occasions, having reviewed the briefs of the respective parties, a review of the pleadings filed herein and all other matters coming to the attention of the Court finds in part as follows:

1. The current rules and regulations of the Commissioner entitled "Rules and Regulations for Outdoor Advertising on the State Highway System" designated as 157 CSR 6-7 are unconstitutional in part as follows:

(a) The Rules and Regulations fail to afford public notice and opportunity for the general public to be heard on the issue of the issuance of the permit to erect and license to maintain an outdoor advertising sign.

(b) The Rules and Regulations fail to define with particularity "commercial and industrial activities" necessary to meet the definition contained in 157 CSR 6-7.2(i) of "Unzoned Commercial or

Industrial Area" and such failure to adequately define such activities constitute vagueness and ambiguity to such an extent as to render the definition contained therein subject to individual and improper interpretation and not within the stated intent of the statutes and regulations applicable to outdoor advertising.

2. To the extent that the Plaintiffs have alleged that the other portions of the rules and regulations are unconstitutional for various reasons the Court finds such arguments are without merit.

Based upon the foregoing findings of fact the Court does hereby ADJUDGE, ORDER AND DECREE as follows:

The Defendant, William S. Ritchie, Commissioner of the West Virginia Department of Highways, or his lawful successor shall immediately take such steps as are necessary to the correct the constitutional infirmities as are specified above by the enactment of such rules and regulations as are necessary to afford general notice to the public of the permit application to afford those persons who may be adversely affected thereby a meaningful hearing and opportunity to be heard prior to such issuance and possible licensure of an outdoor advertising permit and to properly define business or industrial activity which would make a geographical area includable as a commercial or industrial area.

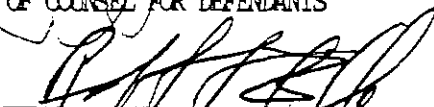
This matter shall remain open upon the dockets of this court for any further rulings necessary.
~~for the enforcement of the lighting provisions and the placement provisions of the sign.~~

Entered this the 1 day of May, 1989.

ORDER:



J-U-D-G-E


EDWIN B. WILEY,
OF COUNSEL FOR PLAINTIFFS
JERRY CAMERON,
OF COUNSEL FOR DEFENDANTS
ROBERT BIBLE,
OF COUNSEL FOR WEST VIRGINIA
DEPARTMENT OF HIGHWAYS

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA.

DAN R. BOWMAN,

PLAINTIFF,

VS: CIVIL ACTION NO. 87-C-355-F

ACKEN SIGNS,

DEFENDANT.

N O T I C E

TO: Edwin B. Wiley
Attorney at Law
1500 North Walker Street
Princeton, West Virginia 24740

Jerry J. Cameron
Attorney at Law
Hudgins, Coulling, Brewster, Morhous & Cameron
P. O Box 529
Bluefield, West Virginia 24701

Robert F. Bible
Attorney, Legal Division
West Virginia Department of Highways
State Capitol Complex
Building Five
Charleston, West Virginia 25305

NOTED CIVIL DOCKET

JUN 26 1989

WILMA F. GRUBB
CLERK CIRCUIT COURT
MERCER COUNTY

Please be advised that a hearing will be held before the undersigned Judge on Friday, June 30, 1989 at 2:00 p.m. for the following matters:

1. Entry of an Order relative to the last hearing in this matter.
2. Consideration of a supplemental order temporarily enjoining the Department of Highways from issuing any further permits for outdoor advertising signs pending filing and operation of new regulations in accordance with the Court's previous Orders.

3. And for such other related matters.

Dated this the 23rd day of June, 1989.


JUDGE JOHN R. FRAZIER

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

DAN R. BOWMAN and
DORIS M. BOWMAN

Plaintiffs,

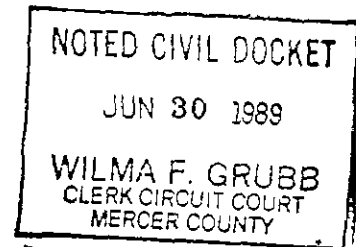
v

CIVIL ACTION NO. 87-C-355-F

ACKEN SIGN, INC. a corporation
et al and WILLIAM S. RITCHIE,
Commissioner of the West Virginia
Department of Highways,

Defendants.

SECOND SUPPLEMENTAL ORDER



This matter came on the 1st day of May, 1989, having previously been set for further hearing by the Court, for a status conference and related matters by the Court's letter dated April 18, 1989, and thereupon appeared the plaintiffs by their counsel, Edwin B. Wiley, and appeared the defendant, Outdoor East, L.P., successor in interest to Acken Sign, Inc., by their counsel, Jerry Cameron, and appeared the defendant, Fred VanKirk, Acting Commissioner of the West Virginia Department of Highways, successor in interest to William S. Ritchie, by his counsel, Robert F. Bible.

Thereupon, the Court after extensive discussion with the counsel present, and after review of the proposed revised "Rules and Regulations for Outdoor Advertising on the State Highway System" (Exhibit A) (hereinafter "Outdoor Advertising Regulations") required by the Court's order pursuant to the previous hearings held on April 18, 1988 and April 25, 1988, found that the proposed rules did not meet all of the

RF) requirements set forth in the previous orders in this matter, ^{including the modifications requested by Jerry Cameron} and after further discussion with counsel, the Court finds that ^{in his letter dated June 8, 1987 (Exhibit C)} the second proposed revised Outdoor Advertising Regulations ^{and C} (Exhibit B) as revised by and agreed to by all counsel, except for the objections and exceptions set forth hereinafter, do comply with the Court's prior rulings regarding notice and public hearing and regarding the definition of "industrial and commercial areas."

Based upon the foregoing, the Court does hereby Adjudge, Order and Decree as follows:

RF) That the second proposed revised Outdoor Advertising Regulations (Exhibit B) ^{and C} be filed forthwith by the West Virginia Commissioner of Highways with the Office of the Secretary of State and the Legislative Rule Making Review Committee as proposed emergency rules in accordance with the procedures set forth in the W.Va. Administrative Procedures Act, W. Va. Code §29A-3-15. The Court specifically finds that its earlier rulings regarding the partial unconstitutionality of the existing rules and regulations constitute the facts and circumstances of the emergency required to be stated in filing the emergency rules, as set forth in the aforesaid W.Va. Code §29A-3-15. The Court hereby notes and overrules the Objection and Exception of the Defendants to this portion of the Court's ruling.

The Court does hereby further Adjudge, Order and Decree that the West Virginia Commissioner of Highways shall forthwith

JRF
proceed to promulgate the second proposed revised Outdoor Advertising Regulations (Exhibit B) ^{and C} as legislative rules pursuant to the procedures set forth in W.Va. Code §29A-3-1 et seq.

JRF
The Court does hereby further Adjudge, Order and Decree that the West Virginia Commissioner of Highways shall forthwith forward a copy of the second proposed Outdoor Advertising Regulations (Exhibit B) ^{and C} to the appropriate officials of the Federal Highway Administration (FHWA) and seek the concurrence of the FHWA to the aforementioned second proposed Outdoor Advertising Regulations.

JRF
It is further Adjudged, Ordered and Decreed that the W.Va. Commissioner of Highways shall file with the Court his affidavit and supporting exhibits showing that the actions required herein have been accomplished, ^{and the Court} ~~at which time this action shall be dismissed as to the aforementioned West Virginia Commissioner of Highways~~ ^{retains jurisdiction of this matter. To all of which the parties except and object.}

Enter this 30 day of June, 1989.

John R. Franzer
JUDGE

Prepared by:

Robert F. Bible 30 June 1989
Robert F. Bible, Counsel
WV Department of Highways

Reviewed by:

Edwin B. Wiley
Edwin B. Wiley, Esquire

Terry Cameron
Terry Cameron, Esquire

EXHIBIT B

MEMORANDUM

TO: THE HONORABLE KEN HECHLER,
Secretary of State of West Virginia
Administrative Law Division

FROM: WEST VIRGINIA OUTDOOR ADVERTISING
ASSOCIATION, An Unincorporated
Assocaition

DATE: JULY 28, 1989

MEMORANDUM OF THE WEST VIRGINIA OUTDOOR ADVERTISING
ASSOCIATION IN OPPOSITION TO EMERGENCY RULE

Gregory A. Morgan, Esquire
Counsel for West Virginia Outdoor
Advertising Association, An
Unincorporated Association

Suite One, Schroath Building
Clarksburg, West Virginia 26301
Telephone: (304) 624-5687

YOUNG, MORGAN & CANN
Of Counsel

M E M O R A N D U M

TO: THE HONORABLE KEN HECHLER,
Secretary of State of West Virginia
Administrative Law Division

FROM: WEST VIRGINIA OUTDOOR ADVERTISING ASSOCIATION,
An Unincorporated Association

DATE: JULY 28, 1989

RE: MEMORANDUM OF THE WEST VIRGINIA OUTDOOR ADVERTISING
ASSOCIATION IN OPPOSITION TO EMERGENCY RULE

The West Virginia Outdoor Advertising Association, an Unincorporated Association ("Association"), submits this Memorandum at the request of representatives of The Honorable Ken Hechler, Secretary of State of the State of West Virginia, and pursuant to West Virginia Code § 29A-3-15a(c). This Memorandum sets forth the Association's position with respect to certain "Emergency Amendments To An Existing Rule" filed with the Administrative Law Division of the Secretary of State's office by the Department of Transportation, Division of Highways ("D.O.H."), on July 14, 1989. The revisions are to Series VI of the Administrative Regs. 17-2A.

The emergency rule amends several areas of Series VI. Among those are to the definition of "Unzoned Commercial or Industrial Area" found in Section 7. Certain criteria have been established to determine whether or not any particular business can be considered a "viable commercial or industrial" activity for the purposes of the sign placement. In Section 8 amendments have been made with respect to the definition of salvage yards. The Association has no quarrel with these amendments, and, in fact, fully supports the strengthening of the "unzoned commercial and industrial activity" definition and the addition of the "viability" concepts. The amendments to the regulations respecting salvage yards have no application to the industry.

The amendments to Section 7.5, entitled "Permits Required" are, however, of great concern to the Association, attached hereto and designated as Exhibit "1." The emergency rule requires, for the first time, the public advertisement (by publication) of the application for a permit to construct, erect, operate, use, or maintain an outdoor advertising sign. The expense to be borne by the Applicant also included are provisions allowing any person claiming to be affected by the proposed sign to request a public hearing prior to the issuance of the permit; for the notice of hearing and the procedure for hearings to be held by the D.O.H. and for the assessment of the cost of such hearings upon the parties.

Memorandum
Page 2
July 27, 1989

The Association believes that these amendments, adopted by means of the emergency rule, are inappropriate and improper under the standards set forth in W. Va. Code § 29A-3-15, and must be disapproved by the Secretary of State. Section 7.5 should be disapproved for two (2) of the three (3) reasons provided for in W. Va. Code § 29A-3-15a(b). First, the Division of Highways has exceeded the scope of its statutory authority and, secondly, no emergency exists to support the emergency rule. These matters will be addressed separately.

I. THE AMENDMENT TO SECTION 7.5 AS SET FORTH IN THE EMERGENCY RULE MUST BE DISAPPROVED.

A. The notice and hearing provisions exceed the scope of the statute.

The authorizing statute for Section 7.5 of Series VI is W. Va. Code § 17-22-15, a copy of which is attached hereto, designated as Exhibit "1." The authorizing section specifies in detail the process by which a licensed outdoor advertising operator must obtain a permit to erect a sign. Subsection (a) provides that "no person shall construct, erect, operate, use ... any advertising sign, display or device without first obtaining a permit therefor from the Commissioner and paying the annual fee."

Subsection (b) details the contents of the permit, the amount of the annual fee, the procedure to be followed upon the event of a denial by the Commissioner of the permit; requires that June 30th be the expiration date of all permits; and, certain other matters. Subsection (b) also protects the lessor of the sign location property by specifically requiring that "each application shall be accompanied by an affidavit of the applicant or his agent that the owner or other person in control or possession of the real property upon which advertising sign, display, or device is to be constructed, erected, operated, used or maintained, has consented thereto."

Subsection (e) sets forth detailed procedures for the revocation of the permit.

Subsection (f) provides for nondiscretionary judicial review of any decision by the Commissioner (now the Division Director of the Division of Highways) for the refusal to grant or revoking a permit, and gives the Appellant three (3) options for venue, being (1) the county where the operator's principal place of business is located, (2) the county in which the sign is to be located, and (3) Kanawha County.

Memorandum
Page 3
July 27, 1989

Analysis of Section 7.5 of the emergency rule reveals its virtual complete disregard for the statutory procedure enacted by W. Va. Code § 17-22-15. It imposes procedures, including the provision of a published public notice, at the operator's expense, a public comment period, and the discretionary holding of a public hearing on the issue of the grant or denial of the required permit, which hearing may be requested by any person who claims to be affected by the proposed sign," which are not found in the statute and are outside the scope of authority granted in W. Va. Code § 17-22-15, or, for that matter, anywhere else in Article 22, nor are they anywhere to be found in the federal counterpart to Article 22, which is Section 131 of Title 23 of the United States Code (see Exhibit "3"). The publication requirement and the opening of the permit process to virtually everyone in the world are matters completely outside the standards set by the statute. There is no language whatsoever in the section which requires these additional burdens on licensed outdoor operators, is there any shown any language from which these requirements can be necessarily inferred. The Association respectfully submits that the D.O.H. is without power to unilaterally impose these additional burdens in the absence of specific statutory authority.

Perhaps the most glaring defect in Section 7.5 is the provision for judicial review contained therein which is in direct conflict with the provisions of W. Va. Code § 17-22-15.

As noted above, the Code section provides that "any persons adversely affected by an Order made and entered by the Commissioner (now the Division Administrator) refusing to grant or revoking a permit is entitled to judicial review thereof." (Emphasis supplied.) The section provides three (3) venue options. Section 7.5 as set forth in the emergency rule, completely disregards the obvious legislative intent and is a blatant attempt to rewrite the statute. In Section 7.5, judicial review is provided as follows:

"Any party adversely affected by the final decision of the Division Administration may apply for judicial review through application for a Writ of Certiorari, to the Circuit Court of Kanawha County." (Emphasis supplied.)

The section is in direct conflict with the statutory provision on three (3) counts. First, the Code section makes review mandatory and nondiscretionary. That is, if a decision is appealed, the Court is required to review the decision. The emergency rule merely allows an application for a Writ of Certiorari, thus making the hearing of the appeal a matter of the Court's discretion. The

Memorandum
Page 4
July 27, 1989

conflict between the statute and the rule operates to invalidate the rule as a matter of law and should clearly be disapproved.

Secondly, Section 7.5 would allow the application to be made only to Kanawha County, not, as the statute allows, to either the county which is the principal place of business of the applicant or to the county in which the proposed sign is to be located. Thus, the emergency rule directly contradicts and restricts an aggrieved party's right to judicial review in his chosen forum as permitted by law.

Thirdly, the provision allowing any "party" to appeal, when considered in conjunction with the public comment, notice and hearing provisions of the amendments to Section 7.5, allows applications for judicial review by persons who are not real parties in interest in the issuance of the permit. The former regulation made the permit application subject to the consent of the affected landowner (See W. Va. Code § 17-22-15[b]). The new regulation will allow delaying litigation by anyone who, for any reason, opposes outdoor advertising. This is in direct conflict with the stated legislative interest of Article 22 of Chapter 17. The Code which states as follows:

"The legislature hereby finds and declares:
(a) That outdoor advertising is a legitimate, commercial use of private property adjacent to roads and highways; (b) that outdoor advertising is an integral part of the business and marketing function and an established segment of the national economy which serves to promote and protect private investments in commerce and industry; (c) that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to federal-aid interstate and primary highways should be regulated in order to protect the public investment in such highways, to promote the recreational value of public travel, to preserve natural beauty, and to promote the reasonable, orderly and effective display of such signs, displays and devices.

The legislature further finds and declares that fiscal actualities reflect that the people of the State of West Virginia would suffer economically if the State failed to participate

fully in the allocation and apportionment of federal-aid highway funds, more specifically that a reduction in federal-aid highway funds would necessitate increased local taxation to support and maintain the state road program and system, and that it is the intention of this bill, among other things, to provide a statutory basis for regulation of outdoor advertising consistent with the public policy relating to areas adjacent to federal-aid interstate and primary highways declared by the Congress of the United States, in Title 23, United States Code, and that the economic benefit resulting from full participation in the federal highway program would constitute a benefit to the community as a whole. (1967, c. 177.)"

The Division of Highways has detoured far off its regulatory right of way in the filing of Section 7.5. It has imposed costly and time-consuming burdens not contemplated nor authorized by the authorizing law. It further purports to rewrite and substantially restrict the rights of persons aggrieved by a D.O.H. decision to appeal it, and to restrict the forum in which the appeal can be heard. All of these amendments are completely beyond the scope of this agency's legal authority, especially in light of the fact that there has been no change, modification or amendment in the controlling statutory provisions since 1967. The amendments to Section 7.5 implemented by means of the emergency rule should be immediately disapproved.

- B. The facts and circumstances stated in the emergency rule do not state the existence of an emergency as defined by the Administrative Procedures Act.

The Secretary of State is assigned the legal duty disapproving emergency rules when he determines that there is no existing emergency to justify the promulgation of the emergency rule, W. Va. Code § 29A-3-15a(b)(2). In order to aid the Secretary of State in the performance of this duty, the Administrative Procedures Act (hereinafter "A.P.A.") requires that the agency must file a statement of the facts and circumstances constituting the emergency, W. Va. Code § 29A-3-15(a), copies of which are attached hereto as Exhibit "4."

In accordance with this requirement the following statement was filed with the emergency rule on July 15, 1989:

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Page 6
July 27, 1989

"THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

The circumstances for filing this Emergency Rule stem from the decision made by Judge John R. Frazier, Circuit Court of Mercer County, West Virginia, in Civil Action 87-C-355-F on June 30, 1989. As stated in the Second Supplemental Order of the June 30, 1989 proceedings by the Court, 'The Court specifically finds that its earlier rulings regarding the partial unconstitutionality of the existing rules and regulations constitute the facts and circumstances of the emergency required to be stated in filing the emergency rules, as set forth in the aforesaid W.Va. Code §29A-3-15.'

The Court also ruled that these revisions be filed forthwith by the Commissioner of Highways as proposed emergency rules with your office as well as with the Legislative Rule Making Review Committee. A copy of the June 30, 1989 Second Supplemental Order of the referenced case is attached." (Emphasis in the original.)

The emergency which is said to justify the rule is the issuance of the order of the Circuit Court of Mercer County, West Virginia. No other facts or circumstances have been cited or presented.

The A.P.A. defines "emergency" in subsection (g) 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. (1982, c. 121; 1985, c. 153; 1986, c. 97; 1987, cc. 75, 76.)

As is apparent, the A.P.A. definition does not include orders of Courts. Further, the D.O.H. states no other facts or circumstances which allege any threat to the public peace, health, safety or welfare which the promulgation of this rule is necessary to

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prevent, nor that there is any time limit imposed by the Code or by any federal statute or regulation nor that any substantial harm exists to the public interest. The terms of the A.P.A. definition are plain and unambiguous. No circumstances or state of facts have been presented by the Department of Transportation, Highways Division, which satisfy the statutory definition of "emergency." The Secretary of State must, therefore, under terms of the procedure established by the A.P.A., disapprove the emergency rule because of the clear lack of the existence of an emergency, and the failure of the D.O.H. to any facts which support the existence of an emergency as defined by the A.P.A.

The promulgation of the emergency rule makes no change in the law which purports to redress any imminent threat, nor is there any amendment that cannot wait for consideration in the normal course of affairs. The only "emergency" is that created by the Circuit Judge.

That there is, in fact, no existing emergency, and that the Judge's declaration of the emergency is a sham, can be seen from the progress of Civil Action No. 87-C-355-F. This matter was initiated in 1987, and tried almost a year ago. The Circuit Court has been supervising the revision of the regulations for over a year, and has, at least temporarily, accomplished their promulgation in the form of the emergency rule by means by the expedient of ordering the D.O.H. to file the rule. By doing so, Judge Frazier has overstepped his authority, since the A.P.A. provides that it is the agency itself which must find the existence of an emergency, not any outside or third party authority, even if judicial. The acceptance of Judge Frazier's authority to find the existence of an emergency by the refusal of the Secretary of State to disapprove the emergency rule would violate the separation of powers provisions found in Article V of the West Virginia Constitution, which states in part, "the Legislative, Executive and Judicial Departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to the others...".

In finding and declaring the existence of an emergency, which is a function and power of the Executive Branch, Judge Frazier has usurped judicial power in violation of the separation of powers provisions of the constitution.

It should also be noted that in spite of Judge Frazier's finding that an emergency exists, there has been no equitable or injunctive relief ordered by the Court to halt the issuance of new permits, and, in fact, the sign permit in the case before Judge

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Frazier has been granted and issued. It is clear that the Judge is attempting to unilaterally legislate and regulate the law in this area to suit himself and in effect expand his county jurisdiction statewide. This is completely improper. The facts do not justify the emergency and the Secretary, therefore, has a mandatory legal duty to disapprove this emergency rule. Any other decision would render the A.P.A. meaningless.

CONCLUSION

For the reasons set forth above, the Secretary of State should disapprove of Section 7.5 of Administrative Regs. 17-2A as amended by the emergency rule because the amendments exceed the scope of the agency's statutory authority and because the facts and circumstances stated do not justify the existence of an emergency as defined by the A.P.A.

GAM:pjp
Exhibits Attached



Department of Highways
Adm. Reg. 17-2A
Series VI, Sec. 7.4.1

(1) 7.4.1 Orders - A ~~Commissioner's~~ Division Administrator's order revoking a license shall be accompanied by a findings of fact and conclusions of law upon which said order was made and entered.

(2) 7.4.2 Judicial Review - Any person adversely affected by an order made and entered by the ~~Commissioner~~ Division Administrator is entitled to a judicial review as set out in Article 22, Chapter 17, of the Code.

7.05/ Permits Required. -- No person shall construct, erect, operate, use, maintain, or cause or permit to be constructed, erected, operated, used or maintained any outdoor advertising sign, display or device without first obtaining a permit from the ~~Commissioner~~ Division of Highways Administrator, and paying the annual fee. In the case of new permits, an inspection fee can be charged as is deemed necessary by the ~~Division Administrator~~.

Upon receipt of a permit application an application number shall be assigned by the Division of Highways. The applicant shall be notified of the temporary application number and shall then be required to publish a class 2 legal advertisement in the newspaper(s) serving the area where the proposed outdoor advertising sign, display or device is proposed to be located. A copy of the certificate of publication shall be provided to the Department within ten (10) days of the final publication date.

As a minimum the advertisement shall include the application number, the location (including ownership of the property upon which the sign is to be placed) and shall notify the public that comments will be received by the Division of Highways, Highway Services Section, until 10 days after the final publication. The advertisement shall also state that all comments must include the specific application number to which they refer.

Any person who claims to be affected by the proposed sign may submit written comments to the Division of Highways, Highway Services Section, and may request a public hearing within ten days of the final publication. Within ten working days of the close of the comment period the Division shall determine whether to approve, deny, or hold a public hearing for said permit.

When the Division determines that a public hearing is required it shall notify the person(s) who requested the

Editor's note. — For designation of the office of state road commissioner as department of highways, see § 17-2A-1.

§ 17-22-15. Permit required for each sign, etc.; applications; refusal of permits; expiration and renewal; change of advertising copy; revocation; fee; judicial review.

(a) Except as in this article otherwise provided, no person shall construct, erect, operate, use, maintain, or cause or permit to be constructed, erected, operated, used or maintained any advertising sign, display, or device without first obtaining a permit therefor from the commissioner and paying the annual fee therefor, as herein provided. The commissioner shall not issue such a permit to any person who has not obtained the license provided for in section thirteen [§ 17-22-13] of this article.

(b) A separate application for a permit shall be made for each separate advertising sign, display, or device, on a form furnished by the commissioner, which application shall be signed by the applicant or his representative duly authorized in writing to act for him, and shall describe and set forth the size, shape and the nature of the proposed advertising sign, display, or device, and its actual or proposed location with sufficient accuracy to enable the commissioner to locate and identify it. Every application shall be accompanied by a fee of one dollar for each advertising sign, display, or device, which fee shall be retained by the commissioner if the permit is issued. Each portion of an advertising sign upon which a display is posted or exhibited shall constitute a separate advertising sign for purposes of this section. If the permit is refused the commissioner shall make and enter an order to that effect and shall cause a copy of such order to be served on such applicant by certified mail, return receipt requested, and shall refund one half the fee to the applicant. Such order shall be accompanied by findings of fact and conclusions of law upon which such order was made and entered. Each application shall be accompanied by an affidavit of the applicant or his agent that the owner or other person in control or possession of the real property upon which such advertising sign, display, or device is to be constructed, erected, operated, used or maintained, has consented thereto. Application shall be made in like manner for a permit to operate, use or maintain any existing advertising sign, display or device. Permits issued hereunder shall expire on the thirtieth day of June of each year, and shall not be prorated, and may be renewed upon the payment of the same fee required to be paid upon application for a permit. No application shall be required for a renewal of a permit.

(c) If more than one side of an advertising sign is used for advertising, a fee for each such side shall be required. Advertisements sculptured in the round shall be treated as using three sides.

(d) The holder of a permit shall, during the term thereof, have the right to change the advertising copy on the structure or sign for which it was issued without payment of any additional fee.

later than March 31, 1979. Such report shall include the information required by subsection (a) together with the Secretary's conclusions and recommendations for appropriate legislation.

"(d) There is hereby authorized to be appropriated not to exceed \$350,000 to carry out this section."

CODE OF FEDERAL REGULATIONS

Reimbursement for certain costs related to highway construction and railroad work, 23 CFR Part 140.

Railroad-highway insurance protection; railroad-highway projects, 23 CFR Part 646.

CROSS REFERENCES

This section is referred to in 23 USCS §§ 120, 121.

RESEARCH GUIDE

Am Jur:

65 Am Jur 2d, Railroads § 287.

§ 131. Control of outdoor advertising

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title [23 USCS § 104], until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever

he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the

zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law which is not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of a right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit information directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas and other travel information systems within the rights-of-way for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable. The Federal share of the cost of establishing such an information center or travel information system shall be that which is provided in section 120 [2

USCS § 120] for a highway project on that Federal-aid system to be served by such center or system.

(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State highway department shall be entitled to such payments unless the State maintains the control required under such agreement: *Provided*, That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be considered a breach of such agreement or the control required thereunder. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

(k) Subject to compliance with subsection (g) of this section for the payment of just compensation, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136 [23 USCS § 136(b)], or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136 [23 USCS § 136(g)], the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United

States Code, section 1254 [28 USCS § 1254]. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136 [23 USCS § 136(b)], the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed \$20,000,000 for the fiscal year ending June 30, 1966, not to exceed \$20,000,000 for the fiscal year ending June 30, 1967, not to exceed \$2,000,000 for the fiscal year ending June 30, 1970, not to exceed \$27,000,000 for the fiscal year ending June 30, 1971, not to exceed \$20,500,000 for the fiscal year ending June 30, 1972, and not to exceed \$50,000,000 for the fiscal year ending June 30, 1973. The provisions of this chapter [23 USCS §§ 101 et seq.] relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967.

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.

(o) The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the time of their erection which do not conform to the requirements of subsection (c), where such signs, displays, and devices are in existence on the date of enactment of this subsection [enacted May 5, 1976] and where the State demonstrates that such signs, displays, and devices (1) provide directional information about goods and services in the interest of the traveling public, and (2) are such that removal would work a substantial economic hardship in such defined area.

(p) In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act [Amendments] of 1974 [enacted Jan 4, 1975], which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed, the United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).

(q)(1) During the implementation of State laws enacted to comply with this section, the Secretary shall encourage and assist the States to develop

sign controls and programs which will assure that necessary directional information about facilities providing goods and services in the interest of the traveling public will continue to be available to motorists. To this end the Secretary shall restudy and revise as appropriate existing standards for directional signs authorized under subsections 131(c) (1) and 131(f) [subsections (c)(1) and (f) of this section] to develop signs which are functional and esthetically compatible with their surroundings. He shall employ the resources of other Federal departments and agencies, including the National Endowment for the Arts, and employ maximum participation of private industry in the development of standards and systems of signs developed for those purposes.

(2) Among other things the Secretary shall encourage States to adopt programs to assure that removal of signs providing necessary directional information, which also were providing directional information on June 1, 1972, about facilities in the interest of the traveling public, be deferred until all other nonconforming signs are removed.

(Aug. 27, 1958, P. L. 85-767, § 1, 72 Stat. 904; Sept. 21, 1959, P. L. 86-342, Title I, § 106, 73 Stat. 612; June 29, 1961, P. L. 87-61, Title I, § 106, 75 Stat. 123; Oct. 24, 1963, P. L. 88-157, § 5, 77 Stat. 277; Oct. 22, 1965, P. L. 89-285, Title I, § 101, 79 Stat. 1028; Sept. 13, 1966, P. L. 89-574, § 8(a), 80 Stat. 768; Aug. 23, 1968, P. L. 90-495, § 6(a)-(d), 82 Stat. 817; Dec. 31, 1970, P. L. 91-605, Title I, § 122(a), 84 Stat. 1726; Jan. 4, 1975, P. L. 93-643, § 109, 88 Stat. 2284; May 5, 1976, P. L. 94-280, Title I, § 122, 90 Stat. 438; Nov. 6, 1978, P. L. 95-599, Title I, §§ 121, 122, 92 Stat. 2700; Nov. 9, 1979, P. L. 96-106, § 6, 93 Stat. 797.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act Oct. 22, 1965, P. L. 89-285, 79 Stat. 1028, known as the Highway Beautification Act of 1965, which among other things appears as a note to this section. For full classification of this Act, consult USCS Tables volumes.

"Such Act", referred to in this section, is probably a reference to Act Jan. 4, 1975, P. L. 93-643, 88 Stat. 2281. For full classification of this Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed word "Amendments" is inserted in subsec. (p) to clarify the Act probably intended to be referred to by Congress inasmuch as Act Jan. 4, 1975, P.L. 93-643, § 1, 88 Stat. 2281, provided that that Act may be cited as the "Federal-Aid Highway Amendments of 1974". Act Nov. 6, 1978, P.L. 95-599, § 122(c), 92 Stat. 2701, purported to amend subsec. (c) by inserting "including those which may be changed at reasonable intervals by electronic process or by remote control," after "devices,"; this matter was added after "devices" as the probable intent of Congress.

§ 29A-3-10. Creation of a legislative rule-making review committee.

Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt, 358 S.E.2d 432 (W. Va. 1987).

§ 29A-3-11. Submission of legislative rules to the legislative rule-making review committee.

Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt, 358 S.E.2d 432 (W. Va. 1987).

§ 29A-3-12. Submission of legislative rules to Legislature.

Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt, 358 S.E.2d 432 (W. Va. 1987).

§ 29A-3-13. Adoption of legislative rules; effective date.

Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt, 358 S.E.2d 432 (W. Va. 1987).

§ 29A-3-14. Withdrawal or modification of proposed rules.

Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt, 358 S.E.2d 432 (W. Va. 1987).

§ 29A-3-15. Emergency legislative rules; procedure for promulgation; definition.

(a) Any agency with authority to propose legislative rules may, without hearing, find that an emergency exists requiring that emergency rules be promulgated and promulgate the same in accordance with this section. Such emergency rules, together with a statement of the facts and circumstances constituting the emergency, shall be filed in the state register and shall become effective immediately upon such filing. Such emergency rules may adopt, amend or repeal any legislative rule, but the circumstances constituting the emergency requiring such adoption, amendment or repeal shall be stated with particularity and be subject to de novo review by any court having original jurisdiction of an action challenging their validity. Fifteen copies of the rules and of the required statement shall be filed forthwith with the legislative rule-making review committee.

An emergency rule shall be effective for not more than fifteen months and shall expire earlier if any of the following occurs:

(1) The secretary of state, acting under the authority provided for in section fifteen-a [§ 29A-3-15a] of this article, or the attorney general, acting under the authority provided for in section fifteen-b [§ 29A-3-15b] of this article, disapproves the emergency rule because (A) the agency has exceeded the

Effect of amendments of 1987. — The 1987, reenacted this section, as amended by amendment, by c. 76, in the second paragraph Acts 1987, c. 75. in (a), substituted "An" for "Any"; and in (a)(1), Applied in *Boyd v. Merritt*, 354 S.E.2d 106 added "or the attorney general, acting under (W. Va. 1986). the authority provided for in section fifteen-b. Cited in *West Virginia Chiropractic Soc'y, Inc. v. Merritt*, 358 S.E.2d 432 (W. Va. 1987). of this article." The amendment by c. 76, effective May 13,

§ 29A-3-15a. Disapproval of emergency rules by the secretary of state; judicial review.

(a) Upon the filing of an emergency rule by an agency, under the provisions of section fifteen [§ 29A-3-15] of this article, by any agency, except for the secretary of state, the secretary of state shall review such rule and, within forty-two days of such filing, shall issue a decision as to whether or not such emergency rule should be disapproved. An emergency rule filed by the secretary of state shall be reviewed by the attorney general as provided for in section fifteen-b [§ 29A-3-15b] of this article.

(b) The secretary of state shall disapprove an emergency rule if he determines:

(1) That the agency has exceeded the scope of its statutory authority in promulgating the emergency rule;

(2) That an emergency does not exist justifying the promulgation of the rule; or

(3) That the rule was not promulgated in compliance with the provisions of section fifteen of this article.

(c) If the secretary of state determines, based upon the contents of the rule or the supporting information filed by the agency, that the emergency rule should be disapproved, he may disapprove such rule without further investigation, notice or hearing. If, however, the secretary of state concludes that the information submitted by the agency is insufficient to allow a proper determination to be made as to whether the emergency rule should be disapproved, he may make further investigation, including, but not limited to, requiring the agency or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.

(d) The determination of the secretary of state shall be reviewable by the supreme court of appeals under its original jurisdiction, based upon a petition for a writ of mandamus, prohibition or certiorari, as appropriate. Such proceeding may be instituted by:

(1) The agency which promulgated the emergency rule;

(2) A member of the Legislature; or

(3) Any person whose personal property interests will be significantly affected by the approval or disapproval of the emergency rule by the secretary of state. (1986, c. 97; 1987, cc. 75, 76.)

Effect of amendments of 1987. — The 1987, reenacted this section as amended by amendment, by c. 75, rewrote (a). Acts 1987, c. 75. The amendment by c. 76, effective May 13,



WEST VIRGINIA DEPARTMENT OF HIGHWAYS

State Capitol Complex

Building Five

Charleston, West Virginia 25305

GASTON CAPERTON
GOVERNOR

FRED VANKIRK
ACTING COMMISSIONER
STATE HIGHWAY ENGINEER

August 2, 1989

Mr. Robert E. Wilkinson
Deputy Secretary of State
State Capitol, 157-K
Charleston, West Virginia 25305

Dear Mr. Wilkinson:

Thank you for the opportunity to respond to the memorandum from Gregory A. Morgan, Attorney at Law, concerning the opposition to the emergency rules filed by the Division of Highways.

As you are aware the only reason we filed the emergency amendments was because of the requirement of the court.

Whether or not this is sufficient basis to determine if this is an emergency situation should be decided by your office or ultimately the State Supreme Court.

The West Virginia Outdoor Advertising Association was well aware for over a year of this suit. At no time did the advertisers see fit to intervene. Therefore, we do not feel that it is appropriate for the Division of Highways or the Secretary of State to address the legal issues as set forth in the Associations memorandum.

Should you desire additional information, do not hesitate to contact me or Bob Bible of our Legal Division.

Very truly yours,

A handwritten signature in dark ink, appearing to read "C. Cameron Lewis".

C. Cameron Lewis, Director
Highway Services Division

CCL:b

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

BARBARA STARCHER
Deputy Secretary of State

RICHARD S. STEPHENSON
Deputy Secretary of State

Telephone: (304) 345-4000
Corporations: 342-8000



STATE OF WEST VIRGINIA
SECRETARY OF STATE

Charleston 25305

WILLIAM H. HARRINGTON
Chief of Staff

RICH O. HARTMAN
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

VIRGINIA SKEEN
Special Assistant

(Plus all the volunteer
help we can get)

August 11, 1987

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

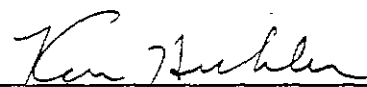
AGENCY: Department of Highways

RULE: Amendment to Series 5, Traffic Safety Rules and Regulations

DATE FILED AS AN EMERGENCY RULE: June 30, 1987

DECISION NO. 13-87

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.


KEN HECHLER
Secretary of State

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Aug 11, 1987
ADMINISTRATIVE LAW DIVISION

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

BARBARA STARCHER
Deputy Secretary of State

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STATE OF WEST VIRGINIA

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Charleston 25305

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DECISION

Emergency Rule Decision (ERD 13-87)

AGENCY: Department of Highways

RULE: Amendment to Series 5, Traffic Safety Rules and Regulations

DATE FILED AS AN EMERGENCY RULE: June 30, 1987

- par. 1 The Department of Highways (DOH) has filed as an emergency rule amendments to the above titled Series 5.
- 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 ERD 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 DOH has filed this emergency rule with supporting documents with the Secretary of State on June 30, 1987, and with the LRMRC on July 6, 1987.

- par. 7 It is the determination of the Secretary of State that the DOH has complied with the procedural requirements of WV Code §29A-3-15.
- par. 8 (B) Statutory Authority -- WV Code §17-2A-8(24) reads
(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 by law.
- par. 9 WV Code §17C-17-11 -- Permits for excess size and weight, subsection (c) reads in part:
The commissioner may charge a fee not to exceed five dollars for the issuance of a permit for a mobile home and a reasonable fee for the issuance of a permit for any other vehicle under the provisions of this section to pay the administrative costs thereof.
- par. 10 It is the determination of the Secretary of State that the Department of Highways has not exceeded its statutory authority in the promulgation of these emergency rules.
- 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 DOH are as follows:

This Emergency Rule is being filed in order to comply with West Virginia Code §17C-17-2, 4 and 11(b). Additionally, these rule changes are necessary to promote public safety through the establishment of travel time restrictions for mobile homes. Increased fees for Special Permits and for Blanket Permits for oversized loads are also established with this rule change to ensure public safety by providing adequate funding for the for the administration of these permits including the support of an adequate number of inspectors. Finally the maximum over dimension permit limitations for mobile home length and combination length have been increased to coincide with neighboring states to prevent the hinderance of interstate transport of mobile homes.

par. 14 As stated in previous ERD's, rules proposed to promote safety may meet a lesser standard. This proposal also brings West Virginia in line with the fees of other states.

par. 15 It is the decision of the Secretary of State that this proposal by the Department of Highways is in procedural compliance with WV Code 29A-3-15; does not exceed the statutory authority of the Department of Highways; and that the facts and circumstances presented constitute an emergency. Therefore, the Secretary of State decides that this emergency rule should be approved.

par. 16 This decision shall be cited as Emergency Rule Decision 13-87 or ERD 13-87 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the Department of Highways, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER
SECRETARY OF STATE

FILED IN THE OFFICE OF
THE SECRETARY OF STATE

THIS DATE Aug 11, 1987

Entered _____ ADMINISTRATIVE LAW DIVISION