

DECEMBER 7

TENTATIVE AGENDA

LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

December 7, 1987 - 7:00 - 9:00 p.m.

COMMITTEE MEETING ROOM, M-438

1. Approval of Minutes - Meetings November 17 11:00 a.m.
and 5:00 p.m.
2. REVIEW OF LEGISLATIVE RULES:
 - a. Workers' Compensation - Medical Fee Schedule
 - b. Dept. of Energy - Surface Mining Reclamation Regulations
 - c. Racing Commission - Thoroughbred Rules, Series 1
 - d. Health Care Cost Review Authority - Exemptions from Certificate of Need Review
3. Other Business:

Monday, December 7, 1987

7:00 - 9:00 P.M.

Legislative Rule-Making Review Committee
(Code §29A-3-10)

Dan Tonkovich,
ex officio nonvoting member

Robert "Chuck" Chambers,
ex officio nonvoting member

Senate

House

Tucker, Chairman
Boettner
Holmes
Tomblin (absent)
Harman
Hylton

Knight, Chairman
Burk
Murphy
Givens
Faircloth
Pritt

The meeting was called to order by Mr. Tucker, Co-Chairman.

The minutes of the meetings of November 17, 1987, were approved.

Mr. Tucker welcomed Mr. Faircloth as a member of the Committee, replacing Mr. Stiles, who died in November.

Mr. Knight explained to the Committee that he had requested Mr. Harry Buch, Chairman, WV Racing Commission, to appear before the Committee and review the operation of dog tracks under the 1987 legislation and that Mr. Buch had declined.

Mr. Knight moved that the Committee hold a public hearing on the Greyhound rules, authorize the staff to conduct that hearing, that the hearing be held preceding the next meeting of the Committee, and that Chairman Buch be summonsed to attend.

Discussion of Mr. Knight's motion followed. Messrs. Harman and Burk asked questions of Committee counsel. Mike Mowery, Staff Counsel, reviewed the code sections 29A-3-11(b) and 4-1-5 which grants the co-chairmen authority to call a public hearing and summon witnesses.

Lois Graham, Executive Secretary of the Racing Commission, declined to answer questions from Mr. Knight.

Mr. Boettner moved a substitute amendment for Mr. Knight's motion, that the Committee reconsider dog racing regulations and request Mr. Buch to appear before the Committee to report by a specific date.

Mr. Knight moved to withdraw his motion. By unanimous consent, the motion was withdrawn.

Mr. Boettner then restated his motion that the Committee reconsider its action in approving the Greyhound Regulations; that a date be set for a public hearing in January; that Chairman Buch be invited to the public hearing; that a deadline be set by which time Chairman Buch should accept or decline the request to appear; and that if he does not indicate his willingness to attend, that the Chairmen be authorized to summon him.

Mr. Knight moved to amend the motion to dispense with the invitation and require that Mr. Buch be summonsed to appear. A roll call vote was demanded and the demand sustained. The motion to amend was rejected. There were five yeas and six nays.

Mr. Boettner's motion was adopted.

Mr. Knight moved that the Attorney General, Secretary of State, Water Resources Board and the Department of Energy be requested to submit a copy of their Freedom of Information rules. Staff was directed to review and prepare a memorandum for the Committee's review.

Mr. Tucker moved to amend the motion to include review of the requirements of the Federal Freedom of Information Act. The motion to amend was adopted.

The motion of Mr. Knight, as amended, was adopted.

Mr. Mowery reviewed the prior action which the Committee had taken on the rule proposed by the Workers' Compensation Commissioner, Medical Fee Schedule. Mr. Farley, Director of the Workers' Compensation Fund, responded to questions and advised the Committee that the concerns of the West Virginia Medical Association and the West Virginia Chiropractic Society have been resolved with the exception of day-to-day issues which will arise as the rule is implemented.

Dr. Jan Harbour, representing the West Virginia Chiropractic Society, responded to questions.

Mr. Givens moved that the rule lie over to the next meeting in order for the Workers' Compensation Commissioner to incorporate modifications and refile the rule as modified.

The motion was adopted.

Mike Mowery reviewed the rule proposed by the Department of Natural Resources, Hazardous Waste Management Regulations, Series 35.

Mr. Dennis Treacy of the Department of Natural Resources responded to questions.

Mr. Givens moved that the proposed rule be approved. The motion was adopted.

Mr. Mowery reviewed the rule proposed by the Department of Energy, Surface Mining Reclamation Regulations.

Roger Hall, Administrator, of the Department of Energy, responded to questions.

Mr. Knight moved that the rule lie over. The motion was adopted.

Mr. Mowery reviewed the rule proposed by the Racing Commission, Thoroughbred Rules, Series 1.

Mr. Knight moved that the rule be amended to state that areas in controversy involving jockey fees and deposit of funds for claimed tickets cannot be changed by procedural or administrative rules without going through the legislative rule-making review process. The motion was adopted.

Mr. Mowery reviewed the rule proposed by the Health Care Cost Review Authority, Exemptions from Certificate of Need Review.

John Kozak, Counsel for HCCRA, addressed the Committee and responded to questions.

Sam Folio, representing HCCRA, responded to questions.

Ken Rutledge, representing the West Virginia Hospital Association, addressed the Committee.

Sally Roberts, analyst for West Virginia Hospital Association, addressed the Committee and responded to questions.

Mr. Boettner moved that the rule lie over. The motion was adopted.

The meeting was adjourned.

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: December 7, 1987

TIME: 7:00-9:00 p.m.

NAME	Present	Absent	Yeas	Nays
Chambers, Robert "Chuck", Speaker				
Knight, Thomas A.	✓			
Burk, Robert W., Jr.	✓			
Givens, Roy E.	✓			
Pritt, Charlotte	✓			
Larry V. Faircloth	✓			
Murphy, Patrick H.	✓			
Tonkovich, Dan, President				
Tucker, Larry A.	✓			
Boettner, John "Si"	✓			
Harman, C. N.	✓			
Holmes, Darrell E.	✓			
Hylton, Tracy W.	✓			
Tomblin, Earl Ray				
TOTAL				

RE: _____

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: Dec 7, 1987

TIME: _____

NAME	Present	Absent	Yeas	Nays
Chambers, Robert "Chuck", Speaker				
Knight, Thomas A.			✓	
Burk, Robert W., Jr.				✓
Givens, Roy E.			✓	
Pritt, Charlotte			✓	
Larry V. Faircloth				✓
Murphy, Patrick H.			✓	
Tonkovich, Dan, President				
Tucker, Larry A.				✓
Boettner, John "Si"				✓
Harman, C. N.				✓
Holmes, Darrell E.			✓	
Hylton, Tracy W.				✓
Tomblin, Earl Ray				-
TOTAL			5	6

RE: Knight's motion - Public hearing preceding next meeting, summon commissioners, authorize staff to conduct meeting. - Racing Rules

REGISTRATION OF PUBLIC
AT
COMMITTEE MEETINGS
WEST VIRGINIA LEGISLATURE

COMMITTEE: Rule Making Review Committee

DATE: December 7, 1987

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly JOHN KOZAK	100 PEEDR. CHAS. 25311	HCCRA	CAN RESPOND TO QUESTIONS
Lois GRAHAM	240 Capital St Chas.	Racing Commission	
Robert Parkce	100 Dec Drive, Chas	HCCRA	
Ben Greene	Charleston	W.V.M.R. II	
JAN HARBOUR	HURRICANE	WVCS	X
Ann Bradley	Robinson + McElwaine 600 United Center	WVMA	
Chris Korlaski	"	"	
WALTER DALE	HCCRA	HCCRA	
Don Kessling	"	"	
SAM FOLIO	"	"	
Sally S. Roberts	1503 DIXIE ST APT C CHARLESTON WV 25311	WVHA	X
Charles H. Well	Charleston	Jockey's Guild	
Mr. Gil DeLaura	Charleston	WVHA	X
Raymond A. Allen	Charleston	DOE	
Beryl V. Lynn	Charleston	DOF	
Robert B. Worden	"	WVMA	

RACING COMMISSION-THOROUGHBRED RULES AMENDMENT

COMMITTEE AMENDMENTS:

On page twenty-three of the proposed rule, Section 37.23, dealing with approved jockey fees, by striking all of Section 37.23 and inserting in lieu thereof the existing provisions of Section 37.23 as contained in 178 CSR 1, effective June 7, 1985, which reads as follows:

"37.23. Approved jockeys' fees:

\$1,000 - \$1,400	10%	of winning purse
\$30 \$25 \$20		
\$1,500 - \$1,900	10%	of winning purse
\$35 \$30 \$25		
\$2,000 - \$3,400	10%	of winning purse
\$45 \$35 \$30		
\$3,500 - \$4,900	10%	of winning purse
\$50 \$40 \$30		
\$5,000 - up	10%	of winning purse
\$55 \$45 \$35		

There shall be no contract mounts except for contract employees. In case an owner or a trainer shall engage two (2) or more jockeys for the same race, he shall pay the losing fee for each jockey so engaged who does not ride in that race."

And further amends said rule by striking Table 37-23A,

And further amends the proposed rule on page fifty-six, Section 61.3(f), by striking the last paragraph in subdivision (f) beginning with the word "Notwithstanding" and ending with the phrase "chapter 19 of the West Virginia Code."

That the proposed rule be amended by adding thereto a new section, designated section 67, to read as follows:

"§178-1-67. Limitation on the use of procedural or administrative rules.

"The commission shall not by procedural or administrative rules attempt to alter or amend subsections 37.23 or 61.3 of these rules so as to negate the effect of amendments to these subdivisions adopted by the Legislature in approving these rules."

DECEMBER 8

AGENDA

LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

December 8, 1987 - 5:00 - 7:00 p.m.

COMMITTEE MEETING ROOM, M-438

1. Approval of Minutes - Meeting December 7, 1987
2. REVIEW OF LEGISLATIVE RULES:
 - a. Health Dept. - Hazardous Substances
 - b. Dept. of Labor - Standards for Weights and Measures Inspectors - adoption of NBS Handbook 130, 1987
 - c. State Tax Dept. - Appraisal of Property for Periodic Statewide Reappraisals for Ad Valorem Property Tax Purposes
 - d. State Tax Dept. - Consumers Sales and Service Tax and Use Tax
 - e. State Tax Dept. - Severance Tax
3. Other Business:

Workers' Compensation Fund bill exempting the promulgation of the medical fee schedule by the Workers' Compensation Commissioner from the legislative rule-making review process

Tuesday, December 8, 1987

5:00 - 7:00 P.M.

Legislative Rule-Making Review Committee
(Code §29A-3-10)

Dan Tonkovich,
ex officio nonvoting member

Robert "Chuck" Chambers,
ex officio nonvoting member

Senate

House

Tucker, Chairman
Boettner
Holmes
Tomblin
Harman (absent)
Hylton

Knight, Chairman (absent)
Burk (absent)
Murphy
Givens
Faircloth (absent)
Pritt (absent)

The meeting was called to order by Mr. Tucker, Co-Chairman.

The minutes of the December 7, 1987, meeting were approved.

Mike Mowery, Committee Counsel, reviewed the rule proposed by the Department of Health, Hazardous Substances.

Mr. Hylton moved that the proposed rule be approved. The motion was adopted.

Mr. Mowery reviewed the rule proposed by the Department of Labor, Standards for Weights and Measures Inspectors - adoption of NBS Handbook 130, 1987.

Mr. Givens moved that the proposed rule be approved. The motion was adopted.

Mr. Mowery reviewed the rule proposed by the Tax Department, Appraisal of Property for Periodic Statewide Reappraisals for Ad Valorem Property Tax Purposes.

Mr. Hylton moved that the proposed rule be approved as modified.

Mr. Murphy moved that the proposed rule be placed at the bottom of the agenda. The motion was adopted.

Mr. Mowery reviewed the rule proposed by the Tax Department, Severance Tax. He explained to the Committee that the Tax Department had agreed to certain modifications of the rule.

Mr. Tomblin moved that the rule be approved as modified. The motion was adopted.

Mr. Tucker reviewed the Workers' Compensation Fund bill exempting the promulgation of the medical fee schedule by the Workers' Compensation Commissioner from the legislative rule-making review process.

Mr. Murphy moved that the bill be approved. The motion was adopted.

Mr. Mowery reviewed the rule proposed by the Tax Department, Consumers Sales and Service Tax and Use Tax. Mr. Mowery explained that the Tax Commissioner had agreed to certain modifications.

Mr. Leo MacCourtney, Vice-President of the WV Broadcasters Association, addressed the Committee. A statement was circulated to the Committee.

Mr. John Bergeron, representing Nashua Corporation, addressed the Committee.

Mr. Buck Crews, representing the Guyan Golf and Country Club, addressed the Committee and responded to questions from the Committee.

John Montgomery, Counsel for the Tax Department, responded to questions from the Committee.

Mr. John Meeks, representing Guyan Golf and Country Club, addressed the Committee and responded to questions. A statement was circulated to the Committee.

Mr. Philip DuPont, President of the Edgewood Country Club, addressed the Committee and responded to questions. A statement was circulated to the Committee.

Mr. Tom Winner, representing the WV Bankers Association, addressed the Committee.

Mr. Tomblin moved that the amendment offered by the Bankers Association to §110-15-31 of the proposed rule concerning banking business be approved. The motion was adopted.

Mr. John Montgomery addressed the Committee.

Mr. Boettner moved to amend the proposed rule relating to country club dues by striking all of Section 61, page 159. The motion was adopted.

Mr. Boettner moved to amend the proposed rule relating to radio and television broadcasters (§110-15-48) to authorize the

taxation of advertising and production services which are not performed in connection with sales of radio and television broadcasting time, and to exempt from taxation such services if they are rendered as an integral part of the charge for broadcasting time.

The motion was adopted.

Mr. Tucker moved that the rule lie over to the next meeting of the Committee. The motion was adopted.

Upon consideration of Mr. Hylton's motion that the rule proposed by the Tax Department, Appraisal of Property for Periodic Statewide Reappraisals for Ad Valorem Property Tax Purposes, be approved as modified, the motion was adopted.

Mr. Murphy moved that rule proposed by the Department of Commerce, Rules Governing Public Use of WV State Parks, State Forests and State Hunting and Fishing Areas Under the WV Department of Commerce, and which was approved as modified and amended at the August 9, 1987, meeting of the Committee, be reconsidered. The motion was adopted.

The meeting was adjourned.

*Adapted
12-8-87*

§ 110-15-31 Banking Business

31.1 Generally, banks, state and national, are not exempt from the imposition of the sales and service tax or use tax on their purchases, inasmuch as banks are the ultimate consumers of such purchases. Banks are only exempt on purchases of property and services that are resold, subject to tax, to consumers.

31.2 Any purchases by banks of tangible personal property or services directly used or consumed in providing a taxable service or for resale are not subject to the sales and service tax or use tax.

31.3 Generally, the services rendered to consumers by banks, state and national, are exempt from the sales and service tax because such services constitute professional services, consideration for the extension of credit, charges related to the transfer of intangible property, or electronic data processing services for others.

31.4 Nevertheless, the sale of some bank services and bank related tangible property are taxable. The following constitutes a complete list of items or services on which banks must charge and collect sales and service tax unless the purchaser or transaction is exempt:

31.4.1 Charges made for real estate management.

31.4.2 Any payment received after July 1, 1987, for rental of safety deposit boxes regardless of the fact that a rental or lease agreement may have been executed prior to July 1, 1987.

31.4.3 Fees received for collection notes and accounts of others.

31.4.4 Sales to consumers of promotional items, such as glassware, silverware, appliances, etc. and

31.4.5 Sales to consumers of checks, checkbooks and money bags, and similar items.

31.4.6 Charges for research and copying.

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: December 8, 1987

TIME: 5:00 - 7:00 p.m.

NAME	Present	Absent	Yeas	Nays
Chambers, Robert "Chuck", Speaker				
Knight, Thomas A.				
Burk, Robert W., Jr.				
Givens, Roy E.	✓			
Pritt, Charlotte				
Larry V. Faircloth				
Murphy, Patrick H.	✓			
Tonkovich, Dan, President				
Tucker, Larry A.	✓			
Boettner, John "Si"	✓			
Harman, C. N.				
Holmes, Darrell E.	✓			
Hylton, Tracy W.	✓			
Tomblin, Earl Ray	✓			
TOTAL	7			

RE: _____

REGISTRATION OF PUBLIC
AT
COMMITTEE MEETINGS
WEST VIRGINIA LEGISLATURE

COMMITTEE: Rule-Making Review

DATE: December 8, 1987 5:00-7:00

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly			
Leo Mac Courtney	WOWK-TV, Huntington	WV Broadcasters Assn	X ✓
John Bergeron	44 Franklin St, NASHUA N.H	NASHUA CORPORATION	X ✓
JOHN MONTGOMERY	CHARLESTON	TAX DEPARTMENT	AS NEEDED
ARLIE HUBBARD, JR	CHAS	COL. GAS TRANS.	
EUCIE Crews	HUNTINGTON	GUYAN GOLF + CC. CLUB	X ✓
Dow Hebb	Charleston	WV TAX DEPT	
Scott Barger	"	" " "	
Jim KARDIA	Charleston	Labor	AS NEEDED
John A Holt	Charleston	Labor	AS NEEDED
John Meeks	Huntington	Guyan Golf & CC Club	✓
Tom Winner	Charleston	W.Va BANKERS ASSOC.	
Mike Farley	"	W.Va. Tax Dept	
Robert Hoffmann	"	" " "	AS NEEDED.
Ray Jansard	"	WV Dept of Health	—
William Rindell	"	WV Dept of Health	—
Bob Rodak	TAX		AS NEEDED
DAN McDAVID	CHAS	SCARLET OAKS CC.	
ROBERT WILSON	CHARLESTON	TAX DEPT	

REGISTRATION OF PUBLIC
AT
COMMITTEE MEETINGS
WEST VIRGINIA LEGISLATURE

COMMITTEE: _____ DATE: _____

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly <i>Philip Dupont</i>	<i>CHARLESTON</i>	<i>EDGEWOOD COUNTRY CLUB</i>	<input checked="" type="checkbox"/>
<i>MIKE HEDGE</i>	<i>CHAS</i>	<i>BHCC</i>	<i>As Needed</i>

TESTIMONY OF LEO M. MACCOURTNEY, VICE PRESIDENT OF THE WEST VIRGINIA BROADCASTERS ASSOCIATION BEFORE THE WEST VIRGINIA LEGISLATIVE RULE-MAKING COMMITTEE ON DECEMBER 8, 1987.

Mr. Chairman, Members of the Committee and Ladies and Gentlemen: First of all, let me express, on behalf of the West Virginia Broadcasters Association, our appreciation for this opportunity to express our opposition to Paragraph 48.1 of the amended emergency legislative regulations for the West Virginia Consumers Sales and Service Tax and Use Law.

Senator Tom Lohr, of the Senate Finance Committee has publicly stated that it was never the intention of the legislature to tax advertising in the print and broadcast media. And yet Paragraph 48.1 of the amended emergency legislative regulations provides for precisely that: A tax on advertisers using radio and television who require production services from those stations to prepare the advertiser's message.

Paragraph 48.1 reads as follows:

48.1 Radio and television broadcasting stations who render advertising services, such as layouts or artwork are engaged in rendering a service subject to the sales and service tax and use tax. However, sales of radio and television broadcasting time are exempt from the sales and service tax and use tax.

In the opinion of the West Virginia Broadcasters Association, Paragraph 48.1 of the amended emergency legislative regulations is discriminatory since nowhere in those regulations do they provide that newspapers, magazines or billboard media who render advertising services such as layout or artwork are engaged in rendering a service subject to the sales and service and use tax.

Broadcast outlets, particularly television stations, are most certainly engaged in the function of commercial production on behalf of advertisers - particularly local advertisers.

The creation of the message is an integral part of the purchase of time on a radio or television station. Without the message, there would be no purchase of time.

It is the position of the West Virginia Broadcasters Association that radio and television broadcasting stations who render advertising services such as layouts or artwork directly associated with the purchase of time on the station are rendering a service which should NOT be subject to the sales and service tax and use tax.

On the otherhand, the West Virginia Broadcasters Association agrees that radio and television broadcasting stations who render advertising services such as layout or artwork when such services are NOT associated directly with the purchase of time on those stations are, in fact, engaged in rendering a service which should be subject to the sales and service and use tax - provided, of course, that the regulations

stipulate that newspapers, magazines and billboard companies are subject to the same sort of provision.

We respectfully request that Paragraph 48.1 of the amended emergency legislative regulations for the West Virginia Consumers Sales and Service Tax and the Use Tax be amended to so read.

Thank You.

STATEMENT OF POSITION

TO: West Virginia Legislature
Legislative-Rulemaking Review Committee

FROM: Philip Dupont, President
Edgewood Country Club
Charleston, West Virginia

RE: Consumers Sales and Service Tax Proposed Regulation
§ 110-15-61.1 - Statement of Opposition to Inclusion of
"Membership Dues" Within Taxable Sales and Service

My name is Philip Dupont, I am a resident of Charleston, West Virginia, and am currently serving as President of Edgewood Country Club (Edgewood).

Edgewood is a non-stock West Virginia corporation and has, since it was organized in 1898, operated as a private membership social club. Edgewood operates a club house with dining facilities, a swimming pool, tennis and squash courts located on Edgewood Drive in Charleston, West Virginia; and maintains an 18-hole golf course with a smaller club house located on Derricks Creek Road near Sissonville, West Virginia.

In 1979, the Circuit Court of Kanawha County made a finding of fact in a business and occupation tax case that:

The initiation fees and dues provide for maintenance of the facilities, and no specific goods or services are given in exchange therefor. (Edgewood Country Club v. Hardesty, State Tax Commissioner, Civil Action No. AP-CA-77-135 (February 16, 1979)).

This case was the result of an audit of both business and occupation and consumers sales taxes of Edgewood Country Club. The Tax Examiner reviewed all of Edgewood's accounts, including the membership dues account, and raised absolutely no question about

a requirement for collecting consumers sales tax on membership dues. Edgewood has never collected sales tax on its membership dues and does not believe the law requires it.

The regulation objected to is the first of 46 new sections added to the State Tax Department's Emergency Regulations that were originally filed July 1, 1987. Secretary of State, Ken Hechler, issued his Emergency Rule Decision (ERD 14-87) on August 12, 1987, in which he found that the Tax Department was in procedural compliance with the provisions of W. Va. Code § 29A-3-15, that the facts and circumstances presented by the State Tax Commissioner constituted an emergency, and that the rule should, therefore, be approved. Thereafter, the Commissioner filed Amended Emergency Regulations stating:

As a result of the public comments received, the Emergency Regulation was modified and on August 17, 1987, it was filed as an approved proposed legislative regulation with the Legislative-Rulemaking Review Committee. In order to remedy concerns identified through public comments, the Tax Department is now amending the Emergency Regulation.

There is no indication that any public comments were made relating to the application of the consumers sales and service tax to country clubs which would give rise to the need for Regulation § 110-15-61.1. (Subject regulation).

The 46 new sections included in the August 17, 1987 filing by the State Tax Department, together with the many subsections contained therein, were never subject to the public comment period required for proposed rules. Thus, a procedural deficiency may exist, particularly with respect to those portions

of the additional sections that were not included as a result of public comments to the original filing.

The portion of the subject regulation objected to is the inclusion of "membership dues" within taxable sales and services, thereby requiring the collection of the 5% consumers sales and service tax on such dues paid by members. We have no objections to other portions of the regulation which includes within taxable sales and services items such as greens fees, golf cart rentals, tennis court fees, food and beverage sales and shop sales. All of these items and any item that would fall in the category of guest fees have consistently been considered subject to the sales tax. Edgewood collects and remits sales tax on all charges in these categories.

Our objection to the subject regulation is based on the belief that membership dues do not fall within the statutory definition of service. This definition provides that "service" includes activities "which involve the rendering of a service as distinguished from the sale of tangible personal property." Edgewood members pay annual dues for the privilege of being a member of the organization without regard to their individual use of any facilities maintained by the Club.

Membership dues paid to Edgewood or to any organization are amounts paid toward the support of the organization and to retain the right to membership, an intangible property right. Payment of dues has no relationship to the use of facilities. A member who uses facilities of Edgewood on a daily basis pays the same amount as a member who uses the Club occasionally or not at all.

Black's Law Dictionary (5th Ed. 1979) defines dues:

As applied to clubs and other membership organizations, refers to sums paid toward support and maintenance of same and as a requisite to retain membership.

There is no "rendering of a service" as required by the statutory definition of "service" for the payment of membership dues.

Where there is an identifiable service or item received for a fee charged to a member such as guest fees, golf cart rentals and food and beverage sales, consumers sales and service tax is properly chargeable and has been collected and remitted by Edgewood.

If, as proposed by the State Tax Department, the payment of membership dues constitutes the purchase of a service subject to the consumers sales and service tax, then every membership organization in West Virginia should be charging tax on membership dues. There is nothing in the statute to suggest that private country clubs should be singled out, therefore, the theory, if valid, must be uniformly applied and should be uniformly enforced.

Examples of other membership organizations that would come within this category include:

- a. Service clubs such as Lions, Rotary, Civitan, Garden Clubs, etc.
- b. Trade or professional associations such as Farm Bureau, Chambers of Commerce, Teachers Associations, Labor Unions, etc.
- c. Social and fraternal organizations such as Elks, Moose, Shrine, American Legion, VFW, etc.

It is our position that membership dues charged by any of the foregoing organizations are simply payment for the right to belong to that organization. Membership is an intangible property right not measured by a specific identifiable service and, therefore, does not constitute a charge subject to the consumers sales and service tax.

A final point that we wish to make is that Edgewood has always paid consumers sales tax on purchases of items for use in the Club such as fertilizer and grass seed for the golf course, nets and equipment for the tennis courts, furnishings for the club house, and other items of machinery and equipment normally used for the operation of a country club facility. If membership dues are determined to be a taxable service requiring the collection of consumers sales and service tax, all purchases except those for improvement to real property will be exempt from the tax. Thus, it is apparent that any revenue potential from the inclusion of membership dues in the category of taxable services would be offset by exemptions claimed by the organizations on purchases for use in their operations.

Respectfully submitted,

Philip Dupont
President, Edgewood Country Club

December 8, 1987

CAMPBELL, WOODS, BAGLEY, EMERSON, McNEER & HERNDON

ATTORNEYS AND COUNSELORS AT LAW

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OF COUNSEL
JAMES H. MOORE, JR.
ASHLAND, KY

ROLLA D. CAMPBELL
SELDEN S. McNEER (1894-1963)
LUTHER E. WOODS
CHARLES F. BAGLEY
ROBERT K. EMERSON
SELDEN S. McNEER, JR.
MILTON T. HERNDON
RICHARD GREGORY McNEER
JAMES R. BAILES
HOWARD R. CREWS, JR.
CHARLES F. BAGLEY, III
EDWARD M. KOWAL, JR.
JAMES D. McQUEEN, JR.
JAMES H. MOORE, III *
JOEL PATRICK JONES
THOMAS L. CRAIG, JR.
W. NICHOLAS REYNOLDS
R. CARTER ELKINS
CHERYL L. CONNELLY
J. GRANT McGUIRE
DAVID REID DILLON
DAVID CURTIS RAY
CHARLES I. JONES, JR.

* NOT ADMITTED IN W. VA.

December 4, 1987

M. E. Mowery, Counsel
West Virginia Legislative Rule-
Making Review Committee
Room M-438, State Capitol
Charleston, West Virginia 25305

Re: Consumers Sales and Service Tax
and Use Tax Amended Emergency
Legislative Regulations
10 C.S.R. 15 (1987)

Dear Mr. Mowery:

INTRODUCTION

We are counsel for Guyan Golf and Country Club ("Guyan"), a private non-profit West Virginia corporation composed of approximately 620 members who reside in the Huntington area. Guyan owns and maintains a golf course, swimming pool, tennis courts and club house. Each member of Guyan pays an initiation fee and also fixed monthly membership dues regardless of the number of occasions the club member or members of his or her family might use the facilities of the club. Historically, Guyan has not collected West Virginia sales tax upon its receipt of initiation fees and membership dues. On behalf of Guyan and its members, we submit these comments in opposition to amended Emergency Legislative Regulation §110-15-61.1, which regulations were filed by the State Tax Department in the State Register on August 20, 1987. All citations to

amended Emergency Legislative Regulation sections herein are to 110 C.S.R.15 (1987).

DISCUSSION

Emergency Regulation §110-15-61.1 changes the State sales tax regulations to make membership dues paid to country clubs in West Virginia subject to sales tax. Not only does such a change overturn established tax practice in West Virginia, but it is also unlawful. This regulation provides as follows:

§110-15-61.1 The total receipts from the operation of country clubs and golf courses are subject to sales and service tax. Taxable sales and services include membership dues, green fees, driving range fees, golf cart rentals, swimming pool admissions, tennis court fees, charges for use of banquet facilities, ballroom rental, food and beverage sales, and pro shop sales. Gratuities collected on behalf of employees serving banquet meals are not subject to sales and service tax, if the full amount of gratuities collected are distributed to the employees who served at the banquet.

The treatment of membership dues under this regulation is the opposite of the long-standing exception from sales tax for membership dues under existing tax practice. It is well-settled that such a complete reversal of administrative practice occurs only when mandated by the Legislature or judicial authorities. Significant changes in the West Virginia sales tax laws were made by the Legislature in 1987 through its enactment of S.B. 536 and S.B. 760. However, none of these modifications imposed sales tax upon membership dues. Furthermore, we are unaware of any judicial decisions which dictate this change.

We are not unmindful of the fact that the Tax Department has apparent authority to impose sales tax upon

admission charges and club dues paid in respect to places of amusement. Such authority initially was provided in Reg. CUT§3.24 promulgated by the Tax Department in 1974 and it is now set forth in Emergency Regulation §110-15-52. Nonetheless, it is clear that those sections of the regulations did not and do not apply to membership dues paid to country clubs. In fact, we have been advised by staff counsel for the Tax Department that the only judicial decision relating to the imposition of West Virginia sales tax upon membership dues was rendered by the Circuit Court of Kanawha County several years ago, and in that case it was held membership dues paid to a private country club were not subject to tax.

Even if the Legislative Rule-Making Review Committee ("the Committee") should determine that the subject regulation does not represent an unsanctioned reversal of the former sales tax regulations and established tax practice in this State, we believe that such regulation is invalid for the following reasons.

First, Emergency Regulation §110-15-61.1 is procedurally defective. On July 1, 1987, the Tax Department repealed existing regulations governing consumers sales tax and reenacted the same in the form of Emergency Regulations which were filed in the State Register on that day. The Emergency Regulations were promulgated in response to modifications to West Virginia sales tax laws made by the Legislature earlier this year. As stated above, changes in the sales tax laws that were embodied in S.B. 536 and S.B. 760 did not include the imposition of sales tax upon membership dues. Moreover, the Emergency Regulations did not include §61.1 thereof and did not otherwise purport to impose tax upon membership dues received by country clubs. Taxpayers were not afforded the right to appear at a public hearing upon the Emergency Regulations, but instead were permitted to file written comments by July 31, 1987.

Following the expiration of the comment period and for the avowed purpose of remedying "concerns identified through public comment", the Tax Department on August 20, 1987, amended the Emergency Regulations by adding thereto more

than forty new sections, including §61.1. We have reviewed carefully each comment received by the Tax Department and we have found none regarding the taxation of membership dues.

In his cover letter to the Secretary of State filing the amended Emergency Regulations, the Tax Commissioner stated: "Because a public comment period has been held on the emergency regulations, it is the Tax Department's position that another public comment period is not required." We have been advised that the Secretary of State acquiesced to the position of the Tax Department and, as a result thereof, no public comment period upon the amended Emergency Regulations was provided to taxpayers.

Accordingly, Guyan and other similarly situated taxpayers have been denied the opportunity to appear at a public hearing upon Emergency Regulation §110-15-61.1 or to submit written comments thereon, all in violation of the express provisions of W.Va. Code §29A-3-15.

Second, there exists no statutory authority for the imposition of sales tax upon membership dues paid to country clubs. Emergency Regulation §110-15-61.1 apparently was drafted to include membership dues within the statutory definition of a taxable "service". That term is defined in W.Va. Code §11-15-2(i) to include "all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible personal property, but shall not include contracting, personal services or the services rendered by an employee to his employer or any service rendered for resale."

Country clubs are primarily social organizations and club members engage in social activities through the utilization of facilities jointly owned or controlled by the members as a group. Admittedly, country clubs make taxable sales of tangible personal property, such as food, beverages and pro shop merchandise and render certain taxable services, such as the rental of golf carts and banquet facilities. Guyan has collected tax upon all of such taxable sales and services.

However, country clubs do not render a taxable service by reason of their receipt of membership dues. While one member of a country club might use club facilities one hundred occasions during a year, another member might not use such facilities during the same period. Yet each member must pay the same membership dues. There is no equivalence between the dues paid by a member and the benefit he or she receives therefrom. This distinguishing feature of membership dues was explained in the leading case of White v. Winchester Country Club, 315 U.S. 32 (1942) as follows:

Consideration of the nature of club activity is a necessary preliminary to the formulation of a test of what constitutes a "due or membership fee." So far as finances go, the fundamental notion of club activity is that operating expenses are shared without insistence upon equivalence between the proportion of an individual's contributions and the proportion of the benefits he receives. Thus, on the one hand, payment of the price of an individual dinner at the club dining room or of a single round of golf lacks the element of making common cause inherent in the idea of club activity. But, on the other hand, payment for the right to repeated and general use of a common club facility for an appreciable period of time had that element and amounts to a "due or membership fee" if the payment is not fixed by each occasion of actual use. 315 U.S. 40.

Inasmuch as there exists no direct correlation between the payment of dues and resultant benefits, Guyan and other country clubs do not perform services on behalf of their members in respect to their receipt of regular membership dues.

Furthermore, Emergency Regulation §110-15-61.1 does not include initiation fees as a taxable receipt of a

country club. Presumably, the Tax Department does not consider this item to be subject to tax for the reason that initiation fees represent a capital expenditure paid to acquire membership, an intangible property right. Courts of other jurisdictions have recognized that there exists no legal distinction between initiation fees and membership dues. For example, in Northland Country Club v. Commissioner of Taxation, 241 N.W.2d 806 (Minn. 1976), the court rejected the contention of the Minnesota Tax Commissioner that membership dues paid to a country club were subject to state sales tax and stated as follows:

In accordance with this observation, it is reasonably arguable that dues paid by Northland's members are for admission to membership and not for "admission to places." Dues paid to a club or other organization are sums paid toward the support of the society and to retain membership therein. They are the obligation into which members enter to pay a sum to be fixed, usually by by-laws, at recurring intervals, for the maintenance of the organization. The commissioner determined that Northland's initiation fees fall outside the reach of Minn. St. 297A.01, subd. 3(d), presumably on the ground that such fees are paid for admission to membership; it is difficult to distinguish initiation fees from membership dues on this basis since the latter are paid for the maintenance of membership. 241 N.W.2d 808.

Since the Tax Department has conceded that country clubs do not render a taxable service in respect to their receipt of initiation fees, it necessarily follows that such clubs do not provide a taxable service by reason of their receipt of sums paid by members to maintain membership.

Based upon the foregoing, we submit that Emergency Regulation §110-15-61.1 is out of harmony with the statutory

definition of the term "service" and it is invalid. See State et rel. Carmen v. Sims, 115 S.E.2d 140, 144 (W.Va. 1960); Eastern Gas & Fuel Association v. Hatcher, 107 S.E.2d 618, 623 (W.Va. 1959).

Third, Emergency Regulation §110-15-61.1 blatantly discriminates against members of privately and publicly owned country clubs for the reason that other sections of the regulations do not impose sales tax upon dues paid by members of other organizations. To insure uniformity and equality in the administration of West Virginia tax laws, the sales tax either must be removed from membership dues paid to country clubs or must be imposed upon dues paid by members of other non-profit and for profit organizations and associations, including, but not limited to, the United Mine Workers of America, AFL-CIO, West Virginia Education Association, West Virginia Bankers Association, West Virginia Chamber of Commerce, and local chapters of the American Legion and Rotary Club.

Finally, we believe the Committee should be cognizant of the fact that the overall revenue impact of this regulation is minimal, at best. There are only a few country clubs in this State. In addition, if country clubs are deemed to be rendering taxable services by reason of their receipt of membership dues, then such clubs would no longer be required to pay tax upon most purchases made by them or services rendered on their behalf. See W.Va. Code §11-15-9(i).

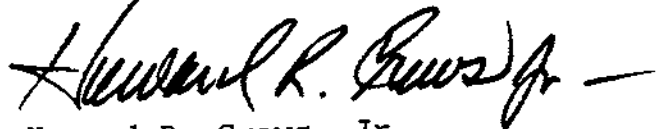
CONCLUSION

Based upon the foregoing, Guyan respectfully requests that Emergency Regulation §110-15-61.1 be modified by deleting therefrom the term "membership dues". Guyan further requests that it be permitted, if it so chooses, to appear at

M. E. Mowery
December 4, 1987
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the Committee hearing upon the Emergency Regulations which is
scheduled on December 8, 1987.

Respectfully submitted,



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HRCjr:ss

*adapted
12-8-87*

§ 110-15-31 Banking Business

31.1 Generally, banks, state and national, are not exempt from the imposition of the sales and service tax or use tax on their purchases, inasmuch as banks are the ultimate consumers of such purchases. Banks are only exempt on purchases of property and services that are resold, subject to tax, to consumers.

31.2 Any purchases by banks of tangible personal property or services directly used or consumed in providing a taxable service or for resale are not subject to the sales and service tax or use tax.

31.3 Generally, the services rendered to consumers by banks, state and national, are exempt from the sales and service tax because such services constitute professional services, consideration for the extension of credit, charges related to the transfer of intangible property, or electronic data processing services for others.

31.4 Nevertheless, the sale of some bank services and bank related tangible property are taxable. The following constitutes a complete list of items or services on which banks must charge and collect sales and service tax unless the purchaser or transaction is exempt:

31.4.1 Charges made for real estate management.

31.4.2 Any payment received after July 1, 1987, for rental of safety deposit boxes regardless of the fact that a rental or lease agreement may have been executed prior to July 1, 1987.

31.4.3 Fees received for collection notes and accounts of others.

31.4.4 Sales to consumers of promotional items, such as glassware, silverware, appliances, etc. and

31.4.5 Sales to consumers of checks, checkbooks and money bags, and similar items.

31.4.6 Charges for research and copying.