

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

Senate Bill 328

BY SENATORS GAUNCH, ASHLEY, CARMICHAEL,
FACEMIRE, KARNES, KIRKENDOLL, LEONHARDT,
STOLLINGS, TAKUBO, WALTERS, PLYMALE, UNGER, BLAIR,
PREZIOSO, WILLIAMS AND ROMANO

[Introduced January 20, 2016;

Referred to the Committee on the Judiciary; and then to
the Committee on Finance.]

1 A BILL to repeal §11-12-86 of the Code of West Virginia, 1931, as amended; to repeal §29-3-23,
 2 §29-3-24, §29-3-25 and §29-3-26 of said code; to amend said code by adding thereto a
 3 new section, designated §9A-1-11b; to amend said code by adding thereto a new article,
 4 designated §29-3E-1, §29-3E-2, §29-3E-3, §29-3E-4, §29-3E-5, §29-3E-6, §29-3E-7,
 5 §29-3E-8, §29-3E-9, §29-3E-10, §29-3E-11, §29-3E-12 and §29-3E-13; and to amend
 6 and reenact §61-3E-1 and §61-3E-11 of said code, all relating generally to raising funds
 7 for veterans' facilities; creating West Virginia Veterans Program Fund; regulating fireworks
 8 generally; requiring certificate; establishing fees; requiring permit; dedicating fees to
 9 Veterans Program Fund; establishing rule-making authority; violations; penalties;
 10 enforcement; defining terms; and exemptions.

Be it enacted by the Legislature of West Virginia:

1 That §11-12-86 of the Code of West Virginia, 1931, as amended, be repealed; that §29-
 2 3-23, §29-3-24, §29-3-25 and §29-3-26 of said code be repealed; that said code be amended by
 3 adding thereto a new section, designated §9A-1-11b; that said code be amended by adding a
 4 new article, designated §29-3E-1, §29-3E-2, §29-3E-3, §29-3E-4, §29-3E-5, §29-3E-6, §29-3E-
 5 7, §29-3E-8, §29-3E-9, §29-3E-10, §29-3E-11, §29-3E-12 and §29-3E-13; and that §61-3E-1 and
 6 §61-3E-11 of said code be amended and reenacted, all to read as follows:

CHAPTER 9A. VETERANS' AFFAIRS.

ARTICLE 1. DEPARTMENT OF VETERANS' AFFAIRS.

§9A-1-11b. Establishment of West Virginia Veterans Program Fund.

1 There is hereby created in the State Treasury a special revenue fund to be designated
 2 and known as the "West Virginia Veterans Program Fund," which shall consist of revenues
 3 derived from the assessment of the fireworks safety fee, as provided in section seven, article
 4 three-e, chapter twenty-nine of this code, to be administered by the Department of Veterans'
 5 Affairs and used for funding veterans' programs. Funds may also be derived from any gift, grant,

6 bequest, endowed fund or donation which may be received by any veterans' program created by
 7 statute or from any governmental entity or unit or any person, firm, foundation or corporation.
 8 Expenditures from the fund shall be for the purposes set forth in this article and are not authorized
 9 from collections but are to be made only in accordance with appropriation by the Legislature and
 10 in accordance with the provisions of article three, chapter twelve of this code and upon the
 11 fulfillment of the provisions set forth in article two, chapter eleven-b of this code: *Provided, That*
 12 for the fiscal year ending June 30, 2017, expenditures are authorized from collections rather than
 13 pursuant to an explicit appropriation by the Legislature. Any balance remaining in the fund at the
 14 end of any fiscal year shall be reappropriated to the next fiscal year.

CHAPTER 29. MISCELLANEOUS BOARDS AND OFFICERS.

ARTICLE 3E. FIREWORKS SAFETY.

§29-3E-1. Unlawful acts.

1 It is unlawful for a person to manufacture, wholesale, distribute, import, sell or store for the
 2 purpose of resale, consumer fireworks, sparkling devices, novelties or toy caps without a license,
 3 registration, certificate or permit from the State Fire Marshal.

§29-3E-2. Definitions.

1 As used in this article:

2 (1) "Agricultural and wildlife fireworks" means fireworks devices distributed to farmers,
 3 ranchers and growers through a wildlife management program administered by the United States
 4 Department of the Interior or the Department of Natural Resources of this state;

5 (2) "APA Standard 87-1" means the APA Standard 87-1 published by the American
 6 Pyrotechnics Association, as amended, and incorporated by reference into Title 49 of the Code
 7 of Federal Regulations;

8 (3) "Articles pyrotechnic" means pyrotechnic devices for professional use that are similar

9 to consumer fireworks in chemical composition and construction but not intended for consumer
10 use, that meet the weight limits for consumer fireworks but are not labeled as such, and that are
11 classified as UN0431 or UN0432 under 49 C.F.R. §172.101 (2014);

12 (4) "Consumer fireworks" means small fireworks devices that are designed to produce
13 visible effects by combustion and that are required to comply with the construction, chemical
14 composition and labeling regulations promulgated by the United States Consumer Product Safety
15 Commission under 16 C.F.R. Parts 1500 and 1507 (2014), and that are listed in APA Standard
16 87-1. Consumer fireworks do not include sparkling devices, novelties and toy caps;

17 (5) "Consumer fireworks certificate" means a certificate issued under section five of this
18 article;

19 (6) "Display fireworks" means large fireworks to be used solely by professional
20 pyrotechnicians licensed by the State Fire Marshal and designed primarily to produce visible or
21 audible effects by combustion, deflagration or detonation and includes, but is not limited to,
22 salutes containing more than two grains (one hundred thirty milligrams) of explosive materials,
23 aerial shells containing more than forty grams of pyrotechnic compositions and other display
24 pieces that exceed the limits of explosive materials for classification as consumer fireworks and
25 are classified as fireworks UN0333, UN0334, or UN0335 under 49 C.F.R. §172.101 (2014);

26 (7) "Distributor" means a person who sells fireworks to wholesalers and retailers for resale;

27 (8) "Division 1.3 explosive" means that term as defined in 49 C.F.R. §173.50 (2014);

28 (9) "Division 1.4 explosive" means that term as defined in 49 C.F.R. §173.50 (2014);

29 (10) "Explosive composition" means a chemical or mixture of chemicals that produces an
30 audible effect by deflagration or detonation when ignited;

31 (11) "Fire Marshal" means the State Fire Marshal;

32 (12) "Firework" or "fireworks" means any composition or device designed for the purpose
33 of producing a visible or audible effect by combustion, deflagration or detonation. Fireworks
34 include consumer fireworks, display fireworks and special effects. Fireworks does not include

35 sparkling devices, novelties and toy caps and model rockets;

36 (13) "Interstate wholesaler" means a person who is engaged in interstate commerce
37 selling fireworks;

38 (14) "Model rocket" means that term as defined in National Fire Protection Association
39 Standard 1122, "Code for Model Rocketry";

40 (15) "New explosive" means that term as defined in 49 C.F.R. §173.56 (2014);

41 (16) "NFPA 1123" means that term as defined in National Fire Protection Association
42 Standard 1123, "Code for Fireworks Display."

43 (17) "NFPA 1124" means that term as defined in National Fire Protection Association
44 Standard 1124, "Code for the Manufacture, Transportation, Storage, and Retail Sales of
45 Fireworks and Pyrotechnic Articles," 2006 Edition.

46 (18) "NFPA 1126" means that term as defined in National Fire Protection Association
47 Standard 1126, "Standard for the Use of Pyrotechnics Before a Proximate Audience."

48 (19) "Novelties" means that term as defined under APA standard 87-1, section 3.2; but
49 shall not include toy pistols, toy caps, toy canes, toy guns or other similar devices;

50 (20) "Person" means an individual, or the responsible person for an association, an
51 organization, a partnership, a limited partnership, a limited liability company, a corporation, or any
52 other group or combination acting as a unit;

53 (21) "Pyrotechnic composition" means a mixture of chemicals that produces a visible or
54 audible effect by combustion rather than deflagration or detonation. A pyrotechnic composition
55 will not explode upon ignition unless severely confined;

56 (22) "Retailer" means a person who purchases consumer fireworks for resale to
57 consumers;

58 (23) "Sparkling devices" means "ground or handheld sparkling devices" as that phrase is
59 defined under APA 87-1, sections 3.1.1 and 3.5;

60 (24) "Special effects" means a combination of chemical elements or chemical compounds

61 capable of burning independently of the oxygen of the atmosphere and designed and intended to
62 produce an audible, visual, mechanical, or thermal effect as an integral part of a motion picture,
63 radio, television, theatrical, or opera production or live entertainment;

64 (25) "Temporary facility" means that term as defined in NFPA 1124;

65 (26) "Toy caps" means that term as defined under APA 87-1, section 3.3; and

66 (27) "Wholesaler" means any person who sells consumer fireworks to a retailer or any
67 other person for resale and any person who sells articles of pyrotechnics, display fireworks, and
68 special effects to a person licensed to possess and use those devices.

§29-3E-3. Production or transportation of fireworks.

1 A person may produce or transport a firework that is a new explosive and that is either a
2 division 1.3 explosive or division 1.4 explosive if the person first meets the requirements of 49
3 C.F.R. §173.56(2)(j) (2014).

§29-3E-4. Sparkling devices and novelties registration required.

1 (a) A person may not sell sparkling devices or novelties without being registered with the
2 State Fire Marshal.

3 (b) To be registered with the Fire Marshal, the retailer shall:

4 (1) Submit an application to the Fire Marshal;

5 (2) Provide a copy of his or her current business registration certificate or his or her
6 certificate to sell sparklers and novelties issued by the state Tax Commission;

7 (3) Pay the required fee; and

8 (4) Provide other information as the Fire Marshal may require by legislative rule.

9 (c) A registration is valid for the calendar year or any fraction thereof and expires on
10 December 31 of each year.

11 (d) A registration is not transferable.

12 (e) A person shall post the registration in a conspicuous place at the location of the
13 business.

14 (f) A separate registration is required for each location.

15 (g) The fee required in subdivision (3), subsection (b) of this section shall be \$15.00 per
16 retail location.

17 (h) The fee assessed by this section shall be retained by the Fire Marshal and expended
18 to offset costs incurred in performing the duties imposed by the provisions of this code.

19 (i) The requirements of NFPA 1124 do not apply to a person only selling sparkling devices,
20 novelties or toy caps.

§29-3E-5. Consumer fireworks certificate required.

1 (a) A retailer may not sell consumer fireworks unless the retailer is certified under this
2 article.

3 (b) To be certified to sell consumer fireworks a retailer shall:

4 (1) Submit an application to the Fire Marshal;

5 (2) Provide a copy of his or her current business registration certificate;

6 (3) Pay the required fee that shall not exceed \$250 for each temporary sales location and
7 \$500 for each permanent retail sales location;

8 (4) Provide proof that the retailer maintains at all times public liability and product liability
9 insurance with minimum coverage limits of \$1 million dollars to cover losses, damages or injuries
10 that might result of the license selling consumer fireworks; and

11 (5) Provide other information as the Fire Marshal may require by legislative rule.

12 (c) A consumer fireworks certificate is valid through December 31 of each year or any
13 fraction thereof.

14 (d) A consumer fireworks certificate is not transferable.

15 (e) A retailer shall post the certificate in a conspicuous place at the location of the
16 business.

17 (f) A separate certificate is required for each location of the business.

18 (g) A certificate holder may also sell sparkling devices and novelties at the same location

19 without additionally obtaining a sparkling devices and novelties registration.

20 (h) A retailer who sells consumer fireworks shall comply with the regulations provided in
21 NFPA 1124.

29-3E-6. Required permit for public fireworks display.

1 (a) A municipality, county, fair association, amusement park, and other organizations shall
2 have a permit to present a supervised display of fireworks from the Fire Marshall.

3 (b) To receive a permit, a municipality, fair association, amusement park, and other
4 organizations shall:

5 (1) Submit an application to the Fire Marshal;

6 (2) Pay the required fee;

7 (3) Furnish proof of financial responsibility to satisfy claims for damages to property or
8 personal injuries arising out of any act or omission on the part of the person or an employee
9 thereof, in the amount, character and form as the Fire Marshal determines to be necessary for
10 the protection of the public; and

11 (4) Provide any other information as the Fire Marshal may require by legislative rule.

12 (c) The Fire Marshal may require approval of the local police and fire authorities of the
13 community where the display is proposed to be held.

14 (d) A permit is not transferable.

15 (e) The display shall be handled by a competent operator licensed or certified as to
16 competency by the Fire Marshal and shall be of such composition, character, and so located,
17 discharged or fired so as to be safe in the opinion of the chief of the fire department serving the
18 community or area where such display is to be held.

19 (f) The permittee shall require a bond from the licensee in a sum not less than \$1,000
20 conditioned on compliance with the provisions of this article and the rules of the Fire Marshal
21 except where the licensee is an insured government entity.

§29-3E-7. Fireworks safety fee, administration, tax crimes, collections, remittances,

deposits, distributions, rules.

1 (a) In addition to the sales tax, a fireworks safety fee of ten percent of all sales is levied
2 on retail sales of consumer fireworks in this state. The fee shall be distributed pursuant to the
3 provisions of this section. The fee computation under this section shall be carried to the third
4 decimal place, and the fee rounded up to the next whole cent whenever the third decimal place
5 is greater than four, and rounded down to the lower whole cent whenever the third decimal place
6 is four or less.

7 (b) A person who purchases consumer fireworks in a retail transaction shall pay to the
8 retailer the amount of the fee levied by this section, which fee is added to and constitutes a part
9 of the sale price, and is collectible by the retailer who shall account to the state for all fees paid
10 by a purchaser. If the retailer fails to collect the fee, or fails to account to the state for the fees
11 paid by a purchaser, then the retailer is personally liable for the payment of the fee to the state.

12 (c) A retailer shall remit to the State Tax Commissioner no later than twenty days after the
13 end of each preceding month all moneys collected for such preceding month, pursuant to the
14 requirements of this section, and shall report such collections on forms and in the manner
15 prescribed by the State Tax Commissioner.

16 (d) All moneys so remitted, net of refunds and adjustments, shall be paid by the Tax
17 Commissioner into the state General Fund, and the amount thereof shall be distributed and paid
18 quarterly, by the Treasurer, into the funds and to the distributees specified in this subsection.

19 One hundred percent of fireworks safety fee moneys, net of refunds and adjustments shall
20 be deposited in the West Virginia Veterans Program Fund, established in section eleven-b, article
21 one, chapter nine-a of this code, for expenditure pursuant to the provisions of that section.

22 (e) Each and every provision of the West Virginia Tax Procedure and Administration Act
23 set forth in article ten, chapter eleven of this code, applies to the fees imposed pursuant to this
24 article, with like effect as if that act were applicable only to the fees imposed by this article and
25 were set forth in extenso in this article.

26 (f) Each and every provision of the West Virginia Tax Procedure and Administration Act
27 set forth in article ten, chapter eleven of this code, applies to the fees imposed pursuant to this
28 article, with like effect as if that act were applicable only to the fees imposed by this article and
29 were set forth in extenso in this article.

30 (g) Each and every provision of the West Virginia Tax Crimes and Penalties Act set forth
31 in article nine, chapter eleven of this code, applies to the fees imposed pursuant to this article,
32 with like effect as if that act were applicable only to the fees imposed by this article and were set
33 forth in extenso in this article.

1 (h) The State Tax Commissioner may make all necessary rules and regulations for the
2 fees to which this article applies as provided in the state Administrative Procedures Act in chapter
3 twenty-nine-a of this code.

4 (i) Notwithstanding any other provision of this code to the contrary, the State Tax
5 Commissioner may deduct and retain one percent from each payment into the General Fund, as
6 provided in this section, for the benefit of his or her office for general tax administration, from
7 which expenditures are permitted from collections without appropriation by the Legislature.

§29-3E-8. Rule-making Authority.

1 (a) The Fire Marshal may propose emergency rules and shall promulgate legislative rules
2 for promulgation, in accordance with the provisions of article three, chapter twenty-nine-a of this
3 code, to implement the provisions of this article, including:

4 (1) Adopting by reference the most recent edition of APA Standard 87-1;

5 (2) Adopting by reference the most recent edition of NFPA 1123, code for fireworks
6 display;

7 (3) Adopting by reference NFPA 1124, code for the manufacture, transportation, storage
8 and retail sales of fireworks and pyrotechnic articles;

9 (4) Adopting by reference the most recent edition of NFPA 1126, standard for the use of
10 pyrotechnics before a proximate audience, as promulgated by the State Fire Commission;

- 11 (5) Procedures for the issuance and renewal of a registration, certificate and permit;
- 12 (6) A fee schedule;
- 13 (7) Establishing insurance or bond requirements;
- 14 (8) Establishing additional criteria for the granting of a registration, certificate, or permit
- 15 under this article; and
- 16 (9) Registration of manufacturers, wholesalers and distributors.

§29-3E-9. Exemptions from article.

- 1 This article does not prohibit any of the following:
- 2 (1) The use of fireworks by railroads or other transportation agencies for signal purposes
- 3 or illumination;
- 4 (2) The use of agricultural and wildlife fireworks;
- 5 (3) The sale or use of blank cartridges for a theatrical performance, use by military
- 6 organizations or signal or ceremonial purposes in athletics or sports; or
- 7 (4) The possession, sale, or disposal of fireworks incidental to the public display of
- 8 fireworks by wholesalers or other persons who have a permit to possess, store, and sell
- 9 explosives from the Bureau of Alcohol, Tobacco, Firearms, and Explosives of the United States
- 10 Department of Justice and the Fire Marshal.

§29-3E-10. Local municipalities' regulation of consumer fireworks.

1 This article does not affect the right of the governing body of a municipality to prohibit the
2 use of consumer fireworks within its boundaries.

§29-3E-11. Violations of this article.

- 1 (a) A person may not intentionally ignite, discharge or use consumer fireworks or sparkling
- 2 devices on public property or private property without the express permission of the owner to do
- 3 so.
- 4 (b) A person may not intentionally ignite or discharge any consumer fireworks or sparkling
- 5 devices within or throw the same from a motor vehicle or building.

6 (c) A person may not intentionally ignite or discharge any consumer fireworks or sparkling
 7 devices into or at a motor vehicle or building, or at any person or group of people.

8 (d) A person may not intentionally ignite or discharge any consumer fireworks or sparkling
 9 devices while the person:

10 (1) Is under the influence of alcohol;

11 (2) Is under the influence of any controlled substance;

12 (3) Is under the influence of any other drug;

13 (4) Is under the combined influence of alcohol and any controlled substance or any other
 14 drug; or

15 (5) Has an alcohol concentration in his or her blood of eight hundredths of one percent or
 16 more by weight.

17 (e) A person who is less than eighteen years of age may not purchase, nor offer for sale,
 18 consumer fireworks: *Provided*, That a person sixteen years of age or older may purchase and
 19 offer for sale sparkling devices and novelties.

§29-3E-12. Criminal penalties.

1 Any person who violates this article or any rules promulgated pursuant to section eight of
 2 this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than
 3 \$100 nor more than \$500.

§29-3E-13. Seizures by the Fire Marshal; enforcement of law.

1 (a) The Fire Marshal shall seize, take, remove and dispose of at public auction or destroy,
 2 or cause to be seized, taken or removed and disposed of at public auction, or destroyed at the
 3 expense of the owner, all stocks of fireworks or combustibles offered or exposed for sale, stored
 4 or held in violation of this article or legislative rule.

5 (b) The West Virginia State Police, sheriffs, municipal police officers and other law-
 6 enforcement officers shall assist in the enforcement of this article.

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 3E. OFFENSES INVOLVING EXPLOSIVES.

§61-3E-1. Definitions.

1 As used in this article, unless the context otherwise requires:

2 (a) "Destructive device" means any bomb, grenade, mine, rocket, missile, pipebomb or
3 similar device containing an explosive, incendiary, explosive gas or expanding gas which is
4 designed or so constructed as to explode by such filler and is capable of causing bodily harm or
5 property damage; any combination of parts, either designed or intended for use in converting any
6 device into a destructive device and from which a destructive device may be readily assembled.

7 "Destructive device" does not include a firearm as such is defined in section two, article
8 seven of this chapter, sparkling devices, novelties, toy caps, model rockets and their components
9 ~~twenty-three, article three, chapter twenty-nine of this code~~ or fireworks as these terms are
10 defined in section two, article three-e, chapter twenty-nine of this code, or high power rockets and
11 their components, as defined in this section.

12 (b) "Explosive material" means any chemical compound, mechanical mixture or device
13 that is commonly used or can be used for the purpose of producing an explosion and which
14 contains any oxidizing and combustive units or other ingredients in such proportions, quantities
15 or packaging that an ignition by fire, by friction, by concussion, by percussion, by detonator or by
16 any part of the compound or mixture may cause a sudden generation of highly heated gases.
17 These materials include, but are not limited to, powders for blasting, high or low explosives,
18 blasting materials, blasting agents, blasting emulsions, blasting fuses other than electric circuit
19 breakers, detonators, blasting caps and other detonating agents and black or smokeless powders
20 not manufactured or used for lawful sporting purposes. ~~or fireworks defined in section twenty-~~
21 ~~three, article three, chapter twenty-nine of this code which are not used in violation of this article.~~
22 Also included are all explosive materials listed annually by the office of the State Fire Marshal and

23 published in the State Register, said publication being hereby mandated.

24 (c) "High power rocket" means the term as defined in National Fire Protection Association
 25 Standard 1127, "Code for High Power Rocketry."

26 ~~(e)~~ (d) "Hoax bomb" means any device or object that by its design, construction, content
 27 or characteristics appears to be, or is represented to be or to contain a destructive device,
 28 explosive material or incendiary device as defined in this section, but is, in fact, an inoperative
 29 facsimile or imitation of such a destructive device, explosive material or incendiary device.

30 ~~(d)~~ (e) "Incendiary device" means a container containing gasoline, kerosene, fuel oil, or
 31 derivative thereof, or other flammable or combustible material, having a wick or other substance
 32 or device which, if set or ignited, is capable of igniting such gasoline, kerosene, fuel oil, or
 33 derivative thereof, or other flammable or combustible material: *Provided*, That no similar device
 34 commercially manufactured and used solely for the purpose of illumination shall be deemed to be
 35 an incendiary device.

36 ~~(e)~~ (f) "Legal authority" means that right as expressly stated by statute or law.

37 (g) "Model rocket" means the term as defined in National Fire Protection Association
 38 Standard 1122, "Code for Model Rocketry."

39 ~~(f)~~ (h) "Person" ~~shall mean~~ means an individual, corporation, company, association, firm,
 40 partnership, society or joint stock company.

41 ~~(g)~~ (i) "Storage magazine" is defined to mean any building or structure, other than an
 42 explosives manufacturing building, approved by the legal authority for the storage of explosive
 43 materials.

§61-3E-11. Exemptions.

1 (a) Unless specifically prohibited by any provision of this code or the laws of the United
 2 States, nothing in this article ~~shall prohibit~~ prohibits the authorized manufacture, sale,
 3 transportation, distribution, use or possession of any explosive material by any person holding a
 4 permit for such issued by the office of the State Fire Marshal. Any person performing a lawful

5 activity pursuant to or regulated by the terms of a permit issued by the Division of Environmental
6 Protection, or any office thereof, ~~shall be~~ is exempt from the provisions of this article.

7 (b) Unless specifically prohibited by any other provision of this code or the laws of the
8 United States, nothing in this section ~~shall prohibit~~ prohibits the authorized manufacture,
9 transportation, distribution, use or possession of any explosive, destructive device or incendiary
10 device by a member of the Armed Forces or law-enforcement officers whenever such persons
11 are acting lawfully and in the line of duty; nor shall it prohibit the manufacture, transportation,
12 distribution, use or possession of any explosive material, destructive device or incendiary device
13 to be used solely for lawful scientific research or lawful educational purposes. Any person
14 engaged in otherwise lawful blasting activities failing to obtain a permit or in possession of an
15 expired permit issued by the office of the State Fire Marshal ~~shall not be construed to be~~ is not in
16 violation of the article.

17 (c) Nothing contained in this article applies to sparkling devices or novelties or to the sale,
18 purchase, possession, use, transportation or storage of fireworks as regulated in article three-e,
19 chapter twenty-nine of this code.

NOTE: The purpose of this bill is to provide a West Virginia Veterans Program Fund and to regulate the sale and use of fireworks.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.