

15-0127

FILED

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CITIZENSHIP COURT  
KANAWHA COUNTY, WEST VIRGINIA

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**NUZUM TRUCKING COMPANY,  
A West Virginia Corporation, and  
PRESTON CONTRACTORS, INC.,  
A West Virginia Corporation,**

**Plaintiffs,**

**and**

**GREER INDUSTRIES, INC.,  
A West Virginia Corporation,**

**Intervenor Plaintiff,**

**v.**

**CIVIL ACTION NO. 14-C-1877  
THE HONORABLE JOANNA I. TABIT**

**THE CITY OF MORGANTOWN,  
WEST VIRGINIA, a West Virginia  
Municipal Corporation,**

**Defendant,**

**and**

**THE WEST VIRGINIA  
DEPARTMENT OF TRANSPORTATION,  
DIVISION OF HIGHWAYS, a West Virginia  
Executive Agency,**

**Indispensable Party/Defendant.**

**ORDER**

(Re: Plaintiffs' Motion for Expedited Summary Judgment as to Count I: State Preemption and Defendant City of Morgantown's Cross-Motion for Summary Judgment as to Count I: State Preemption)

Pending before the Court for decision is the referenced *Plaintiffs' Motion for Expedited Summary Judgment as to Count I: State Preemption* filed by Nuzum Trucking Company and Preston Contractors, Inc. ("Plaintiffs"), and joined by Greer Industries, Inc. ("Intervenor Greer")

and Indispensable Party/Defendant The West Virginia Department of Transportation, Division of Highways ("WV DOH"), and *Defendant City of Morgantown's Cross Motion for Summary Judgment.*

In deciding these Motions, the Court has considered the pleadings in the case, specifically the Motions and supporting memoranda and materials submitted by the parties, and the pertinent legal authorities relating to the issues.

As set forth herein, the Court is of the opinion, that *Plaintiffs' Motion for Expedited Summary Judgment as to Count I: State Preemption* must be **GRANTED** and that *Defendant Morgantown's Cross-Motion for Partial Summary Judgment as to Count I: State Preemption* must be **DENIED**.

#### PROCEDURAL STATEMENT

1. This matter came before the Court by way of Plaintiffs' Verified Complaint, filed on October 17, 2014.
2. Plaintiffs filed their subject Motion for Expedited Summary Judgment as to Count I: State Preemption on or about November 10, 2014.
3. Greer filed a Motion to Intervene on or about November 13, 2014, and formally became a party on December 3, 2014, by Court Order.
4. By the same Court Order a hearing was set concerning Plaintiffs' then pending Motion for Expedited Summary Judgment as to Count I: State Preemption for December 16, 2014.
5. On December 16, 2014, the Court heard oral argument from counsel for Plaintiffs, Intervenor Greer, the WV DOH, and Morgantown on all issues raised by Plaintiffs' Motion for

Summary Judgment as to Count I: State Preemption and Morgantown's Cross-Motion for Summary Judgment as to Count I: State Preemption, and all related pleadings.

**STATEMENT OF UNDISPUTED FINDINGS OF FACT<sup>1</sup>**

1. Plaintiffs Nuzum Trucking Company and Preston Contractors, Inc., are duly formed and validly existing West Virginia corporations engaged in a variety of motor carrier and freight trucking business enterprises, including without limitation, transporting resources and goods on state roads in, around, and through Morgantown's B4 Business District.

2. Defendant Morgantown is a Class II city as defined in W. Va. Code § 8-1-3.

3. Indispensable Party/Defendant, the West Virginia Department of Transportation, Division of Highways ("WV DOH"), is the executive subsidiary agency of the West Virginia Department of Transportation that is responsible for regulating the state road system in and throughout West Virginia.

4. Plaintiffs have historically traversed state roads in and through Morgantown's municipal boundaries, including West Virginia State Route 7 ("WV 7"), in the course of their day-to-day motor carrier operations. WV 7 is an east-west state road with major junctions at West Virginia Route 2 near New Martinsville, United States Route 250 near Hundred, United States Route 19 near Morgantown, and Interstate 68 and Interstate 79 in and around Morgantown.

5. A part of WV 7 runs through Morgantown's B4 Business District. (See Plaintiffs' Memorandum, Exhibit 2.)

6. By Order dated June 12, 1945, WV 7 was designated as a primary state road. (See Plaintiffs' Memorandum, Exhibit 3.)

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<sup>1</sup> The Court specifically notes that the parties stipulated that no outstanding issues of material fact were present in this action prior to the Court's hearing conducted on December 16, 2014.

7. For decades, Plaintiffs have utilized WV 7 as a vital state road to transport various products into the broader system of intrastate and interstate commerce.

8. In 2013, a group of individuals labeling themselves as "Safe Streets Morgantown" advanced the concept of a prohibition of certain "heavy truck traffic" in Morgantown's B4 Business District.

9. By letter dated June 17, 2014, "Safe Streets Morgantown" requested that Morgantown prohibit, via ordinance, certain heavy trucks from traveling in and over state roads located within Morgantown's municipal boundaries. (See Plaintiff's Memorandum, Exhibit 9.)

10. On July 25, 2014, Morgantown's City Manager met with Paul A. Mattox, Jr., the Secretary of Transportation/Commissioner of Highways for the State of West Virginia and Jonathon T. Storage, Esquire, an attorney with the Legal Division of the WV DOH, concerning Morgantown's desire to enact an ordinance barring heavy trucks from traveling in and over state roads located in Morgantown's B4 Business District. (See Plaintiffs' Memorandum, Exhibit 10.)

11. By letter dated July 29, 2014, the WV DOH (via its Legal Division Director, Anthony G. Halkias) addressed Morgantown's positions raised in the July 25, 2014 meeting and stated as follows:

West Virginia Code Sections 17-4-27 and 17C-17-12 **do not allow** for local management of roads within the state road system. The Legislature has granted the Commissioner of Highways plenary power to manage and control the use of public highways comprising the state road system. Therefore, without the permission of the Commissioner, any such municipal regulation would be invalid."

(Id. (emphasis added).)

12. Despite the WV DOH's stated position, Morgantown's City Council proceeded to pass an edited version of "Safe Street Morgantown's" proposed Heavy Truck Ordinance at the First Reading on August 19, 2014. (See Plaintiffs' Memorandum, Exhibit 1.)

13. On September 2, 2014, City Council adopted the Heavy Truck Ordinance and amended Articles 301 and 347 of Morgantown's traffic code, thereby prohibiting "heavy trucks" from being operated on certain state roads, specifically WV 7, in Morgantown's B4 Business District. (Id.)

14. As enacted, the term "heavy truck" "meant any vehicle which is designed or operated for the transportation of property and 1) has combined declared gross weight over 26,000 pounds as combined declared gross weight is defined in W. Va. Code § 17A-3-3(c) and 2) has three or more axles in total," unless otherwise exempted from application of the ban. (Id.)

#### CONCLUSIONS OF LAW

1. Pursuant to West Virginia Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law."

2. Summary judgment is designed to effect expedient resolution of controversies on the merits without resort to a protracted trial if there is essentially no real dispute as to salient facts or if a dispute purely involves a question of law. HN Corp. v. Cyprus Kanawha Corp., 195 W. Va. 289, 293 (1995).

3. Interpreting a West Virginia statute, administrative rule, or regulation presents a purely legal question. Syl. Pt. 2, W.Va. Bd. of Gov., et. al. v. W. Va. Higher Edu. Pol. Commission, 221 W.Va. 187 (2007).

4. The issue presented to this Court is whether Morgantown possesses the authority to enact the Heavy Truck Ordinance, a municipal ordinance which bars a classification of motor carriers traveling on state roads located within Morgantown's municipal boundaries.

5. The Plaintiffs, Intervenor Greer, and the WV DOH contend that the Heavy Truck Ordinance is preempted by state law, as jurisdiction over state roads is solely and exclusively vested in the WV DOH, and thus Morgantown's Heavy Truck Ordinance is void and unenforceable.

6. Morgantown contends that it has jurisdiction to regulate and control traffic on state roads within Morgantown's municipal boundaries pursuant to W.Va. Code §§ 17-4-27, 14C-17-12, and general common law.

7. The doctrine of state preemption is applicable when the State has assumed control of a particular subject of regulation, and a local government has enacted an ordinance in the same field. See 62 C.J.S. Municipal Corporations § 141 (2011). Indeed, when a state law or body of law fully occupies a particular area of legislation, indicated by the State's comprehensive regulatory scheme and the common law, no local ordinance will be permitted to contravene it.<sup>2</sup>

8. To begin the Court's analysis to determine if the statutory and existing common law preempts the Heavy Truck Ordinance, the Court must start with some basic propositions, the first being that municipal corporations, such as the City, are creatures of the State. See Alderson v. City of Huntington, 132 W. Va. 421, 52 S.E.2d 243 (1949).

9. Second, a municipal corporation only has the powers "granted to it by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable." Syll. pt. 2, State ex re. Charleston v. Hutchinson, 154 W.

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<sup>2</sup> See American Tower Corp. v. Common Council of City of Beckley, 210 W. Va. 345, 557 S.E.2d 752 (2001).

Va. 585, 176 S.E.2d 691 (1970), Syll. pt. 1, City of Fairmont v. Investors Syndicate of American, Inc., 172 W. Va. 431, 307 S.E.2d 467 (1983).

10. Third, municipal corporation powers are so narrowly proscribed that the West Virginia Supreme Court has held that "[i]f any reasonable doubt exists as to whether a municipal corporation has power, the power must be denied." See Id.; see also 13B Michie's Jurisprudence: Municipal Corporations, § 24 (2014) (stating that "[T]he general rule is that the powers of a municipal corporation are to be strictly construed and, if there is a reasonable doubt as to the existence of a particular power, the doubt is to be resolved against its existence."). Id. at § 26.

11. And fourth, the West Virginia Supreme Court has further stated that "where both the State and a municipality enact legislation on the same subject matter, it is generally held that if there are inconsistencies, the municipal ordinance must yield." Davidson v. Shoney's Big Boy Restaurant, et al., 181 W. Va. 65 at 68, 380 S.E.2d 232 at 235 (1989).

12. In W.Va. Code § 17-4-1, *et seq.* (1994), the Legislature explicitly set forth a comprehensive framework for state roads, and the state road system, which exclusively vests control of, and jurisdiction over, state roads within the WV DOH. See W.Va. Code § 17-4-1 (stating that "the authority and control over the state roads shall be vested in the commissioner of highways"); see also W.Va. Code §§ 17-2A-8(1),(8),(11),(37) (stating that "in addition to all other duties, powers and responsibilities given and assigned to the commissioner in this chapter, the commissioner may...exercise general supervision over the state road program and the construction, reconstruction, repair and maintenance of state roads and highways...establish road policies and administrative practices...negotiate and enter into reciprocal contracts and agreements with proper authorities of other states and the United States relating to and regulating

the use of roads and highways with reference to weights and types of vehicles...and exercise jurisdiction, control, supervision and authority over local roads, outside of the state road system, to the extent determined by him or her to be expedient and practicable.")

13. Indeed, the West Virginia Supreme Court previously noted this reality in State ex rel. Keene v. Jordan, 192 W.Va. 131, 132-133 (1994), wherein the Court stated: "17-4-1 invest[s] in the commission and the commissioner the exclusive power over the construction, maintenance and control of said system... the State Commission of Highways has exclusive authority and control over state roads."). Further, the West Virginia Supreme Court of Appeals has held that "[t]he public highways of this State belong to the State and are subject to the control of the State." Herold v. Hughes, 90 S.E.2d 541, 455 (W.Va. 1955).

14. WV 7 is a primary state road, subject to the exclusive jurisdiction and control of the WV DOH.

15. Municipalities, such as Morgantown, have limited jurisdiction over roads "under their jurisdiction", such as city streets, city alleys, and city avenues.

16. Municipal jurisdiction over roads does not extend to state roads and state highways located within municipal boundaries given the legislative restriction "under their jurisdiction," and the body of statutory and common law which vests exclusive control and jurisdiction over state roads and the state highway system in the WV DOH. See W.Va. Code § 17-4-1 *et seq.*

17. Additionally, the Heavy Truck Ordinance must be struck down, as validation of the Heavy Truck Ordinance would render nugatory and invalid numerous provisions of state law and would inject chaos and mayhem into the state road system by destroying the uniform system of state roads and state highways throughout West Virginia.

## CONCLUSION

Based upon this analysis, this Court concludes that the WV DOH is vested solely and exclusively with control over state roads and state highways as set forth in W.Va. Code § 17-4-1 *et seq.*, and as embodied in the common law of West Virginia. See State ex rel. Keene v. Jordan, 192 W.Va. 131, 132-133 (1994). The Court further finds that municipalities, such as Morgantown, possess no power, actual, inherent, or otherwise, to impose weight restrictions, weight thresholds, or weight limitations on state roads and state highways which travel in and through municipal boundaries.

Such municipal intrusions would inject mayhem and chaos into the state road system and would undermine the WV DOH's exclusive jurisdiction. Indeed, it is readily apparent to this Court that the WV DOH is vested with expansive authority to foster, maintain, and regulate a uniform state road system, free from municipal intrusions and restrictions on travel, such as Morgantown's Heavy Truck Ordinance.

Based on the foregoing, it is therefore **ORDERED** that the Plaintiffs' pending Motion for Summary Judgment as to Count I: State Preemption be **GRANTED** as set forth herein and that Morgantown's Cross-Motion for Summary Judgment as to Count I: State Preemption be **DENIED**. Consistent with these rulings, Morgantown's Heavy Truck Ordinance is deemed **INVALID** and **UNENFORCEABLE** and Morgantown is hereby **ENJOINED** and **PROHIBITED** from taking any further actions to implement or enforce the Heavy Truck Ordinance.

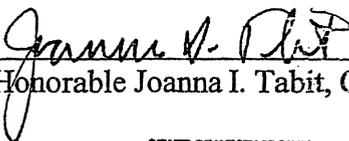
The objections and exceptions of Defendant Morgantown are noted and preserved.

Judgment having been granted to the Plaintiffs as to Count I of the Verified Complaint, the remaining Counts and Claims set forth in the Verified Complaint are dismissed as moot.

The clerk shall forward true copies of this Order to the attorneys of record herein and remove this matter from the Court's docket.

All of which is **ORDERED**, accordingly.

ENTER: January 12, 2015.

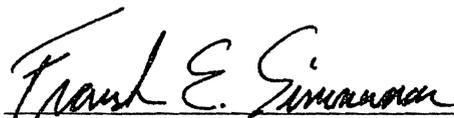
  
The Honorable Joanna I. Tabit, Circuit Judge

Drafted by:

  
Paul R. Cranston, Esq.  
Brian Shockley, Esq.  
Cranston & Edwards, PLLC  
1200 Dorsey Avenue, Suite II  
Morgantown, WV, 26501  
*Counsel for Plaintiffs Nuzum Tucking Company  
and Preston Contractors, Inc.,*

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 12  
DAY OF January, 2015  
 CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
*by H. Adair*

Approved by:

 BY PRC W/CONSENT  
Frank E. Simmerman, Jr.  
Simmerman Law Office, PLLC  
254 East Main Street  
Clarksburg, WV 26301  
*Counsel for Greer Industries, Inc.*

 BY PRC W/CONSENT  
Anthony G. Halkias, Esq.  
Jonathan T. Storage, Esq.  
1900 Kanawha Blvd-Bldg. 5  
Charleston, WV, 25305  
*Counsel for WV DOT-DOH*

Robert M. Bastress by PRC W/CONSENT  
Robert M. Bastress, Esq.  
P.O. Box 1295  
Morgantown, WV, 26507-1295  
*Counsel for Defendant City of Morgantown*

Filed

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 01/11/15 11:50

**NUZUM TRUCKING COMPANY,  
A West Virginia Corporation, and  
PRESTON CONTRACTORS, INC.,  
A West Virginia Corporation,**

STATE OF WEST VIRGINIA  
KANAWHA COUNTY CIRCUIT COURT

**Plaintiffs,**

and

**GREER INDUSTRIES, INC.,  
A West Virginia Corporation,**

**Intervenor Plaintiff,**

v.

**CIVIL ACTION NO. 14-C-1877  
THE HONORABLE JOANNA I. TABIT**

**THE CITY OF MORGANTOWN,  
WEST VIRGINIA, a West Virginia  
Municipal Corporation,**

**Defendant,**

and

**THE WEST VIRGINIA  
DEPARTMENT OF TRANSPORTATION,  
DIVISION OF HIGHWAYS, a West Virginia  
Executive Agency,**

**An Indispensable Party/Defendant.**

**ORDER DENYING THE CITY OF MORGANTOWN'S  
MOTION FOR RECONSIDERATION**

Pending before the Court for decision is the Motion for Reconsideration of Summary Judgment Decision filed by Defendant City of Morgantown on or about December 24, 2014.

On December 16, 2014, the Court heard oral argument from counsel for Plaintiffs, Intervenor Greer, the WV DOH, and Morgantown on all issues raised by Plaintiffs' Motion for

Summary Judgment as to Count I: State Preemption and Defendant City of Morgantown's Cross-Motion for Partial Summary Judgment, and all related pleadings. Subsequently, after granting Plaintiffs' Motion for Summary Judgment as to Count I: State Preemption from the bench, Defendant City of Morgantown filed the Motion for Reconsideration of Summary Judgment Decision now at issue.

Having considered all pleadings filed in this matter to date, specifically all motions, all memoranda, joinders, and the pertinent legal authorities relating to the motions, as well as the record before the Court, the Court is of the opinion that the Court's prior bench ruling granting Plaintiffs' Motion for Summary Judgment as to Count I: State Preemption must be **AFFIRMED**, and thus Morgantown's pending Motion for Reconsideration of Summary Judgment Decision is hereby **DENIED**.

It is further hereby **ORDERED** that the Court's order granting Plaintiffs' Motion for Summary Judgment as to Count I: State Preemption was intended to be and is hereby designated a final order in this civil action. Accordingly, the clerk is hereby directed to remove this civil action from the Court's docket.

The objections and exceptions of Defendant City of Morgantown are noted and preserved for the record.

The clerk shall forward true copies of this Order to the attorneys of record herein.

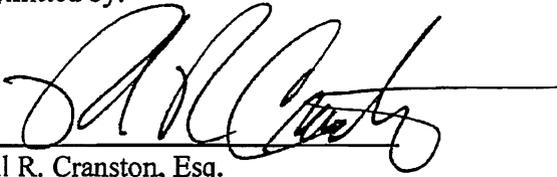
All of which is **ORDERED**, accordingly.

ENTER: January 29, 2015.

Joanna I. Tabit  
The Honorable Joanna I. Tabit, Circuit Judge

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 3  
DAY OF February, 2015.  
Cathy Gatson CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
by ACD

Submitted by:

A handwritten signature in black ink, appearing to read "Paul R. Cranston", written over a horizontal line.

Paul R. Cranston, Esq.

Brian Shockley, Esq.

Cranston & Edwards, PLLC

Dorsey Avenue Professional Building

1200 Dorsey Avenue, Suite II

Morgantown, WV, 26501

*Counsel for Plaintiffs Nuzum Tucking Company  
and Preston Contractors, Inc.*