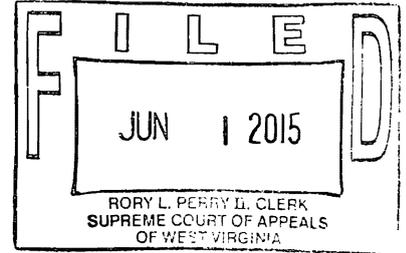


IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA



THE CITY OF MORGANTOWN, WEST VIRGINIA,
A West Virginia Municipal Corporation,
Defendant Below, Petitioner

vs.

No. 15-0127

NUZUM TRUCKING COMPANY, a West Virginia Corporation,
and PRESTON CONTRACTORS, INC., a West Virginia Corporation,
Plaintiffs Below, Respondents,

and

GREER INDUSTRIES, INC., a West Virginia Corporation,
Intervenor Plaintiff Below, Respondent,

and

THE WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, a West Virginia Executive Agency,
Defendant Below, Respondent.

BRIEF FOR PETITIONER CITY OF MORGANTOWN

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Robert M. Bastress, Jr., *Constitutional Considerations for Local Government Reform in West Virginia*,
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Richard Briffault, *Our Localism: The Structure of Local Government Law*, 90 COLUM. L. REV. 1
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Willard D. Lorensen, *Rethinking the West Virginia Municipal Code of 1969*, 97 W. VA. L. REV. 653,
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ASSIGNMENTS OF ERROR

(1) The circuit court erred in ruling that the City of Morgantown does not have the authority under West Virginia Code §§ 17-4-27 and 17C-17-12 to control the weight of vehicular traffic on state routes within the city limits but is preempted by the general supervisory authority over state routes accorded to the Commissioner of Highways by West Virginia Code §§ 17-2A-8 and 17-4-1.

(2) The circuit court erred in applying an excessively narrow concept of municipal powers and in failing to follow Article VI, § 39a of the West Virginia Constitution.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Plaintiffs filed this action in October 2014 challenging the validity of an ordinance enacted by the City of Morgantown that banned most heavy trucks from its downtown commercial area and, effectively, from a major residential area. The plaintiffs simultaneously sought a preliminary injunction against enforcement of the ordinance, but the City agreed to stay enforcement pending resolution of at least the state preemption issue. The parties filed cross motions on that question, agreeing that it presented a pure question of law. The Division of Highways, sued as a defendant and necessary party, joined in the plaintiffs' motion. Greer Industries moved to intervene as a plaintiff in the case, the City did not oppose the motion, and the court granted it. Following briefing and oral argument, the court on January 12, 2015, entered an order granting the plaintiffs' motion for summary judgment on state preemption and denying the City's motion. The court also denied the City's subsequent motion for reconsideration, which raised both substantive and procedural objections. The City timely filed this appeal on February 11, 2015.

STATEMENT OF THE FACTS

For years, the City of Morgantown has had serious problems with large numbers of heavy trucks wending their way through the city on State Route 7, traversing through residential areas (along Brockway Avenue) and the downtown commercial district (on Walnut Street crossing High

Street and onto University Avenue).¹ The truck traffic has provoked persistent and vocal citizen complaints about the safety hazards, noise pollution, air pollution, and congestion that the heavy trucks have caused. Appendix at 46, 55-57, 66, 68, 201, 210-20. Acting on the advice of several attorneys, *e.g.*, Appendix at 59-64, 68, 82-88, and at the urging of Morgantown residents and business persons, the Morgantown City Council on September 3, 2014, enacted two ordinances that together banned nonessential heavy trucks from using Route 7 through the City's downtown business district.² Appendix at 33-37. The ordinance would also have the effect of limiting truck traffic through residential areas along Route 7 that lead into the downtown area. In enacting the law, the council noted, among other things:

- The Morgantown Planning Organization's Long Range Plan "recommends reduction of 'truck traffic in residential neighborhoods and on other streets where significant numbers of bicycles and pedestrians are present.'"

¹Route 7 is a state highway. It begins at the border with Maryland, just west of Oakland, Md., and just east of Terra Alta. It then runs westward through Preston County, passing through Kingwood, Reedsville, Masontown, and several small communities, through Monongalia County, including Morgantown, and finally through the breadth of Wetzel County, ending in New Martinsville. The route's course through Morgantown begins in Sabraton as Earl Core Road, then becomes Brockway Avenue through the Greenmont and South Park neighborhoods, crosses Decker's Creek and becomes Walnut Street, turns right onto University Avenue, then becomes Beechurst Avenue, then Monongalia Boulevard before exiting the City going west towards Core and Blacksville.

²One of the ordinances defines "downtown business district" for purposes of the truck restrictions as the entirety of the B4 General Business District in the City's Planning and Zoning Code but not including Beechurst Avenue, University Avenue south of Beechurst, or Don Knotts Boulevard. Appendix at 33. The latter exclusion from the truck restriction would enable trucks who want to travel through Morgantown, including through the downtown area, to use Route 19 along Don Knotts and University and after Routes 19 and 7 merge at the corner of University and Walnut.

The City's Planning and Zoning Code can be found at <http://www.morgantownwv.gov/wp-content/uploads/Newest-Planning-Zoning-Code.pdf>. Section 1331 of the Code creates the zoning districts and § 1349 deals with the B4 District. The zoning map of the City is available at http://www.morgantownwv.gov/wp-content/uploads/official_zoning_map_07-01-2012.pdf.

The second ordinance enacted on September 3rd imposed the substantive restrictions and provided exceptions from the ban for essential uses (*e.g.*, trucks delivering into the zone, solid waste disposal trucks, emergency vehicles, governmental trucks). Appendix at 35-37.

- “The purpose of the General Business District (B-4) is to ‘promote development of a compact, pedestrian-oriented central business district.’”
- The City Pedestrian Safety Plan states that “the most serious compromises to a safe walking environment are a) sidewalk designs which provide little or no barrier between pedestrians and heavy and/or fast moving vehicles; b) noxious emissions from truck engines and other exhausts; and c) loud noise from trucks and other heavy vehicles beginning before daylight and continuing late into the afternoon. Each of the three conditions seriously compromises the walkability, the livability and desirability of the City and the sense of safety which is important to pedestrians[.]”

Appendix at 34.

Plaintiffs Nuzum Trucking and Preston Contractors, Inc. are firms based in Preston County that frequently use heavy trucks to haul materials on Route 7 and through Morgantown. Intervenor plaintiff Greer Industries, Inc. operates limestone quarries proximate to Route 7 and east of the City, and it routinely hauls its products through the City on Route 7.³ The plaintiffs challenged the validity of the City’s ban on heavy trucks through residential areas and the downtown business district. The Division of Highways, a state agency within the Department of Transportation, was joined as a defendant in this case but has taken the position that the City lacks the authority to regulate vehicular weights on roads that are part of the state road system.

SUMMARY OF ARGUMENT

Chapter 17 of the West Virginia Code regulates roads and highways. Its Article 4 deals with the state road system, *i.e.*, the collection of expressways and state routes that enable vehicular traffic between communities throughout the State. Section 17-4-1 vests the general “authority and control” over that system in the Commissioner of Highways. Sections 26 through 31 address specifically the “connecting parts” of the state’s road system that consist of streets and roads within municipalities

³Route 7 does intersect with Interstate 68 just before entering Morgantown. The weight limits on the federal highway, however, are lower than the limits imposed on state routes. *Compare* 23 U.S.C. § 127 *with* W. Va. Code § 17C-17-8 to -9.

that connect state routes entering into and leaving a city and that have been designated by the Commissioner as part of the state road system. W. Va. Code § 17-4-26 to -31. In allocating responsibility for these streets that constitute connecting parts, § 17-4-27 provides that “[t]he state road commissioner shall exercise the same control over connecting parts of the state road system in municipalities, *except the regulation of traffic*, that he exercises over such system generally[.]” (Emphasis added.) In this Court’s only interpretation of that language, *Snyder v. Baltimore & Ohio Railroad Co.*, 135 W. Va. 751, 756, 65 S.E.2d 74 (1951), it held that the section removed from the State any power over traffic regulations on state routes within cities. That conclusion is consistent with the history of this Court’s use of the term, “connecting parts of the state road system.” See *Chittum v. City of Morgantown*, 96 W. Va. 260, 122 S.E. 740 (1924).

Even more specific authority for Morgantown to regulate truck weights and truck traffic on roads within the city appears in Chapter 17C, which deals with traffic regulations and laws of the road. Its Article 17 focuses on the size and weight of vehicles, and § 17C-17-12 allocates regulatory authority over such matters between the Commissioner and local authorities. Its subsection (c) provides that “[l]ocal authorities with respect to highways under their jurisdiction may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight thereof, on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways.” The next subsection, § 17C-17-12(d), provides that the Commissioner of Highways shall have authority as hereinabove granted to local authorities” to regulate vehicular weights on highways “under the jurisdiction of said [Commissioner].” “Jurisdiction” in these subsections most logically refers to the authority to regulate traffic on the subject route. Under that use of “jurisdiction,” § 17-4-27 governs the allocation of authority and the express grant of that section to cities to control traffic gives a city the power to regulate truck weights and traffic on state routes within the city limits.

““The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter[.]” Syllabus Point 1, in part,

UMWA by Trumka v. Kingdon, 174 W. Va. 330, 325 S.E.2d 120 (1984).” *Robinson v. City of Bluefield*, 234 W. Va. 209, 214, 764 S.E.2d 740, 745 (2014). Under *Robinson*’s maxim and under the most reasonable interpretation of §§ 17-4-27 and 17C-17-12, the conclusion follows that the Legislature has empowered the City of Morgantown to regulate truck weights and traffic on state routes within its borders.

The circuit court stated in its conclusions of law that a city has only such powers as are expressly granted by statute or necessarily or fairly implied and “if any reasonable doubt exists as to whether a municipal corporation has power, the power must be denied.” This extremely restrictive interpretation of municipal power has been known as “Dillon’s Rule.” Historically, this Court has followed the rule, although more recent cases have afforded municipal powers a more generous view – even while also citing some version of Dillon’s Rule. *See McCallister v. Nelson*, 186 W. Va. 131, 134-36, 411 S.E.2d 456, 459-61 (1991); *Sharon Steel Corporation v. City of Fairmont*, 175 W. Va. 479, 334 S.E.2d 616 (1985). The Rule, however, is contrary to West Virginia constitutional and statutory law.

Article VI, § 39a of the West Virginia Constitution provides that a city “may pass all laws and ordinances relating to its municipal affairs” provided they are not “inconsistent or in conflict with” state law. West Virginia Code § 8-1-7 requires that municipal powers in the State “shall be given full effect *without regard to the common law rule of strict construction.*” (Emphasis added.) Section 8-11-1 of the Code provides that a city’s “governing body has plenary power and authority to [m]ake and pass all needful ordinances, orders, bylaws, acts, resolutions, rules and regulations not contrary to the constitution and laws of this state[.]” West Virginia Code § 8-12-2 further states, “In accordance with the provisions of the ‘Municipal Home Rule Amendment’ to the constitution of this state, . . . any city shall have plenary power and authority . . . to provide for the government, regulation and control of the city’s municipal affairs” in any manner “not inconsistent or in conflict with” state law. Finally, the Legislature has bestowed on cities a general police power: § 8-12-5(44) gives every city the “plenary power and authority . . . [t]o protect and promote the public morals,

safety, health, welfare and good order.”

Through the foregoing constitutional and statutory provisions, the people of West Virginia have accorded their cities broad powers to regulate their affairs, subject to legislative override. That popular judgment demands respect by the courts.

Traffic laws vary greatly among the states, but there is consensus on some general principles. “Transportation in city streets is, in general, subject to municipal police regulation. . . . Trucks, pickups, and other vehicles for hauling freight, goods, and articles may be, and generally are, subject to municipal regulation in certain respects. They may, for example, be regulated as to their weight [and] the weight of their loads, . . . particularly with respect to use of certain streets[.]” EUGENE MCQUILLEN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24.652, at 440-41 (1998). “Trucks and other automobiles may be prohibited from passing over designated streets, and such an exclusion may, where reasonable, be made applicable to trucks and other vehicles for hire or to heavy vehicles. . . . Ordinances establishing routes for trucks or commercial vehicles through a city usually are regarded as reasonable and have been upheld.” *Id.* § 24.656, at 447.

Other states have held that cities may control vehicular weight and truck traffic on streets and highways within their borders, *including* on state routes within the municipal borders. *E.g.*, *Crossan v. State of Delaware*, 281 A.2d 494 (Del. 1971); *People of the City of Dearborn v. Sugden & Sivier*, 343 Mich. 257, 72 N.W.2d 185 (1955). There has been no undue disruption of the highway systems in those jurisdictions. If a city does unreasonably limit truck traffic, courts and the Legislature can provide a correction.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner City of Morgantown maintains that oral argument is necessary in this case under the criteria of Rule 18(a) of the Rules of Appellate Procedure. The City certainly does not waive oral argument. The appeal is assuredly not frivolous; it raises important issues of constitutional and statutory interpretation that can have a profound and far-reaching impact on the exercise of municipal power throughout the State. Neither the decision being appealed nor prior decisions of

this Court have authoritatively decided those questions. And the decisional process will be aided by the opportunities for counsel to address the Court and for the Court to inquire of counsel.

The City also submits that, under the criteria of Rule 20(a), the case is appropriate for Rule 20 argument. The appeal presents issues of first impression under West Virginia Code §§ 17-4-26 and -27 and 17C-17-12 regarding the allocation of municipal and state authority to regulate truck traffic traveling on state routes within a city. Those issues are of fundamental importance to cities throughout the state who want to maintain safe, clean, and reasonably quiet residential and commercial neighborhoods. The statutory issues are also intertwined with significant constitutional questions, notably the interpretation and effects of Article VI, § 39a, the Home Rule Amendment, which this Court has never seriously addressed. The City does not have knowledge of inconsistencies or conflicts among lower courts on the issues presented but can vouch that numerous cities within the state have expressed keen interest in the issues presented.

ARGUMENT

I. WEST VIRGINIA CODE §§ 17-4-27 AND 17C-17-12 EXPRESSLY AUTHORIZE THE CITY TO REGULATE THE WEIGHT OF TRUCKS AND TRUCK TRAFFIC ON STATE ROUTES WITHIN THE CITY.

Chapter 17 of the West Virginia Code addresses the subject of roads and highways. Its Article 2A, which creates and defines the Commissioner's office, endows the Commissioner with the power and duty to "[e]xercise general supervision over the state road program and the construction, reconstruction, repair and maintenance of state roads and highways." W. Va. Code § 17-2A-8(1). Article 4 of Chapter 17 deals with the state road system, *i.e.*, the collection of expressways and state routes that enable vehicular traffic between communities throughout the State. Section 17-4-1 vests the general "authority and control" over that system in the Commissioner of Highways. Sections 26 through 31 address the "connecting parts" of the state's road system that consist of streets and roads within municipalities that connect state routes entering into and leaving a city. W. Va. Code § 17-4-26 to -31. Section 26 provides that the Commissioner may "designate or relocate and redesignate, as a connecting part of the state road system, any bridge or street within

a municipal corporation.” The Commissioner exercised that power in 1945 when it designated certain Morgantown streets as connecting parts of Route 7. Appendix at 43-44 & 198-99. Section 27 then allocates between the city and the state control over those connecting parts, § 28 deals with procedures the Commissioner must follow when constructing or reconstructing connecting parts, § 29 provides that the designation as a connecting part of the state road system will not affect pre-existing franchises, § 30 provides the same for prior contracts for construction or improvement of the road, and § 31 authorizes the Commissioner to issue rules to govern the width and grades of “streets designated as connecting parts of the state road system” and for their construction and maintenance.

In allocating responsibility for these streets that constitute connecting parts, § 17-4-27 provides:

§ 17-4-27. Control of connecting parts of state road system within municipalities.

The state road commissioner shall exercise the same control over connecting parts of the state road system in municipalities, *except the regulation of traffic*, that he exercises over such system generally, but he shall assume no greater duty or obligation in the construction, reconstruction and maintenance of streets which are part of the state road system than he is required to assume in the case of state roads outside of municipalities. In order, however, to promote the safe and efficient utilization of such streets, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any municipality on any highway or street hereafter constructed with state or federal aid shall be subject to the approval of the state road commissioner.

(Emphasis added.) Clearly, this section reserves to the city the authority to regulate traffic on state roads within the city’s limits.

That is precisely the interpretation that this Court gave to the section in its only opportunity to do so. *Snyder v. Baltimore & Ohio Railroad Co.*, 135 W. Va. 751, 756, 65 S.E.2d 74 (1951), involved a suit against the railroad for an accident in Huntington on what the Court described as “an arterial highway known as Third Avenue.” 135 W. Va. at 754, 65 S.E.2d at 76. Third Avenue in Huntington, of course, is Route 60 in the state road system. As a basis for proving his claim, the plaintiff relied on a Huntington traffic ordinance that the defendant was violating when the accident occurred. The Court found the ordinance to be “controlling. Whatever power the State had over

Third Avenue did not, in our opinion, extend to traffic regulations. See [W. Va. Code §] 17-4-27.” 135 W. Va. at 756, 65 S.E.2d at 77. Accordingly, the legislative design is clear: West Virginia Code §§ 17-4-1 and 17-4-26 through -31 put the onus on the Commissioner to designate state roads through cities, to maintain them, to construct or repair them, but the authority to regulate traffic on them remains with the cities.⁴

The history preceding the enactment § 17-4-27 reenforces the correctness of *Snyder’s* conclusion. In this Court’s first encounter with municipal regulation of truck traffic, *State ex rel. Constanzo v. Robinson*, 87 W. Va. 374, 104 S.E. 473 (1920), it concluded that a Wheeling ordinance that imposed a tonnage limit on vehicles using the city’s streets except by special permit conflicted with the State’s “Good Roads Law.” The latter had created a state road commission to oversee “a connecting system of highways throughout the state.” Acts of the W. Va. Legislature 1917, Ch. 66. The Legislature amended the applicable state law in 1921, and two years later, Morgantown enacted an ordinance limiting the weight of vehicles traveling on its streets. Coal haulers using part of the same route at issue in this case challenged the ordinance in *Chittum v. City of Morgantown*, 96 W. Va. 260, 122 S.E. 740 (1924). The Court found that the 1921 Act had changed the law “very greatly” and “no doubt with reference to the decision in the *Constanzo* case.” 96 W. Va. at 262-63, 122 S.E. at 741. The Court then cited § 101 of the 1921 Act:

[A]ny incorporated town or city in this state shall have power to enact and enforce ordinances and regulations limiting the speed, size and weight of vehicles upon such streets . . . as are not designated by the state road commission as connecting parts of the state road system.

Since the route in question had not been designated as a connecting part of the state road system by

⁴The circuit court made no attempt to interpret § 17-4-27; it cited the section in passing but concluded, without explanation, that it was trumped by the Commissioner’s general powers in §§ 17-4-1 and 17-2A-8. Plaintiffs did not brief the section but did argue orally at the summary judgment hearing that “connecting parts of the state road system” referred only to city streets that connect two state routes. That is not a plausible interpretation. For one, it would render both § 17-4-26 and § 17-4-31 nonsensical. Second, it would also make the State responsible for the maintenance and repair of most all city streets since most all of them in some fashion or another connect together two state routes – while also simultaneously taking away the authority to maintain and repair state routes within cities. That, of course, would be an absurd result and certainly does not reflect reality.

the Commission, the Court held that Morgantown was free to limit vehicular weights on it. Following the 1931 recodification of the Code, the Legislature met in special session in 1933 and rewrote Article 4 of Chapter 17. 1933 Acts of the Legislature, Extraordinary Session, Ch. 40. At that point, it enacted the first sentence in § 17-4-27 and gave “control over connecting parts of the state road system in municipalities” to the Commissioner, “except the regulation of traffic.” “Connecting parts of the state road system” through the 1921 Act, *Chittum*, and the 1933 enactment of § 17-4-27 clearly embraced the portions of state routes running through incorporated cities. And the law as it emerged in 1933 and applies today conferred control over traffic regulation (including vehicular weights) on state routes through cities on the cities, not the Commissioner.

Even more specific authority for Morgantown to regulate truck weights and truck traffic on roads within the city appears in Chapter 17C, which deals with traffic regulations and laws of the road. Its Article 17 focuses on the size and weight of vehicles, and § 17C-17-12 allocates regulatory authority over such matters between the Commissioner and local authorities. Its subsection (c) provides:

§ 17C-17-12. When [Commissioner of Highways] or local authorities may restrict right to use highways.

(c) Local authorities with respect to highways under their jurisdiction may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight thereof, on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways.

The next subsection, § 17C-17-12(d), drives the point home: “The [Commissioner of Highways] shall likewise have authority as hereinabove granted to local authorities” to regulate vehicular weights on highways “under the jurisdiction of said [Commissioner].” “Jurisdiction” could in both subsections be used as a geographical reference – that cities control vehicular weight within city limits and the Commissioner controls them outside cities. Alternatively, and perhaps more logically, “jurisdiction” could refer to the authority to regulate traffic on the subject route. Under that use of “jurisdiction,” § 17-4-27 governs the allocation of authority and the express grant of that section to cities to control traffic gives a city the power to limit truck weights and traffic. Under either

interpretation of § 17C-17-12, Morgantown validly enacted its truck ordinance. The Legislature could not have been clearer: the City can enact reasonable laws that route truck traffic on highways within the city and that impose weight limitations for such usage.⁵

The specific provisions of §§ 17-4-27 and 17C-17-12 bestowing municipal authority over truck traffic control over the general power conferred on the Commissioner by § 17-4-1. That conclusion is not only an application of common sense but also of a time-honored rule of statutory interpretation. The maxim, in its fancy form, is *generalia specialibus non derogant*, or, in plain English, a specific statute on a particular subject controls over a general statute affecting the same matter. *E.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (“a specific statute will not be controlled or nullified by a general one”); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* § 28 at 183-88 (2012).

This Court recently applied this maxim and demonstrated its application in *Robinson v. City of Bluefield*, 234 W. Va. 209, 764 S.E.2d 740 (2014), when it concluded that the more specifically stated authorization in West Virginia Code § 19-20-20 for magistrate and circuit courts to order the destruction of dogs that are “vicious, dangerous, or in the habit of biting or attacking other persons” supercedes the more general grant to cities in 8-12-5(26) to impound or destroy “animals or fowls kept contrary to law or found running at large.” The Court noted its prior holdings:

“The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter[.]” Syllabus Point 1, in part, *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984). *Accord Tillis v. Wright*, 217 W.Va. 722, 728, 619 S.E.2d 235, 241 (2005) (“[S]pecific statutory language generally takes precedence over more general statutory provisions.”); *Bowers v. Wurzburg*, 205 W.Va. 450, 462, 519 S.E.2d 148, 160 (1999) (“Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails.”)

⁵The circuit court and the plaintiffs both cited *State ex rel. Keene v. Jordan*, 192 W. Va. 131, 451 S.E.2d 432 (1994), as support for their conclusion that the State can regulate traffic within cities. *Keene*, however, concerned whether the State had overriding authority with regards to a state route maintenance decision within a municipality. Section 17-4-26 and -27 quite clearly accord that authority to the Commissioner, and it is not questioned in this case. The decision in *Keene* therefore adds nothing to the determination about truck traffic regulation within city limits.

(Citations omitted)); *Daily Gazette Co., Inc. v. Caryl*, 181 W.Va. 42, 45, 380 S.E.2d 209, 212 (1989) (“The rules of statutory construction require that a specific statute will control over a general statute[.]” (Citations omitted)).

234 W. Va. at 214, 764 S.E.2d at 745; *see also State ex rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor*, Syl. Pt. 6, 222 W. Va. 588, 668 S.E.2d 217 (2008) (“The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter”).

Accordingly, under the most reasonable interpretation of §§ 17-4-27 and 17C-17-12, the Legislature has empowered the City of Morgantown to regulate truck weights and traffic on state routes within its borders.

II. THE CIRCUIT COURT APPLIED AN UNDULY NARROW AND ERRONEOUS STANDARD OF THE SCOPE OF MUNICIPAL POWER.

The circuit court stated in its Conclusions of Law 9 and 10:

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 rel. Charleston v. Hutchinson*, 154 W. Va. 585, 176 S.E.2d 691(1970); Syll. Pt. 1, *City of Fairmont v. Investors Syndicate of America[,], Inc.*, 172 W. Va. 431, 307 S.E.2d 467 (1983).

10. Third, municipal corporation powers are so narrowly proscribed [sic] 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.

Appendix at 296-97. This Court has, indeed, recited such restrictive interpretations of municipal powers over the years, and did so as recently as last November in *Robinson v. City of Bluefield*, 234 W. Va. at 211, 764 S.E.2d at 742, relying on *Booten v. Pinson*, 77 W.Va. 412, 421, 89 S.E. 985, 989 (1915); *Brackman's Inc. v. City of Huntington*, 126 W.Va. 21, 27 S.E.2d 71 (1943); *Miller v. City of Morgantown*, 158 W.Va. 104, 109, 208 S.E.2d 780, 783 (1974); and *Hyre v. Brown*, 102 W.Va. 505, 135 S.E. 656 (1926). The extremely restrictive interpretive principles regarding municipal

power shaped by the common law have been known, collectively, as “Dillon’s Rule.”⁶ Historically, this Court has followed the rule, although more recent cases have afforded municipal powers a more generous view – even while also citing some version of Dillon’s Rule. *See McCallister v. Nelson*, 186 W. Va. 131, 134-36, 411 S.E.2d 456, 459-61 (1991); *Sharon Steel Corporation v. City of Fairmont*, 175 W. Va. 479, 334 S.E.2d 616 (1985).

The citizens of West Virginia, however, have repeatedly and loudly instructed this Court to dispense with its miserly constructions of municipal powers. In 1936, the voters ratified Article VI, § 39a of the Constitution, “Home Rule for Municipalities.” Among other things, the Amendment ended the legislative practice of enacting local laws creating charters for specific cities and required that the Legislature must use general laws for the incorporation and governance of cities.⁷ More instructive, for present purposes, the Amendment provided that any city with a population over 2,000, “through its legally constituted authority, may pass all laws and ordinances relating to its municipal affairs” provided they are not “inconsistent or in conflict with this Constitution or the General Laws of the State then in effect, or thereafter, from time to time enacted.” A straightforward and literal – plain meaning – reading of this Amendment gives cities inherent powers: they can do *anything* within their municipal affairs so long as it is not inconsistent with state or federal law.

Section 39a thus established what is called “legislative home rule,” that is, the city can exercise all powers subject to the Legislature’s power to deny them. That is to be contrasted with “*imperium in imperio* (“government within a government”) home rule,” which accords to local

⁶The Rule is named after a 19th Century judge and author of a treatise on municipal corporations. *See generally* Robert M. Bastress, Jr., *Constitutional Considerations for Local Government Reform in West Virginia*, 108 W. VA. L. REV. 125,144-151 (2005); Willard D. Lorensen, *Rethinking the West Virginia Municipal Code of 1969*, 97 W. VA. L. REV. 653, 658-64 (1995).

⁷In so doing, the Amendment overruled *Booten v. Pinson*, 77 W.Va. 412, 89 S.E. 985 (1915), one of the key cases relied upon by this Court in *Robinson*. In *Booten*, the Legislature had written a new charter for the City of Williamson, eliminating its former governing council, and charging the Governor with appointing a new one. After § 39a’s enactment, that could not constitutionally occur.

governments the power to maintain primacy over state law with regards to local subjects.⁸ (There are also variations on both types.) The goals of home rule are straightforward: “to undo Dillon’s Rule by giving localities broad lawmaking authority and to provide local governments freedom from state interference in areas of local concern.” Richard Briffault, *Our Localism: The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10 (1990).

Because courts narrowly construed the subjects that cities could regulate (and preempt state law) under *imperium in imperio* home rule, the states developed legislative home rule, which made the Legislature – not the courts – the arbiter about the scope of municipal power. (Hence the name “legislative home rule.”) Unfortunately, this Court has not allowed that to develop in West Virginia and has not enabled the people to achieve (as yet) the twin purposes of § 39a. From its first encounter with § 39a, *Brackman’s, Inc. v. City of Huntington, supra* (a case relied upon by *Robinson*), the Court continued to cite to and rely on all aspects of Dillon’s Rule.

Undaunted, the voters of West Virginia pressed on with their efforts to secure meaningful and flexible powers for their cities. In 1969, the Legislature rewrote the State’s municipal code, Chapter 8. In doing so, it included § 8-1-7 on the “construction of powers and authority granted.” The section stipulated that “[t]he enumeration of powers and authority granted in this chapter (*i.e.*, Chapter 8 on Municipal Corporations) shall not operate to exclude the exercise of other powers and authority fairly incidental there or reasonably applied. . . . The provisions of this chapter shall be given full effect *without regard to the common law rule of strict construction* and particularly when the powers and authority are exercised by charter provisions framed and adopted . . . under the provisions of this chapter.” (Emphasis added.) This Court ignored that directive. *E.g., Rogers v. City of South Charleston*, 163 W. Va. 285, 256 S.E.2d 557 (1979); *but see McCallister, supra*. The

⁸See generally Robert M. Bastress, Jr., *Localism and the West Virginia Constitution*, 109 W. VA. L. REV. 683, 691-94 (2007); Richard Briffault, *Our Localism: The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990). The Home Rule Pilot Project created by the Legislature in W. Va. Code § 8-1-5a basically creates an *imperium in imperio* home rule; it authorizes cities to enact any law that is not inconsistent with federal law or with a narrow set of specifically articulated subjects in subsections (j) and (k) and can by ordinance override state law if the ordinance is approved by the Municipal Home Rule Board.

Legislature thus returned to § 8-1-7 in 2007 and added that the provisions of the Chapter shall be construed “*in accordance with the provisions of the Municipal Home rule Amendment to the constitution of this state, the powers and authority granted by such Constitution*, other provisions of this code and any existing charter.” (Emphasis added.) Obviously, the Legislature has concluded that § 39a conferred “powers and authority” on cities, and it has required this Court to respect that “without regard to the common law rule of strict construction.”

The Municipal Code of 1969 also included § 8-11-1, which provides:

a) To carry into effect the powers and authority conferred upon any municipality or its governing body by the provisions of this chapter, or any past or future act of the Legislature of this state, the governing body has plenary power and authority to:

(1) Make and pass all needful ordinances, orders, bylaws, acts, resolutions, rules and regulations not contrary to the constitution and laws of this state[.] . . .

To further enable cities to carry into effect the promise of Article VI, § 39a, the Legislature also included in the Municipal Code a section entitled “Home Rule Powers for All Cities,” West Virginia Code § 8-12-2. Its subsection (a) states, “In accordance with the provisions of the ‘Municipal Home Rule Amendment’ to the constitution of this state, and in addition to the powers and authority granted by (I) such constitution, (ii) other provisions of this chapter, (iii) other general law, and (iv) any existing charter, any city shall have plenary power and authority by charter provision not inconsistent or in conflict with such constitution [or other provisions state law] to provide for the government, regulation and control of the city's municipal affairs, including, but not limited to” eleven enumerated but broadly stated subjects of municipal regulation. The ninth of those listed accords cities the power to enact laws for “[t]he government, protection, order, conduct, safety and health of persons or property therein[.]” Finally, the Legislature has bestowed on cities a general police power: § 8-12-5(44) gives every city the “plenary power and authority . . . [t]o protect and promote the public morals, safety, health, welfare and good order.”

The upshot of the above is that the people of West Virginia have spoken through their Constitution and through their duly enacted laws. West Virginia’s cities *do* have inherent powers; they are created by Article VI, § 39a, and they enable cities to enact any law regarding their

municipal affairs. The Legislature has reenforced that through the enactment of §§ 8-1-7, 8-11-1, 8-12-2, and 8-12-5, combining to give municipalities broad regulatory authority. That authority is subject, of course, to being overridden by the Legislature. The State, as noted, has legislative home rule. As Part I has shown, the Legislature in this case has not acted to disable cities from regulating traffic or truck weights on state routes within their jurisdiction but has specifically authorized the exercise of such authority.

The Court should use this occasion to make clear the above principles of municipal power in West Virginia, to bury once and for all Dillon's Rule in all its permutations, to unshackle the State's cities from the Rule's constraints, and to permit delivery of the constitutional promises made nearly eighty years ago by the ratification of Article VI, § 39a.

III. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT MUNICIPAL REGULATION OF TRUCK TRAFFIC ON STATE ROADS WITHIN CITIES WOULD CAUSE UNDUE DISRUPTION.

The lower court's Conclusion of Law 19, Appendix at 298, found that validating Morgantown's ordinance in this case "would inject chaos and mayhem into the state road system by destroying the uniform system of state roads and state highways throughout West Virginia." *See also* the Court's "Conclusion," Appendix at 299 ("Such municipal intrusions would inject mayhem and chaos into the state road system[.]") Why municipal regulation of truck traffic and the use of truck routes would cause any undue disruption is not immediately apparent, let alone why it would bring about the hyperbolic consequences forecast by the circuit court. Indeed, it is not only eminently reasonable, but is salutary, for the Legislature to conclude that individual cities ought to have the capacity to control the routes of large trucks through their residential neighborhoods and commercial districts. That conclusion no doubt explains why other states have done just that.

State laws vary widely, but there is consensus on some general principles. "Transportation in city streets is, in general, subject to municipal police regulation. . . . Trucks, pickups, and other vehicles for hauling freight, goods, and articles may be, and generally are, subject to municipal regulation in certain respects. They may, for example, be regulated as to their weight, the weight of

their loads, and width of their tires, particularly with respect to use of certain streets, kinds of pavement or road surface, and bridges.” EUGENE MCQUILLEN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24.652, at 440-41 (1998). In addition,

Trucks and other automobiles may be prohibited from passing over designated streets, and such an exclusion may, where reasonable, be made applicable to trucks and other vehicles for hire or to heavy vehicles. Accordingly, trucks or commercial vehicles may be excluded from certain streets designated for pleasure driving. An exclusion of this character has been held to present no conflict with state law. Ordinances establishing routes for trucks or commercial vehicles through a city usually are regarded as reasonable and have been upheld.

Id. § 24.656, at 447. As noted, such regulations must be reasonable, cannot conflict with state or federal law, and must leave open adequate alternative channels for commerce to move. *Id.*

Petitioner has not found a comprehensive survey on the issue of how the states allocate authority with regards to truck weight regulations within cities, but a check of secondary authorities indicates, not surprisingly, that the states vary in their particular approaches. *See generally Power to Limit Weight of Vehicle or Its Load with Respect to Use of Streets or Highways*, 75 A.L.R.2d 376; *Jurisdiction and Power in Respect of Street or Road which Is Part of, or Touches upon, a State or Federal Highway*, 144 A.L.R. 307; *Validity of Regulations Excluding or Restricting Automobile Traffic in Certain Streets*, 121 A.L.R. 573. To be sure, however, other states have held that cities may control vehicular weight and truck traffic on their streets and highways and that such authority extends to state routes within the municipal borders. *E.g.*, *Crossan v. State of Delaware*, 281 A.2d 494 (Del. 1971); *Medlock v. Allison*, 224 Ga. 648, 164 S.E.2d 112 (1968); *People of the City of Dearborn v. Sugden & Sivier*, 343 Mich. 257, 72 N.W.2d 185 (1955); *see also Union Sand & Supply Corporation v. Village of Fairport*, 172 Ohio St. 387, 176 N.E.2d 224 (1961). The City is aware of no chaos or mayhem that has occurred on the roads of those jurisdictions. If a city does act unreasonably in limiting truck traffic, both the courts and the Legislature are available to provide a correction. Meanwhile, cities must remain able to protect their residential and critical commercial areas from heavy truck traffic creating congestion, noise pollution, air pollution, and safety hazards.

CONCLUSION

This Court should reverse the judgment of the Kanawha Circuit Court and hold that the City of Morgantown is not preempted by state law in enacting the truck regulation challenged in this case and should remand the case to the circuit court to address the remaining issues raised by the complaint.



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CERTIFICATE OF SERVICE

I have served by U.S. Mail the foregoing Brief for Petitioner on respondents' counsel, Paul R. Cranston and James B. Shockley, Cranston & Edwards, PLLC, 1200 Dorsey Avenue, Suite II, Morgantown, W. Va., 26501, on respondent Greer Industries' counsel, Frank E. Simmerman, Jr., Simmerman Law Office, PLLC, 254 East Main Street, Clarksburg, W. Va., 26301, and on counsel for respondent Division of Highways, Michael J. Folio and Jonathan T. Storage, 1900 Kanawha Blvd., East, Building 5, Room 517, Charleston, W. Va., 25305, on this the 1st day of June, 2015.



Robert M. Bastress, Jr. (ID # 263)