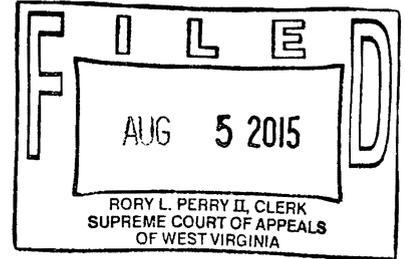


IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA



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.

PETITIONER'S REPLY BRIEF

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ARGUMENT

1. *The Good Roads Amendment of 1920 Adds Nothing to this Case.*

Respondents at several points cite to the Good Roads Amendment of 1920 as authority for its position that Morgantown lacks the capacity to regulate truck traffic on state routes within its jurisdiction. The Amendment, however, merely gives the Legislature the authority (which it would have had even without the amendment) to create a system of state roads and to assign control and supervision of those roads to officers and agencies. The Legislature has done just that. As detailed in the City's prior brief, the Legislature created the Division of Highways and the office of Commissioner of Highways to be the general superintendents of roads and, as to the connecting parts of the state road system within cities, has allocated responsibilities between the Commissioner and the affected cities. In sections 17-4-27 and 17C-17-12, the Legislature assigned to the Commissioner the responsibilities to design and maintain such connecting roads and to ensure they have proper signage and assigned to the cities control over traffic regulation, including vehicular weights over such connecting routes.

2. *West Virginia Code § 17C-17-11a Adds Nothing to this Case.*

Respondents at page 11 of their brief point to West Virginia Code § 17C-17-11a's authorization to the Commissioner to increase vehicular weight limits above the statutory limits on roads within his jurisdiction. That means nothing to this case because, as explained in the City's prior brief, connecting parts of the state road system within municipalities are not within the Commissioner's jurisdiction for purposes of regulating traffic and vehicular weights. W. Va. Code §§ 17-4-27 and 17C-17-12. Rather, the cities control traffic and weight limits. *Id.* In any event, even if the Commissioner could invoke § 17C-17-11a to increase truck weights on Route 7 through Morgantown, he has not done so. And if he did issue such a ruling, it could not stand unless it was reasonable. No such ruling could be found reasonable.

3. *The Commissioner Controls the Location, Construction, and Maintenance of State Roads that Course through Cities but Does Not Control Traffic Regulation on Them.*

The cases cited by the respondents on page 12 of their brief – *State ex rel. Keene v. Jordan*,

192 W. Va. 131, 451 S.E.2d 432 (1994), *et al.* – clearly establish, as does the West Virginia Code Chapter 17, that the Commissioner and the Division of Highways control state road decisions, including within municipalities, as to their location, construction, and maintenance. The City does not dispute that conclusion. But none of those cases involves the regulation of traffic. *That* is governed by West Virginia Code §§ 17-4-27 and 17C-17-12 and is expressly delegated in those section to the cities through which the State’s connecting parts travel.

4. *Route 7 through Morgantown is a State Route and Is a Connecting Part of the State Road System.*

When one reads West Virginia Code sections 17-4-26 through -31 together, it is clear that the Legislature used the term, “connecting parts of the state road system,” to refer to city streets that the Commissioner of Highways has designated to be parts of state routes. That is the plain meaning of the term. Route 7, for example, runs into Morgantown at Sabraton and exits the city past Star City and is “connected” in between by use of the city streets that are Earl Core Road and Brockhurst, Walnut, University, and Beechurst Streets and finally Monongahela Boulevard. It is common sense that, as provided by § 17-4-26, the Legislature would assign to the Commissioner the responsibility to define and maintain those routes while leaving control over traffic regulation to the cities.

Respondents’ statement (on page 18 of their brief) that “there is simply nothing in Chapters 7 or 7C¹ that would suggest a state highway like WV 7 is under the ‘jurisdiction’ of a municipality like Morgantown just because it passes through it borders” ignores the plain meaning of those chapters as well as common sense. There *are* provisions that not only “suggest” but also expressly provide that state routes like WV 7 are under the City’s jurisdiction for purposes of traffic control and the City has cited them. W. Va. Code §§ 17-4-27 and 17C-17-12. Moreover, the respondents’ statement virtually refutes itself. The Legislature could, of course, reasonably conclude that a city should have the authority to control traffic on a state route over its streets “just because it passes through that municipality’s borders.”

¹Presumably, respondents intended to refer to Chapters 17 and 17C, and petitioner proceeds on that assumption.

5. *The State Commissioner's Authority to Review the Adequacy of a City's Traffic Regulation Signage Does not Confer on the State Any Capacity to Veto the Substance of a City's Traffic Regulations.*

Respondents suggest at page 19 of their brief that the requirement in § 17-4-27 that a city must get approval from the Commissioner regarding the adequacy of its signage giving notice of traffic regulations confers on the Commissioner the power to veto the substance a city's traffic regulation. That would lead to an absurd interpretation of § 17-4-27: that the Legislature in the first sentence reserved to cities the power to regulate traffic on state roads within their jurisdiction and in the second sentence took it away. That would not make any sense. Moreover, it would be counter to the plain language of § 17-4-27. What the section requires is Commissioner approval of "the location, form and character of informational, regulatory and warning signs" – clearly communicating that the Commissioner's authority is over the adequacy's of a city's signage in giving notice to motorists and pedestrians and not to the substance of a city's laws.

6. *The Scope of Municipal Power Is Properly Raised on this Appeal.*

The respondents argue on page 20 and following that the City did not raise below the constitutional and statutory scope of municipal power. That is true; the City did not raise the issue because it was not necessary given the clarity of the governing statutes. Nevertheless, the respondents raised the issue (*e.g.*, App. 17, 184) and the circuit court expressly relied upon the outdated common law rule of strict interpretation of municipal powers in ruling against the City. (Conclusions of Law 9 & 10, App. 296-97. The issue is therefore squarely presented as to how municipal powers are to be construed. The City urges this Court to firmly hold, once and for all, that cities in West Virginia can enact any law in furtherance of the interests of their residents so long as the law is not in conflict with state or federal law. The common law rule of strict interpretation relied upon by the circuit court – even though specifically rebutted by Article VI, § 39a of the West Virginia Constitution as well as by West Virginia Code §§ 8-1-7, 8-11-1, 8-12-2, & 8-12-5(44) – continues because of judicial recalcitrance to throttle the exercise of municipal discretion in the State and to thwart the clear intention of the State's citizens as expressed through the above-cited

provisions. This Court must correct that situation.

7. *The Morgantown Ordinance Would Not Impair Any of Respondents' Rights.*

Respondents, at 23-27, argue that the Morgantown truck ordinance would impair their rights to participate in commerce and pursue their occupations. That argument is not raised in this appeal (the complaint raised it, but the summary judgment motion and ruling did not address it), but it is, in any event, specious. State and local governments may subject all commercial activity to reasonable regulation in furtherance of a legitimate interest, and the standard of reasonableness is very generous. *E.g., Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Hartsock-Flesher Candy Company v. Wheeling Wholesale Grocery Company*, 174 W. Va 538, 328 S.E.2d 144 (1985). Here, there can be no question that Morgantown's truck routing ordinance promotes legitimate governmental interests in enhancing safety and preserving the quality of life in downtown Morgantown. Second, the Morgantown ordinance reasonably advances those interests while permitting respondents to continue to conduct their businesses profitably. The ordinance only excludes large trucks from particular sections of the city – neighborhoods that are primarily residential or that have a heavy concentration of pedestrians and commercial establishments that are adversely affected by obnoxious heavy truck traffic. That is, Morgantown is reasonably attempting to create a liveable and enjoyable community. Meanwhile, the City has left open ample alternatives for respondents to do their business. They can still traverse through downtown Morgantown; they just have to use the slightly longer route of connecting with Route 19 on Don Knotts Boulevard before hooking back up with Route 7 at the corner of Walnut and University. That diversion is hardly a burden. Moreover, respondents also have the alternative of using the interstate routes around Morgantown, which could actually be faster for them depending upon their destination points. They eschew that option, of course, because the truck weight limits for federal interstate highways are significantly lower than the West Virginia state route limits.

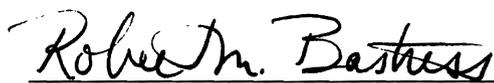
8. *Morgantown Enacted Its Truck Routing Ordinance after Careful Consideration and Upon the Advice of Counsel.*

Respondents, before the circuit court and before this Court, have made pejorative references

to a citizens' group that advocated for an ordinance limiting downtown truck traffic in Morgantown and have attempted to create the impression that the Morgantown City Council marched blithely on because of citizen pressure and in spite of professional advice that it was exceeding its authority. First, the fact that a citizens' group proposed the downtown truck ban and pushed for its adoption simply demonstrates that democracy is working in Morgantown. Second, while it is true that the Division of Highways has consistently taken the self-serving position that it has total control,² including over the regulation of trucks, of state routes through municipalities, the City studied the issue carefully and did, indeed, consult outside counsel on the validity of the proposed ordinance. Three sets of counsel, Steptoe & Johnson (App. at 59-64), Kay, Casto & Chaney (App. at 82-88), and the undersigned advised the City that it had the lawful authority to regulate truck traffic.

CONCLUSION

The bottom line in this case is that the specific grants of authority in West Virginia Code §§ 17-4-27 and 17C-17-12 supercede the general grants of power conferred on the Commissioner. The Court should reverse the ruling of the Kanawha Circuit Court and establish West Virginia cities have the power to regulate the flow and size of vehicular traffic within their cities and that cities can enact any law furthering the welfare of their citizens that is not in conflict with state or federal law.


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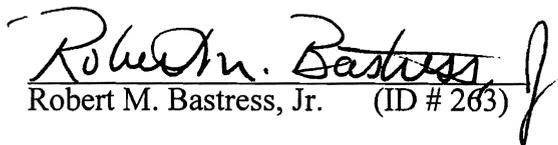
Counsel for Petitioner City of Morgantown

²The Division of Highway's position that it has total control and responsibility, including traffic regulation, over state routes in cities must strike the residents of Morgantown and vicinity as more than a little ironic. Those residents must daily manipulate their way over state roads with pot holes the size of moon craters. It seems to those residents that the Division wants control but is not willing to take responsibility for state roads.

Counsel for the City begs the Court's indulgence for venting on behalf of his clients, the residents of war-torn Morgantown.

CERTIFICATE OF SERVICE

I have served by U.S. Mail the foregoing Reply 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 3rd day of August, 2015.


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