

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 15-0127

The City of Morgantown, West Virginia,
a West Virginia municipal corporation,
Defendant Below, Petitioner,

vs.

Appeal from a final order of the
Circuit Court of Kanawha County
(Case No. 14-C-1877)

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 OF RESPONDENTS NUZUM TRUCKING COMPANY, PRESTON
CONTRACTORS, INC., AND GREER INDUSTRIES, INC.**

Paul R. Cranston (WVSB # 5191)
James B. Shockley (WVSB # 7222)
CRANSTON & EDWARDS, PLLC
1200 Dorsey Avenue
Morgantown, WV 26501
Phone: (304) 296-3500
Fax: (304) 296-3600
paulcranston@comcast.net
jbshockley@comcast.net
*Counsel for Nuzum Trucking Co. and Preston
Contractors, Inc.*

Frank E. Simmerman, Jr. (WVSB #
3403)
Chad L. Taylor (WVSB # 10564)
Frank E. Simmerman, III (WVSB #
11589)
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906
fes@simmermanlaw.com
clt@simmermanlaw.com
trey@simmermanlaw.com
Counsel for Greer Industries, Inc.

TABLE OF CONTENTS

	page(s)
TABLE OF AUTHORITIES	ii
I. STATEMENT OF THE CASE	1
A. Supplemental Facts	1
B. Supplemental Procedural History	5
II. SUMMARY OF ARGUMENT	7
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	8
IV. STANDARD OF REVIEW	9
V. ARGUMENT	9
A. The West Virginia Department of Transportation, Division of Highways Has Exclusive Authority and Control Over West Virginia State Roads, Preempting Morgantown’s Ability to Regulate State Route 7.	9
1. The Commissioner of Highways Is the Ultimate Authority Over All Roads in West Virginia.	10
2. The Legislature’s Comprehensive Regulatory Structure over the State Highway System Preempts Morgantown’s Right to Regulate WV 7.	13
3. Neither W. Va. Code § 17-4-27 nor W. Va. Code § 17C-17-12 Empower Morgantown To Regulate State Highways.	15
B. Morgantown Has No Inherent or Implied Powers Through the Home Rule Act or Otherwise that It Can Use to Overrule State Law.	20
C. Morgantown’s Proposed Ordinance Would Injure Plaintiffs, Interfere with Interstate Commerce, and Lead to Serious Confusion and Chaos in the State Road System.	23
VI. CONCLUSION	28
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	page(s)
Constitutional Provisions	
Good Roads Amendment to the West Virginia Constitution.....	23
U.S. Constitution Article I, § 8, cl. 3	24
U.S. Constitution. Article I, § 10, cl. 1	24
West Virginia Code Chapters 7 and 7C.....	10
West Virginia Constitution, Amendment 3	23
West Virginia Constitution, Amendment III, (1920).....	10
West Virginia Constitution, Article VI Section 39(a)	22
Statutes	
Chapters 7 and 7C of the West Virginia Code.....	23
W. Va. Code § 17-2A-1	10
W. Va. Code § 17-2A-8(11)	13
W. Va. Code § 17-4-1	10, 13, 18, 23
W. Va. Code § 17A-3-3	4
W. Va. Code § 17C-1-37	19
W. Va. Code § 17C-17-11	11
W. Va. Code § 17C-6-3	12, 15
W. Va. Code § 8-1-5(k)	22
W. Va. Code §§ 17-4-1	19
W. Va. Code 17-4-27	15
W. Va. Code 17C-17-12	15
W. Va. Code R. § 157-5-8.1	11
West Virginia Code § 17-4-26.....	16
West Virginia Code § 17-4-4.....	16
Cases	
<u>Am. Tower Corp. v. Common Council of City of Beckley</u> , 210 W. Va. 345, 557 S.E.2d 752 (2001).....	13

<u>Chesapeake & Potomac Tel. Co., v. City of Morgantown</u> , 144 W. Va. 149, 107 S.E.2d 489 (1959)	18
<u>Chittum v. Morgantown</u> , 96 W. Va. 260, 122 S.E. 740 (1924).....	17
<u>Chrystal R.M. v. Charlie A.L.</u> , 194 W. Va. 138, S.E.2d 415 (1995).....	9
<u>Crutcher v. Kentucky</u> , 141 U.S. 47 (1891)	25
<u>Dale v. Painter</u> , 765 S.E.2d 232 (2014)	14
<u>Dillon v. Bd. of Educ. of Mingo County</u> , 171 W. Va. 631, 301 S.E.2d 588 (1983).....	19
<u>Garrity v. New Jersey</u> , 385 U.S. 493 (1967).....	25
<u>Gilman v. Philadelphia</u> , 70 U.S. 713 (1866).....	25
<u>Heavner v. State Road Comm’n</u> , 118 W. Va. 630, 191 S.E. 574, 576 (1937).....	12, 14
<u>Herold v. Hughes</u> , 141 W. Va. 182, 90 S.E.2d 451, 454 (1955)	13
<u>Hunter v. City of Pittsburgh</u> , 207 U.S. 161 (1907).....	21
<u>Huntington v. State Water Comm’n</u> , 137 W. Va. 786, 73 S.E.2d 833 (1953).....	23
<u>Huntington</u> , 137 W. Va. at 800, 73 S.E.2d at 841	23
<u>Keene v. Jordan</u> , 192 W. Va. at 132, 451 S.E.2d at 132-33	22
<u>O’Neil v. City of Parkersburg</u> , 160 W. Va. 694, 237 S.E.2d 504 (1977)	27
<u>Perito v. County of Brooke</u> , 215 W. Va. 178, 597 S.E.2d 311 (2004)	18
<u>Powderidge Unit Owners Ass’n v. Highland Props.</u> , 196 W. Va. 692, 474 S.E.2d 872, 880 (1996)	9, 20
<u>Smith v. State Workmen’s Comp. Comm’r</u> , 159 W. Va. 108 S.E.2d 361 (1975).....	13
<u>Snyder v. Baltimore & Ohio R.R. Co.</u> , 135 W. Va. 751, 104 S.E. 473 (1951)	17
<u>State ex rel. Constanzo v. Robinson</u> , 87 W. Va. 374, 104 S.E. 473 (1920).....	17
<u>State ex rel. Frazier v. Meadows</u> , 193 W. Va. 20, 454 S.E.2d 65, 69 (1994).....	13
<u>State ex rel. Keene v. Jordan</u> , 192 W. Va. 131, 451 S.E.2d 432, 434 (1994).....	12, 14, 18
<u>State ex rel. Robertson v. State Rd. Comm’r of W. Va.</u> , 135 W. Va. 562, 64 S.E.2d 28 (1951)	17
<u>State ex rel. Sheldon v. City of Wheeling</u> , 146 W. Va. 691, 122 S.E.2d 427 (1961).....	21
<u>State Rd. Comm’n v. Miller</u> , 108 W. Va. 431, 151 S.E. 436 (1930).....	12, 14
<u>State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars</u> , 144 W. Va. 137, 107 S.E.2d 353 (1959).....	13
<u>Toler v. City of Huntington</u> , 153 W. Va. 313, 168 S.E.2d 551 (1969).....	21
<u>Vector Co. v. Bd. of Zoning Appeals of Martinsburg</u> , 155 W. Va. 362, 184 S.E.2d 301, 304 (1971)	14

<u>W. Va. Dept. of Health v. Blankenship</u> , 189 W. Va. 342, 431 S.E.2d 681 (1993).....	19
<u>West v. Clarksburg</u> , 123 W. Va. 22, 13 S.E.2d 155 (1941).....	17
<u>Western Union Telegraph Co. v. Kansas ex rel. Coleman</u> , 216 U.S. 1, 26 (1910).....	25
<u>Yick Wo v. Hopkins</u> , 118 U. S. 356 (1886).....	27

Foreign Case Law

<u>City of Dearborn v. Sugden & Sivier</u> , 343 Mich. 257 (1955)	25
<u>Crossan v. Delaware</u> , 281 A.2d 494 (Del. 1971)	25
<u>Medlock v. Allison</u> , 224 Ga. 648 (1968)	25
<u>Union Sand & Supply Corp. v. Vill. of Fairport</u> , 172 Ohio St. 387 (Ohio 1961).....	25

Secondary Authorities

13B Michie’s Jurisprudence: <u>Municipal Corporations</u> , § 24 (2014)	21
13B Michie's Jurisprudence: <u>Municipal Corporations</u> , § 26 (2014).....	21
17 Michie’s Jurisprudence: <u>Streets and Highways</u> , § 3 (2014)	15
17 Michie’s Jurisprudence: <u>Streets and Highways</u> , § 67 (2014)	17
17 Michie’s Jurisprudence: <u>Streets and Highways</u> , § 69 (2014)	15
Bastress, Robert M., <u>Localism and the West Virginia Constitution</u> , 109 W. Va. Law Review 683 (2007)	15

I. STATEMENT OF THE CASE

Respondents Nuzum Trucking Company, Preston Contractors, Inc., and Greer Industries, Inc. (together “Respondents”) are asking this Court to affirm the decision of the Circuit Court of Kanawha County that held that Petitioner, the City of Morgantown, lacked the authority to enact an ordinance prohibiting certain trucks from travelling on a portion of West Virginia State Route 7 (“WV 7”) that passes through Morgantown’s city limits.

Petitioner’s recitation of the stipulated factual record in this matter is inadequate for the Court’s consideration of the Circuit Court’s decision. Further, Respondents submit that the full nature and scope of this action’s procedural history will aid the Court.

Accordingly, Respondents supplement Petitioner’s Statement of the Case as follows:

A. Supplemental Facts

Nuzum Trucking Company (“Nuzum”), Preston Contractors, Inc. (“Preston”), and Greer Industries, Inc. (“Greer”), and their affiliates, have historically traversed and relied upon West Virginia state roads, including WV 7, in order to carry out their day-to-day motor carrier operations. (Appx. 2, 4, 123, 124.) WV 7 is an east-west state road with 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. (Appx. 39, 41.) A part of WV 7 runs through Morgantown’s B4 Business District. (Appx. 39, 41.) By Order dated June 15, 1935, WV 7 was designated as a primary state road, and on such date, exclusive jurisdiction of WV 7 vested in the West Virginia State Road Commission. (Appx. 43.¹) Subsequent to its original designation, WV 7 was re-designated as a primary state road on June 12, 1945. (Id.)

¹ See also Complaint and Answer:

In the mid-2000s, a group of individuals with businesses and/or property located along WV 7 sought to have Morgantown exercise municipal power over WV 7 to prohibit motor carriers exceeding a certain weight threshold from traveling in or over those portions of WV 7 located within Morgantown's municipal boundaries. (Appx. 8-9.) On September 2, 2005, Morgantown's City Manager, at the direction of Morgantown's City Council, mailed a copy of a proposed City Ordinance barring so-called "heavy trucks" from traveling through Morgantown's B4 Business District to the West Virginia Department of Transportation, Division of Highways ("WV DOH") in an attempt to obtain the WV DOH's approval of Morgantown's regulation of WV 7. (Appx. 46-49.) Morgantown's correspondence invited the WV DOH's comments and criticisms concerning the legality of its proposed prohibition of heavy truck traffic motor carriers from traveling in and through Morgantown's B4 Business District. (Id.)

On October 4, 2005, the WV DOH responded by citing multiple legal obstructions to Morgantown's attempt to regulate a state road and informing Morgantown that the WV DOH could not endorse passage of the proposed ordinance. (Appx. 51-53.) After receiving this response, Morgantown's City Manager addressed Morgantown's municipal power to regulate state roads within Morgantown's municipal boundaries by publicly stating, "We [Morgantown] basically have three options. We could appeal the DOH decision to the secretary of state or the

Complaint ¶ 26: "WV 7 is an east-west state highway with major junctions with West Virginia Route 2 near New Martinsville, West Virginia, United State Route 250 near Hundred, West Virginia, United States Route 19 near Morgantown, West Virginia, Interstate 68, and Interstate 79 in and around Morgantown. WV 7 cuts directly through downtown Morgantown and through Morgantown's B4 Business District. (Appx. 6-7.)

Answer ¶ 26: "Defendant City admits paragraph 26, except to the extent that it asserts all of the listed junctions are 'major.'" (Appx. 94.)

Complaint ¶ 27: "By Order dated June 12, 1945, WV 7 was designated by the State Road Commission of West Virginia as a primary state route and on this date, jurisdiction of WV 7 vested in the West Virginia State Road Commission." (Appx. 7.)

Answer ¶ 27: "Defendant City admits paragraph 27." (Appx. 94.)

governor; we could seek changes in state law that allow cities to have more control; or we could do as the letter instructed [and stand down].” (Appx. 66.)

Despite the foregoing, in January and February of 2006, Morgantown’s City Council continued to vet the legality of the proposed ordinance barring heavy trucks from traveling on state roads within Morgantown’s municipal boundaries. At or about this time, Morgantown’s Deputy Mayor publicly declared, “It would be nice if heavy trucks didn’t go through downtown . . . but our city attorney doesn’t think we have the authority, and the DOH doesn’t think we have the authority. I don’t want to set up an ordinance that leads to litigation.” (Appx. 56.) Morgantown’s proposed heavy truck ordinance eventually died on the floor, Morgantown apparently having realized and acknowledged its inability to regulate state roads within municipal boundaries via heavy truck prohibitions.

In 2013, however, a group of individuals with connections to the 2005 group labeled themselves “Safe Streets Morgantown” and renewed the concept of a prohibition of heavy truck traffic in Morgantown’s B4 Business District. (Appx. 68.) 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. (Appx. 68-74.)

After its June 17, 2014 letter, “Safe Streets Morgantown” continuously lobbied City Council to enact the proposed ordinance, claiming that Morgantown possessed unfettered municipal power to regulate state roads within Morgantown’s municipal boundaries pursuant to W. Va. Code §§ 17-4-27 and 17C-17-12. (Id.)

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. (Appx. 76-77.) 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).)

Despite the WV DOH's stated position, the clarity of the law, and the designation of WV 7 as a "primary route" within the state road system (not as a "connecting part" of the state road system), Morgantown's City Council proceeded to pass an edited version of "Safe Street Morgantown's" proposed Heavy Truck Ordinance at a First Reading on August 19, 2014. (Appx. 33-37.) On September 2, 2014, at a Second Reading, City Council adopted the Heavy Truck Ordinance and amended Articles 301 and 347 of Morgantown's traffic code, thereby prohibiting as defined "heavy trucks" from being operated on certain state roads in Morgantown's B4 Business District. (Id.)

As enacted, the term "heavy truck" "means 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." (Id.)

The Heavy Truck Ordinance explicitly excluded from its restriction: “(1) the operation of any Heavy Trucks in the Downtown Business District when that operation is necessary to conduct business at a destination within the Downtown Business District where merchandise or material is loaded or unloaded during the normal course of business,” *e.g.*, delivery trucks, “(3) the operation of any governmental or quasi-governmental vehicle in the performance of any official function or duty,” *e.g.*, busses, and “(5) the operation of solid waste disposal vehicles.” (Appx. 193.) The top five companies and organizations with documented traffic incidents in and around Morgantown’s B4 Business District, (1) Mountain Line; (2) Monongalia County Schools; (3) Advantage Tank Lines; (4) Allied Waste; and (5) Blue Ridge Beverage (Appx. 79-80), fall into the aforementioned exclusion and thus may continue to travel on WV 7 in Morgantown’s B4 Business District. Indeed, Petitioner admitted that “[a] plain reading of the ordinance establishes that the entities with the greatest number of traffic incidents, such as Allied Waste and Blue Ridge Beverage, are immune or exempt from application of the ordinance.” (Appx. 16, Compl. ¶ 87 at; Appx. 162.)

Initially, the Heavy Truck Ordinance was to be effective immediately upon passage by City Council. Morgantown’s City Council, however, postponed enforcement for a 90-day period, until on or about December 1, 2014, so that Morgantown could install scales, signage, and other infrastructure necessary to enforce the Heavy Truck Ordinance. (Appx. 97-98.) After the enactment of the Heavy Truck Ordinance, the WV DOH again informed Morgantown that its municipal regulation of state roads within Morgantown’s municipal boundaries was an unlawful exercise of municipal regulatory authority over the state road system. (Appx. 90, 91.)

B. Supplemental Procedural History.

On October 17, 2014, Respondents Nuzum and Preston initiated this civil action by filing Plaintiffs’ Verified Complaint in the Circuit Court of Kanawha County, West Virginia. (Appx.

1-91.) In Count I of their six-count Verified Complaint, Respondents Nuzum and Preston pleaded a count denominated: State Preemption - Declaratory and Injunctive Relief. (Appx. 17-19.) Pursuant to Count I, Nuzum and Preston pleaded, among others, that “WV 7 is not a ‘connecting part’ of the state road system, such as a city street or city alley. WV 7 is a West Virginia state road and regulatory authority is vested in the WV DOH.” (Appx. 19.) Further, pursuant to Count I, Nuzum and Preston “request[ed] expedited declaratory relief holding that the Heavy Truck Ordinance is void and unenforceable and Plaintiffs [Respondents Nuzum and Preston] further request[ed] a permanent injunction prohibiting Morgantown from enforcing the Heavy Truck Ordinance.” (Id.) Respondent Greer filed a Motion to Intervene on or about November 13, 2014, and formally became a party on December 3, 2014. (Appx. 120-122.)

On November 10, 2014, Respondents Nuzum and Preston filed a Motion for Expedited Summary Judgment as to Count I: State Preemption, with a supporting Memorandum, seeking the relief requested in Count I of their Verified Complaint. (Appx. 168-235.) On November 26, 2014, Petitioner filed “Defendant City of Morgantown’s Memorandum in Opposition to Plaintiffs’ Motion for Partial Summary Judgment and in Support of City of Morgantown’s Motion.”² (Appx. 244-249.) In its briefing, the Petitioner argued that “the West Virginia Code [Sections 17-4-27 & 17C-17-12] expressly authorizes the City of Morgantown to regulate heavy truck traffic and truck weights within the City of Morgantown.” (See Appx. 242-249.) Absent from Morgantown’s moving papers or Response to Respondents’ Motion for Summary Judgment is any discussion of West Virginia Constitution, Article, VI, § 39a, or the theory that the Petitioner has the municipal power, under the doctrine of Home Rule or otherwise, to regulate state roads and state highways within municipal boundaries.

² On November 26, 2014, Petitioner filed Defendant City of Morgantown’s Cross Motion for Partial Summary Judgment. (Appx. 242-243.)

Respondents the West Virginia Department of Transportation, Division of Highways and Greer joined in Nuzum and Preston's pending Motion for Summary Judgment as to Count I: State Preemption on December 11th and December 4th, 2014, respectively. (Appx. 250-257.) Respondents Nuzum and Preston, jointly, and Respondent the West Virginia Department of Transportation, Division of Highways, individually, filed responses to Petitioner's Motion for Summary Judgment.

On December 16, 2014, the Circuit Court of Kanawha County, West Virginia heard oral arguments from counsel for all Respondents and the Petitioner relating to "Plaintiffs' Motion for Expedited Summary Judgment as to Count I: State Preemption and Defendants City of Morgantown's Cross-Motion for Summary Judgment as to Count I: State Preemption." (Appx. 291-301.) The issue presented to the Court on December 16, 2014, was "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 within Morgantown's municipal boundaries." (Appx. 296.)³ At the hearing on December 16, 2014, the Court granted Plaintiffs' Expedited Motion for Summary Judgment. On December 24, 2014, Petitioner filed a Request for Reconsideration, which was promptly denied by the trial court. (Appx. 309-313.)

II. SUMMARY OF ARGUMENT

Each year, this Court faces difficult legal questions that require it to review complex statutory language and decide between two reasonably plausible interpretations in rendering its decision. Often this Court must balance powerful competing policy interests in doing so. The matter at bar before the Court, however, does not present such a challenge.

³ 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." (Appx. 293.)

Under any reasonable interpretation of the West Virginia Constitution and Code, the City of Morgantown cannot regulate West Virginia State Route 7 and impose weight limitations upon this state road. The West Virginia Legislature has created a comprehensive regulatory structure governing West Virginia roads that centralizes all authority and control over the system in the hands of the Commissioner of Highways. This structure preempts any authority on Morgantown's part to regulate WV 7, a designated state road that is outside Petitioner's jurisdiction. Morgantown lacks any authority or ability—whether implied, inherent, or arising from the Home Rule amendment—to overrule the Legislature's carefully designed regulatory scheme.

Moreover, public policy does not favor allowing municipalities to control state roads. Instead of a uniform set of rules and regulations governing the transfer of goods on state roads (as intended by the Legislature), each municipality would have the opportunity to impose their own arbitrary requirements on the state highway system within their boundaries, frustrating and limiting intrastate and interstate commerce. This case is a prime example of why the law narrowly construes municipal powers—to foster a uniform, non-chaotic state infrastructure system—and proof that there is no basis, let alone a compelling basis, for overruling long-standing West Virginia law that limits the scope of municipal powers so that uniform state systems, such as the transit system, can exist free of unlawful municipal intrusions.

Accordingly, the Circuit Court's Order granting Respondents' Motion for Summary Judgment should be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because the dispositive issues have been authoritatively decided by the Legislature and by this Court, through the statutes and decisions cited herein, and

because the stipulated factual record and legal arguments are adequately presented in the briefs and record on appeal.

Accordingly, the decisional process would not be significantly aided by oral argument, as this issue is long settled, and this case is appropriate for memorandum decision pursuant to the West Virginia Revised Rules of Appellate Procedure.

IV. STANDARD OF REVIEW

“Where the issue on an appeal from the circuit court’s ruling is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1 Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995). Additionally, this Court’s review of a summary judgment order is *de novo*. Powderidge Unit Owners Ass’n v. Highland Props., 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996).

Further, Respondents note that the Petitioner admitted key facts set forth in the Verified Complaint and that the parties also “stipulated that no outstanding issues of material fact were present in this action prior to the Court’s hearing conducted on December 16, 2014.” (Appx. 293.)

V. ARGUMENT

A. The West Virginia Department of Transportation, Division of Highways Has Exclusive Authority and Control Over West Virginia State Roads, Preempting Morgantown’s Ability to Regulate State Route 7.

The West Virginia Legislature—as mandated by the people of West Virginia—has created a comprehensive regulatory structure governing West Virginia roads that centralizes all authority and control over the system in the hands of the Commissioner of Highways. The powers and control of the Commissioner of Highways extend over state and local roads, making it the ultimate authority on the regulation of West Virginia’s roads. West Virginia’s constitutionally mandated structure does not delegate to municipalities, including the City of

Morgantown, the right or ability to regulate state highways, like WV 7. Accordingly, Morgantown's attempts to impose weight limits on WV 7 fail as a matter of law.

1. The Commissioner of Highways Is the Ultimate Authority Over All Roads in West Virginia.

The West Virginia Constitution unequivocally provides that the state officers and agencies, such as the WV DOH, shall control and supervise the system of state roads. The Good Roads Constitutional Amendment, adopted in 1920, vested in the Legislature the duty to “make provision by law for a system of state roads and highways connecting at least the various county seats of the states, and [for such system] to be under the control and supervision of such state officers and agencies as may be prescribed by law.” W. Va. Const., amend. III, (1920) (emphasis added).

In furtherance of this directive, the Legislature enacted Chapters 7 and 7C of the West Virginia Code to govern and regulate West Virginia's state highway system. These Chapters unequivocally mandate that the Commissioner of Highways is the ultimate authority on all road-related issues in the state. See W. Va. Code § 17-4-1 (“the authority and control over the state roads shall be vested in the commissioner of highways.” (emphasis added)).⁴ The Commissioner of Highways possesses broad regulatory authority over both state and *local roads*:

In addition to all other duties, powers and responsibilities given and assigned to the commissioner in this chapter, the commissioner may:

[1] Exercise general supervision over the state road program and the construction, reconstruction, repair and maintenance of state roads and highways;

[2] Establish road policies and administrative practices;

⁴ The Commissioner of Highways is “the chief executive officer of the [WV DOH].” See W. Va. Code § 17-2A-1 (stating that “[T]he office of state Road Commissioner . . . is hereby continued in all respects, but is hereby designated as the West Virginia Division of Highways”).

[3] Negotiate and enter in 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

[4] *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.*

W. Va. Code §§ 17-2A-8 (1), (8), (11), (37) (emphasis added). Accordingly, although primarily focused on the state highway system, the Commissioner of Highways possesses the right to control local roads as well if he or she deems it to be expedient. *Id.*

As part of its overall regulatory authority of the West Virginia system of roads, the Commissioner of Highways sets the weight limitations on public highways (as federal law permits):

If, in the opinion of the *commissioner of the department of highways*, the design, construction and safety of any highway, or portion thereof, are such that the gross weight limitations prescribed in section nine of this article can be increased without undue damage to any such highway, *the commissioner may, by order, increase the gross weight limitations of vehicles which may be operated upon any such highway, or portion thereof, designated by him in such order and may establish therein the gross weight limitations which shall thereafter be applicable to the highway or portion thereof so designated by him:* Provided, That the maximum gross weight, including the load established by the commissioner for any such designated highway or portion thereof, shall not exceed eighty thousand pounds, except as otherwise provided in this article: Provided, however, That no such order of the commissioner shall establish any weight limitation in excess of or in conflict with any weight limitation prescribed by or pursuant to acts of Congress with respect to the national system of interstate and defense highways.

W. Va. Code § 17C-17-11a (emphasis added). Indeed, the Commissioner of Highways may overrule the maximum gross weight limitation of 80,000 pounds issue mandated by the Legislature through the issuance of special permits as determined necessary in the discretion of the Commissioner of Highways. See W. Va. Code § 17C-17-11; W. Va. Code R. § 157-5-8.1

(“the Commissioner of Highways may, *in his or her discretion*, upon application in writing and good cause being shown therefore, issue a special permit authorizing the applicant to operate or move upon, along, over, or across the highways of this state, a vehicle or combination of vehicles of a size, weight, or load exceeding the maximums specified by law” (emphasis added)). Read together, these statutory and regulatory provisions reflect the Legislature’s intent that the Commissioner of Highways be the ultimate authority on all issues relating to the West Virginia state road system, including, but not limited to, weight restrictions.

The West Virginia Supreme Court has recognized this intent. In analyzing W. Va. Code § 17-4-1, the West Virginia Supreme Court has clearly found that:

[I]t was the policy of the Legislature in the enactment of the aforesaid statute [Chapter 17 of the W. Va. Code] to provide a comprehensive and all embracing system of statutory law, establishing a general state road system... and providing for and investing 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.⁵

State ex rel. Keene v. Jordan, 192 W. Va. 131, 132-33, 451 S.E.2d 432, 434 (1994) (internal citation omitted) (emphasis added); see also State Rd. Comm’n v. Miller, 108 W. Va. 431, 435, 151 S.E. 436, 437 (1930) (stating that that the powers of the commission (now Commissioner of Highways) are unusually broad); Heavner v. State Road Comm’n, 118 W. Va. 630, 634-35, 191 S.E. 574, 576 (1937) (stating that the legislature granted control over the state road system in the Road Commission in the broadest possible terms “through the enactment of a comprehensive statute covering the location, construction, maintenance and control of the entire road system of

⁵ Morgantown cannot even alter speed limits on state roads within municipal boundaries “until such alteration has been approved by the Commissioner of Highways.” See W. Va. Code § 17C-6-3.

the state” and further describing the powers of the Road Commission as broad and sweeping in nature).⁶

2. The Legislature’s Comprehensive Regulatory Structure over the State Highway System Preempts Morgantown’s Right to Regulate WV 7.

The clear and unambiguous language of W. Va. Code § 17-4-1 firmly states that “authority and control over the state roads⁷ shall be vested in the commissioner of highways.” (emphasis added); see Syl. pt. 4, Am. Tower Corp. v. Common Council of City of Beckley, 210 W. Va. 345, 557 S.E.2d 752 (2001) (stating that “it is well established that the word ‘shall,’ in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation” (internal citations omitted)).

“[T]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. pt. 1, Smith v. State Workmen’s Comp. Comm’r, 159 W. Va. 108, 219 S.E.2d 361 (1975). In analyzing statutory language generally, words are given their common usage, and “courts are not free to read into the language what is not there, but rather should apply the statute as written.” State ex rel. Frazier v. Meadows, 193 W. Va. 20, 24, 454 S.E.2d 65, 69 (1994). Indeed, “when a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syl. pt. 5, State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 144 W. Va. 137, 107 S.E.2d 353 (1959). If the Legislature had intended W. Va. Code § 17-4-1 to allow for municipal regulation of state roads, it would not

⁶ See also Herold v. Hughes, 141 W. Va. 182, 187, 90 S.E.2d 451, 454 (1955) (“The public highways of this State belong to the State and are subject to the control of the State”); see also W. Va. Code § 17-2A-8(11) (granting the Commissioner of Highways “jurisdiction, control, supervision and authority over local roads, outside the state road system, to the extent determined by him or her to be expedient and practicable”).

⁷ Respondents again note the admissions of Petitioner that WV 7 is a state highway designated as a primary state route. See footnote 1 *supra*.

have adopted such concrete, unambiguous language—language that is fundamentally necessary to create a uniform system of state roads within West Virginia free of arbitrary municipal intrusions such as Morgantown’s Heavy Truck Ordinance.⁸

Having vested in the Commissioner of Highways the exclusive power to regulate state roadways, as the aforesaid provisions of West Virginia law makes clear, the West Virginia Legislature has preempted any municipal regulation of those same roads. “That municipal ordinances are inferior to in status and subordinate to legislative acts is a principle so fundamental that citation of authorities is unnecessary. Equally fundamental is the legislative principle that where an ordinance is in conflict with a state law, the former is invalid.” Vector Co. v. Bd. of Zoning Appeals of Martinsburg, 155 W. Va. 362, 367, 184 S.E.2d 301, 304 (1971); see also W. Va. Const. art. VI, § 39a (“any such [municipal] charter or amendment thereto, and any such [municipal] law or ordinance so adopted, shall be invalid and void if 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 municipal ordinance contravenes state legislation if it espouses a view or position that is irreconcilable with that stated in a state statute or regulation. See generally Vector Co., 184 S.E.2d at 304.

As State ex rel. Keene, State Rd. Comm’n, and Heavner make abundantly clear, Morgantown has no regulatory authority or control over state roads because all such authority and control is vested in the WV DOH. And learned treatises agree that the state’s statutory regulation over state highways preempts any municipal regulation of those highways. See 17

⁸ Petitioner devotes much of its argument to non-relevant rules of statutory interpretation given the plain language of the statutes at issue. See Dale v. Painter, 765 S.E.2d 232, 239 (2014) (“a statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible to two or more constructions of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” (internal citation omitted)).

Michie’s Jurisprudence: Streets and Highways, § 69 (2014) (“formerly, in West Virginia, county courts had broad discretionary power over the establishment, regulation and control of public roads. Under the present West Virginia statutes, however, the state road system, consisting of expressways, trucklines, feeders, state local service, and park and forest roads, as defined by statute, is under the authority and control of the state commission of highways. Under the present statutes, the power of county commissions [and by analogy municipalities] is generally limited to bridges, approaches and public landings remaining under their control and jurisdiction.”); see also 17 Michie’s Jurisprudence: Streets and Highways, § 3 (2014) (“Under the West Virginia statutes, the authority and control over the state roads is vested in the commissioner of highways.”)⁹

3. Neither W. Va. Code § 17-4-27 nor W. Va. Code § 17C-17-12 Empower Morgantown To Regulate State Highways.

Morgantown’s attempts to place its Heavy Trucks Ordinance within the bounds of Sections 17-4-27 and 17C-17-12 fail because these provisions allow municipalities a limited right to regulate certain local roads—subject to the ultimate authority of the Commissioner of Highways. See generally W. Va. Code §§ 17-4-27, 17C-17-12. These provisions, however, do not provide municipalities with any authority to regulate state highways such as WV 7.

Section 17-4-27 provides the Commissioner of Highways with the right to exercise control over the “connecting parts of the state road system in municipalities” to the same extent “he exercises over such system generally,” reserving for the municipality only the right to regulate traffic. See W. Va. Code § 17-4-27. Similarly, Section 17C-17-12 provides local

⁹ Fundamentally, Respondents submit that the position expressly taken by the Legislature and noted by the Courts is pragmatic as “environmental and transportation issues have cross-boundary implications and thus call for regional or state wide regulation.” Bastress, Robert M., Localism and the West Virginia Constitution, 109 W. Va. Law Review 683, 687 (2007). Stated succinctly, “not all governance is more effectively or equitably performed at the local level.” Id. at 685.

authorities, such as municipalities, the right to regulate the weight of trucks or other commercial vehicles on “highways under their jurisdiction.” See W. Va. Code § 17C-17-12. The essential prerequisite to any regulation of a road by Morgantown, therefore, is a finding that WV 7 is either a “connecting part” of the state road system or a road under Morgantown’s “jurisdiction.”

As recognized by the trial court, however, State Route 7 is a primary state road. (See Appx. 293, January 12, 2015 Order, Findings of Fact, Par. 6.) WV 7 was first designated, as admitted by Petitioner, as a primary state road¹⁰ on June 15, 1935, pursuant to the then effective section of W. Va. Code § 17-4-4:

Pursuant to Section 4, Article IV, Chapter 40, Acts of the Legislature of 1933, it is ordered that the Primary Routes in Monongalia County, as designated June 15, 1935, be amended, their designation to be as follows

(Appx. 43-44.) Contrary to Morgantown’s assertions in its brief (and despite its admissions below), the Commissioner of Highways re-designated WV 7 as a state route, not a connecting part, in 1945. (See Appx. 43-44, 198-199.)

Morgantown cannot point to any evidence in the record that would support its claim that WV 7 is a “connecting part” of the state highway system within its boundaries, as opposed to a state route. Only the Commissioner of Highways may order a road within the state of West Virginia to be designated as a “connecting part” of the state road system. See, e.g., W. Va. Code § 17-4-26 (“The state road commissioner may, at any time, after due consultation with and notice

¹⁰ Petitioner having opened the door to discussion of the underlying summary judgment hearing through incomplete and inaccurate citation to the statement of counsel for Respondents Nuzum and Preston at said hearing at Footnote 4 of its Brief, the Respondents hereby clarify and correct the points briefed by Petitioner. Respondents Nuzum and Preston’s counsel specifically argued at the trial court level that no order exists that designated the sections of WV 7 in Morgantown at issue as “connecting parts” of the state road system, thus logically, the Court does not get to W. Va. Code § 17-4-27; counsel for Petitioner argued as follows regarding “connecting parts” of the state road system at the trial court level: “it’s to be inferred from 17-4-26 that these connecting roads are, in fact, pieces of the state road system that go through municipalities.” (December 16, 2014 Hearing Tr. at 27:12-20, attached as Exhibit 1 hereto.)

to the governing body of the municipal corporation, locate and designate or relocate and redesignate, as a connecting part of the state road system, any bridge or street within a municipal corporation”); Syl. pt. 2, West v. Clarksburg, 123 W. Va. 22, 13 S.E.2d 155 (1941) (“The designation of a street, within a municipal corporation as a connecting part of a primary road, Acts 1933, Ex. Sess., Ch. 40, Art. IV, Sec. 26, must be made by an order entered by the state road commissioner, so that the street can be located with certainty.”); see also State ex rel. Robertson v. State Rd. Comm’r of W. Va., 135 W. Va. 562, 567, 64 S.E.2d 28, 31 (1951) (holding that “[a]n order duly entered by the state road commissioner is essential to the proper designation of a city street as the connecting part of the primary road system through a municipality under the provisions of Art. IV, Sec. 26, and further that the description of the part so designated should be certain and definite.”); 17 Michie’s Jurisprudence: Streets and Highways, § 67 (2014) (“under the West Virginia statute, the designation of a street, within a municipal corporation as a connecting part of a primary road must be made by an order entered by the state commissioner of highways.”). Petitioner has stipulated that WV 7 is a state road, and no evidence exists in the record, other than Petitioner’s baseless claim, that WV 7 is a “connecting part” of the state road system.¹¹ Because WV 7 is a state road, not a “connecting part,” Section 17-4-27 simply does not apply and cannot be used to justify Morgantown’s Heavy Trucks Ordinance.

Similarly, there is no rational construction of Section 17C-17-12 that allows Morgantown to regulate the weight of vehicles on WV 7. To do so, Morgantown must prove that WV 7 is a

¹¹ Respondents further submit that the cases cited by Petitioner, State ex rel. Constanzo v. Robinson, 87 W. Va. 374, 104 S.E. 473 (1920), Chittum v. Morgantown, 96 W. Va. 260, 122 S.E. 740 (1924), and Snyder v. Baltimore & Ohio R.R. Co., 135 W. Va. 751, 104 S.E. 473 (1951) add nothing to Petitioner’s arguments given that the afore-referenced opinion dealt with city streets and avenues, and WV 7 is a state road as set forth herein. Further, Respondents incorporate by reference their briefing below discussing these cases, located at Appx. 258-264.

road “under its jurisdiction.” W. Va. Code § 17C-17-12. Such a finding, however, would fly in the face of the entire comprehensive regulatory scheme created by the Legislature because it would allow a municipality, not the Commissioner of Highways, to control a state highway. Indeed, as noted in State ex rel. Keene, empowering Morgantown with such control over state roads and the state road system “would lead to the absurd result of empowering cities to control the Department of Highways’ maintenance and construction decisions [and control decisions].” Id. at 133-34. There is simply nothing in Chapters 7 or 7C that would suggest that a state highway like WV 7 is under the “jurisdiction” of a municipality like Morgantown just because it passes through that municipality’s borders. Instead, these Chapters plainly reflect the opposite intent. See Chesapeake & Potomac Tel. Co., v. City of Morgantown, 144 W. Va. 149, 160, 107 S.E.2d 489, 496 (1959) (statutes “intended by the lawmaking body to become effective as part of a general system of law will be so construed as to operate in harmony with such system, and not to contravene or infringe upon it, if the terms, fairly and reasonably considered, will permit such construction”).¹²

In fact, the Department of Highways has repeatedly informed Morgantown that Sections 17-4-27 and 17C-17-12 do not provide Morgantown with the right to regulate the weight of vehicles on WV 7. On July 29, 2014, the WV DOH responded to Morgantown’s requests for WV DOH approval of the Heavy Truck Ordinance by letter, stating 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

¹² Petitioner fundamentally seeks to have this Court read into the West Virginia legislative scheme a broad and sweeping grant of municipal power over state roads, contrary to the plain language of the specific statute addressing state road control and jurisdiction, W. Va. Code § 17-4-1. See v. County of Brooke, 215 W. Va. 178, 184, 597 S.E.2d 311, 317 (2004) (internal citations omitted) (“[I]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.”).

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.

(Appx. 76 (emphasis added).) WV DOH has expertise in state road laws and their application and is the governmental entity charged with maintaining a state road system in West Virginia.

See W. Va. Code §§ 17-4-1, et seq. As a general principle of law, interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an entity's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); see also Syl. pt. 1, Dillon v. Bd. of Educ. of Mingo County, 171 W. Va. 631, 301 S.E.2d 588 (1983).

Moreover, the Department of Highways refused to approve the requisite signage to make the Heavy Truck Ordinance enforceable. As set forth in Section 17-4-27 of the West Virginia Code, any and all such signs are subject to the approval of Commissioner of Highways who has the exclusive authority to approve or reject any such signs. It is the Respondents' understanding that the Commissioner has informed Morgantown in no uncertain terms that such approval will not be granted, as the Commissioner has the exclusive authority and control over the regulation of trucking on state roads (subject only to Federal law). Without these signs, Morgantown's Heavy Truck Ordinance is void and unenforceable under West Virginia law. See W. Va. Code § 17C-17-12 (any prohibition on the operation of trucks or other commercial vehicles, or limitation on the weight of trucks or commercial vehicles, on any highway (which includes any "roadway" as set forth in W. Va. Code § 17C-1-37) in West Virginia must be designated by appropriate signs placed on such highway to be enforceable).

In contravention of clear statutory law, the direction of WV DOH, and its own prior acknowledgment of its lack of authority, the City of Morgantown has passed a Heavy Trucks Ordinance that is unlawful in every conceivable way. To allow it to stand would frustrate the intent of the West Virginia Legislature and cause chaos within the state road system. Accordingly, the ruling of the trial court should be affirmed.

B. Morgantown Has No Inherent or Implied Powers Through the Home Rule Act or Otherwise that It Can Use to Overrule State Law.

In a novel argument not presented to the lower court, Morgantown now claims that it possesses inherent or implied powers that allow it to regulate traffic on state highways in contravention of state law. Because Morgantown failed to preserve this argument in the lower court, however, it is now waived. See Powderidge, 196 W. Va. at 700, 474 S.E.2d at 880 (although this Court’s review of a summary judgment order is *de novo*, “this Court . . . will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion”). “To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.” *Id.* (emphasis added). The Petitioner failed to present the municipal power, home rule, and police power arguments raised in Petitioner’s Appellate Brief at the trial court level, thereby waiving them.¹³

Even assuming, *arguendo*, that Morgantown’s arguments were not waived, they fail as a matter of law because Morgantown has no inherent or implied powers under West Virginia law. In West Virginia, a municipal corporation is vested with and can exercise the following powers and no others: (1) those granted in express words by general statutes or charters; (2) those necessary or fairly implied in or incident to the powers expressly so granted; and (3) those

¹³ See also December 16, 2014 Hearing Tr. at 24:1-4, attached as Exhibit 1 hereto, (counsel for Petitioner stating: “I don’t think the Court needs to get into municipal powers, generally speaking. That’s why we didn’t brief it, because there are specific statutes in this case which expressly authorize the city’s actions” (emphasis added).)

essential to the declared objects of the municipal corporation, not simply those convenient to the municipal corporation. See State ex rel. Sheldon v. City of Wheeling, 146 W. Va. 691, 693-694, 122 S.E.2d 427, 428-29 (1961). In other words, “a municipal corporation is a creature of the State and can only perform such functions as may have been conferred by the constitution, or delegated to it by the law-making authority of the State. It has no inherent powers, and only such implied powers as are necessary to carry into effect those expressly granted.” Syl. pt. 1, Toler v. City of Huntington, 153 W. Va. 313, 168 S.E.2d 551 (1969) (internal citations omitted); see also Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) (“Municipal corporations are . . . created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them The number, nature and duration of the powers conferred upon these corporations . . . rests in the absolute discretion of the State.”).

Not only does Morgantown lack any inherent or implied powers, its granted powers are narrowly construed to ensure that they do not interfere with those of the state. Where a fair, substantial, reasonable doubt exists as to whether a municipal corporation possesses a power, the power must be denied. See generally Toler, 153 W. Va. 313; accord 13B Michie’s Jurisprudence: Municipal Corporations, § 24 (2014). “The 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.

West Virginia law does not provide municipalities with any authority over state roads or state highways like WV 7. As set forth above, per W. Va. Code § 17-4-1 “the authority and control over the state roads shall be vested in the commissioner of highways,” and:

[I]t was the policy of the Legislature in the enactment of the aforesaid statute [Chapter 17 of the W. Va. Code] to provide a comprehensive and all embracing system of statutory law, establishing a general state road system . . . and providing for and

investing 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.

Keene v. Jordan, 192 W. Va. at 132-33, 451 S.E.2d at 434 (emphasis added). Morgantown, therefore, cannot regulate or exercise any control over WV 7 and certainly does not possess any inherent or implied powers to do so.

The Home Rule Amendment does not alter this analysis. The home rule provision, of the West Virginia Constitution, provides as follows:

Under such general laws, the electors of each municipal corporation, wherein the population exceeds two thousand, shall have power and authority to frame, adopt and amend the ordinances related to its municipal affairs: Provided, That any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in *conflict with this constitution or the general laws of the state* then in effect, or thereafter from time to time enacted. (emphasis added).

Const. art. VI, § 39a. As noted by counsel for Petitioner in a law review article:

Section 39a ended that cumbersome and problematic practice by requiring the Legislature to use general laws for incorporating municipalities. In addition, cities with more than 2,000 in population may create and amend their own charters and “may pass all laws and ordinances relating to municipal affairs.” Obviously, the scope of this home rule grant depends upon how generously the Supreme Court treats the term “municipal affairs.” A proviso in the section makes clear that the home rule conferred is legislative home rule: any municipal charter or law “shall be invalid and void if inconsistent or in conflict with . . . the general laws of the state.”

Bastress, Robert M., Localism and the West Virginia Constitution, 109 W. Va. Law Review 683, 699 (2007) (internal citation omitted).¹⁴

¹⁴ W. Va. Code § 8-1-5(k) provides as follows: “(k) Prohibited Acts. -- The municipalities participating in the Municipal Home Rule Pilot Program do not have the authority to pass an ordinance . . . pertaining to: (1) The Constitution of the United States or West Virginia; (2) Federal law or crimes and punishment”

In West Virginia, municipalities are characterized as “local and subordinate government[s], created by the sovereign authority of the State, primarily to regulate and administer the local and internal affairs of the city or town incorporated, in contradistinction to those matters which are common to and concern the people at large of the state.” Huntington v. State Water Comm’n, 137 W. Va. 786, 799, 73 S.E.2d 833, 841 (1953) (internal citations omitted).¹⁵

The Good Roads Amendment to the West Virginia Constitution as well as Chapters 7 and 7C of the West Virginia Code establish that the regulation, authority, and control of state highways is a uniquely statewide concern to be managed by the state Department of Highways, not each Home Rule municipality. See W. Va. Const., amend. III; W. Va. Code § 17-4-1, et seq. The Home Amendment, therefore, does not authorize Morgantown to regulate WV 7. See generally Huntington v. State Water Comm’n, 137 W. Va. at 799-800, 73 S.E.3d at 841 (to the extent a condition is “not confined or restricted to the health of the inhabitants of that municipality,” “the condition which here exists is statewide, not local”).

C. Morgantown’s Proposed Ordinance Would Injure Plaintiffs, Interfere with Interstate Commerce, and Lead to Serious Confusion and Chaos in the State Road System.

There are significant public policy concerns entangled with Morgantown’s Heavy Truck Ordinance that support affirming the Circuit Court’s grant of Respondents’ Motion for Summary Judgment. For instance, if enforced, the ordinance would severely and negatively restrict Respondents’ rights to enjoy their property, business operations, and existing contracts and to

¹⁵ As further noted by this Court, “many decisions hold that in matters which do not concern the inhabitants of the municipality alone but which are of statewide interest or concern a municipality can be compelled to carry out the plans of the state and to perform the duties which it [the state] imposes.” Huntington, 137 W. Va. at 800, 73 S.E.2d at 841.

move their products to market on intrastate and interstate highway systems, including the navigable waterways of the United States. The West Virginia state road system is a cross-boundary, statewide transit system under the exclusive control and jurisdiction of the WV DOH. As found by the trial court, Respondents have “historically traversed state roads in and through Morgantown’s municipal boundaries, including West Virginia State Route 7, in the course of their day-to-day motor carrier operations.” (See Appx. 293-294, January 12, 2015 Order, Findings of Fact, ¶ 4.) The trial court further found that “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.” (Id. at ¶ 7 (emphasis added).) West Virginia Route 7, for example, provides Respondents with critical and constitutionally protected access to the intrastate and interstate commerce system through the nation’s highways and navigable waterways. It is this unique, direct link that allows Respondents to serve customers in the region along the Allegheny, Monongahela, and Ohio Rivers in West Virginia, Ohio and Pennsylvania, fostering intrastate and interstate commerce and competition. Preventing Respondents and those similarly situated to them from using WV 7 would severely impact their business operations as well as injure their right to participate in intrastate and interstate commerce.

Of course, state roads do not exist in a vacuum, but instead are an important part of our nation’s interstate commerce system, subject to state and federal constitutional requirements and statutes. The Commerce Clause confers a right to engage in interstate trade free from restrictive state regulation. See, e.g., U.S. Const. art. I, § 10, cl. 1. (“No State shall . . . pass any Law . . . impairing the Obligation of Contracts.”); U.S. Const. art. I, § 8, cl. 3 (“The Congress shall have Power to . . . regulate Commerce . . . among the several States.”). Individuals in the United States have a constitutionally protected right to participate in interstate commerce on America’s

roads and navigable waters. See Crutcher v. Kentucky, 141 U.S. 47 (1891) (the Supreme Court struck down a license requirement imposed on certain out-of-state companies stating, “To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States.”); Gilman v. Philadelphia, 70 U.S. 713 (1866) (“Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie.”).¹⁶

If the Court were to accept Morgantown’s position that local municipalities have the power—over the objection of the state—to employ such restrictive laws on interstate and intrastate commerce, then Morgantown and hundreds of other municipalities would be able to force the state into direct conflict with the U.S. Constitution and federal law and regulations. The City of Morgantown must yield to the power of the State Legislature, which vested control of state roads within the WV DOH.¹⁷ Otherwise, the resulting patchwork of municipal regulations is the antithesis of the uniform structure sought by the Legislature when it

¹⁶ In Western Union Telegraph Co. v. Kansas ex rel. Coleman, 216 U.S. 1, 26 (1910), the Supreme Court referred to “the substantial rights of those engaged in interstate commerce.” Similarly, in Garrity v. New Jersey, 385 U.S. 493, 500 (1967), the Supreme Court declared that engaging in interstate commerce is a “righ[t] of constitutional stature.”

¹⁷ Respondents submit that the foreign authorities cited by Petitioner are wholly inapposite to the instant analysis, as each case cited by Petitioner was decided within a foreign, distinct, and non-analogous legislative and common law framework. See Crossan v. Delaware, 281 A.2d 494, 496 (Del. 1971) (stating that “the General Assembly has withheld from the Department [State Department of Highways and Transportation] the power to regulate traffic on streets within incorporated cities and towns”); see also Medlock v. Allison, 224 Ga. 648, 648 (1968) (acknowledging that the General Assembly vested the municipality with authority); City of Dearborn v. Sugden & Sivier, 343 Mich. 257, 261 (1955) (stating that “the weight restriction on truck traffic are identical with corresponding provisions of the motor vehicle Code of the state as set forth in section 724 thereof Thus there is not conflict between State and municipal actions.”); Union Sand & Supply Corp. v. Vill. of Fairport, 172 Ohio St. 387, 390-391 (Ohio 1961) (concluding that pursuant to Ohio Code 715.22 and 723.01 municipal corporations have broad powers and duties with respect to streets and highways within their city limits).

empowered the WV DOH and the Commissioner of Highways to regulate and control the state highway system.

There are also serious potential concerns resulting from the arbitrary and capricious nature of the Heavy Truck Ordinance. In the instant case, a group of individuals labeling themselves “Safe Streets of Morgantown” sought to pass local legislation that trumps state and federal law. This group pursued their objective *despite* the long-standing advice and legal opinion of Morgantown’s city attorney, the WV DOH, and outside counsel hired by Morgantown, which found that (i) Morgantown had no such authority, (ii) such an ordinance would be subject to Federal and State preemption, and (iii) any purported safety concerns were already addressed by state and federal law. (Appx. 9-14, Compl. ¶¶ 41-43, 45-48, 56, 61, 67-69, 78.) Ignoring these facts, Safe Streets of Morgantown forced through the Heavy Truck Ordinance under the guise of “general safety concerns” (a statement inserted at the last minute before the reading of the ordinance and that does not comport with the WV DOH’s findings). (Id.; Order of Court, Finding of Facts ¶¶ 12, 13, 14.)

The specific attack on Respondents’ vital interest in interstate commerce is clear from the fact that, without any evidence of safety issues and against the recommendations of its attorney and the DOH, the city enacted an ordinance purportedly based on “general safety concerns” that (i) attacks Respondents’ right to use, as they have for decades, WV 7, a vital primary state road to transport products into a broader system of intrastate and interstate commerce (Appx. 293-295, Order of Court, Finding of Facts ¶¶ 4-11) but (ii) *intentionally excludes* from its regulation all of the top five companies with *documented traffic incidents* in or around Morgantown’s B4 business district (Appx. 16, Compl. ¶¶ 76, 87; Appx. 161-162, Answer ¶¶ 76, 87; Appx. 193-194). Specifically, the Heavy Truck Ordinance excluded from restriction: business delivery

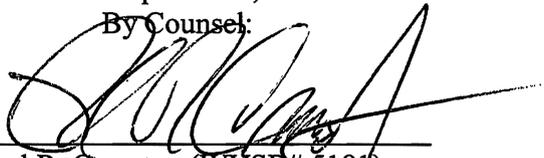
trucks, governmental or quasi-governmental vehicles in the performance of any official function or duty, and solid waste disposal vehicles. (Appx. 193.) The top five companies and organizations with documented traffic incidents in and around Morgantown's B4 Business District are government trucks (*i.e.*, city and school busses), waste disposal trucks, and business delivery trucks (Appx. 79-80), yet they would be allowed to travel on WV 7 in Morgantown's B4 Business District under the Ordinance (Appx. 193). As Petitioner admitted, "[a] plain reading of the ordinance establishes that the entities with the greatest number of traffic incidents, such as Allied Waste and Blue Ridge Beverage, are immune or exempt from application of the ordinance." (Appx. 16, Compl. ¶ 87; Appx. 162.)

Such arbitrary and capricious legislation depriving the citizenry of its property and rights conflicts with fundamental principles of government. See, e.g., Yick Wo v. Hopkins, 118 U. S. 356, 369 (1886) ("When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."); O'Neil v. City of Parkersburg, 160 W. Va. 694, 702, 237 S.E.2d 504, 509 (1977) ("Constitutional due process as applied here guarantees against arbitrary legislation, demanding that it shall not be unreasonable, arbitrary or capricious and that the requirements therein shall have a real and substantial relation to the purpose of the act."). Given the disconcerting nature of Petitioner's actions in enacting the Heavy Truck Ordinance and the problematic results that would ensue if it were to be enforced, public policy supports affirming the order below.

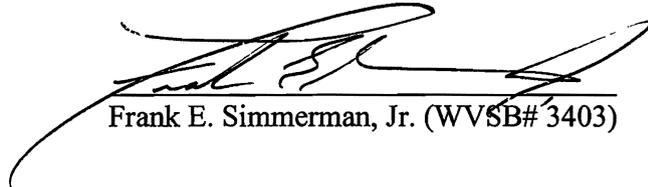
VI. CONCLUSION

Respondents respectfully request that this Court affirm the grant of summary judgment entered by the Circuit Court of Kanawha County.

Respectfully submitted,
Respondents,
By Counsel:



Paul R. Cranston (WVSB# 5191)



Frank E. Simmerman, Jr. (WVSB# 3403)

Paul R. Cranston (WVSB# 5191)
James B. Shockley (WVSB# 7222)
CRANSTON & EDWARDS, PLLC
1200 Dorsey Avenue
Morgantown, WV 26501
Phone: (304) 296-3500
Fax: (304) 296-3600
jbshockley@comcast.net
*Counsel for Nuzum Trucking Co. and Preston
Contractors, Inc.*

Frank E. Simmerman, Jr. (WVSB# 3403)
Chad L. Taylor (WVSB# 10564)
Frank E. Simmerman, III (WVSB# 11589)
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906
trey@simmermanlaw.com
Counsel for Greer Industries, Inc.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 15-0127

The City of Morgantown, West Virginia,
a West Virginia municipal corporation,
Defendant Below, Petitioner,

vs.

Appeal from a final order of the
Circuit Court of Kanawha County
(Case No. 14-C-1877)

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,

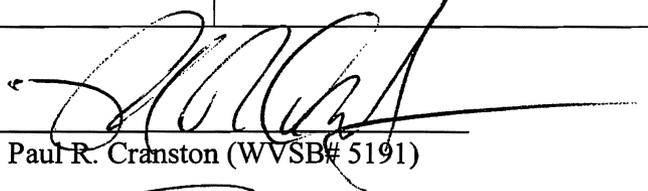
and

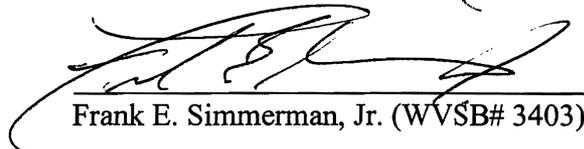
The West Virginia Department of Transportation,
Division of Highways, a West Virginia Executive Agency
Defendant Below, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "*Brief of Respondents Nuzum Trucking Company, Preston Contractors, Inc., and Greer Industries, Inc.*" was served upon the following counsel of record, by U.S. Mail, on July 15, 2015:

Robert M. Bastress, Esq. P.O. Box 1295 Morgantown, WV, 26507-1295 rmbastress@gmail.com <i>Counsel for Petitioner The City of Morgantown</i>	Michael J. Folio, Esq. 1900 Kanawha Blvd-Bldg. 5 Charleston, WV, 25305 <i>Counsel for Defendant Below, Respondent the West Virginia Department of Transportation, Division of Highways</i>
---	---


Paul R. Cranston (WVSB# 5191)


Frank E. Simmerman, Jr. (WVSB# 3403)

EXHIBIT

1

1 along with - - unfortunately I didn't include 26 in
2 here, because that argument - -

3 THE COURT: Is there somewhere in the
4 enabling statute or anywhere is there a definitional
5 statute that says connecting state roads are - -

6 MR. BASTRESS: No, no. There are
7 definitions of the categories that Section 7-4-1
8 creates. Section 7-4-1 creates the classification of
9 state roads to include expressways, which you can
10 imagine those are the interstates and the like,
11 trunklines, feeders, state and local service, but there
12 no definite - - those are each defined terms. But,
13 there's no specific definition of connecting roads, so
14 it's to be inferred from 17-4-26 that these connecting
15 roads are, in fact, pieces of the state road system
16 that go through municipalities. And therefor, that
17 describes Route 7. And that's a connecting road, and it
18 connects the roads outside the city on Route 7, with
19 the city streets, themselves, which have been
20 designated as part of the state road system.

21 The plaintiffs did suggest in their
22 memorandum that the second sentence in Section 17-4-27
23 qualifies the first sentence by requiring a DOH
24 approval of signage, when - - for roads hereafter

1 I don't think the Court needs to get into
2 municipal powers, generally speaking. That's why we
3 didn't brief it, because there are specific statutes in
4 this case which expressly authorize the city's actions.
5 Of course, the city - -

6 THE COURT: What about Mr. Cranston's
7 argument that State Route 7 is a primary route, it's
8 not a connecting - -

9 MR. BASTRESS: Well, I think, to understand
10 what connecting roads are, you have to read 17-4-26 and
11 27 together. And I think 17-4-26 makes it clear that a
12 connecting part of this state road that is within the
13 city is connecting the city streets with the rest of
14 the highway. And so Route 7, itself, is a connecting
15 road as it winds through Morgantown and hooks up,
16 eventually, with 19 or, I think, it's 119. I get that
17 confused all the time. It runs concurrently down along
18 University Avenue.

19 And, of course, that's where Morgantown
20 is attempting to route the truck traffic. They don't
21 say you can't go through Morgantown, you just can't use
22 Route 7 through Brockway and through the downtown. So
23 the - - so I would point to these specific statutes,
24 the, and of course, Morgantown concedes that, generally